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Trade Special Measures and Sustainable Development: Implementation of Fisheries Subsidies Agreement

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ABSTRACT: The evolution of international environmental law and the law of the World Trade Organization (WTO Law) led to the adoption of the Agreement on Fisheries Subsidies, creating the nexus between the limitation of trade special measures. The Agreement on Fisheries Subsidies provided for the implementation of special and differential treatment measures within the framework of the World Trade Organization even if these measures are subsidized. The special and differential treatment measures aim for the economic development of some sate parties meanwhile the limitation of environment distortion searches to prevent the extinction of the exhaustible natural resources to maintain sustainable development. The ability to pursue economic development by using subsidized fishing activities raises concerns about special measures in the trade-environment agreement. The paper concludes that no economic development is possible when a sustainable environment is endangered. The conditions for implementing the SDT measures under WTO Law are not the same as they are in the Agreement on Fisheries Subsidies. Their implementation in this agreement can contribute to the immediate distortion of marine wildlife without preserving the survival of specimens of the species threatened with extinction. Therefore, the sustainability of special trade measures refers to the ability to continue carrying on development programs that abide by the sustainable requirement.

KEYWORDS: Special and differential treatment, Sustainable development, Fisheries Subsidies Agreement, WTO Law, Subsidies.

1. INTRODUCTION

International law embodies the principles of development in its different aspects. The member states (subjects of international law) established different international organizations aiming to further the aspects of development as well. The research of this paper analyses the implementation of policies from two international organizations: the World Trade Organization (WTO) and the United Nations (UN). The special measures of trade constitute the Special and Differential Treatment (SDT), and they emphasize the particularity of the international trade law. They regulate the principles of reciprocity of public international law and allow the implementation of non-reciprocity principles in international trade to support the development needs of developing countries [Kennedy, 2005]. The World Trade Organization (WTO) recognizes three categories of memberships: developed countries, developing countries, and the least-developed countries. Therefore, the law of the World Trade Organization (WTO Law) admits the implementation of special and differential treatment measures for developing and least-developed countries in support of their development. The UN also emphasized the development aspect and designed the sustainable development goals with the United Nations General Assembly Resolution 70/1 on Sustainable Development by 2030 [UN Resolution 70/1, 2015]. The resolution urged the international community and the states to undertake actions to achieve the established goals. It considers international trade as an engine of inclusive economic growth to reduce poverty, and to promote sustainable development [UN Resolution 70/1, 2015]. The adoption of the Agreement on Fisheries Subsidies of the WTO put closer the regulation concerns of development between trade and sustainable goals. Many goals in the UN Resolution made statements supporting connectivity between trade and sustainable development. However, the Fisheries subsidy agreement, like the other agreements of the WTO, provides for the implementation of special and differential treatment measures between the developed countries and the developing countries, including the least-developed countries. The purpose of the special and differential treatment measures is economic development which can be pursued only when sustainable development is preserved. While the ratification process of the Agreement on Fisheries Subsidies is ongoing with the WTO contracting parties, articles 3.8, 4.4, and 6 of the Agreement on Fisheries Subsidies embedded the special and differential treatment measures for developing and least-developed countries to achieve economic development. Allowing the non-reciprocity could lead to a distorting of sustainable environment. As the developing countries and the least-developed countries represent the majority of the WTO contracting parties, the implementation of the special and differential for subsidized fisheries could endanger marine resources [Zreik, 2024] because it means an authorized use of subsidized, illegal, unreported, and unregulated fishing and fishing activities. The implementation of the special trade measures aims at the development of the contracting parties. The question is whether making exceptions to the subsidy restrictions based on the special and differential treatment measures contributes to sustainable development. The next section of the paper reviews the background studies on the implementation of special and differential treatment measures in the WTO for development.

