CHAPTER IV
THE IMPLEMENTATION OF WTO'S NONDISCRIMINATION PRINCIPLES IN "DS480: EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA"

This chapter will explore and discourse about why Indonesia decided to file a complaint against the EU at the WTO dispute settlement mechanism. This chapter will be described through the application of the international regime theory to elaborate the WTO's principles which made its decision in favor to developing countries and comprehensive reasons of why Indonesia as a developing country finally to do so which was the decision to file a complaint against the EU at the WTO.

A. Non-Discrimination Treatment

In every multilateral agreement particularly administered by the WTO consists of non-discrimination clause that requires member countries to not discriminate the international trade which clearly written and stated within WTO's principle with respect to their internal taxes and domestic regulations. For instance, Article III of the GATT states that the products imported from any contracting party shall be treated no less favorable than the national-origin (domestic) products.

Non-discrimination clause as regulated in the WTO's principle is a fundamental principle of the multilateral trading system in which recognized in the preamble of the WTO as a primary role in ensuring the goals of the WTO as an institution dealing with international trade. Thus, non-discrimination treatment in the WTO is classified into two principles, within the most-favored-nation (MFN) treatment obligation and the national treatment obligation (Saggi & Sara, 2008, p. 1365).

As a result of rounds proceeded in the WTO establishment, these agreements are made to be one of its functions, to prevent discrimination against foreign products (McGinnis & Movsesian, 2000, p. 531).

1. Most Favored Nations

The Most Favored Nations (MFN) is one of the WTO's principles that regulate non-discrimination treatment against developing countries. The MFN is the main source of WTO's law and frequently subjected as the dispute within the member countries of WTO. The MFN clause has been an essential component of international trade agreements for over 100 years and is broadly accredited as one of the pillars of the GATT/WTO system (Hochman, 2008, p. 789). The MFN is regulating non-discrimination treatment between goods, services, service suppliers based on the origin country or destined country.

The MFN principle is a basis for international law, specifically within the WTO's code of conduct in ensuring the trade flow as smoothly, predictably, and freely as possible, particularly for developing countries. Developing countries are addressed as a country in which it is less advantaged in terms of economic power and capacity. WTO as an organization for liberalizing trade, it conducts the forum for governments' representative to negotiate their trade agreements among member countries. However, it is also a place for those representatives to settle trade disputes that occurred that involves two or more parties. As well as its function to deliberate the core of WTO is to rules trade systems (WTO, 2005).

In utilizing the WTO as a place to talk, and governments try to sort out the problems occurred

between states, the MFN principle is a key to open the ideas when a trade dispute took place, it means that a certain party has violated an international trade law which is regulated by the WTO. However, this very principle regulates on the multilateral trading system to reform the frictions and issues of bilateral policies which assurances of a rule-based outline where trading rights are not contingent on the interest of an individual or political influence (WTO, 2019). In result, the best way to have a condition where every member country can benefit from this agreement, that one country must act under the WTO's regulation in which it extends automatically to other member countries.

Regulations that arrange the non-discrimination treatment within the WTO Agreement are:

- Article I GATT 1994 (obligation of MFN treatment on goods);
- Article III GATT 1994 (obligation of national treatment on goods);
- Article II GATS (obligation of MFN treatment on services);
- Article XVII GATS (obligation national treatment on services).

2. National Treatment

Lies in the heart of WTO's basic principle in ensuring the trade fairness among its member countries, WTO upholds the national treatment as a principle that entails its member to not discriminate between imported goods and like domestic goods with respect to their internal taxes and domestic regulations. For instance, Article III of the GATT states that the products imported from any contracting party shall be treated no less

favorable than the national-origin (domestic) products (Saggi & Sara, 2008, p. 1365).

However, the practical implementation of national treatment as prearranged by GATT/WTO face difficulties, provided that competing products are often differentiated, especially for imported products has less favorable than the domestic products under the pretext to protects the local productions. Even the biodiesel imported from Indonesia, the European Union shall reconsider its proceedings in order to obey the WTO's most basic principle. In fact, the analysis of national treatment is playing field in the bilateral scheme, where the subjects are addressed between domestic and foreign firms.

Furthermore, national treatment is also used as an internal instrument tool of protectionism linked to Council Regulation (EC) No 1225/2009 on protection against dumped imports by the European Commission. Although in fact that the tariff measured against the imported products can take into account which subsequently increase the tax incentives and final purpose to rally welfare; however, the practice has a side effect it can discriminate against the imports (Saggi & Sara, 2008, p. 1366).

