

Principles of Non-Discrimination against Trading State Party of Powerful Country on the basis of World Trade Organization “Case Study Banning Thai Coconut Products”

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ABSTRACT

The principle of Non-discrimination of the World Trade Organization (WTO) aims to provide fairness to all member countries by means of the Most Favored Nations Treatment and National Treatment under the General Agreement of Trade and Tariffs (GATT). Accordingly, the free trade has been promoted in all regions of the world. However, many WTO members resort to take advantage of general exceptions to the non-discriminatory practice by invoking Article XX of WTO in disguise, thus affecting the free trade principle of WTO.

Keywords

Non-Discrimination GATT, Banning Thai Coconut, Exceptions of Article xx.

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Introduction

After the World War II, the world community had the same goal in developing the global economy to revive. Accordingly, the World Trade Organization was established and became successful as a result of borderless trade and promotion for free trade at both bilateral and multilateral levels. These resulted in the trade being expanded and it covered all regions of the world.

As WTO main objectives include to ensure that all countries can trade equally, the organization therefore came up with the Non-discrimination principle among state members under GATT. Importantly, such Non-discrimination principle comprises the Most Favored Nation Treatment and National Treatment. Ironically, while the Non-discrimination principle has been expected to help facilitate free trade, it has become a tool for the world economic power states which have relatively advanced technologies and advantage in developing equipment and tools for manufacture. This is different from many developing and least developed countries which often face difficulties in affording expensive technologies for various aspects including human health and environmental protection. Such difficulties are drawback for the competition in the world market as they are often used by the world economic powers as the tools for trade barrier. For example, the United Kingdom and the United States banned the products mixed with any part of coconut from Thailand, citing the use of animal labor in the manufacturing process. The details of these cases will be discussed later.

WTO's Agreement concerning International Trade

The World Trade Organization (WTO) is an international organization which provides frameworks for facilitating interactions on international trade among member states by means of international agreements and instruments namely

“Multilateral Agreement on Trade”. Only member states which recognize this agreement will be bound to obligations or rights set forth under the agreement.

At present, WTO is the international organization on trade. It is the international organization having the most member states. It also has over multilateral agreements covering various issues, including goods and services sectors, as well as obligations related to the protection of intellectual property concerning trade (Martin Dixon Robert C. Sarah W, 2011). It should be noted that, among the important agreements under the WTO framework, this article aims to analyze the Principle of Non-Discrimination.

Principle of Non-Discrimination

WTO's member states shall not discriminate the imported goods from other parties. This principle on Non-Discrimination appears in Article 1, paragraph 1 of GATT 1994 which stipulates that “...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties (Martin Dixon Robert C. Sarah W, 2011). This provision requires all member states to treat one another equally without any discrimination. No special privileges or treatments will be granted to any state other than others. The goal of Non-Discrimination could be achieved if member states adhere to the Most Favored Nations Treatment and National Treatment discussed below.

I. Most Favored Nations Treatment Principle (MFN)

MFN is an important legal principle of WTO which plays a crucial role to support the non-discrimination principle towards the goods imported from or exported to WTO member states at the border crossing point and international

port. In so doing, a granting state is obliged to grant privileges to a beneficiary state on the “same category of matter” as it grants any privileges to a third state.

In Anglo-Iranian Oil company case, the International Court of Justice (ICJ) ruled that the treaty is the “attachment point” between a beneficiary state and a third state which enable the latter to claim the rights under MFN from a granting state. The GATT is therefore considered as “ingenious” shorthand to legal process which a granting state is bound to grant MFN rights to a third state although it does not want to. However, both granting and beneficiary states may specify in the treaty between each other that the beneficiary state shall not claim MFN rights more than those stipulated in GATT although the granting state actually grants privileges to a third state more than a beneficiary state.

It is important to note that there are exceptions of MFN as follows:

1. Generalized System of Preferences (GSP)

GSP is a unilateral act that a developed country grants privileges on customs taxes to the goods of a developing country by means of waiving or reducing customs taxes.

It is the most important international trade system for developing countries. Thailand has been granted the privileges from this system for over thirty years in exporting goods to industrialized countries, thus causing Thailand’s trade has been expanding constantly (Somboon Sangiambut, 2562). On the contrary, many least developed countries argue that the MFN does not benefit them because they are not able to compete with the developed countries on the basis of equality. As a result, the WTO commission usually grants special GSP by reducing taxes lower than normal to such least developed countries (Rangsan Tanapornpun, 2563).

