Mandatory Planting for Garlic Importers in Accordance to World Trade Organization

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Abstract
The purpose of this study was to determine the implementation of compulsory planting for garlic importers in accordance with the World Trade Organization legal system. The research results show that the provisions stipulated by the Ministry of Agriculture regarding the obligation to carry out mandatory domestic garlic planting for prospective garlic importers to obtain Recommendation of Horticultural Product Import are not in accordance with the World Trade Organization legal system. If this continues, it will cause environmental damage, given the topographical and climatic conditions that are only around the mountains with limited access in some areas.
Keywords: *Garlic, Importers, mandatory planting, environmental damage.*

INTRODUCTION

The presence of globalization opens more opportunities among states to bring out huge and significant implications to various sectors which one of those is commerce. Globalization in commerce currently requires the manifestation of trade liberalization that commerce should be carried out with minimum barriers. It may affect the order of international society, in particular to several aspects such as politic, economy, social, and culture. The increasing flow of goods due to import and investment practices in Indonesia is a sign that this country feels the effect of globalization and liberalization in commerce. (Seran, 2014).

The more liberal the international trade is, discriminative and protectionist-oriented marketing practices are likely to happen. The past has confirmed that a trigger aspect of World War II was due to the increasing practices of discriminative commerce. (Adolf, 2004). Realizing that such discriminative and injuring commerce should be avoided, therefore, countries around the world are missing an international organization which specifically governs international trade affairs in a legal framework expected to be the standard of international trade. Through long negotiation and gathering, an organization called World Trade Organization (i.e., WTO) was established in 1994 as an international organization that governed international trade practices. (Hata, 2006)

Indonesia has declared that they joined as the member of WTO by ratifying an agreement of the international organization establishment through Act No. 7/ 1994 about Ratification of International Organization according to particular rules that derived from negotiation or agreement (Jhamtani, 2005). In addition, WTO is legally-binding over its members. In other words, its legal system confines the members and may become dominant in nature, as well as imposing its rules to the members. (Adolf, 2004). Hence, the consequence that WTO members receive is that their entire national legal products that deal with international trade should rely on each instrument mentioned in WTO legal system, such as General Agreement on Tariff of Trade 1994, Technical Barriers to Trade Agreement, and etc. Each action the members (including Indonesia Government) carry out under particular policies and regulations may not deviate from what has been set in WTO legal system, as what has been previously agreed by Indonesia, and it confines the state as the subject of various international agreements that exist in WTO legal system.(Huda, 2016)

As a developing country among the members of WTO, Indonesia actually needs attention, as many practices of liberal trades often bring lameness over the economy growth of developing countries. Along with the organization of WTO, furthermore, argumentations related to the conflict of interest in commerce between developed and developing countries often turn up. Developing countries which mostly are ex-colonial countries after World War II have a desire to create an independent economy with other countries.

Therefore, they do their best to suppress their import rate by enacting policies that may impede the entry of import goods and services for the sake of employment and industrial protection, as well as reinforcement for national entrepreneurs in order to attain foreign exchanges. (Mallawa, 2012, hal. 13). WTO really understands the existence of particular interest for developing countries. Given that one of this organization visions is to improve its members' prosperity. Therefore, WTO has a specific clause for developing countries called Special and Differential Treatment (i.e, SDT) that spreads over various agreements in WTO legal system. It provides convenience and chances for developing countries to improve their economy. Additionally, negotiations of agreements that deal with the interests of developing countries are still currently pursued. (Kinanti, 2015)

Another aspect that needs to be taken into account in terms of international trade by WTO members deals with living environment, given its commitment that every country over the world has responsibility to preserve living environment for the sake of their people. It involves the implementation of international trade that recognizes the preservation of living environment through the provision of Article XX letter (b) GATT 1994 that provides chances for the member countries to take any actions that deal with international trade such as barriers of import practices in order to preserve the living environment. The member countries that pose themselves as exporter claim that export practices, such as exploiting natural sources, should prioritize the principle of sustainable development.(Nugraheni, 1997). A stipulation that international trade should be along with the preservation of living environment is supported by Agenda 21 in Earth Summit Conference, emphasizing that it is expected for international economy to create conducive climate by encouraging an international commerce that prioritizes sustainable development and makes both trade and environment go in harmony. (Kusumadara, 1995)

