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Transformation of Rules of Origin Dispute Settlement In Free Trade Agreement Scheme Through Mutual Agreement Procedure

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Abstrack: *Dispute resolution has been regulated in a free trade agreement (FTA) so the dispute resolution procedure should follow the dispute resolution procedure established by the FTA (das sollen). However, FTA dispute settlement procedures are not widely used to resolve disputes between importers, exporters, and state authorities related to import duty rates on imported goods in the FTA scheme. Litigation procedures in each country are the only option (das sein). Normative juridical law research methods use a statute approach to FTAs and a comparative approach to dispute settlement in the field of international tax law. Research proves the weakness of FTA dispute resolution, namely the private sector and the business world as the main stakeholders in FTA schemes do not get the right to justice in disputes (access to justice) so that disputes are resolved through domestic litigation in each country. As a result, exporters and authorities of the exporting country who are not involved in the litigation process may be disadvantaged in court decisions in the importing country. Transformation of dispute resolution in FTA agreements through the mutual agreement procedure (MAP) as in international tax law (tax treaty) must be made to provide an opportunity for parties from both countries in FTA agreements, both the private sector and the competent authorities to submit objections.*

Introduction

An import from a country bound by a free trade agreement with Indonesia will be subject to preferential tariffs if the imported goods are believed to have really originated from the relevant FTA member country. Provisions regarding the origin of goods are regulated in the Rules of Origin (RoO). This means that preferential rates cannot be given as long as the requirements in the RoO are not met. The requirements or criteria include 3 (three) things, namely a. Origin Criteria; b. Direct Consignment Criteria; and

c. Procedural Provisions. These criteria are cumulative so that if there are conditions that are not met then preferential rates are not given, meaning that importers must pay import duties according to the general tariff (MFN) (Darwin & Purjono, 2017).

Dispute settlement procedures have been included in the FTA agreement so that the parties should follow the dispute settlement procedures established by the FTA. Nonetheless, in reality, the dispute resolution procedure on FTA agreements is not used to resolve disputes related to preferential RoO. Instead, litigation procedures are often preferred.The absence of effective and fair dispute resolution from the agreement*Free Trade Agreement*(FTA) resultsettlement of disputes between importers and the government through litigation (Yi, 2016).

The increase in dispute resolution through litigation in the Tax Court can be seen that in the last 3 (three) years before the Covid-19 pandemic (2017, 208 and 2019) there was a significant number of disputes. There are more than 750 to 1,400 cases per year with the subject matter of customs disputes related to Free Trade Agreement (FTA) Import Duty rates. Withthe number of dispute files has increased plus the number of Tax Court decisions that have come out is not proportional to the number of disputes that continue to go to court. Moreover, changes in the tax landscape are goodin a mannerdomestic and global are expected to create a tsunami of dispute. Therefore, as a preventive effort, Indonesia needs to be prepared to face these conditions (Safarina, 2019).

In the study of legal politics, the core of the supremacy of justice initiated by Gustav Radbruch does not separate aspects of justice and expediency from the most basic thing in law, namely justice (Bernard L. Tanya, 2011). Furthermore, Bentham developed a doctrine known as the doctrine of utility where law must be able to provide the greatest happiness for as many people as possible (the greatest number) (das sollen) (Fuady, 2010). The existence of disputes can have an impact on inefficient economic development, decreased productivity, infertility in the business world, and increased production costs (das science) (Margono, 2004).

For this reason, the RoO dispute resolution rules must be aimed at creating more effective dispute resolution procedures, which can bring together the conflicting interests of the parties involved. Dispute settlement rules must also ensure the enforcement and application of preferential treatment in accordance with the intended purpose of the preference between the signatory parties (Park & Lee, 2012).

