

THE EFFECT OF PROHIBITION AND/OR RESTRICTION POLICY ON SMUGGLING RATE IN INDONESIA

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ABSTRACT

This paper found a very close relation between the policy of product prohibition or restriction and smuggling rate in Indonesia. The increase in Indonesian smuggling rate is largely due to prohibition and/or restriction regulation. The prevalent smuggling practice is due to the increase in demand for a commodity, because the intended product is the restricted one. Therefore it will trigger the smugglers to do smuggling practice. In addition, significant price disparity also encourages the smugglers to do smuggling practice, because consumers buying products in black market will get price one or two level lower than the normal price.

Keywords: policy, prohibition, restriction, practice, smuggling.

INTRODUCTION

Economic globalization and global free trade are two interdependent and interrelated currents. These two current will change economic and trading order in countries throughout world, including Indonesia. Such national economic and political system globalization and internalization process requires conceptual interpretations on the phenomenon arising in international relation. One of them is an idea about integration emerging among politicians and scientists (Zhainara Iskakova, 2018). It is well-established that the policy in economic and trade sector is an integral part of national development tending to focus on the development of international economic system and other state's economy. It is because all factors contribute to defining national economy, either directly or indirectly. Along with the world's economic development, international trade system prevailing now and managed by an international organization called World Trade Organization (WTO) with General Agreement on Tariffs and Trade (GATT) agenda logico-economically stating that free trade will reinforce economy and benefit the people by utilizing comparative advantage of individual states with basic rules concerning non-discrimination, access to market, unfair trading practice, and exception deviating from WTO's basic rules in certain condition for the sake of public interests (Wikipedia, 2019). A analysis show that the a free trade agreement gives benefits to its members (Nucharee Nuchkoom Smith, 2015).

Meanwhile, the objective of WTO establishment, as mentioned in the preamble of the Agreement is to improve standard of life, to realize full job opportunity, to increase real income and demand, and to enlarge product and service production and trading. The existence of WTO successfully reduces tariff and other constraints of trading, and this success is considered as having improved economic growth, reduced poverty rate, and lowered price (Wikipedia, 2019).

Indonesia as the state having ratified international agreement in trade sector in Republic of Indonesia's Law Number 10 of 1995 about Customs, later amended with Republic of Indonesia Number 17 of 2006 should comply with any provisions prevailing to all member states with any of its consequences. Thus, in this case, the successful domestic economy and trade is highly affected by the condition of foreign countries (abroad). As such, a state's successful foreign economic system will define the national development process (Rakhmawati, 2006).

Discussing international trade is of course inseparable from speaking of export (exporting product or money from Indonesia to foreign countries) and import activities (importing product or money from foreign country to Indonesia) (Sutarto, 2010). Meanwhile, export and import activities are closely related to smuggling crime. The news coverage presents the prevalence of smuggling crime in many regions of Indonesia, either coming into or getting out of Indonesian territory almost everyday. This smuggling has been at worrying level, because it occurs in almost all aspects, ranging from motor vehicle, wild animal, electronic appliance, forest produce, fuel, and food staple (rice and sugar) smuggling (Ramadhani, 2017).

Chairperson of Geospatial Information Agency, Priyadi Kardono, stated that Indonesia as a maritime country has 6,315,222 km²-wide water territory, 99,093 km²-long coastal line, and 13,466 named and coordinated islands (Geospasial, 2018). It is impossible for the government to put its customs and excise officers along the borderline throughout Indonesian customs territory to supervise the flow of commodities in the attempt of export and import activities (Sunarno, 2007).

LITERATURE REVIEW

The term "smuggling", "to smuggle" is actually not a juridical term; it refers to a daily phenomenon in which an individual import or export some commodities to or from home silently or clandestinely with certain background. The background of such activities includes avoiding import duty (economic factor), avoiding the government's prohibition regarding weapon, ammunition, and etc, narcotics (security factor); smuggling in this definition is in broad sense (Hamzah, 1988).

Baharuddin Lopa suggested that smuggling is to import, to export, to deliver product between islands without complying with the enacted legislation, or not complying with customs formality (douaneformaliteiten) specified by legislation.

Douaneformaliteiten is the excise conditions to be complied with in importing and exporting product including interinsular trading (transportation) (Lopa, 1990).

Black's Law Dictionary mentions that "Smuggling is the crime of importing or exporting illegal articles or articles on which duties have not been paid" (Garner, 2004). Meanwhile Elizabeth A Martin defined smuggling as the offence of importing or exporting specified goods that are subject to customs or excise duties without having paid the requisite duties. Smuggled goods are liable to confiscation and the smuggler is liable to pay treble their value or a sum laid down by the law (whichever is the greater); offenders may alternatively, or additionally, receive a term of imprisonment (E. A. Martin, 2003).