In addition to developing country, Indonesia is an agrarian country which often enacts policies and regulations that deal with international trade, especially in agricultural aspect as food sources. One latest regulation that has been established by the Ministry of Agriculture on behalf of Indonesia government is requiring onion importers to do garlic mandatory planting in local areas of this country to obtain Recommendation of Horticultural Product Import (i.e., RIPH) at 5% rate from the total import quota proposed. This stipulation is mentioned in Article 32 of Act of Agricultural Ministry No. 38/Permentan/HR.060/11/2017 as amended by Act of Agricultural Ministry No. 24/Permentan/HR.060/5/2018 about Recommendation of Horticultural Product Import.

The practice of garlic import by Indonesia is considered high which approximately reach 90% of the total national needs per year. Looking into the balance data of food ingredient 2012, It shows that production rate of national garlic has reached 9 tons, while its import rate is 201 tons.(Winardi, 2013). It explains a huge gap between them. High import rate may decrease the rate of domestic productivity that is unable to fulfill the domestic needs. The regulation of mandatory planting of garlic toward importers is an attempt by Indonesia government to suppress the import rate of garlic and increase domestic productivity. It is due to the fact that Indonesia, as a developing country, has desire to fulfill the domestic needs without being dependent on others. As the member of WTO, however, each stage Indonesia takes should always be in the corridor of WTO legal system. According to the issue previously described, does the implementation of mandatory planting for garlic importers correspond to WTO legal system? And does the implementation of mandatory planting for garlic importers preserve the living environment?

LITERATURE REVIEW

Import Policy Analysis

Policy analysis is a fact that emerges because, as Quade (1982) said, the existing policy formulation is not satisfactory. If the process is not satisfactory, in the paradigm of deontologists who value the process is more important than the result. Policy analysis theory is lay theory. Policy analysis is a theory that comes from the best of experiences and is not initiated from findings, academic studies or scientific research. This means that the theory of policy analysis is lay theory not academic theory. There are two major groups of applied import policy instruments, namely tariffs and non-tariffs. In the era of free trade, tariff instruments as a means of protection are rarely used because the import tariff structure is set as low as possible (0-5%). This is almost ineffective in controlling imports, but in fact makes the flow of imported goods more streamlined.

There are 3 (three) policy substances that are regulated in the import provisions for certain products, namely: 1) imports are carried out by Registered Importers (IT); 2) imports are made through certain seaports and international airports; and 3) imported goods are subject to technical verification at the port of loading of origin of the goods. The goals to be achieved through IT regulations are to create an orderly import administration, build an import database and build an import tracking system in order to monitor import activities.

Garlic Import Policy

On June 15, 2004, Indonesia has ratified the China SEAN Framework Agreement FTA through Presidential Decree Number 48 of 2004. ASEAN-China Free Trade Area (ACFTA) is an agreement between ASEAN member countries and China to realize a free trade area. One of the economic agreement frameworks in the ACFTA is the Early Harvest Program (EHP). In the EHP, the tariff for live animal products, fish, meat, plants, vegetables, fruit and nuts is gradually reduced to 0% (Kudadiri, 2013). Garlic is included in EHP products, namely the vegetable category. Since 2005, import tariffs for garlic products have been abolished (Jumini, 2008). This 0% import tariff is valid until now. The elimination of these tariffs made the import volume increase based on FAO data in 2005, the import volume increased by 16.23% compared to the previous year

In assisting the national garlic development program and increasing the competitiveness of garlic and controlling dependence on imports, the government issued a Minister of Agriculture Regulation No. 38/2017 on RIPH (Recommendations for Import of Horticultural Products). With this regulation, importers are required to plant domestic garlic with a minimum yield of 5% of the annual RIPH application volume. The area of land developed by the importer is calculated to produce 5% production with an estimated average productivity of 6 tons per hectare.

