THE DEVELOPMENT IN TRADE AND ENVIRONMENT DEBATE: PARTICULAR CONCERN TO DEVELOPING COUNTRIES

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ABSTRACT

The key theme of this article deals with discussing and examining how and whether the recent outstanding development in trade and environment debate can result in the conflict between developed countries and developing countries. Also, the issue of processes and production methods (PPM) and Article XX of GATT will be taken into account in this article in order to determine what is particular concern to developing countries. From the study, it is implicitly found that the conflict between developed and developing countries has obviously emerged because developing countries cannot fulfill the requirement of trade measures established by WTO while developed countries have attempted to set the trade measures as their import restriction. As a result, it is difficult to refuse that those trade measures might be viewed as the obstruction of the economic development in developing countries.

KEYWORDS : Trade and Environment Debate, Concern to Developing Countries, Trade Measures

บทคัดย่อ

บทความนี้มีวัตถุประสงค์ที่จะอภิปรายประเด็นถกเถียงที่เป็นความขัดแย้งระหว่างการค้าและสิ่งแวดล้อมในบริบทของประเทศที่กำลังพัฒนา โดยความขัดแย้งดังกล่าว สามารถเกิดขึ้นเมื่อประเทศที่กำลังพัฒนา ไม่อาจดำเนินการตามข้อเรียกร้องเกี่ยวกับการค้าและสิ่งแวดล้อม ที่ถูกกำหนดโดยองค์การ

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การค้าโลก (World Trade Organization) เช่น มาตรการตาม มาตรา XX แห่ง GATT หรือ มาตรการ PPM เป็นต้น ซึ่งกำหนดให้ประเทศสมาชิกสามารถออกแบบนโยบาย หรือ มาตรการป้องกันการค้าที่อาจส่งผลกระทบต่อสิ่งแวดล้อมหรือป้องกันการนำเข้าสินค้าที่มีกระบวนการผลิตไม่เหมาะสมหรือไม่ได้มาตรฐาน ประเด็นดังกล่าวนี้เองถูกหยิบยกขึ้นมาถกเถียงว่าเป็นอุปสรรคที่สำคัญในการขัดขวางการพัฒนาเศรษฐกิจของประเทศกำลังพัฒนาหรือไม่ เนื่องจากข้อจำกัดของประเทศที่กำลังพัฒนาหลาย ๆ ด้านไม่อาจตอบสนองข้อเรียกร้องขององค์การการค้าโลก

คำสำคัญ : การค้าและสิ่งแวดล้อม ประเทศกำลังพัฒนา ความขัดแย้ง

1 INTRODUCTION

Trade and environment debate has become the complicated issue that has been conferred and discussed for many decades.[1] Furthermore, it would be interesting to note that environment and trade may be interconnected in the sense of conflict. It is difficult to refuse that several environmental problems are the consequence of the extension of global economic activities because the development of all economic activities is explicitly necessary to depend on the environment.[2] Additionally, many concerns relating to trade and environment debate can be focused on the issue of how the nexus of trade and environment can be practically achieved despite the fact that trade measures have been frequently viewed as a divergence to environmental concerns.[3] The issues of particular concern to developing countries also become one of interesting issues which have been brought to discuss on numerous international negotiation forums.

Although there are a number of international organizations, particularly the World Trade Organization, known as WTO, which have continuously concentrated on trade and environment debate for many years, this issue remains extremely controversial in developing countries. Unfortunately, trade measures that may be used as an effective tool in addressing

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[1] Mangda Shabin, 'Trade and Environment: How Real Is the Debate' in Gary Sampson and John Whalley (eds) *The WTO, Trade and Environment* (Edward Elgar, 2005) 579, 580.

[2] International Institute for Sustainable Development and United Nations Environment Programme, *Environment and Trade A Handbook* (United Nations Environment Programme, 2nd ed, 2005) 2.

[3] Agata Fijalkowski and James Cameron (eds), *Trade and The Environment: Bridging the Gap* (Cameron May, 1998) 56.

environmental problems have become controversial issue between trade supporters and developing countries. Developing countries concern that trade restriction aiming to protect environment can promote green protectionism.[4] In this regard, the linkage between trade and environmental protection shall be depicted as an important obstacle of the economic development in developing countries. In other words, trade measures aiming to protect environment, such as processes and production methods known as 'PPM', environmental standard, environmental labels and environmental management certification programs, can be also viewed as an impediment of the export of developing countries because most developing states are probably incapable to complete those trade measures' requirement.