2. BACKGROUND

2.1 Special and Differential Treatment in Trade Multilateral Trade Agreements

The special and differential treatment measures aim to reduce the gap of trade between the developed countries and the developing countries. These special and differential treatment measures are selectively designed to reduce the economic inequality among the trade contracting parties [Herdegen, 2016]. The Special and differential treatment (SDT) started with the General Agreement on Tariffs and Trade in the 1960s and continued in the Marrakesh agreement which established the WTO. The SDT measures are conceived either in the form of a transition to amend their domestic according to the multilateral trade system [Kennedy, 2005] or in the form of non-reciprocity of trade concessions. Before the establishment of the WTO, the SDT measures focused on the non-reciprocity of concessions as provided in articles XXXVI, XXXVII, and XXXVIII of the General Agreement on Tariffs and Trade (GATT). The GATT exempts the implementation of the most-favored-nation clause in trade relations between developed countries and developing countries [GATT, Art. XXXVI:1]. The category of developing countries which includes the least-developed countries represents the contracting parties of the WTO whose living standard is still low and whose development is in its early stages [GATT Art. XVIII:1]. Developing countries include the least-developed countries which face serious challenges in carrying out the sustainable development agenda because of the impediments to their human asset index (HAI) [Committee for Development Policy]. Six indicators serve to determine the HAI: the under-five mortality rate, the prevalence of stunting, the maternal mortality ratio, the gross secondary school enrolment ratio, the adult literacy rate, and the gender parity index for gross secondary school enrolment. In 1979, the General Assembly of the United Nations identified the category of the least-developed countries for the first time and allowed the implementation of special measures to encourage development in these countries [UN General Assembly Resolution 34/210, 1979].

Non-reciprocity of the concessions led to the addition of Part IV of GATT related to Trade and Development. The non-reciprocity, as an exception to the most-favored-nation treatment, became a form of deviating from the general rule of reciprocity with the developed countries [Hegde, and Wouters, 2021]. Part IV of GATT embodied the articles XXXVI, XXXVII, and XXXVIII which deal respectively with the principles and objectives of accessing developed countries' markets, with the commitments of the contracting parties to support the market access of the developing, and with the joint action among the contracting parties.

The provisions of the Generalized System of Preferences also allowed the exemption of the most-favored nation treatment for ten (10) years in 1971 to support development in developing countries [Generalized System of Preferences, 1971]. Before the end of the GSP's decade, the contracting parties adopted the Enabling Clause to grant more favorable and differentiated treatment to the products originating from the least-developed contracting parties [Enabling Clause Decision, 1979]. The early inclusion of SDT measures in the WTO Agreement got an interest from the scholar Feuer who questions the concerns of applying the SDT measures in international economic law and international development law. The future implementation of the SDT measures could determine the development concerns of the developing and least-developed countries [Feuer, 1994]. His concerns back then arose the concerns of the extent to which the implementation of the SDT measures could ensure the economic development of the contracting parties in international trade negotiations. The regulation of international trade for sustainable development reached a higher level with the adoption of the Agreement on Fisheries Subsidies during the twelfth Ministerial Conference [WTO, 2022]. While expecting the entry into force of the Agreement on Fisheries Subsidies after the ratification of 2/3 of the WTO contracting parties, the special trade measures reached one hundred fifty-seven (157) in the WTO [WTO, 2023].

2.2 Subsidies Prohibition on Fisheries to Protect Ocean

The impact of subsidizing fishing and fishing-related activities is harmful to maintaining ocean sustainability. The 'Friends of Fish' raised concerns about endangering marine wildlife by subsidizing fishing and fishing-related activities in connection with international trade in 1998 [UNEP, 2008]. Then, the Ministerial Conference in Doha recalled the necessity of reviewing the impacts of subsidies on fisheries activities. The regulation of subsidized fisheries activities in international trade for sustainable development also emerged during the 2002 Johannesburg World Summit on Sustainable Development [UNEP, 2008]. The negotiations of subsidies on fisheries were left to be under the Subsidies and Countervailing Measures Agreement (SCM Agreement) [Chen, 2010] as later confirmed in the protocol amending the SCM Agreement [Protocol, 2022]. Both the SCM Agreement and the Agreement on Fisheries Subsidies intend to regulate the financial support not only for fair trade but also for the protection of the environment.

The fish stocks depletion by fisheries subsidies got a solution in the WTO Fisheries Subsidies Agreement. The three-quarter depletion of biological fish stock is due to the inappropriate use of subsidies [UNEP, 2008]. The fisheries subsidies are responsible for overfishing and unfair competition. The adoption of the Fisheries Subsidies Agreement prohibits the use of subsidies as provided in Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

> *A subsidy is a financial contribution by a government or any public body within the territory of a Member Where (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government's practice* [SCM Agreement, 1994].