Development of Garlic Imports in Indonesia

Based on the import approval (PI) of 157,000 tons issued by the Ministry of Trade and added to the realization of the import relaxation policy as stated in MOT 27/2020 concerning the temporary elimination of the SPI requirements for garlic and onions which are valid until 31 May 2020. In the issuance of RIPH (Recommendation for Import of Horticultural Products) in accordance with the Regulation of the Minister of Agriculture Number 39 of 2019 concerning Import Recommendations for Horticultural Products. The regulation explains that business actors importing strategic horticultural products are required to develop strategic horticultural commodities domestically. The Ministry of Agriculture also carries out compulsory verification of planting based on documents from the Agriculture Service and accompanied by records from the Central Statistics Agency (BPS). It will also block importers who cheat, such as pretending to plant, so that they cannot apply for RIPH again. In accordance with WTO rules, the Indonesian government cannot limit import quotas for horticultural products. However, the Ministry of Agriculture focuses on technical requirements, such as clear traceability, whether it is safe for consumption, implementation of good agriculture practice, and good post-harvest handling. This is so that imported products that enter Indonesia have good quality.

RESULTS AND DISCUSSION

1. Mandatory Planting for Garlic Importers as the Attempt of Import Restriction

Import restriction is possible to be applied in international trade. Every state has sovereignty to decide how many rates of import they need to take toward particular goods to be imported into their state. However, with agreements among states around the world, embargo is likely to apply through two kinds of barriers including tariff and non-tariff barriers. Tariff barrier in international trade is charged to taxation or custom duties on goods that cross the national borders of a country. On the other hand, non-tariff barrier is commonly in the form of:

a. Specific limitation that consists of absolute embargo on import practices, import restriction and quota system, technical procedures and regulations for particular product import;
b. Custom Administration Rules that consist of particular procedures of import, custom value, forex rate, and forex control;

c. Government participation that consists of governmental procurement policies, export incentives and subsidies, countervailing duties, domestic assistance, and trade diverting. (Hadi, 2004)

Indonesia government restricts garlic import through a non-tariff barrier by establishing technical regulations that deal with mandatory planting of garlic toward importer. The high annual rate of garlic import by Indonesia makes the government represented by the Ministry of Agriculture need to take some actions to alleviate the dependence on import garlic. Garlic is a food product classified into rare category in terms of its agronomy to be produced domestically, given the deficit sufficiency status and huge-level import.(Sumarno, 2005)

Besides, the pertinent ministerial departments should accelerate their attempt to pursue garlic self-sufficiency target by 2021. Hence, the Ministry of Agriculture should immediately improve their garlic productivity domestically in order to restrict the import flow of garlic. This effort is applied by imposing mandatory planting of garlic toward prospective garlic importers. Therefore, the import rate is expected to be restricted due to the increasing potency of domestic production on garlic supply.

Regulation enacted by the Ministry of Agriculture requires garlic importers who are about to get Recommendation of Horticultural Product Import (i.e., RIPH) to declare their readiness to expand garlic planting domestically. Hence, it becomes one of qualification procedures for importers to get RIPH from the Ministry of Agriculture. Based on Article 32 of Ministerial Regulation a quo, the importers may complete it either individually or collectively with farmer. Implementing the stipulation of Article 32, and as accordance to the mandate mentioned in subsection (3), the Decree of Directorate General of Horticulture No. 912/Kpts/HK.320/D/11/2018 about Technical Guidance of Domestic Garlic Planting Development in terms of pertinent procedures and conditions that importers must carry out is established. Additionally, the technical guidance mentions that the planting rate of garlic must be 5% of the total import volume the importers previously proposed, and the target of its productivity must reach 6 tons per hectare.

What makes it interesting is that this regulation is established when Indonesia has not yet coped with a lawsuit filed by New Zealand and the United State, related to horticultural products set under the previous ministerial regulations on Recommendation of Horticultural Import Product. The lawsuit was filed in 2013 and filed to DSB WTO No. WT/DS477 and WT/DS478. Looking into the Report of the Panel, the reason behind this lawsuit was because Indonesia assigned an obligation toward all horticultural products importers who wanted to get RIPH to have warehouse with particular capacity, in addition to the regulation of 6-month harvest period. Unfortunately, Indonesia was considered lose, and thus, according to DSB panel, Indonesia was required to do amendment on the pertinent regulation that dealt with RIPH. However, in 2017, the Ministry of Agriculture established a mandatory planting for every garlic importer who wants to get RIPH.

