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Can an Anti-Dumping Policy be Substituted for Predatory Pricing?

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ABSTRACT

One of the most contentious issues in international commerce is anti-dumping (AD). And among the controversies of this AD rule, there is also what is considered in "conflict" with business competition law, both in terms of the purpose of the regulations and from the rules themselves. One of them is related to predatory pricing. Therefore, this study aims to conduct further analysis regarding the possibility of predatory pricing rules in substituting anti-dumping regulations in Indonesia. Based on these aims, this study employs a normative method with a statutory and conceptual approach. This study then reveals that dumping can be classified as a predatory pricing practice in terms of indications and impacts. However, the legal consequences and consequences of the two are different. So it would be impossible if anti-dumping arrangements were substituted with predatory pricing. Nevertheless, this research still supports that anti-dumping regulations are included in the regulation or law prohibiting unfair business competition and monopolistic practices because the practice of dumping itself is an unfair business competition practice.

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1. INTRODUCTION

Currently, the world has entered into international free trade activities. Indeed, Free trade is thought to enhance the global economy by encouraging nations to specialize in the commodities and services that they can produce the most effective. Similarly to how buyers gain from sales, each country benefits by paying less for the things it purchases on global marketplaces (Mankiw & Swagel, 2005, p. 109). Hence, Over the last two decades, governments all over the world have been governed by the norms and regulations of multilateral trading institutions (e.g., the World Trade Organization [WTO] and the International Monetary Fund [IMF]) to encourage fair and freetrade while lowering possible trade barriers (Bagchi, Bhattacharyya, & Narayanan, 2014, p. 31).

But unfortunately, the freedom of international trade seems to have problems and challenges. Dumping and other exporting nations' trade policies have become a serious impediment to free and fair

trade (Bagchi et al., 2014, p. 31). And among its protective strides, anti-dumping (AD) has developed as the most prevalent strategy option for countries conducting international trade activities (Bagchi et al., 2014, p. 31). Therefore, Members of the World Trade Organization (WTO) impose anti-dumping penalties to compensate for the impact of dumping products on local industries (Omphemetse S. Sibanda, 2020, p. 216). And In recent decades, the application of anti-dumping policies, which are intended to counteract the impact of imports perceived to be sold below "normal" pricing, has grown (Macrory, 2005, p. 487). Including Indonesia.

The AD policy is part of the General Agreement on Tariffs and Trade (GATT) and permits World Trade Organization (WTO) states to impose restrictions on international imports in certain circumstances. If a specific product is dumped into the local market, which legally signifies it is imported at a lower price than its "normal value," and the dumping also causes or threatens considerable harm to local producers, the local industry can seek AD protection. According to Article VI of the GATT and the AD Agreement, the government may then implement safeguards, which are often accompanied by the application of AD tariffs on 'dumped' imports imported from manufacturers in the target nation (Vandenbussche & Viegelahn, 2013, p. 2).

It's just that in international trade, One of the most contentious issues is Anti-dumping. The broad employment of 'new protectionism' in anti-dumping (AD) measures in the past has long sparked rather contentious disputes in academics (Bagchi, Bhattacharyya, & Narayanan, 2015, p. 279). Since its inception, the Anti-dumping policy has often been questioned. Not even a few also view that using anti-dumping policy to limit competition is a violation of the law. However, such deviations are often advocated in the name of "the public interest." (Yoon, 1994, p. 247). And in its development, the application of this rule is also discriminatory between countries and between exporting companies within a country (Tabakis & Zanardi, 2017, p. 655).

Antidumping measures were developed in response to an exception to this arrangement: when an international business applies temporarily low prices to push competitors out of the market and subsequently elevates prices, a tactic known as "predatory pricing." Anti-dumping policies are designed to preserve this by making it illegal to sell imported products "for less than fair value" (Mankiw & Swagel, 2005, p. 109). Thus, AD is often considered a trade barrier, where AD tends to elevate the market power of local companies in such away. Still, on the other hand, it is not infrequently also associated with massive suppression of international trade (Egerod & Justesen, 2021, p. 3).