Indonesian dictionary explains that *penyelundupan* (smuggling) derives from the word *selundup* (smuggle). The word *selundup* (smuggle) is defined as crawl under something; duck the head; coming in clandestinely or illegally; infiltrate; penetrate; dive, stuck. Meanwhile, smuggling is defined as a process, a way, an action of smuggling or smuggling something; importing product illegally to avoid import duty or smuggling illegal product (Departemen Pendidikan Nasional, 2008).

Indonesia has governed criminal sanction against smuggling in the provision of Articles 102, 102, and 102B (Indonesia, 2006), particularly smuggling crime in import area with imprisonment as shortly as 1 (one) year and maximally 10 (ten) years and fine minimally IDR 50,000,000.00 (fifty millions rupiah) and maximally IDR. 5,000,000,000 (five billions rupiahs); smuggling crime in export area with imprisonment as shortly as 1 (one) year and maximally 10 (ten) years and fine minimally IDR 50,000,000.00 (fifty millions rupiah) and maximally IDR. 5,000,000,000 (five billions rupiahs); smuggling crime leading to the state's impaired economic aspects with imprisonment as shortly as 5 (five) years and maximally 20 (twenty) years and fine minimally IDR. 5,000,000,000 (five billions rupiahs) and maximally IDR. 100,000,000,000 (a hundred billions rupiahs).

In principle, smuggling is an infringement against criminal provision in Customs and Excise Law. Meanwhile, the Customs and Excise Law itself belongs to state administration law domain, particularly fiscal law. The characteristics of fiscal law are oriented to the state's right in financial area. Thus, the prevalent smuggling crime will affect the state's economy directly. In the presence of smuggling crime incidence, the state will suffer from loss directly due to inadequate or unpaid tax or import duty.

METHODS

This study is non-doctrinal law research; primary data source was obtained from interview with investigators constituting Civil Servant Officials in Directorate General of Customs, North Sumatera Regional Office, Special Region Office of Riau Islands, Batam General Service Office, and Eastern-Part Borneo Region Office; and Focus Group Discussion; meanwhile, secondary data source was obtained from literatures; techniques of collecting data used were interview, document study, and Focus Group Discussion; all of data collected were then analyzed using an interactive model of analysis.

OBJECTIVE OF THE STUDY

Many attempts have been taken to cope with smuggling crime occurring in Indonesia. However, the reasons of smuggling crime are important to recognize. One reason of smuggling crime incidence in Indonesia is the presence of policy concerning the prohibited and restricted products for export and import. The objective of research is, among others, to find out and to analyze the effect of prohibition and/or restriction regulation on smuggling rate in Indonesia.

SMUGGLING CRIME IN INDONESIA

Black market is very closely related to smuggling. Smuggling is any process of acquiring prohibited/restricted products using unlawful ways; therefore the products sold in black market usually result from smuggling. Illegal trade incidence is at least characterized with the simultaneous existence of smuggling, legal trade, and price disparity (L. Martin & Panagariya, 1984). Some constraints are found in coping with smuggling crime: poor enforcement of trading law and price disparity (Pitt, 1981); sufficiently long distance from border area (Norton, 1988); inadequate supply of product, so that employers destroy the market by selling the products circulating in black market (Zoltan J. ACS, 2011).

Recalling Indonesian wide customs territory as wide as Republic of Indonesia's sovereignty territory, it is impossible for the government to be able to assign all customs officers along borderline in its customs territory to oversee the flow of product in export and import activities (Sunarno, 2007). Such condition gives the smugglers an opportunity of conducting import- and export-related activities without paying import duty and tax to Directorate General of Customs and Excise. Such smuggling activity, of course, results in negative effect leading to the considerable loss of state financial income (Sukinto, 2013). Former Director General of Customs and Excise, Agung Kuswandono, said that during 2013 DJBC reportedly had taken action against 4,752 smuggling cases with the state's total loss of IDR 165.15 billions. Out of 4,752 cases, 3,690 come from import activity, 237 from export, 128 from facilities, and 697 from excise (Ariyanti, 2014). Meanwhile Director of Customs and Excise Enforcement and Investigation, Harry Mulya, said that during 2015 DJBC has successfully taken action against 10,009 smuggling cases; this data increased by 50.7% compared with that in 2014, 6,640 cases, with the state's total potential loss of IDR 3.7 trillions (Cukai, 2016). The potential loss value also increased compared with that in previous year, IDR 600 billions (Tempo.co, 2016).