3. METHODS

Sustainable development and the implementation of special and differential treatment represent two different perspectives of international law. While the former is related to international environment law, the latter is engrained in international economic law, especially the WTO Law. Recently, both fields of international law have been interwoven with the economic activities impact on the environment. The interaction or the compatibility of both areas of international law does not admit the use of methods required in the field for either field. Normative research methods shall be used to solve the concerns of WTO Agreements focusing on the environment. The normative research methods aim to assess the implementation of the concept of development from different perspectives to determine the flaws or inconsistencies of the concept in the globalized.

The paper, first, uses the normative research methods in international environmental law and in WTO Law for the concepts of sustainable development. As economic development without sustainable development can jeopardize the development of the trade partners including developing countries and least-developed countries, the next section analyzes the findings of international trade regulations for the protection of the environment.

4. FINDINGS ON INTERNATIONAL TRADE REGULATIONS FOR ENVIRONMENTAL PROTECTION

International trade regulations for the protection of the environment are enshrined in international trade agreements and explained according to the decisions of the WTO's dispute settlement body.

4.1 Environmental Protection in International Trade Agreement

The multilateral trade of the WTO included many trade agreements such as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Subsidies and Countervailing Measures Agreement (SCM Agreement). These agreements regulate the implementation of SDT measures to encourage development through trade while protecting the environment. The GATT ensures the conservation of exhaustible natural resources, and the protection of human, animal, and plant life or health [GATT, 1947]. In addition to the provisions of the general exceptions, the implementation of GATS' provisions for the protection of the environment, the supply of services under mode (b) of the GATS can also protect human, animal, or plant life health to ensure a sustainable environment during the trade of services [GATS, 1994]. A state can regulate the consumption of services provided abroad to support the effort of sustainable development [Morrison and Nielsen, 2013]. The scope of trade in services includes (a) the supply of services from the territory of one Member into the territory of any other Member; (b) the supply of services in the territory of one Member to the service consumer of any other Member; (c) the supply of services by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) and the supply of services by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [GATS, 1994].

However, the legality of trade can also threaten environmental justice, ecojustice, and species justice. The legal trade of wild fauna and flora is merely a conventional authorization to trade, which can disrupt and dislocate wildlife instead of preserving the normal life of fauna and flora [Sollund, 2022]. For instance, an estimation of legal trade reached €100 billion in the European Union meanwhile illegal trade value varies between 7.5 to 24.5 billion [European Committee on Environment, 2016].

Besides the WTO's multilateral trade agreements, many other international agreements contribute to the preservation of marine resources. The United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES, 1973] regulates international trade for the preservation of exhaustible natural resources. The United Nations Convention on the Law of the Sea (UNCLOS) also provides for the conservation of marine living resources and the sustainable use of these resources; and it requires the states to prevent, reduce, and control marine pollution no matter the origin of the pollution [UNCLSO, 1982]. The Marine Stewardship Council (MSC) adopted also eco-certification for sustainable fishing practices to minimize environmental harm and maintain the health of the targeted species [Zreik, 2024]. The prevention of any pollution in the sea and the eco-certification for sustainable fishing practices can facilitate the sustainability of the special and differential treatment in international trade. They are conceived to guarantee the viability of fisheries activities which can contribute to the economic, social, and environmental development of the developing countries such as the sustainability of foreign direct investment in the host countries [Sauvant and Evan, 2021].

Some regional regulations of international trade also ensure the protection of the environment. Hsieh called them the regionalization of green trade to designate the shift of global normative endeavors toward regional trade agreements [2024]. The North American Free Trade Agreement (NAFTA), which became the United States-Mexico-Canada Agreement (USMCA) under the first administration of Trump and the European Union (EU) played a major role in their efforts to integrate the international sustainable objectives in the regional economic integration. They have been the pioneers of green regionalism (Hsieh, 2024). Notwithstanding, the EU is the only regional economic community to become a member of the CITES in 2015 [Reeve, 2015]. After its accession, the EU incorporated the Resolutions and provisions of CITES into EU Law through the EU Wildlife Trade Regulations, namely: Council Regulation (EC) No 338/97, implemented through Commission Regulation (EC) No 865/2006 and Commission Implementing Regulation (EU) No 792/2012.