And among the controversies of this AD rule, there is also what is considered to be in “conflict” with business competition law, both in terms of the law's purpose and from the rules themselves. One of them is related to predatory pricing (Schmidt & Richard, 1992), which in the end, raises research questions whether the anti-dumping policy has anything in common with the principle of predatory pricing? And is it possible for predatory pricing to substitute anti-dumping rules? Previous research has found that the substitution debate is more complicated than initially thought and thus still has not reached a definite conclusion (BI & VAN UYTSEL, 2015, p. 189). Therefore, this study aims to conduct further analysis regarding the possibility of predatory pricing rules substituting anti-dumping regulations in Indonesia. There is no overlapping of regulations that can cause legal uncertainty and difficulties in law enforcement.

2. METHODS

This research will use a lot of secondary data sources through literature review, so this research will tend to be normative research. The method employed would be more of a conceptual and statutory approach. The reason for using a conceptual approach is that this study seeks to provide an analytical point of view of problem-solving in legal research in terms of the aspects of the legal concepts that underlie it. Meanwhile, the legislative approach implemented in this research is due to the effort to examine the laws and regulations related to predatory pricing and also anti-dumping. Thus, the law that will be utilized cannot be separated from primary (Law No. 10 of 1995 on Customs Law and Law of No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition) and

secondary legal materials (such as books, scientific journal article). The legal materials will then be analyzed using qualitative and prescriptive analysis techniques after being collected using the literature study method.

3. FINDINGS AND DISCUSSION

3.1. Anti-dumping, Definitions and Concepts Based on The Theory and The Law

Anti-dumping used to be popular exclusively in wealthy countries, but that has changed since the 1990s. Several industrialized nations established anti-dumping policies (AD) in the early twentieth century, beginning with Canada in 1904, to alleviate the situation in which foreign corporations dumped items into their local markets owing to worries about the impact on domestic enterprises (Blonigen & Prusa, 2016, p. 108). However, both affluent and developing countries have made widespread use of the method. And, over the last 25 years, anti-dumping has emerged as the most popular protective instrument (Debaere, 2017, p. 4).

Avsar (2018, p. 4275) terms and defines dumping as price discrimination in the international market. This definition may have some truth in specific points of view and situations. The term "dumping" describes a situation in which a firm acquires a meager price for the same item in its international market than it does in its domestic market, or when it exports goods at a loss. Therefore, Article 18 of Law Number 10 of 1995 concerning Customs states that it is included in the act of dumping when "the export price of the goods is lower than its normal value." And hence, then antidumping can be applied.

In terms of effect, Dumping can have a major influence on other enterprises in the target market, placing downward pressure on pricing and earnings for market providers (Blonigen & Prusa, 2016, p. 108). Therefore, antidumping laws (AD) are designed to protect domestic industries from dumping (Andersen & Feinberg, 2018, p. 2). Law Number 10 of 1995 in Article 18 b also states that if the imported goods are "1. cause losses to domestic industries that produce goods similar to those goods; 2. condemn the occurrence of losses to domestic industries that produce goods similar to those goods, and 3. hinder the development of the domestic similar goods industry".

And, of course, it is not only Indonesia. Many nations are now implementing anti-dumping legislation to defend their businesses. In practice, if a foreign business sells a product to a domestic market at a lower price than the fair value in the foreign country (or a third country), the domestic firm may petition the government or a competent authority to implement an anti-dumping legislation. Following receipt of the petition, domestic governments must investigate either the dumping margin (DM) or the injury margin (IM) to establish if dumping has happened (Chang, Hwang, & Peng, 2019, p. 422).