All attempts taken those states may be taken as well in Indonesia. However, in fact the attempt of coping with smuggling crime faces such obstacles as inadequate number of law enforcers, limited infrastructure, and community factors (Ilham, 2015). The higher the people's law consciousness, the better will be the legal culture created, leading to the change of community's mindset (perception) on law. Thus, it can change the people's behavioral pattern in law enforcement. It means that the higher the people's law consciousness, the higher is the people's compliance with the law. This people's compliance level is an indicator of law functioning in the society (Friedman, 1975).

Out of many aspects affecting the incidence of smuggling crime, according to the author, the policy about prohibition and/or restriction is the trigger with largest share. Thus, the objectives of current research are to find out and to analyze the extent to which the policy of prohibition and/or restriction affects smuggling rate in Indonesia.

This prohibition and restriction issue builds more on the presence of international convention, in which Indonesia as the member of either World Customs Organization (WCO) or WTO and international custom and excise practice has ratified and applied the provisions of international trade convention to the national legislation (Purwito, 2007)

Meanwhile, the object of import and export product restriction policy is the commodity of product. The restriction can be applied well to the price of commodity traded (with a trading tax) or by limiting the quantity of commodity (with trading quota) to decrease the quantity of commodities traded internationally and controlling international price with domestic price. Tariff-per-unit (import tax) pressing and quantity limitation (import quota) can be applied to imported product to restrict the quantity of imported product and to increase domestic price above international price. Meanwhile, the policy of export restriction is intended to limit the quantity of exported products through pressing both export tax and export volume, so that domestic price will be lower than the price in world market/international price.

Meanwhile, government policy related to import prohibition is the one prohibiting the entry of certain products or foreign products into our country. Import prohibition policy is implemented to avoid the products harming the community. This policy is usually implemented due to political and economical reasons.

Directorate General of International Trade Negotiation of Republic of Indonesia Ministry of Trade states that there are three targets of import prohibition policy (Widayanto, 2011):

1. Living environment-oriented import prohibition policy

A state's government can prohibit certain product import when the product is harmful to human beings, animals, and plants in a state, or because the product is the result of natural resource exploitation thereby damaging ecological balance. In Indonesia there are some products prohibited from entering into Indonesia because they are harmful to living environment: plastic waste (Minister of Trade's Decree Number 520/MPP/Kep/8/2003), ethylene bromide pesticide, B3 waste but certain item, *penaeus nanamae* species-shrimp (Joint Regulation of Ministers of Interior and Marine and Fishery), and milk and dairy products made in China.

2. The import prohibition policy is intended to protect domestic industry.

In normal condition, a member of WTO is prohibited from limiting import and export quantitatively as governed in Article XII of GATT 1994. Nevertheless, in certain condition the member countries can take safeguard measures as the attempt of protecting domestic industry from the loss resulting from the increased import.

There are two conditions to apply safeguard measures:

- a. There is an increased import compared with the similar product production at home
- b. The increased import threatens and generates serious loss to domestic industry producing the similar products.

In the presence of such provision, the state can adjust the certain product to deal with the pressure coming from product import due to international competition. Safeguards measures are provisional in nature and taken merely in the attempt of adjusting domestic industry to deal with various pressures. Safeguards measures cannot be used to protect domestic industry in long term.

3. Maintaining balance of payments

When WTO member states deal with balance of payments/BOP difficulties, the member states can apply restriction over service trade resulting in the commitment including payment or transfer related to the commitment.

Some conditions should be fulfilled for the exception to be enacted:

- a. The developing country's economy is weak, thereby can support the low standard of life only
- b. On early development stage
- c. Dealing with BOP difficulties as the result of domestic market opening policy and the change of terms of trade.

POLICY OF PROHIBITION AND/OR RESTRICTION

In principle, the primary cause of smuggling crime incidence in Indonesia is the presence of policy about prohibition and/or restriction. The prohibition or restriction methods can be varying; the prohibition means dealing with criminal law including drug, explosive substance, or weapon. Meanwhile, restriction can include high tax such as excise on cigarette and liquor; tight requirements (intended to the people's interest, e.g. wood); license and/or Intellectual Property Right owned by an individual or a company can be the government's legal foundation to prohibit counterfeit products; quota such as rice and sugar; and etc. The sources of black market may be clandestine as it is in contradiction with the society norms, including prostitution, pornographic product, amulet/black magic, and etc (most sources in contradiction with society rule has been governed in government regulation) (Wikipedia, 2017).