Nevertheless, the account for indicating a country performs discriminatory practices can be measured from its commitment to an NT agreement that depends on its given two dimensions: quality and market size. From these two important aspects, it becomes the determinant factor for WTO to decide whether or not a country performs a discrimination treatment. As a supervisor to monitor international trade or

bilateral relations in terms of economic cooperation.

B. Indonesia's Loss due to European Union Regulation

Indonesia, since 2006, has implemented a regulation to reduce fossil fuel by forcing biofuel usage in the industry. This regulation is implemented in the Indonesian government's program, the B15, to blend the biodiesel 15 percent to traditional fuels. Then, the B20, in 2016, has enforced the local Biodiesel productions. As a result, Indonesia's companies have been increasing their capacity to produce biodiesel from crude palm oil (CPO) which subsequently can improve and open access to export the biodiesel products. However, the Indonesian biodiesel producer companies have been developing in a very fast pace, supported by the government's funding that implemented CPO supporting fund to support subsidiary for biodiesel producers due to the biodiesel price is slightly higher than the price of fossil fuels.

The biodiesel policies in Indonesia are regulated by several rules and decisions. First, Government Regulation No.1/2006 is the first important phase for Indonesian biofuel development. This regulation rules about the procurement and usage of Biodiesel. In order to support this regulation, the government issued the Presidential Decree 20/2006 to establish National Biofuel Development Team, which monitors the biofuel program implementation and creates the blueprint for biofuel development.

According to the Indonesian National Biofuel Development Team, the blueprint states that the development of biofuels aim to (1) decrease the poverty and unemployment; (2) boost the economic activity through procurement of biofuel; and (4) reduce fossil fuel domestic consumption. As the Indonesia House of Representatives (Dewan Perwakilan Rakyat or DPR) issued Act of Energy (Act 30/2007) to strengthen the

regulation that prioritizes renewable energy and biofuel. Besides, the Indonesian government implemented the subsidiary policy of CPO Supporting Fund which specifically managed by Plantation Fund Management Agency (*Badan Pengelola Dana Perkebunan* or BPSP).

The Indonesian biodiesel products are increasingly improved to boost rapid economic growth, particularly to the European Union as one of the largest markets for exporting Indonesia's biodiesel products. Nonetheless, the European Union has implemented trade restrictions against Indonesia's biodiesel producers by imposing high anti-dumping measures in order to protect domestic productions.

In November 2013, the EU has implemented the anti-dumping measures to import biodiesel from Indonesia, that applied 21,3% additional tax to Indonesia’s biodiesel products based on the European Commission’s decision after 15 months investigation started from 2012.

The implementation of anti-dumping measures:

- Not exceed the dumping margin (the difference between export price and the normal value)
- Only being applied during and to the extent to take action for removing the loss caused by dumping
- Stopped at least five years after the measures imposed, unless there is evidence showing the massive injury and loss caused by continuously and repeatedly dumping.

Furthermore, the EU which imposed anti-dumping measures to Indonesia’s biodiesel companies has reasoned that this dumping practices done by Indonesian companies have significant negative impacts to the European financial performance and producers (Indonesian Palm Oil Association, 2017). Then, the EC imposed a tariff of €217 per ton imported biodiesel. This caused imported biodiesel prices becomes significantly higher than the biodiesel produced domestically by the

EU. However, this restricting policy instigated Indonesia biodiesel export dramatically reduced, which 36% in 2013. Besides, with the dramatic reducing number of imported biodiesel products, the domestic production and sales have increased due to high tariff imposed against imported biodiesel.

C. Indonesia Made Use of the WTO's Principle in Filing Complaint against the European Union

After dealing with the European Union's regulation on protecting the domestic products against imported products, in particular, the Indonesian biodiesel, Indonesia have experienced loss and disadvantaged from this situation. Then Indonesian government filed a complaint to the WTO as the negotiating forum and fair-trade upholder by utilizing the non-discrimination clauses and dispute settlement understanding which prioritizes the needs and interest of developing countries that have rights to be favored by the DSB's decisions and rulings throughout the panel report.

1. Non-discrimination Principles as the Limiting Regulator for Developed Countries

Using MFN, the benefit is derived from the MFN clause's ability to curb opportunistic behavior by governments that might otherwise undermine trade agreements. However, to curbing the opportunistic behavior of governments, since it also affects governments' incentive to cooperate. The MFN clause is prioritizing the needs of developing countries as a developing country has less capacity in economic scale compared to the developed countries.