4.2 Decisions by the Dispute Settlement Body on International Trade Regulations for a Sustainable Environment

The decisions of the dispute settlement body on the regulations of international trade for a sustainable environment are twofold: the prohibition of discrimination and the regulations of export competitiveness in trade. An inseparable and mutual nexus exists between economic progress and environmental protection [Islam, 2006]. The trade-environment interface is perceptible in the general exceptions of the Art. XX of the General Agreement on Tariffs and Trade, especially paragraphs (b) and (g). These paragraphs ensure the protection of human, animal, or plant life or health, and the conservation of exhaustible natural resources as far as the effective trade measures are in conjunction with the domestic production or consumption restrictions. In *China – Measures Related to the Exportation of Various Raw Materials*, the Dispute Settlement Body (DSB) of the WTO clarified the interpretation of the phrase 'made effective in conjunction with restrictions on domestic production or consumption' in Art. XX(g). It means that the restrictive measures on exportations and the restrictions on domestic consumption or production must *work together* [Appellate Body Report, 2012]. The General Agreement on Trade in Services has also an exception related to the protection of the environment in paragraph (b) of GATS' Art. XIV: the necessity to protect human, animal, or plant life or health. The study of these exceptions shows the prohibition of discrimination when implementing the trade-environmental provisions.

In the chapeau of both GATT and GATS related to the general exception, the state parties are required not to apply the trade-environment measures in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same (like) conditions prevail, or a disguised restriction on international trade (trade in services). In *Brazil – Measures Affecting Imports of Retreaded Tyres*, the DSB disapproved the discriminative ban on the importation of retreaded tires from Brazil, which allowed the importation of the retreaded tires from MERCOSUR countries [Appellate Body Report, 2007]. This discrimination does not change the effects of retreaded tires on the environment. The preservation of the exhaustible resources does not have to discriminate either for the importation or exportation market. The US Clean Air Act was also recognized to be discriminatory though its basic purpose was the preservation of the exhaustible natural resources [Appellate Body Report, 1996]. The Act applied different methods of treatment to both domestic gasoline and imported gasoline to prevent the pollution of the air. The Appellate Body found the measures unjustifiable, discriminative disguising the restrictive measures on international trade under the chapeau of Art. XX.

The Dispute Settlement Body also applied the provisions of the SCM Agreement. When the Ontario Government granted the premium rates, known as the Feed-in-Tariffs (FITs) to promote a sustainable environment by supporting renewable electricity, the requirement of FITs on the use of wind and solar domestic equipment in large percentages had been identified as subsidies. Therefore, they did not guarantee fair competition nor ensure a sustainable environment [Cosbey and Mavroidis, 2014]. The FITs discriminated among the suppliers of electricity because it violated the provisions of Art. 3.1 (b) of the Subsidies and Countervailing Measures Agreement [Appellate Body Reports, 2013].

5. DISCUSSION REGULATION OF RELEVANT SUBSIDIES FOR RESPONSIBLE FISHING PRACTICES

The compatibility of fisheries subsidies with sustainable development relies on the possibility of maintaining a sustainable environment. The protection of the environment should be general and non-discriminative. Trade-environment agreements are interwoven to prevent and limit the over-exploitation of environmental resources. The increasing connectivity of trade and the environment keeps growing because trade agreements are no longer limited to the reduction of tariffs and regulations of regimes but it becomes a matter of sustainable development [Sundaram, 2022]. With 166 contracting parties to the WTO Agreement on 26 February 2024 when the thirteenth Ministerial Conference of WTO approved the membership of Comoros and Timor-Leste in Abu Dhabi (United Arab Emirates), the number of the least-developed reached 35 countries. Adding the least-developed countries into the group of developing countries can only increase the list of beneficiaries of the special and differential treatment (SDT) measures within the framework of the WTO Agreements.