Furthermore, under the General Agreement on Tariff and Trade (GATT) rules concerning an environmental issue, such as Article XX on General Exceptions, can also do affect on developing countries. Therefore, the issues of particular concern to developing countries in terms of trade and environment debate should be carefully determined whether and how developing countries could voluntarily participate in the environmental protection whereas their economic development must not be restricted by unjustifiable or arbitrary discrimination. This article is to discuss and examine how the recent outstanding development in trade and environment debate can result in the conflict between developed countries and developing countries. The article also aims to present some issues of particular concern to developing countries, such as the issue of processes and production methods (PPM) and Article XX of GATT and to evaluate why those trade measures have become the significant obstruction of economic extension and development in developing countries.

2 THE RECENT OUTSTANDING DEVELOPMENT IN TRADE AND ENVIRONMENT DEBATE

Trade and environment debate has been discussed and evolved for many decades through several international negotiation forums, such as United Nations Conference and the World Trade Organiza-

[4] Shawkat Alam and Rafiqul Islam, 'The Trade Environment Interface: Issues Lurking Behind The North-South Tensions' (2004) *2 Macquarie Journal of International and Comparative Environmental Law* 121, 132.

tion Ministerial Conference. Recently, the relationship between environmental issue and trade was seemingly reaffirmed as the highlight topic on the negotiation forum of WTO at the Doha Ministerial Conference in 2001.[5] Under the Doha Declaration, which is a main outcome of the conference, it established some articles relating to the negotiations on trade and environment described in Article 31. Article 31 states that, with a view to enhancing the mutual supportiveness of trade and environment, the relationship between existing WTO rules and specific trade obligations set out in Multilateral Environmental Agreements (MEAs) shall be limited in scope the applicability of such existing WTO rules as among parties to the MEA in question, and the reduction or elimination of tariff and non-tariff barriers to environmental goods and services must be promoted.[6]

It is noted that the key point of the controversy between trade and environment is mentioned. It is obvious that trade and environment have totally different objective. Trade attempts to distribute and expand opportunities in the goods and services production through eliminating trade barrier; in contrast, the purpose of environmental protection is to establish the rules for activities adversely having an affect on environmental quality.[7] However, under Article 31 of Doha Declaration, it aims to coexist between WTO rules and Multilateral Environmental Agreements (MEAs) and to declare that the WTO rules cannot be absolutely separated from environmental protection. The Doha Declaration also denotes the particular concern to developing countries through the responsibilities of the Committee on Trade and Environment (CTE) in Article 32. Article 32 states that the Committee on Trade and Environment shall give particular attention to the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions

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[5] *Adil Najam et al, Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development and The Regional and International Networking Group, 2007) 3.

[6] World Trade Organization, *Doha WTO Ministerial 2001: Ministerial Declaration* (2012) World Trade Organization <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeenvironment>.

[7] Geza Feketekuty, 'The Link Between Trade and Environmental Policy' (1993) *2 Minnesota Journal Global Trade* 171, 172.

and distortions would benefit trade, the environment and development.[8]

Nevertheless, at the Doha Ministerial Conference, it would be interesting after the achievement of negotiation on trade and environmental issues that developed countries pay attention and strived to push forward them as negotiating agenda[9] has emerged among international community, the further significant question is whether developing countries are ready to accept and fulfill provisions concerning trade and environment under the Doha Declaration.

3 THE CONFLICT BETWEEN DEVELOPED COUNTRIES AND DEVELOPING COUNTRIES IN THE SENSE OF TRADE AND ENVIRONMENT DEBATE

In reality, there has been a conflict of interests in trade and environment debate between developed countries and developing countries. In developed countries' view, environmental protection are gazed as the substance for protecting the global environment; however, in a certain point of developing countries, environmental protection cannot be separated from the economic development of the countries concerned.[10] Hence, this different perspective may be implicitly comprehended that developing countries are to concentrate on their economic development as priority even though environment and natural resources are to be degraded because of such economic development.

Developing countries also attempted to argue that developed countries should be responsible for the harm to the environment resulting from the way of development adopted by them.[11] This claim of developing countries may lead to the fragile relationship between GATT rules and developing countries manner; in other words, developing countries which are as GATT member do not need to undertake the same disciplines

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[8] World Trade Organization, above n 6.

[9] Shawkat Alam, 'Trade and Environment Linkage in the Post Uruguay Round Context' (2004) 11 *James Cook University Law Review* 36, 47.

[10] Ibid 36.

[11] Palitha T.B. Kohona, 'The Environment: An Opportunity For North/South Cooperation' (1993) *Third World Legal Study* 71, 72.

as developed country member.[12] It seems that such manner of developing countries to the GATT results from their dissatisfaction to developed countries.