The lack of understanding of developing countries in implementing of WTO's regulation that favors developing countries may become an obstacle despite the fact that many developing

countries are actively using the dispute settlement mechanism in DSB to resolve the disputes.

In its practice, the European Union which accused Indonesia had practicing dumping by exporting its biodiesel products in a massive amount with a price lower than the normal value.

The national treatment is also being utilized as its idea to guarantee there is no discrimination treatment occurred against imported products as it shall not be less favorable than the domestic products.

2. Dispute Settlement Understanding as the Guarantor of Developing Country in the Trade Dispute

A developing country may experience difficulty in utilizing what WTO's system that has been offered in dispute settlement mechanism. For example, DSU recognizes the preferential treatment for developing countries. A developing country, in a certain situation and condition, could be given a longer period of time to give a written argument to panelists; a developing country also reserves the rights to be trialed by a panel where one of its members has citizenship from developing countries. The WTO Secretariat has also been appointing two advisors to assists developing countries in their dispute until a certain phase (Bossche, Natakusumah, & Koesnaidi, 2010, p. 105).

Basically, the WTO's provisions in regard to dispute settlement mechanism of developing countries are the same with the provisions applied to developed countries. However, there are several differences that significantly make developing

countries are more favorable than in developed countries (Fitriyanti & Yulianugroho, 2007, p. 40).

a) Once the consultation fails to solve the dispute within sixty days since the request of the consultation, the disputed parties could have an agreement to extend the period of time when the sixty days period of time has been expired. Whereas the consulting parties have not been reaching the agreement when the consultation ends, the DSB chairperson must decide the extension of the period of time. (Atack, 2016)
b) If a dispute occurs between a developed country and developing country, the panelists must involve minimum one-panel member originated from developing countries if the developing country wishes.
c) If one or more disputed party(s) is a developing country, panel report must explicitly state form of agreement in more favorable treatment and preferential treatment to the developing countries in the dispute settlement procedures. Moreover, the panelists must give a reasonable period of time for developing countries to prepare and file their reasons and evidence.
d) If the dispute occurred between a developed country and developing country, then the developing country requested that one of the panelist members should come from a developing country, this request must be granted.
e) WTO member must give special attention to the developing countries if the causal of the dispute is the developing country's policy.

f) If one of the disputed parties is a developing country and there is a need to provide additional legal advice, WTO secretariat must provide legal experts to that developing country.

The DSU is also recognizing a favorable treatment to developing countries in which it is specifically designed in its articles as follow: (Hidayati, 2014, p. 161)

a) Special Provisions for Developing Countries

Article 3 Paragraph 12 DSU specifically provides special provisions for developing countries as defendant party that filing a complaint where it has to withstand developed countries to follow procedures based on GATT 1966 decision. This regulation provides alternatives towards provisions available within article 4 that regulates consultation, article 5 that regulates good office, conciliation and mediation, article 6 that regulates panel establishment, and article 12 that regulates panel procedures.

Based on this decision, first, if the consultation process between disputed parties fails, Director General could *ex officio,* uses good offices and consult in order to facilitate the dispute settlement has been occurred, in accordance to the request of the developing country involved in the dispute.

Based on GATT 1947, members that are addressed as a developing country will

be given five times to use good offices from Director General accordingly to the decision was made. Second, if the consultation that was engaged by the Director-General could not resolve any decision in two months, the Director-General will input the achieved results to the DSB by request. The DSB will continue the process by appointing the panel in the consultation process with or without parties' consent. Third, the panel must take actions with the condition and various considerations accordingly to the implementation of the dispute, along with the economic consequences and economic development that can affect other members. In the end, the panel must ensure its report to DSB within sixty days after the dispute occurred.