This is in accordance with the fundamental structure of the GATT/WTO anti-dumping policy consisting of the following legal procedures. Legal petitions initiate Anti-dumping investigations with domestic parties representing an industry. The anti-dumping agency or authority then investigates if there is true dumping, which is legally defined as international corporations setting prices below a "fair" or "normal" value in relation to the value of the exporting nation. The anti-dumping agency also determines whether the trade practice is detrimental to the domestic industry represented by the applicants. When the anti-dumping agency determines that the two primary conditions have been satisfied, it applies anti-dumping taxes on imported items equal to the computed dumping margin (Song & Lee, 2013, p. 6).

So based on this, According to the provisions of the WTO/GTTA Antidumping Agreement and the antidumping laws in related countries, In general, the antidumping procedure consists of three stages: first, the firm makes an antidumping application; second, the government assesses antidumping margins and examines losses; and third, the government chooses whether or not to tax it (Xiang, Zongxian, & Xuyuan, 2011, p. 161). Surprisingly, the WTO rules do not codify general AD legislation, but rather describe the "fundamental principles" that must be applied to national law to

regulate the investigation, decision, and application of AD duties. Within certain constraints, each WTO member has the authority to create laws, including legislation AD (Sandkamp & Yalcin, 2021, p. 1122).

Although anti-dumping penalties are a trade policy tool, they are driven by and have the ability to dramatically damage domestic sectors' interests. Dumping in international commerce occurs when goods are sold in foreign markets at prices lower than what is deemed "fair value" (Feinberg, 2013, p. 365). under WTO regulations, nations can compel AD charges on imported products by enacting AD legislation, wherein the government initiates AD investigations if the government accepts requests for AD action from local industry. The government can then apply AD taxes if the importing country's management finds that international manufacturers are "dumping" their export products and that the dumping causes "material damages" to the local industry. Dumping is defined in international commerce when the free on board (FOB) price of a product in the importing country is less than the "normal value." Typically, the "typical value" is the price charged by the exporter in their own nation. The price of products in the exporting nation less the FOB price in the importing country is characterized as margin dumping (Mukunoki, 2021, p. 423).

3.2. Predatory Pricing, Definitions, and Concepts Based on The Theory and The Law

As stated in POJK No. 77/POJK.01/2016 that the basis of transactions between parties in peer-to-peer lending is an agreement or contract. So if referring to Article 1313 Burgerlijk Wetboek (KUHPerata) it is stated that "An agreement or agreement is an act where one or more people bind themselves to one or more other people". However, according Usanti & Roro (2017), the use of the term deed for agreement is deemed inappropriate by legal experts (jurists), because the scope of the word "deed" is still broad. The formulation of the agreement was changed from "acts" to "legal acts" (rechtshandeling). The addition of the word "law" causes a change in the sense that not all actions are included in the meaning of the agreement. In its development, the agreement is no longer a "legal act" but a "legal relationship" (rechsverhouding). The same thing is also supported by (Subekti, 1992). By definition, a legal relationship can be defined as a relationship that contains the rights and obligations of the parties bound by an agreement or law (Tutik, 2008).

Predatory pricing has become the main focus in almost all business competition laws globally (Zaid & Aufa, 2022). Even according to Hutchinson & Treščáková (2021, p. 12), exploitative abuse and exclusive violations such as predatory pricing are at the core of competition law enforcement. By theoretical definition, Predatory pricing transpires when a corporation lowers its price below cost in order to coerce competitors out of the market, allowing the predatory firm to behave as a monopolist (Taylor, Moldoveanu, & Taylor, 2013, p. 1) by raising returns prices to supracompetitive levels (Cheng, 2020, p. 343).

Based on this, Ranjan (2004, p. 4881) explains many theories about what is meant by predatory pricing. It is essential to look at the two most important theories about predatory pricing. The first is cost-based predatory pricing: The cost-based theory of predatory pricing comes from the work of Phillip Areeda and Donald Turner. According to the theory developed by Areeda and Turner, predation occurs only when the price is kept below marginal cost. However, since it is difficult to calculate the marginal cost in practice, the average variable cost can be used instead. The “Areeda-Turner test” was named after it. Thus, according to this theory, Pricing must be set at or above the reasonably expected average variable costs. Therefore, (Gani, 2020, p. 34) argues that to judge whether the dominant firm's price is predatory or not, a cost-based rule is applied, and they usually use marginal cost or average variable cost as a criterion.