It seems that trade and environment debate becomes much more controversial between developing countries and developed countries when there were the appearances of disputed cases related to the issue of trade and environment, such as the Shrimp and Turtle Case (India, Pakistan, Malaysia, Thailand - USA, 1998)[13] and the Gasoline Case (Venezuela, Brazil - USA, 1996)[14], which were brought to the WTO dispute settlement bodies. As a result, from the discussion above, it is obviously said that there is an obvious conflict between developed countries and developing countries in the sense of trade and environment debate.

4 THE ISSUES OF PARTICULAR CONCERN TO DEVELOPING COUNTRIES

There have been some particular concerns to developing countries due to recent developments in trade and environment debate. Regarding to the debate, the argument of many developing countries is that their social primacies diverge from those of developed countries; as a result, it is not fair if developed countries are to discriminate against the export of developing countries by using the priority of environmental issue that are not primary agenda in developing countries.[15] Consequently, this section aims to present outstanding trade measures used for the purpose of environmental protection, such as processes and production methods (PPM) as well as Article XX of GATT 1994 and discuss how these trade measures can do affect on developing countries.

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[12] Chiedu Osakwe, 'Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behavior and Performance' (2011) 20 *Minnesota Journal of International Law* 365, 365.

[13] World Trade Organization, *Environment: Dispute 8 India and etc Versus US: 'shrimp-turtle'* (2012) World Trade Organization <http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>.

[14] World Trade Organization, *Environment: Dispute 7 Venezuela and Brazil Versus US: 'Gasoline'* (2012) World Trade Organization <http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm>.

[15] International Institute for Sustainable Development and United Nations Environment Programme, above n 2, 56.

4.1 Processes And Production Methods (PPM)

Processes and production methods, known as 'PPM' can be simply described as 'the way in which a product is made.'[16] Generally, before many products are available for market, there are many stages such products have to go through.[17] PPM is also denoted as 'any activity that is undertaken in the process of bringing a good to market.'[18] As a result, how a product is produced, used and disposed has become an environmental consideration that environmentalists attend.[19] Moreover, currently, there are a large number of PPM-based trade measures are brought to relate to the market product.[20] For example, in the Shrimp and Turtle Case, United States rejected the import of shrimp products that were exported by developing countries because those developing countries trawled shrimps by using the inappropriate method and mechanism that may result in the destruction of sea turtles. It is well recognized that this case is an important example that concentrates on the stage of how a product is produced in addition to the concern of whether the way of production method may adversely result in environment and natural resources.

As a result of the PPM use in environmental protection, the debatable issue is whether PPM-based trade measures can be viewed as the trade restriction of developing countries or not. In regard to the current situation, due to the lack of technology in developing countries, they cannot probably achieve the requirement of PPM-based trade measures.[21] According to the Shrimp and Turtle Case, developing countries cannot provide any effective devices or technologies for protecting sea turtles from shrimps trawling. This is main reason why many products exported by developing countries are frequently rejected because of the

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[16] Ibid 53.

[17] Ibid.

[18] Jason Potts, *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy* (International Institute for Sustainable Development, 2008) 3.

[19] International Institute for Sustainable Development and United Nations Environment Programme, above n 2, 55.

[20] Sanford E. Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27:2 *Columbia Journal of Environmental Law* 383, 396.

[21] International Institute for Sustainable Development, 'Trade and Environment's New Agenda' (Paper presented at IISD Viewpoint: World Trade Organization Fourth Ministerial Conference, 9-13 November 2001).

reason of environmental protection. Interestingly, this problem should be resolved by the assistance of developed countries. Developed countries must provide technological and financial assistance[22] in order that developing countries can meet the requirement of PPM-based trade measures.

4.2 The GATT Article XX on General Exceptions

In order to understand the function of the GATT Article XX, firstly, it is unavoidable to consider the core principles of GATT. The objective of GATT principle is that any forms of trade barrier must be eliminated. Furthermore, the WTO forms the significant discipline of non-discrimination as the key principles of trade between WTO members.[23]

The GATT Article XX permits member countries to take any actions at national level in order to protect the environment.[24] In regard to the GATT Article XX on General Exceptions, in principle, this article provides member countries the right to establish the level of protection that may be appropriate on their environment.[25] Article XX (b) and (g) provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...
> (b) necessary to protect human, animal or plant life or health; ...
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. ...[26]

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[22] Ved P. Nanda, 'Developed Countries' Assistance to the Developing World for Environmental Protection' (1991) 1 *Kansas Journal of Law & Public Policy* 27, 27.

[23] International Institute for Sustainable Development and United Nations Environment Programme, above n 2, 31.

[24] Mangda Shabin, above n 1, 587.

[25] Ibid.

[26] World Trade Organization, *WTO rules and Environmental Policies: GATT exceptions* (2012) World Trade Organization <http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm>.