Exempting both the developing countries and the least-developed countries from implementing the prohibition of subsidies on fisheries for two years potentially reduces the survival of many exhaustible natural resources within the jurisdiction of the beneficiaries including the exclusive economic zone. The Fisheries Subsidies Agreement allows developing countries and the least-developed countries to maintain or grant subsidies on fishing activities even if these subsidies are illegal, unreported, and unregulated [Agreement on Fisheries Subsidies, 2022]. The majority of the WTO's contracting parties are developing countries, including the least-developed countries. Allowing the pursuit of over-exploitation of marine wildlife for two years may become another legal trade distortion of a sustainable environment in the ocean. Exempting the same majority of the contracting parties to the WTO Agreement from their obligation to refrain from the grant or maintenance of subsidies on fishing activities related to overfished stock up to and within the exclusive economic zone according to the provisions of Art. 4(4) of the Fisheries Subsidies Agreement can endanger the sustainable environment of marine wildlife. The exclusive economic zone of a country extends up to 200 nautical miles about 370km [UNCLOS, 1982]. The enforcement of the exemption within the territory of the developing countries and the least-developed countries for two years after the entry into force of the Fisheries Subsidies Agreement will endanger the sustainable development thereof preventing the achievement of economic development. These exemptions contribute to harming marine wildlife instead of preserving the sustainable environment. Moreover, the implementation of the SDT measures does not ensure the capacity-building of the developing countries and least-developed countries to maintain the trend of exportation competitiveness after the expiration of the two years.

The scope of the Agreement on Fisheries Subsidies encompasses the application of articles 1.1 and 2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) to regulate marine wild fishing or fishing activities. This insertion of the Fisheries Subsidies Agreement into the SCM Agreement requires the applicability of both the SCM Agreement provisions and the Fisheries Subsidies Agreement provisions to ensure the sustainability of the SDT in the international trade system. The prohibition of subsidies on fisheries is adopted to regulate illegal, unreported, and unregulated fishing, and to prevent the introduction of new subsidies which contribute to overcapacity and overfishing in conformity with the sustainable development goal 14.6 [UN 2030 Agenda, 2015]. The commercialization of such sea products can face the challenges of unfair competition under the provisions of the SCM Agreement (Art. 27.3 for a longer period of SCM enforcement after it enters into force) and illegal trade under the provisions of CITES. Exporting sea products in the market of some developed countries will become another legal battle engaging the least-developed countries. For instance, the United States banned the importation of shrimp and shrimp products from non-certified countries, which did not use certain categories of nets to catch shrimp [Appellate Body Report, 1998]. However, the most affected countries of environmental destruction, the least-developed countries, barely participate in the litigation procedures in the World Trade Organization Dispute Settlement System. Bangladesh is still the only least-developed country to complain against the anti-dumping measures of India [WTO, 2018]. Both the complainant and the respondent reached a mutual and satisfactory solution before the Dispute Settlement Body (DSB) concluded the proceedings. They notified their mutual understanding to the DSB Chairman in the document WT/DS306/1 on 2 February 2004 [WTO, 2006]. Except for this case, the least-developed countries have been third parties in the following disputes: *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, DS27 (Madagascar and Senegal); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, DS58 (Senegal); *United States-Rules of Origin for Textiles and Apparel Products,* DS243 (Bangladesh); *European Communities – Export Subsidies on Sugar*, DS265, 266 and 283 (Madagascar, Malawi, and Tanzania); and *United States-Subsidies on Upland Cotton,* DS267 (Benin, Chad).

6. CONCLUSION

The implementation of the special trade measures in the trade-environment agreement does not carry the same characteristics as in the sole framework of trade agreements. The SDT measures are particular measures that are only applicable to the trade agreements of the World Trade Organization. They are applicable within the general rules of the WTO in some determined circumstances. The general rules of the WTO establish trade relations which are governed accordingly to protect the interests and economic development needs of the developing countries and the least-developed countries. However, the environmental problems are inclusive, therefore requiring inclusive solutions. In the case of the trade-environment agreement, both trade and environment evolved in different frameworks though belong all to international law. It follows that the SDT measures cannot be determined as special measures without considering the trade-environment conditions in which their application is sought, if possible. The SDT measures shall abide by the requirements of maintaining a sustainable environment, which can ensure the sustainable development of those developing and least-developed countries. The implementation of the SDT measures can contribute to sustainable development if they abide by not only the economic development provisions but also the sustainable development targets. Whether the enforcement of SDT measures in the Agreement on Fisheries Subsidies is appropriate and effective will depend on the preservation of marine wildlife for sustainable development.

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