Despite the fact that the DSU explains if the panel considers the provided period of time within 60 days is not sufficient to create a report, therefore based on approval of the defendant, the time could be extended. As time extends, there are differences between regulation aforementioned, based on article 4, 5, 6, and 12 and its conformity based on the available procedures. However, the DSU's dispute settlement mechanism is valid without a doubt that it is in favor of developing countries if it does not, the decision will be made according to the procedures above.

b) Special Attentions to Developing Countries within the Consultation Process

In its correlation to the consultation process conducted in order to achieve the best solution, article 4 paragraph 10 of DSU explains that since the consultation process requested every member of WTO should give special attention to the problems which considered as developing countries' interests. Article 12 paragraph 10 of DSU also explains that the consultation process on what developing countries have done, all the disputed parties can create an agreement to extend 60 days provided in continuing the consultation process. If the disputed parties do not agree, then the chairperson of DSB could decide after the consultation process related to the relevant and within the reasonable time extension.

c) The Developing Countries-origin Panelists

In its composition of the panel, article 8 paragraph 10 describes that the dispute occurred between a developed country and developing country, a panel should be consisted and involved at least one panelist that comes from a developing country based on the disputed developing country's request. In most cases that involved developing country in the dispute, the developing country's government is always becoming one of the panelists in the available panel process.

d) Extension of Reasonable Period of Time for Developing Countries

During the panel process, article 12 paragraph 10 states that the dispute that involving members which addressed as a developing country, then the panel should give a reasonable period of time for developing countries in preparing and explaining what are taken into considerations.

e) Panel Report Must Advantage Developing Countries

Within the panel report, Article 12 Paragraph 11 describes that the condition of one or more parties are coming from developing countries, then the panel report must clearly state that actions have been taken on the decision that is relevant to the WTO's regulation in regards of 'special and differential treatment' and actions that advantages actions that emerged during the implementation of dispute settlement procedures of WTO.

f) Developing Country Can Conduct Retaliation through DSB's Consensus

After the dispute settlement process reaches the final step, then one of the possibilities of a DSB decision will be the determining factor that one party had to violate the GATT/WTO's regulation. If the results of actions that violate and disadvantage the defendant are not implemented, then the defendant party can be given rights to conduct retaliation through DSB's consensus in accordance to the article 21 paragraph 7-8 of DSU. It is mentioned that in monitoring the implementation recommendation or ruling,

a special treatment should be given to the problems that involved developing countries. Afterward, if a case filed by a developing country, DSB will take it into consideration on what further actions will be done by not limiting the consideration only to trade substantial coverage, but also related to the greater impact towards the economy of a developing country.

g) Legal Experts are Provided by the WTO Secretariat

According to article 27 paragraph 2, the WTO Secretariat must provide the legal experts that can master the field particularly related to the dispute settlement mechanism within WTO for developing countries that need their services based on developing countries' request. These legal experts must provide assistance to WTO members that are addressed as developing countries to ensure that Secretariat is able to be fair for its each member countries with no exception. Moreover, the legal experts could only take a role before the trial phase on every dispute available. During the consultation and panel, developing country members are mostly taking legal experts from the Advisory Center on WTO.

h) Special Provisions in the GATS Agreement

Within article 4 GATS Agreement, there are special provisions for developing countries and particularly for least-developed countries. Especially, the increasing participation from developing countries and trade services must be facilitated through negotiations towards special commitments that related to the

'power of developing countries' towards the capacity of trade services in domestic, efficiency and competition, including technological access, development of developing countries, distribution network and network information access, and market access liberalization in various sector and types of export interest offers for developing countries.

A special priority is also given to least-developed countries, and a special calculation must be conducted on the special difficulties that a country experienced in receiving the special negotiations and commitments in regards of the economic situation of a least-developed country.

i) Special Provisions in DSB Decision Implementation

The implementation of DSB decisions could affect significantly in developing countries. There are many special conditions that should be considered in its correlation to the regulation of article 21 paragraph 2 of DSU. If a country is facing an economic crisis and there is evidence found that the implementation of a recommendation and decisions of DSB could worsen the economic condition, then there will be given a period of time extension to obey and carry out the recommendations and decisions of DSB.

One of the advantages of the WTO dispute settlement system compared to GATT, GATT has no integrated dispute settlement procedure, and instead, the regulations are separated. On one side, there is a conciliation system and dispute settlement in general based on article XXII

and XXIII, while there is another special dispute settlement procedure found in various proceeding document from Tokyo Round 1979. Whereas the WTO dispute settlement mechanism is summarized in the 'Dispute Settlement Understanding' except other special agreements arranged in covered agreement.

Based on this regulation that states the dispute settlement system expounding in article 3 paragraph 2 DSU to give security and prediction forces for the multilateral trading system. Thus, the dispute settlement system takes a role to ensure the rights and obligations of countries member in accordance with the agreements applied and clarify the provisions applied to the agreement.

Then the importance of dispute settlement is identified as the further purpose of dispute settlement system. This system is an implementation of the dispute settlement mechanism formed previously in GATT. However, the purpose of the dispute settlement mechanism has never been articulated specifically in GATT.