It is noted that, under Article XX (b) and (g), it is to allow WTO members to design their own policies and measures in order to necessarily protect human, animal or plant-life health or if associated to the natural resources conservation.[27] However, this Article does not allow member countries to establish their policies and measures that result in arbitrary or unjustifiable discrimination between WTO members.[28] Like the use of PPM-based trade measures for environmental protection, the controversial issue is whether Article XX of GATT can be viewed as the trade restriction of developing countries or not.

In the Shrimp and Turtle Case (India, Pakistan, Malaysia, Thailand - USA, 1998), this case is focused on the issue of the violation of the GATT rules and the discrimination. Many developing countries which are as WTO members, such as India, Pakistan, Malaysia and Thailand have complained to the WTO that United States violated principles of non-discrimination the GATT 1994. In fact, the section 609 of the US Endangered Species Act 1973 provides that 'shrimp harvested with technology that may adversely affect certain sea turtles protected under US law may not be imported into United States.'[29] Furthermore, United States claimed that 'US shrimp trawlers use 'turtle excluder devices (TEDs)' in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles'.[30] Hence, United States did not accept the importation of shrimp products from those developing countries because they used inappropriate devices that adversely affected on the destruction of sea turtles. The debatable issue is whether the section 609 of the US Endangered Species Act 1973 aiming to protect sea turtles is lawful under Article XX of GATT or not. Also, It is doubted whether such US measure claimed by United States can be considered as arbitrary or unjustifiable discrimination to developing countries.

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[27] Abdul Ghafur Hamid et al, 'The WTO Rules Versus Multilateral Environmental Agreements: The Search For Reconciliation' (2008) 5 *Macquarie Journal of International and Comparative Environmental Law* 57, 62.

[28] Ibid.

[29] Simeneh Kiros Assefa, 'The Trade and Environment Debate: The Normative and Institutional Incongruity' (2008) 2(2) *Mizan Law Review* 311, 329.

[30] World Trade Organization, above n 13.

In this case, there were some interesting arguments of United States that endeavored to defend itself from the violation of the GATT rules. United States claimed that the measure under section 609 was very essential to protect sea turtles; in addition, the only way to protect them from drowning in shrimp nets is the use of TED.[31] Furthermore, some experts supported the claim of United States that sea turtles can be recognized as the common heritage of mankind which needs all states to protect them; moreover, the TED is cheap and effective to trawl shrimps.[32] According to the above reasons, it seems that the US action may be legitimate under the GATT Article XX.

As a result of the WTO decision, the complainants won the case because the WTO Panel settled that the section 609 is inconsistent to the GATT rule as Article XI (Principle of General Prohibition of Quantitative Restrictions); in other words, the Panel stated that such US measure discriminated between WTO members.[33] Nevertheless, this case was appealed to the consideration of the WTO Appellate Body. It was surprising that the WTO Appellate Body vetoed some reasons of the Panel and pointed some serious errors in the Panel's reasons.[34] However, eventually, the Appellate Body concluded that the US measure was not justified under Article XX of GATT'.[35]

5 CONCLUSION

In conclusion, the recent developments in trade and environment debate have been focusing on the issues of concern to developing countries. It is noticed that the issues of concern to developing countries were consisted in the agenda of several international negotiation forums, especially on the negotiation forum of WTO at the Doha Ministerial Conference in 2001 that promoted the issue of trade and environment as the highlight. Furthermore, the Doha Declaration also established some provisions that concern

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[31] Mangda Shabin, above n 1, 592.

[32] Agata Fijalkowski and James Cameron (eds), above n 3, 22.

[33] World Trade Organization, above n 13.

[34] Bruce Neuling, 'Shrimp-Turtle Case Implications for Article XX of GATT and the Trade and Environment Debate' (1999) 22:1 *Loyola of Los Angeles International and Comparative Law Review* 1, 32.

[35] World Trade Organization, above n 13.

the economic development in developing countries.

However, the relationship between trade and environmental protection remains controversial. Although various trade measures used for environmental protection, such as Article XX of GATT 1994 and PPM-based trade measures have been extended at both international and domestic level, developing countries cannot fulfill the requirement of those trade measures. As a result, it is difficult to refuse that those trade measures might be viewed as the obstruction of the economic development in developing countries.

It is well recognized among international community that the economic development, which developing countries have attempted to seek, must be addressed together with the environmental protection.[36] As a result, they should change their attitude. If developing countries are restricted to export because of trade measures aiming to protect environment, they should adjust themselves to harmonize to the global trend by improving their own national policies converting to emphasize the priority of environmental issue. Furthermore, due to the commitment to the WTO, developed countries can adequately provide technological and financial assistance to developing countries in order to support them to fulfill their goal and survive among the competition of global trade.



[36] Ved P. Nanda, above n 22.

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