In accordance with the intent of the WTO Agreement on rules of Origin, in setting the Rules of Origin by member countries it is expected to ensure: transparency is created, does not have an impact that restricts, distorts or disrupts international trade. In addition, the formulation of the Rules of Origin must be carried out in a consistent, uniform, impartial and reasonable manner, and based on positive standards (Zaki, 2021)

Based on the understanding mentioned above, the authors propose a formulation of the problem, namely what improvements must be made to the FTA rules regarding the rules of origin dispute resolution in the free trade

agreement scheme to obtain a dispute resolution procedure that guarantees legal certainty and justice in the application of preferential RoO.

For focusing on research on rules of origin dispute resolution solutions in free trade agreement schemes, there are two important questions in this research:

How is the implementation of the rules of origin dispute resolution in the free trade agreement scheme? Howdispute resolution transformation*rules of origin*in the free trade agreement schemethrough the mutual consent procedure?. The purpose of this research is to examine the problem of resolving rules of origin disputes in the free trade agreement scheme through a joint agreement procedure so that a solution can be found.

Research Method

Study This is a normative juridical research (legal research) and comparative law (comparative law). This study uses normative legal research methods because the main problem in this research is related to legal issues (Marzuki, 2011). Normative legal research (legal research) is research that refers to the norms contained in laws and regulations, international conventions, treaties, court decisions, and norms that live in society (William J. Filstead, 1978). Normative legal research is a type of research that is commonly used in legal science development activities which is commonly called legal dogmatics (Sidharta, 2009). This research is also known as doctrinal research. namely research conducted to find legal rules that determine what are the rights and obligations of juridical subjects of law in a particular society (Bernhard Arief Sidharta, 2000). Wignjosoebroto gives the notion of doctrinal legal research as research on laws that are conceptualized and developed on the basis of the doctrines adhered to by the drafter and/or the bearer (Wignjosoebroto, 2009).

In addition, normative legal research is not solely a study of legal texts (Johnny Ibrahim, 2008). As Friedman interprets law not in the sense of "rules" and "regulations" or positive law, but law in the sense of "legal system" which consists of structure, substance, and culture (Friedman, 1984). In this study, legal research was carried out on positive law, namely laws and regulations related to dispute resolution on the rules of origin in trade agreements.

The use of comparative law allows us to understand social dynamics and legal changes, legal institutions, and dispute resolution procedures (Glendon et al., 1999). Comparison of law with dispute resolution, especially in the field of tax and customs law by making the Mutual Agreement Procedure (MAP) a recommended solution to existing problems.

Comparative legal research uses international tax law as a relevant field of law because as part of fiscal law, it is only natural that the Customs Law adopts a tax law based on the principle of concordance / mutatis mutandis / generale sunt praeponenda singularibus / General things are to precede particular things, general laws are to proceed particular laws (general laws can be applied if special laws are not regulated) (Sutardi, 2016).

Discussion and Results

Problems in Free Trade Dispute Resolution

Studies have shown that this preferential RoO has led to disputes, however, dispute settlement procedures under FTAs are unpredictable and not transparent (Cantin & Lowenfeld, 1993). Furthermore, inspection procedures that require the importing country's Customs Authority to obtain the necessary information directly or indirectly from the exporting country, require quite a large amount of money. Verification procedures have become ineffective due to limited verification visit budgets. To compensate for this weakness in verification procedures, countries tend to increase the stringency of pre-export inspections in the certificate of origin (SKA) certification procedure (Commission of the European Communities, 2003). Consequently exporters are subjected to stringent pre-export inspections including post-audit checks. This increases the uncertainty for companies about their rights and responsibilities in FTAs thereby reducing the use of FTAs, and in the end it often leads to disputes (Manchin & Pelkmans-Balaoing, 2007).

This sparked endless disputes regarding the interpretation and application of preferential RoO rules. It is not clear who should be blamed between exporters and importers, or the authorities of the exporting country and the authorities of the importing country regarding the risks and responsibilities for violating the preferential RoO rules, because the certificate of origin (CoO) for export products is issued by the product manufacturing country, while the provisions preferential tariffs and the imposition of import duties imposed by importing countries imposed on importers. This creates uncertainty. This uncertainty is the main reason why many companies do not use FTA preferential tariffs (Yi, 2016).