In general, there are two categories of GSP:

1. GSP for customs reduction: an general GSP usually granted to the lower middle income countries.
2. GSP –LDC: a reduction of customs taxes to the least developed countries. The taxes are reduced at special rates.

Thailand has been granted general GSP from various countries, namely Australia, Belarus, Japan, Kasakstan, New Zealand, Russia, Turkey and the United States (UNTAD, information in October 2019).

2. Economic Integration

Article 24 of GATT allows the establishment economic integration which helps facilitate trade privileges among member states. This approach could be done in the form of setting up the Customs Union or Free Trade Area.

I. National Treatment Principle

Under the National Treatment Principle, member states shall not treat foreign goods differently from local ones which is likely to cause disadvantage for such foreign goods in trade competition. The National Treatment shall begin when the foreign goods cross the border or have processed through

the customs clearance. The National Treatment could be conducted in two forms as follows:

- Taxation
- Local Regulation

As discussed above that the essence of GATT supports free trade among member states through two main principles, i.e., Most Favored Nation Treatment, and National Treatment, WTO members could however be exempted from GATT rules if there are certain situations according to article XX of GATT. These include the protection of human, animal or plant life or health, or relating to the conservation of exhaustible natural resources according to paragraph (b) and (g) consecutively.

Obviously, the interpretation of the above exceptions is very important. Otherwise, it will be against the principle of *Pacta Sunt Servanda* and could become a huge burden for developing countries, most of which are not able to afford expensive facilities as far as export industry is concerned.

In this regard, the Dispute Settlement Panel and Appeal Body explains that the WTO member shall apply the exceptions in any subparagraph carefully as follows:

1. WTO members shall not implement the exceptions in a manner of arbitrary discrimination among the countries having the same or similar situation.
2. WTO members shall not implement in a manner of unjustifiable discrimination among the countries having the same or similar situation.
3. The implementation of such exceptions shall not be a disguised restriction on international trade (Jaruprapa Rakpong, 2560).

Thailand’s experience with article XX: a case study of banning Thai products with a claim of animal torture and natural resources protection

Thailand ranks 9th in the world for the country exporting coconuts, while the export of the coconut milk, which is coconut products came first in the world ranking for export and has the export value of 12,000 million baht. Thailand’s market for exporting coconuts and coconut products are European Union, UK, Australia and China (Wiriya Likitwong, 2563). However, People for Ethical Treatment of Animals (PETA), a non-governmental organization, recently launched a campaign against Thai coconut products in the United Kingdom. The NGO published the pictures and video clips featuring monkeys were collecting coconuts inside the monkey training school and coconut farms in Surat Thani and Chumporn, two southern provinces in Thailand. PETA also reported that Thai farmers tortured the monkeys by capturing “Kang Monkeys” (a specie of monkey) to brutally train them to collect coconuts. Furthermore, the NGO published the pictures showing the some monkeys being chained with used tyres and others being detained in big cages. The pictures also included the monkeys being detained in a cage on a truck and shaking the cage in an attempt to escape from the caretakers. It claimed further that there are eight farms forcing monkey labor to collect coconuts for exporting them to the world market. The male monkeys were forced to collect as many as 1,000 coconuts per day (human can collect only 80 coconuts per

day), and if any monkey resisted to do the job, his tooth will be removed.

The PETA's reports mentioned above resulted in many large department stores in England took the coconut products from Thailand out of the shelves, and stopped buying as well as importing such products. These department stores voiced their opinion in the same direction that "as the ethical retailers, we do not allow the use of monkey labors in our merchandises". In addition, the England government also cited the information revealed by PETA to bar this kind of products from Thailand, resulting in huge impacts on the export of the Thai coconut-processed products.

In U.S.A, Costco is the latest retail store that ceased to sell Chao Koh coconut milk, following many stores such as Giant Food, Food Lion, Stop & Shop. As Ingrid Newkerg, PETA's president put it "no buyer wants to see monkeys in chain and being treated like coconut collecting machines. She also echoed that Cosco did the right thing to deny the exploitation from animals (Matichon Online, 2563).