Second, recoupment method: According to this theory, a company will be considered a predator when in a significant period of time only if it can compensate or recoup for all losses. The predator's initial intention is to drive out all competitors and then run a monopoly situation. Whether or not a predator can recoup its losses will depend on the market structure, such as the type of barriers to entry that exist. The monopoly position acquired by the company will allow it to recoup the losses it

suffered during the period of predation. After eliminating a competitor, if the firm is unable to raise its price because of the ease with which the eliminated competitor can re-enter, all motives for predation will be defeated. Thus, according to this theory, it is not only pricing below production costs to eliminate competitors that are predatory pricing, but also different possibilities for recoupment predators.

However, (Mateus, 2011, p. 251) explained that because predatory pricing is part of the case that must be proven based on the rule of reason method, the proof of predatory pricing must include three elements, namely:

a. there is a profit sacrifice at the beginning, which is marked by selling very low prices.
b. "Profit sacrifice" has become a hallmark of predatory pricing (Azzopardi, 2017, p. 239). And according to (Cai, 2020, p. 166), this element of "low pricing" is the main element in the practice of predatory pricing. In Article 20 of the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, it is very clearly stated that one of the criteria for predatory pricing is "by selling at a loss or setting a very low price." According to Zaid, Dawaki, & Ololade (2021, p. 27), the use of the term "selling at a loss" is because predatory pricing strategies are often identified with selling goods below marginal cost, while the mention of "very low prices" is because predation strategies are also identified with selling goods below the price of other competitors.
c. This kind of situation and practice is possible if a business actor has dominance in the market. When the dominant business actor is in a favorable position with all the resources at his disposal to bear losses for a limited period of time, of course, the aim is to exclude smaller competitors from the market (Schön, 2015, p. 296).
d. Harming similar business actors who are competitors in the market or potential business actors who want to enter the market.
e. There has been a long debate whether competition laws should protect competitors or not. For the Chicago school, competition law does not focus on protecting business actors. So that the losses experienced by competitors due to the effects of competition are not a concern of the business competition law. They assume that it is the welfare of consumers that must come first. Therefore, the allegation of predatory pricing must be conditional that the predatory business actor is proven to have carried out anti-competitive practices at the expense of consumer welfare (Meisel, 2015, p. 388).
f. But on the other hand, According to (Cai, 2020, p. 166), that the reason why predatory practices are condemned and strictly prohibited in the competition law is because of their effect on current or future competing companies. In fact, the European Union (EU) executive body is prioritizing investigations into predatory pricing practices in which dominant firms indirectly harm end consumers by removing competitors from the market (Botta, 2020, p. 157). Therefore, Article 20 of the Law of the Republic of Indonesia Number 5 of 1999 also states that business actors are prohibited from having the intention "to eliminate or kill the businesses of their competitors in the relevant market" when setting low prices. Because "it may result in monopolistic practices and or unfair business competition."
g. The ability to compensate for losses from the results of the sale and loss sacrifice at the beginning (Recoupment) (Zaid, 2022).
h. In Indonesian law, predatory pricing is promulgated in Article 20 of the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition stating that “Business actors are prohibited from supplying goods and or services by selling at a loss or setting prices that are very low with the intention of getting rid of or shutting down the business of its competitors in the relevant market so that it can result in monopolistic practices and or unfair business competition.” Unfortunately, the law does not mention the requirement for compensation as an element of predatory pricing practice. Because predatory pricing is a two-step approach for ensuring monopolistic profits. During the first step,

the predation stage, a company charges a lower price than its cost in the hope of pushing its competitors out of the market by forcing them to sell at a loss. If successful, the company can proceed to the second step, the return stage. Having owned the market for itself, the now dominant firm charges a monopoly price in an attempt to recoup the losses it suffered in the predation stage and to get a steady stream of monopoly profits into the market (Leslie, 2013, p. 1695). Thus, the element of compensation is essential in determining the practice of predatory pricing.