The presence of policy concerning prohibited and/or restricted products impacts on the increase in smuggling rate in Indonesia. It is because in some certain regions in Indonesia, some constraints are still found: distance and transportation media leading to high price of products and limited quantity of products. Meanwhile, importing the product from adjacent states with closer distance to enable people to buy it at lower price with the quantity that can fulfill their need cannot be done as it is related to the regulation about prohibition and/or restriction. The fulfillment of people's need in local region should rely on the supply delivered from central region, so that in some certain regions in Indonesian border areas there is a significant price disparity between central and local regions. In addition, price disparity between home and foreign countries can be the cause of prevalent smuggling practice in some border areas in Indonesia.

Supervision over these prohibited and/or restricted products has been governed in Article 53 of Customs Law. Clause (1) mentions that in relation to the supervision over the implementation of prohibition and restriction provision, technical institution establishing the regulation of prohibition and restriction over certain product import and export should inform it to the minister. Furthermore, Clause (2) mentions that the implementation of supervision over prohibition and/or restriction regulation as intended in clause (1) is governed further by the minister. Meanwhile, the action taken over prohibited and/or restricted products has been governed in clause (3) stating that all prohibited or restricted products not qualifying export and import requirements, if they have been informed with customs notification, on importer or exporter's request can be: a) cancelled for its export; be) re-exported; or c) annihilated under Customs and Excise official's supervision. Meanwhile the prohibited and restricted products for import or export with no notification or with incorrect notification is stated as the products mastered by the state as mentioned in Article 68, unless the enacted legislation states otherwise (Clause 4). Its implementation regulation has been governed in Republic of Indonesia's Government Regulation Number 21 of 1996 about Action Taken in Customs Division, Presidential Decree Number 20/P of 2005, and Ministry of Finance's Regulation Number 161/PMK.04/2007 about Supervision over Importing or Exporting Prohibited and/or Restricted Products. The enactment of provision regarding import and export of prohibited and/or restricted products and the effectiveness of supervision over prohibited and/or restricted product are governed again in the provision regarding the supervision over import and export of prohibited and/or restricted products, particularly Republic of Indonesia Minister of Finance's Regulation Number 224/PMK.04/2015 about Supervision over Import and Export of Prohibited and/or Restricted Products. Meanwhile, the prohibited and/or restricted commodities have been governed by related individual ministries, particularly Ministry of Trade.

THE EFFECT OF PROHIBITION AND/OR RESTRICTION POLICY ON SMUGGLING CRIME IN INDONESIA

As the result of restriction policy issued by government, the price of related products in black market will increase. The restriction represents the decreased supply and the increased potential loss in supplier, seller, and all broker aspects. The decreased supply, according to supply and demand theory, will make the product scarce thereby impacting on the increased price. Meanwhile, the illegally acquired products will have price one or 2 level lower than normal price. It is because the supplier does not provide ordinary price like the normal one including payable tax. However, there is another possibility: the illegally supplied products can be more expensive than the normal one, because they are acquired difficultly and may not be provided legally. In relation to the case of products not available legally, black market will flourish when there is high demand from the consumers. Nevertheless, connection in black market can be reduced by removing relevant legal restriction, so that supply will increase. Meanwhile, government can also try to reduce demand; economically it gets out of habit and is not as easy as the process of reducing supply (Wikipedia, 2017).

As known, Indonesia is an archipelago state still constrained with transportation vehicle problems and government has not been able to fulfill the people's need using domestic production output. Therefore, high demand for staple commodities, particularly in some border areas gives the smugglers the opportunity of committing smuggling practice. As suggested by former Minister of Finance, Chatib Basri, many factors resulting in smuggling attempt: 1) sharp price disparity of domestic and foreign products; 2) the products belong to prohibited commodity; and 3) substantial import/export duty (Hen, 2014).

As aforementioned, the cause of smuggling crime incidence is, among others, the presence of regulation regarding prohibited and/or restricted products, while the attempt of fulfilling the people's need for staple products should be prioritized by central government. It is because prohibition and/or restriction regulation leads to the scarcity of food product and can be misused by irresponsible officials for a certain purpose. Considering the result of interview with Samino, as the Chairperson of Investigation and Product Resulting from the Action Taken section, in Directorate General of Customs and Excise Regional Office of North Sumatera, it can be found that importers complain about the bureaucratic and elaborate regulation of prohibited/restricted products because of unpredictable requirement, cost, and time in preparing export/import permission. Meanwhile, one of preconditions for export/import is permission or license published by the Ministry of Trade with recommendation from director general of related institution. Such bureaucracy can be misused by irresponsible official for certain purpose. There has been a case of iron steel import in Lampung in which the Ministry of Trade treated differently the commodities with same specification. The officers published license for importer A to complete the import document, while they did not so for importer B. In importer B's opinion, this policy is made not because of incomplete requirement but because of inadequate "bride-price (bribe)" given and the officer's bad mood. Another case occurred in Bekasi in which one condition to the publishing of Indonesian National Standard (SNI) recommendation is that the Ministry of Trade officer will come directly the factory where production process runs. Any cost expended during checking process should be assumed by importer. During the process of checking the factory abroad, in fact not only the officials but also their family members go to do it.