The WTO's most prominent purpose is settling disputes among its member under these agreements. Disputes are frequently and bound to arise due to protectionists groups inevitably seek discriminatory legislation. Under the DSU, a panel that consists of experts hears the argument between disputed parties when the defendant claimed that another member of WTO had violated an agreement. The panel then recommends that the violating-party withdraw the offending measures (McGinnis & Movsesian, 2000, p. 531). Indonesia, as the defendant, uses DSU's special and

differential treatment which applied within the DSB. This regulation under the DSU must be obeyed all member countries, as well as the decisions and recommendations issued by the DSB with no exception which is regulated specifically in article 3 paragraph 12, article 4 paragraph 10, article 8 paragraph 10, article 12 paragraph 10, and article 12 paragraph 11 of DSU. Other provisions which in favor to developing countries provided by the DSB under the WTO administration are also specifically implemented in article 4 of GATS Agreement and article 21 paragraph 2 of DSU that states developing countries are rightful to be given special treatment from the application of DSB's decisions and recommendations.

The DSU carries out a valuable transformation for developing countries. Less developed countries have a better opportunity to preserve their interests in the orientation of rule-based rather than a power-oriented scheme. Consequently, although the DSU is an advantage, developing countries must struggle to attain international financing for training and capacity building and for the formation of a shared instrument among developing countries to refine industrial country trade policies of interest to them—not only to decrease the charges of the refining but also to organize the proposal of cooperative cases. Furthermore, developing countries could practice cases in which they are embroiled to identify distance in WTO contracts that required to be addressed over negotiations.

Transformation of the dispute settlement system is not appearing to be important on the compromising schema of developing countries. Their means are mostly focused on the way to protecting their interests, spanning the distance with industrial countries in regards of legal

expertise, and creating operative enforcement and reciprocal devices (Hoekman, Mattoo, & English, 2002, p. 79).

D. Final Report of the Dispute between Indonesia-European Union in Anti-Dumping Measures on Biodiesel from Indonesia

Indonesia has finally won the dispute DS480: European Union – anti-dumping measures on biodiesel from Indonesia. The panel adopted a conclusion in which it has reconsidered both defendant and plaintiff to be determined as follows:

1. The European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers; as a consequence, the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994;
2. The European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" for the main input that was not the cost prevailing "in the country of origin", Indonesia;
3. The European Union acted inconsistently with Articles 2.2.2(iii) and 2.2 of the Anti-Dumping Agreement by failing to determine "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin"; the panel rejects Indonesia's request that the panel finds that the European Union additionally acted inconsistently with Article 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Article 2.2.2(iii) of the Anti-Dumping Agreement;

4. The European Union acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the European Union;
5. Indonesia has not established that the European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by relying on prices of CFPP 13 biodiesel produced by the EU industry in calculating an adjustment to the price of Indonesian imports;
6. The European Union acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, by failing to establish the existence of significant price undercutting with regard to Indonesian imports;
7. The European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively;
8. Indonesia has not established that the European Union acted inconsistently with Article 7.1(ii) of the Anti-Dumping Agreement because it applied provisional measures to P.T. Musim Mas based on a WTO inconsistent preliminary determination of the existence of dumping for P.T. Musim Mas;
9. Indonesia has not established that the European Union acted inconsistently with Article 7.2 of the Anti-Dumping Agreement because it applied to P.T. Musim Mas a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for P.T. Musim Mas;

10. Indonesia has not established that the European Union acted inconsistently with Article 9.2 of the Anti-Dumping Agreement because the provisional anti-dumping duty that was applied to P.T. Musim Mas and definitively collected was not in an "appropriate amount", within the meaning of Article 9.2; and
11. Indonesia has not established that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by applying to P.T. Musim Mas and definitively collecting a provisional anti-dumping duty in excess of the provisionally estimated margin of dumping for this exporting producer.

The panel recommends:

1. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The panel concludes that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Indonesia under these agreements.
2. Pursuant to Article 19.1 of the DSU, the panel recommends that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994. Indonesia requests that the panel uses our discretion under the second sentence of the same article to suggest ways in which the European Union should bring its measures into conformity with the Anti-Dumping Agreement and the GATT 1994. Indonesia considers that the measures at issue in this dispute should be withdrawn. The panel declines to exercise its discretion under the second sentence of Article

19.1 of the DSU in the manner requested by Indonesia.

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