2. Mandatory Planting for Garlic Importers in Accordance to WTO Legal System

In taking actions that deal with international trade, either under a set of policies or regulations, Indonesia as the member of WTO- should see and refer to the legal system of WTO as their basis. This legal system contains WTO agreement. The annexes of WTO agreement are as follow.

1). Multilateral Trade Agreements that consist of Multilateral Agreements on Trade in Goods (Annex 1A), General Agreement on Trade in Services (Annex 1B), and Agreement on Trade Related Aspects of Intellectual Property Rights (Annex 1C);
2). Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2);
3). Trade Policy Review Mechanism (Annex 3);
4). Plurilateral Trade Agreements (Annex 4), that confines the members that are willing to get engaged. (Putra dan Darmawan, 2017)

As a developing country, Indonesia deserves Special and Differential Treatment accommodated by various instruments of WTO legal system. However, having this SDT clause does mean that developing countries are totally free to take any actions, but particular exception and leniency is provided more rather than what developed countries have. To see whether the regulation related to mandatory planting for garlic importers has corresponded to the predetermined stipulations in WTO legal system, some instruments in WTO legal system can be observed, as follow.

a. General Agreement on Tarriff and Trade (GATT)

As the legal umbrella of the entire regulations related to trades in goods, it may refer to the regulation of import restriction in GATT. Sometimes, a state needs to restrict their uncontrollable import practices which may threat their economy stability. Regarding to the restriction of import and in order to avoid any enactment of protectionist policies which may injure other business partners, a stipulation is firmly and explicitly established under Article XI GATT. Subsection (1) Article a quo mentions that import restriction may only apply by implementing barriers in terms of tax tariff, custom duty in the form of quota, license of import/export, or any other actions by the members. The next subsection mentions that, toward the exception, any other kinds of barriers may apply, especially for agricultural and animal husbandry products, only for supporting the government policies in particular condition, such as: to mitigate the dissemination of similar products in domestic markets, to decrease the production surplus of similar products in domestic market, or to restrict animal-based products which production depends on import commodity. Therefore, it notes that the regulation of mandatory planting of garlic toward importers does not correspond to the mandate of Article XI GATT. It is because the article requires that even the import license should only be in terms of tariff barrier, while the importers should complete a non-tariff obligation at first to get an Import license initiated by RIPH. Toward the exception, this regulation does not meet the predetermined terms and condition, given the very limited stock of domestic garlic and its low productivity.

b. On Import Licensing Procedures (ILP Agreement) and Agreement on Technical Barriers to Trade (TBT Agreement)

As an agreement that stems from GATT, ILP Agreement specifically set any affairs that deal with procedures and conditions related to import license applied by the members. The essence of this agreement is in Article 1 that import license is a kind of non-tariff barrier and it only applies in administrative context such as proposing import by completing particular documents. This policy aims to avoid any actions that distort trade. Therefore, in a comprehensive understanding, the regulation of mandatory planting on garlic toward the prospective importers does not correspond to ILP Agreement. Since this regulation aims to obtain RIPH which is the procedure to get SPI as an import license on garlic, either non-tariff barriers or any others out of administrative matter is not allowed to be established in the process of obtaining RIPH. Otherwise, tariff barriers such as taxes, custom duties, and other expenses are allowed by GATT.

TBT Agreement is one derived from GATT that specifically regulates technical barriers allowed in international trade. The stipulation of Article 2.1 TBT Agreement mentions that any technical barriers to be applied by the member country should be necessary and solely for the sake of national defense, public health, and balance of national expense. Such technical barriers may only be applied in the form of scientific and technological manners. In regard to the stipulation of mandatory planting on garlic toward prospective importers, it is indeed a technical barrier. However, the implementation of such technical barrier does not correspond to any conditions allowed in TBT Agreement. This regulation primarily aims to restrict the rate of import and increase the domestic productivity charged to prospective importers in order to reach self-sufficiency.

c. Agreement on Agriculture (AoA)

A specific agreement that regulates commercial products in agricultural sector also regulates particular actions allowed in it, including horticulture. Garlic is a kind of horticultural product, and thus, it should comply with AoA. AoA is an agreement that plays an important role on the sustainability of agrarian countries such as Indonesia that relies on agricultural sector as one of their primary sources of necessity. AoA consists of three pillars of main substances related to agricultural product marketing. Those are making domestic market place for import agricultural commodity (i.e., market access), alleviating the supports and subsidies to agricultural sector (i.e., domestic support), and mitigating the support and subsidies for farmers to export their products (i.e., export competition).