Attempts have been made to harmonize the rules to resolve the issue of preferential RoO, but the preferential RoO model (Annex D.1 and D, 2006) was expected to stall, and FTA contracting parties were left to set up preferential RoO in their respective FTA agreements. Procedures that are not uniform in various FTA agreements, coupled with the rapid development of global FTAs, have made the procedure for trading goods in preferential RoO schemes increasingly complicated and chaotic so that it is called the spaghetti bowl effect (Bhagwati, 1995).

Disputes regarding country of origin regulations continue to increase in line with the increasing volume of international trade aimed at preferential treatment (such as FTA schemes). However, relatively little research has been devoted to dispute settlement procedures regarding RoO under FTAs. Dispute resolution systems are key to ensuring compliance with preferential tariff applications in FTAs, as well as the expected enforcement of FTA rules. The number of disputes submitted to FTA arbitration panels is very low and the official records disclosed are limited (Yi, 2016).

FTA dispute resolution procedures have been criticized for being ineffective. The main reason is that private sector entities, such as companies, as key stakeholders in FTA schemes are not given access to engage in dispute mechanisms and decision making. Dispute resolution regulated in pure FTA agreements is Government to Government (G to G). So

that finally, the settlement of import duty tariff disputes was resolved through domestic litigation in each country (Yi, 2016).

The Tax Court is the choice of importers as a settlement of import duty tariff disputes in the FTA scheme. Data on the number of import duty tariff disputes related to FTA in 2017 to 2019 shows a quite significant number (more than 750 to 1,400 cases per year) 9 (DGCE data, 2020).Meanwhile, data from the Secretariat of the Tax Court shows the number of dispute files experiencedenhancement. The number of Tax Court decisions that came out was not proportional to the number of disputes that continued to go to court. Meanwhile, the changing tax landscape is goodin a mannerdomestic and global are expected to create a tsunami of dispute. Therefore, as a preventive effort, Indonesia needs to be prepared to face these conditions (Safarina, 2019).

Thus the factual problem that occurs in the FTA agreement is that the involvement of exporters and importers in the verification procedure and the right to access to justice through dispute resolution in the FTA agreement are not regulated at all. The only legal remedy for dispute resolution for importers is through litigation in domestic courts in each country (Yi, 2016).

In addition to the absence of access to justice for the business world in resolving disputes according to FTA agreements, the impact of the closed and non-transparent FTA dispute resolution system allows FTA partner countries to treat FTA implementation unilaterally without a process of confirmation and accountability to other FTA partner countries. Based on the Free Trade Agreement (FTA) Objection and Appeal Focus Group Discussion (FGD) Tuesday, September 7 2021, the Directorate General of Customs and Excise conveyed the treatment of partner countries for Indonesia's Certificate of Origin (SKA) which has undergone post-importation verification (retroactive check) but Indonesia is not given Verification decision information. Data shows that there have been 3,622 Indonesian SKA in partner countries whose accuracy has been doubted through the retroactive check procedure. The main problem is that the results of the decision on retroactive check responses were not notified back to Indonesia. Likewise, SKA data that was rejected or received was not informed to Indonesia.

The unavailability of access for Indonesian exporters to FTA dispute resolution procedures causes losses to Indonesia because local court decisions in FTA partner countries have harmed Indonesian exporters by not giving FTA import duty rates unilaterally without consulting Indonesia as the authority that issues certificates of origin. goods and exporters who have an interest in FTA import duty rates.

The researcher analyzed the case of Indonesian cans and oil exports to Korea being refused to obtain import duty rates according to the FTA because the import of goods to Korea did not meet the shipping requirements (direct consignment criteria), and was confirmed by the decision of the Korean Tax Court. This case is an example of the weakness of access to justice available to exporters. Exporters will be harmed by the decisions of customs authorities and court decisions in FTA partner countries, but have no direct channels to defend their rights in the local courts of the importing country. Likewise, the authorities of the Indonesian state as a partner country of Korea's FTA which

issued the SKA do not have access to the authority to be involved in local court proceedings in Korea which have unilaterally canceled the provision of tariffs according to the FTA (Jai-Sik & Kim, 2017).