On the other hand, under Indonesian law, this predatory pricing practice in Law no. 5 of 1999 has a criminal penalty of a minimum fine of "5,000,000,000.00 (five billion rupiahs) and a maximum of Rp. 25,000,000,000.00 (twenty-five billion rupiahs), or imprisonment instead of a fine of a maximum of 5 (five) months". This shows that the practice of predatory pricing in Indonesian law has criminal consequences in the form of (fines) penalties.

3.3. Analysis of Substitution of Antidumping Arrangements with predatory pricing

The debate about whether dumping is included in predatory pricing is relatively new but very significant. Their normative basis is that anti-dumping regulations and predatory pricing have something in common for those who agree. Among these is the common goal to protect competition and competitors, elements such as the presence of business actors selling at too low a price, and impacts that can harm other business actors. The only difference is that in the case of dumping, the business actor is a foreign business actor. Hence Feinberg (2013, p. 365) comments that dumping in international trade is selling in foreign markets at prices below what is considered "fair value." As far as "fair value" refers to the domestic market price, the result of international price discrimination, and economic costs (including standard returns), predatory pricing may be the reason.

But on the other hand, there are also substantial differences between the two. The first is the difference in approach, where the antidumping approach is more likely to use per se illegal because setting a low price is enough to impose retaliatory sanctions in the form of additional import duties. Meanwhile, predatory pricing uses a rules of reason approach where low prices are not enough to be considered a predatory practice. The second is the difference in legal consequences where dumping does not have criminal legal implications (fines) like predatory pricing. It is difficult to substitute antidumping and predatory pricing arrangements with these substantial differences. And of course, this also results in impossibility.

However, considering that dumping is also a business competition issue. And also, considering the language of anti-dumping regulations that have the same objectives as business competition law (Dung, 2006, p. 61), This study then found that anti-dumping regulations can be substituted into the competition law. this study later found that anti-dumping policy can be substituted into business competition laws. This is similar to what BI, (2013, p. 34) said that the anti-dumping law has or should have the same justification as the competition law. Therefore, the proper way to overcome its anti-competitive effect is to align it with competition policy or replace it entirely with competition law. Countries like Japan, Korea, Peru, Mexico, Chile, and Hong Kong have advocated this. BI, (2013, p. 34) further explained that these three nations differentiate between predatory pricing designed to establish market domination and unjust predatory pricing, the latter of which encompasses much more than the pricing strategies that would be considered under-cost in other contexts. This enlarged coverage makes the results for the substitution issue less evident than when there is only dominance-oriented predatory pricing. The reason for this is because the unfair predatory pricing policies in the three nations analyzed are to some extent prone to protectionism. Due to the dual conception of predatory pricing, efforts to reconcile predatory pricing regulations to remove anti-dumping legislation will find more obstacles of the same kind. It is important to better understand the rationale behind unjust predatory pricing policies in order to determine whether or not they should be maintained and, if so, how they might be modified to have a less negative impact on protectionist abuse.

4. CONCLUSION

It is not a simple affair to ascertain if anti-dumping and predatory pricing systems can be substituted for one another. While they do have certain similarities, there are also some key distinctions between the two. As a general rule, anti-dumping can be categorized as a predatory pricing practice with regards to its indicators and effects However, the legal consequences and implications of the two are different. So it would be impossible if anti-dumping arrangements were substituted with predatory pricing. Nevertheless, Because dumping is itself an unfair business competition practice, this research still supports that anti-dumping regulations are included in the law prohibiting unfair business competition and monopolistic practices because the practice of dumping itself is an unfair business competition practice.

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