In term of actions allowed to execute in import restriction that relates to regulations on market access as mentioned in Article 4.2, the member countries may not apply any other barriers but has been ordered to convert (tariff barrier in the form of regular custom duties). The exception of this stipulation is on Article 5 and Annex 5. Article 5 mentions that another barrier is allowed only if there is a gap or fallout between import and trigger price in order to protect the price. In addition, Annex 5 mentions that there is a special treatment as an exception.

Article 4.2 mentions that it should be under particular terms and conditions, such as: import product consists of less than 3% of domestic consumption according to the basic period, it has never received any export subsidies yet, it is for the sake of an effective production restriction on main agricultural products, it aims to protect foods and environment, as well as the minimum access on pertinent products should be 4% of the entire public consumption on the basic period. Additionally, the barriers should be transparent through a process of negotiation with other members. Related to AoA, the regulation of mandatory planting on garlic does not correspond to what has been mandated in this agreement. Furthermore, the exceptions do not meet the entirely required conditions, as the garlic import has reached 90% of domestic consumption and not for the sake of restriction on production activity.

d. Special and Differential Treatment (SDT)

This far, the regulations on SDT have not reached the final yet although the regulations related to SDT contains agreements in WTO legal system. Many negotiations have been made since Doha Round up to recent years, many agreements that prefer to accommodate the needs of developing countries is reached. More importantly, many proposals proposed by various developing countries remains to be considered well. Following Keck and Low (2004), there are some SDT-related categories according to the submitted proposals, as follow.

1). Special and differential treatment is an acquired political right.
2). Developing countries should enjoy privileged access to the markets of their trading partners, particularly the developed countries.
3). Developing countries should have the right to restrict imports to a greater degree than developed countries.
4). Developing countries should be allowed additional freedom to subsidize exports.
5). Developing countries should be allowed flexibility in respect of the application of certain WTO rules, or to postpone the application of rules.

However, following Yanai, SDT regulations are still vague since there is no certain and firm legal basis. The concept of SDT is not yet codified in the concept of norms, but solely according to the result of political compromises among the members of WTO. SDT consists of several categories including regulations that aim to increase marketing opportunity, regulations that protect the interests of developing countries, flexibility on commitment, transitional period, and technical assistance. It is actually accommodated by some agreements in WTO legal system, and similar to what is set in TBT agreement mentioning that every member country should take the interests of developing countries they work together with as business partners into their account in implementing any technical barriers. In the context of AoA, alleviations on tariff set under its three pillars may not immediately apply for developing countries. Developing countries may get leniency in the form of lower tariff and longer period of time, as well as a special clause called *de minimis*.

Overall, SDT regulations remain putting forward the obligations of developed countries toward developing countries, rather than the rights of developing countries. Therefore, negotiations regarding to SDT still continue so far. The last meeting was at KTM WTO in Bali in 2013 and it resulted in Bali package, providing leniency for developing countries to get domestic subsidies for local farmers. However, it notes that none of the stipulations related to SDT clauses agreed that developing countries are allowed to implement technically non-tariff barriers for the sake of their embargo although it was the agenda of discussed proposal. Toward mandatory planting of garlic and in accordance to SDT regulations, therefore, it may not rely on the authority of developing countries, since STD does not provide chances for developing countries so far to be able to take actions that may hamper any trades which are not suitable with various agreements of trade in WTO legal system. This far, SDT focuses on providing attention and consideration to developing countries, not providing freedom for developing countries to do various kinds of technical barriers.