Such condition reveals that some government institutions have not reformed its service yet. It is the condition in which state apparatuses are faced with low quality of public service and various corruption, collusion, and nepotism practices harmful to the people as the recipient of service; people's poor awareness; *ewuh pekewuh* (fear, discomfort, and reluctance) culture; illegal levy, prolonged postponement, and elaborate bureaucracy; and public officials' habit of asking for service rather than giving service in administrative affairs in government offices (Nurtjahjo, 2013).

This elaborate bureaucracy makes the people dealing with the government bureaucracy reluctantly. In addition, illegal levy practice in turn impacts on the people's poor legal awareness. Bureaucratic uncertainty triggers the people's in compliance with the enacted rule. Such bureaucracy is one of trigger for the smuggling practice incidence in Indonesia.

Although many attempts have been taken to cope with smuggling crime, in fact the smuggling rate in Indonesia increases continuously. It is because the poor enforcement of customs law, particularly regarding the smuggling in Indonesia. Law enforcers should be related to not only good morality, firmness, and sustainable attempt to enforce justice and truth based on the

enacted legislation, and firm rule and law but also to public participation. Law enforcement, according to Satjipto Rahardjo, is a process to bring the legal desires into reality. Meanwhile the legal desires are the legislators' ideas and thoughts formulated into legislation; therefore the law enforcement process conducted by law enforcers here is closely related to the preexisting legislation (Rahardjo, 2004). The formulation of legislators' idea put into legislation will contribute to defining the implementation of law enforcement (Rahardjo, 2004). Soerjono Soekanto stated that law enforcement is an activity of harmonizing the relationship of values elaborated into well-established norms or views or values embodied into attitude or action as a series of last-stage value elaborations to create (social engineering), to take care of, and to maintain (social control) the peaceful life intercourse (Soekanto, 1983). Furthermore, Soerjono Soekanto said that some factors affect law enforcement: legal factor (law), law enforcer (those composing or applying the law), infrastructure or facilities supporting law enforcement, community (environment where the law is enacted), and culture (product of work, creation and feeling based on human willing in life interaction) (Soekanto, 2014). Those factors are closely interrelated, because they are the essence of law enforcement and the parameter of an effectively enacted law or regulation. Meanwhile, according to Lawrence M. Friedman, the effective and successful law enforcement is dependent on three elements of legal system: legal structure, legal substance and legal culture (Friedman, 1975).

The complexity of customs law enforcement problem, particularly in smuggling crime, will impact on the customs legal system not running well in Indonesia. Tariff burden and significant price disparity tempting the people to consume products circulating in illegal market, elaborate bureaucracy (legal substance), inadequate infrastructure, not all institutions having conducted bureaucratic reform (legal structure), and poor legal consciousness within community (legal culture) of course highly affect the enforcement of customs law in eradicating smuggling crime in Indonesia. Not only law enforcers but also community should have this legal culture. It is because when the members of community (people) give the smugglers the opportunity of doing smuggling crime, the deviation will keep occurring. Therefore, law enforcers and communities' legal culture should be improved equally because legal culture is very important to a rule's enforcement. Although the rule has been developed well, it will be meaningless when its law enforcers and community' behavior still deviates. Some attempts have been taken to improve this legal culture: education, welfare improvement, and socialization. Indeed it is difficult and takes time to do, because the change of community's legal culture should be done systematically and sustainably.

CONCLUSIONS

In the presence of policy regarding prohibited and restricted products highly affect the increase in smuggling rate. It is because people will tend to consume the products resulting from smuggling crime. In addition to meeting their need for quantity, they can also buy the product at relatively low price. Significant price disparity triggers the smuggler to commit smuggling practice, because consumers buying product in black market will get price one or two level lower than the normal price. It is because the supplier will not give price like the normal price including payable tax. Meanwhile, they cannot rely on government's supply for obtaining the products due to far distance, inadequate transportation mode, and government's incapability of meeting the people's need for domestic production. This problem complexity makes the smuggling remaining to occur and even increase in number over years. Thus, it is time for the government to develop policy about import facilitation for certain products in border areas.

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