In-depth research on dispute resolution procedures under FTAs has not been sufficiently carried out to date (Azrieli, 1993). Therefore it is very necessary research on dispute settlement procedures related to import duty tariff dispute settlement in the free trade scheme.

Transformation of Dispute Resolution through Mutual Agreement Procedure

The existence of disputes can have an impact on inefficient economic development, decreased productivity, infertility in the business world, and increased production costs (Margono, 2004). Conventionally, dispute resolution is usually carried out through a litigation process. In the litigation process, the parties are opposed to each other, besides that litigation dispute resolution is the final means (ultimum remedium) after alternative dispute resolution does not produce results (Margono, 2004).

Researchers found that there was a similar pattern or typology of FTA disputes with international tax disputes where it is known that there is a means of resolving disputes outside the court through mutual agreement procedures (Mutual Agreement Procedure / MAP). Through a comparative legal approach, researchers found that in resolving international tax disputes, MAP has provided opportunities for taxpayers from both countries in the tax treaty to submit objections if there are actions from one or both countries which result in tax imposition that is not in accordance with the tax treaty. because the imposition of taxes that are not in accordance with the tax treaty will violate these provisions and violate the rights and obligations of the countries in the agreement (Darussalam & Septriadi, 2008).

Tax law is a relevant field of law to be used as comparative law with customs law because both are part of fiscal law, so it is only natural that the Customs Law rules adopt tax laws (Sutardi, 2016).

Dispute resolution theory is needed to find solutions to the many disputes between the parties involved (HS & Nurbani, 2018). Dean G Pruitt and Jeffrey Z. Rubin put forward a theory about dispute resolution. There are 5 (five), namely: First, contending, namely trying to implement a solution that one party prefers over the other party. Second, yielding, that is, lowering one's own aspirations and being willing to accept less than what one actually wants. Third, problem solving, namely finding satisfactory alternatives from both parties. Fourth, withdrawing, namely choosing to leave the disputed situation, both physically and psychologically. The fifth is in action (silent), namely doing nothing (Pruitt & Rubin, 2004).

Achmad Ali revealed the weakness of dispute resolution through litigation. According to him, it is a mistake if people think that in modern society, only court institutions are the only way to resolve disputes. Outside the court there are still other ways of resolving disputes, such as: mediation, arbitration and conciliation. There are people who are dominated by litigation methods such as the United States, on the other hand there are those who are dominated by non-litigation methods, such as Korea and Japan (Ali, 2013).

The researcher chose to use applied theory, the theory of dispute resolution put forward by Dean G Pruitt and Jeffrey Z. Rubin, namely the third option: problem solving, namely finding satisfactory alternatives from both parties by means of negotiation. In this dissertation as problem solving, namely finding satisfactory alternatives from both parties, the researcher chooses negotiation, especially in the field of tax and customs law as part of fiscal law, the ideal concept is formulated as a solution to problems in resolving disputes through joint agreement procedures.

In order to address the issue of dispute resolution, it is urgent to include a clause that will guarantee the binding enforcement of the decision of the RoO dispute settlement procedure given the fact that cases related to preferential RoO still follow an inefficient litigation process due to the binding strength of the judicial decision. In reforming dispute settlement procedures under FTAs, the cultural differences of contracting parties must be taken into account. Especially, in the midst of efforts to establish mega FTAs with Asian countries under TPP and RCEP, it is very important to establish more predictable and practical ADR procedures under FTAs.