Both UK and USA argued that they had banned the coconut products from Thailand because forcing monkeys to collect coconuts was the animal torture, thus allowing them to ban such products for the sake of protection of animals and conservation of natural resources under Article XX (b) and (g) of GATT which are the exception of the principles of the Most Favored Nation Treatment and National Treatment. Ironically, the reason given by the UK and USA for such banning discussed above seems to set a precedent that the collection of coconuts can by no means be made by animals. Interestingly, Leslie Sponsel, professor of anthropology, Hawaii University and Dr. Poranee Natadecha Sponsel suggested that according to their studies about the relationship between humans and monkeys in the southern part of Thailand, they found that there was no evidence of the cruelty related to the use of the monkeys. In fact, monkeys are like pets in the families. Interestingly, some families treat monkeys like family members. For example they are usually showered by the owners and brought to coconut farms by sitting on the motorcycles behind the owners. Research also found that the monkeys are well looked after and trained like children (Reporter Journey, 2563).

Therefore, it is important for those who have accused Thailand of torturing monkeys for coconuts collection to reconsider. Moreover, they should understand that using monkeys to collect coconuts is like using animals to do some works in the West. These include using dogs to control sheep or using other animals such as tigers, lions, elephants incircus to entertain the audiences in exchange for money.

WTO and its mechanisms for settlement of disputes

When any dispute related to international trade arises, any WTO member involved in such dispute is, under WTO rules, required to submit a request to the Dispute Settlement Body in order to reach the Agreement on Dispute Settlement Understanding (DSU) without applying for the confronting dispute settlement. The DSU will ensure that the diplomatic relationship and coordination between working agencies between the states involved are not too much affected. Also,

this approach provides an opportunity for those involved to settle their disputes quickly and without complication.

It should be noted that the DSU has its uniqueness for the dispute settlement, ranging from consultation for nominate the panel, appeal, endorsement of hearing minutes, and compliance. Clearly, the DSU has some characters which is different from both domestic and international settlement of dispute as follows:

1. Combination between Trade Negotiation and Ruling for Dispute Settlement

The conflicting members cannot request for nomination of the panel unless they attend the consultation process and such process has been passed for at least 60 days. During such a period of time, both conflicting members are able to discuss and exchange ideas so that they can avoid the confrontation according to ordinary legal process.

In addition to such consultation, there is also mediation process. And in order to come to conclusion as soon as possible, the panel will not accept any third party's opinion despite its interest in the dispute such as the NGOs on Environment or Labor unless such opinion has been formally integrated in the complaint made by conflicting member's government.

2. Use of two-tier Panels

If the consultation is not successful, the parties can request for panel nomination comprising three experts in the disputing area. After the dispute has been determined at the stage of the panel, if any party does not agree with the panel's decision, it is entitled to appeal to the Appellate Body, comprising seven members to revise the legal issues previously decided by the panel.

3. Certain Period of Time for the Dispute Settlement Process

There is clear timeline at each stage of dispute settlement. This enables the conflicting parties to be able to estimate the period of time from the beginning to the end of the process. For example, the beginning of the consultation until the day of endorsing the panel's decision shall not exceed 9 months, and not exceed 12 months as from the day of the appointment of the panel in the case there is an appeal.

4. Member is entitled to enforce the decision by means of seeking Compensation and Suspension of Concessions.

This measure will apply if the party who lost the case is not able to comply with the decision within the agreed period of time, or does not want to comply with such decision. This measure is regarded as a guarantee for the member state affected from the use of measures against the WTO rules. However, such compensation and suspension of the rights shall be made in the same proportion as the damages occurred.

Conclusion and Recommendation

The banning of the Thai coconut products by citing Article XX (b) and (g) of WTO as discussed above has affected Thailand's trade a great deal. This article therefore suggests Thailand improve the situation by actively taking actions in accordance with the WTO's framework on dispute settlement as follows:

1. Inviting representatives of the WTO members concerned, and reporters, both local and international, to observe and consider the facts of the accusation towards the Thai entrepreneurs on animal torture by using monkeys to collect coconuts.

The entrepreneurs should request the Thai government to file a claim with the WTO in order to have the opinion voiced by the third party heard by the panel as discussed above.

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