3. Mandatory Planting of Garlic toward Importers for Living Environment

Another important thing that Indonesia government should take into account in order to apply mandatory planting for prospective garlic importers is living environment. As previously discussed, international trade should be in synergy and considering the aspect of living environment. Agenda 21 of Rio

Declaration required that international trade should be able to create a sustainably economy condition, manifested in the form of sustainably natural sources as an asset of producing goods for the sake of both domestic and international needs. (Wijaya, Nopriandri, Habiburakhman, 2017)

The amount of garlic mandatory planting the importers should do is 5% of the total import they propose. Indeed, it forces them to have an area to implement the mandatory planting. Actually, the main factor that decreases productivity of garlic in Indonesia is the limited area and insufficient stock of seeds. Furthermore, the agro-climate condition of garlic that needs to be planted in the height between 700 -1.300 mdpl requires plateaus to do this mandatory planting of garlic. Indonesia actually has potential area for implementing this regulation, as it has many prosperous plateaus in several areas. However, it needs accurate calculation and good execution to plant garlic, given that the areas are also the part of natural ecosystem which sustainability needs to be preserved in accordance to the spirit of living environment preservation. Moreover, the regulation of garlic mandatory planting deals with international trade, in terms of obtaining RIPH for garlic import activities.

In Technical Guidance of Garlic Development Implementation by garlic importers, it mentions that local Department of Agriculture may provide information related to the prospective area for planting garlic. It should meet several conditions such as: having appropriate agro-climate for garlic, not conservatory area, not National Budget-based area, should be known and reported to the local Department of Agriculture. Some experts and prominent figures argued that this regulation had potency to spoil living environment, as it evoked erosion or even slides in highlands due to land clearing. In addition, among 370,25 thousands hectare area claimed by the Ministry of Agriculture for planting program in consideration on infrastructural access, human sources, and market assurance, only Java and Sumatra are truly ready for it, and it is only 56,44 thousands hectare. It means that area clearing and access preparation in other regions require land acquisition and development.

What should be taken into account is that the technical guidelines have set the procedures of implementation and monitoring on land clearing and preparation, both by the businessmen and the local department of agriculture. Therefore, the potency of damaging highland environment which is actually difficult to be accessed should be watched out. The living environment is likely to be damage if the implementation and monitoring of infrastructural development for land clearing does not correspond to the principle of sustainable development. Importers who are in hurry of pursuing RIPH are likely to see this as a chance to do particular actions that may violate the principle of sustainable development, since no specific regulation is set for this issue. Hence, the set of international trades by Indonesia government has implicit potency to evoke environmental damage. In addition, as the regulation of garlic mandatory planting is not consistent with both WTO legal system and the principle of living environment preservation, it should not be applied.

CONCLUSION

According to this article, it concludes that, first, the stipulation by the Ministry of Agriculture about mandatory planting of garlic in domestic area for garlic importers to obtain RIPH is not consistent with WTO legal system. This stipulation is seen as an attempt of import restriction by Indonesia government, and the regulation of import restriction, especially on garlic as a kind of horticultural product has been set in various WTO legal systems including GATT, ILP Agreement, TBT Agreement, and AoA. In addition, the import restriction to be allowed by those legal regulations is tariff-barrier-based restriction in the form of taxes, custom duties, and the other expenses. Similarly, although Indonesia is a developing country with SDT right, it does not mean that Indonesia is free to do any actions which may hamper and distort international trade. Second, the stipulation of garlic mandatory planting for importers is in fact against WTO legal system since it may evoke environmental damage due to topographical condition, climate and limited access in some highland areas. Importers who are running out of time to pursue RIPH may see this legal vacuum on procedures of preparing and executing land clearing is seen as a chance to do things that violate the spirit of sustainable development, especially in the context of international trade.

According to these points of conclusion, it is expected for the Ministry of Agriculture, on behalf of Indonesia government, to nullify the provision of Article 32 that deals with garlic mandatory planting imposed to importers along with the entire subsections that relate to the regulation. Toward the importers

who have carried out and/or are carrying out the mandate, especially in term of land clearing, a review and monitoring by Department of Agriculture and other pertinent Ministerial departments should be conducted in order to ensure that infrastructural development to create access and planting areas is consistent with the principle of sustainable development.

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