As is the case with FTA import duty tariff disputes, international taxes also have the same object and the parties involved (Darussalam & Septriadi, 2008). FTA disputes seen from international agreementsinvolvecountryFTA partners, this is the same as the Tax Treaty in International Taxes. For this reason, dispute resolution through a Mutual Agreement Procedure (MAP) as in international tax law must be made to become a Rules of Origin dispute resolution involving FTA partner countries by involving importers and exporters so that a valid and strong final decision is actually reached.

Mutual Agreement Procedure(MAP) is an administrative procedure regulated in the Double Tax Avoidance Agreement (P3B) to prevent solving problems that arise in the application of P3B. The push to increase revenue amid a pandemic as well as efforts to address issues of undermining the tax base and transferring profits can potentially widen tax disputes that may arise between tax authorities and taxpayers. In the case of transactions that occur in the form of cross-border transactions, then this dispute is mainly related to the application of international agreements in the field of taxation. In this case, the business world and investors are in uncertainty due to the risk of double taxation from cross-border transactions (Chaisse, 2017).

Tax disputes often occur because of differences in interpretation and interests between tax officers or tax authorities and taxpayers (Asriyani Asriyani, 2017). Upon the opening of the tax dispute space, the state is obliged to provide access to dispute resolution channels (Sa'adah, 2019). Mainly, conventionally dispute resolution is carried out through a litigation process that places the parties against each other (Winarta, 2012). However, considering the lengthy time for settlement and the heavy burden on the justice system in handling all types of tax disputes, another route is needed as an alternative.

The trend of alternative tax dispute resolution in connection with international transactions is currently leading to mutual consent procedures (*Mutual Agreement Procedure)*between tax authorities. This procedure tends

to be the preferred choice in global practice because it has the main advantage of being able to encourage the full elimination of double taxation (Baistrocchi & Roxan, 2012).

The interests of the two countries in encouraging international investment and trade flows as well as protecting their tax bases from cross-border transactions can be seen in the Double Tax Avoidance Agreement (P3B) that they signed. As a form of two-state agreement in international law, P3B can be analyzed through a contract theory approach (*contract theory*), which was originally developed for private contracts (van Aaken, 2009).

The author recommends adopting MAP as in International tax settlements. The MAP must be transformed into a free trade dispute resolution procedure by improving the retroactive check and verification visit mechanism that has been regulated by the FTA agreement. MAP is useful in providing the private sector with access to dispute resolution forums, considering that companies, producers, and exporters are parties or actual beneficiaries of FTAs (Yi, 2016).

In the final conclusion, the authors suggest that in order to ensure the effectiveness of MAP implementation in resolving RoO disputes, it must ensure that there is a mechanism for correcting the final decision of the customs authority if the MAP results are different from the results of dispute resolution through litigation. Thus, the transformation of dispute resolution through the Mutual Agreement Procedure will guarantee fairness, certainty and legal benefits.

Conclusion

Dispute resolution according to FTA agreements has not provided certainty, justice and benefits for interested parties, both the private sector and the government / FTA member countries.The design of dispute resolution through third parties (extra judicial bodies) such as panels and arbitration institutions does not provide transparency and does not provide opportunities for submitting disputes to business people, so that in the end the import duty tariff dispute settlement is resolved through domestic litigation in each country. In the settlement of disputes through litigation in the domestic courts of each country, exporters who are disadvantaged as a result of customs authority decisions and court decisions in the importing country, do not have direct channels to defend their rights in the courts of the importing country. Likewise, the authority of the country that issued the SKA does not have access to the authority to be involved in local court proceedings in partner countries that have unilaterally canceled the import duty tariff.

Transformationagainst the settlement of disputes on FTA agreements throughmutual consent procedureMutual Agreement Procedure (MAP) as in international tax law (tax treaty) must be made forprovide an opportunity to the parties from the two countries in the FTA agreement, both the private sector and the competent authorities, to submit objections if there is an action from one or both countries which results in the imposition of import duties that are not in accordance with the FTA agreement, due to the imposition of tariffs that are not in accordance with the agreement would violate these

provisions and violate the rights and obligations of the countries in the treaty.

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