THE DEVELOPING COUNTRIES AND THE WORLD TRADE ORGANIZATION: MAKING THE MOST OF THE MEMBERSHIP IN THE PROBLEMATIC SYSTEM

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ABSTRACT

Prinsip-prinsip dasar hukum dagang dalam Organisasi Perdagangan Dunia/World Trade Organization (WTO) sangat efisien, tetapi penerapannya cukup bermasalah bagi negara berkembang dikarenakan lemahnya daya tawar perekonomian negara berkembang. Namun, WTO menawarkan mekanisme penyelesaian sengketa dagang internasional yang sangat efektif bagi para anggotanya. Hal ini sangat berguna bagi negara-negara berkembang untuk melindungi kepentingan perekonomiannya dari rekan rekan dagang mereka yang jauh lebih kuat dalam sistem perekonomian global modern. Adanya kecurigaan yang beralasan atas adanya kepentingan sempit negara-negara maju dengan agenda tersembunyi untuk menjadikan WTO sebagai "bentuk baru kolonialisme", hendaknya tidak memarikan semangat negara-negara berkembang untuk berpartisipasi secara positif dalam WTO. Sambil menggunakan forum penyelesaian sengketa yang ada sebagai tameng, negara-negara berkembang harus mengambil langkah aktif untuk mempersempit atau bahkan menghapuskan permasalahan mendasar yang ada, yaitu ketidakseimbangan kekuatan ekonomi, dengan melakukan reformasi serius atas sistem perekonomian dalam negeri

Kata kunci: Developing Countries, Dispute Resolution Mechanism, Most Favored Nation (MFN) Principle, National Treatment Principle, World Trade Organization

I. INTRODUCTION

The World Trade Organization (WTO) has its upsides and downsides. Its fundamental principles are unquestionably efficient but their derivative principle and actualizations are problematic. Other problems are the human rights, social, and environmental costs of putting the trade concerns as its priorities. However, the WTO is a system in the making. While the international community is struggling to drive it into a more acceptable system, the issue is what the developing countries must put into consideration in making the decision to join or in making the most of their membership in the system.

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The opinion expressed in this paper is that developing countries can boost their economic development faster if they join the WTO under certain conditions. Pending the more positive result from the Doha Round in giving the developing countries real access to the market for goods of their traditional strengths and in structuring the best effort provisions into legally binding provisions, developing countries can make the best of the existing regime by using the WTO dispute settlement mechanism to create level playing field. The other thing is, in whatever situation, developing countries must participate in the WTO system with the view to incite internal trade reform with serious commitment to good trade policy (Aaditya Mattoo & Arvind Subramanian, 2004: 393).

II. THE PROBLEM WITH SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES

The strength of the WTO is its fundamental principle of non-discrimination in multilateral trading system, the Most Favored Nation (MFN) and National Treatment (NT) (The General Agreement of Tariffs and Trade 1947, Articles I & III). The MFN principle puts a member (country) under a legal obligation to grant equal treatment to all nations (trading partners) with regards to their "like" products and services. Similar to MFN principle but to domestic party, the NT principle prohibits a member to treat "like" domestic goods or services more favourably than "like" imported goods or services. It is therefore understood that the main legal issue in the WTO dispute is determination of "like" products. It is efficient because by joining the WTO a country automatically enjoys the benefit of equal treatment from others. So, potentially any member receives the same opportunity and treatment as other members with respect to market access of each other member, thus enhancing market access for each member's export (Aaditya Mattoo & Arvind Subramanian, 2004: 393).

However the downside of this principle exists in the asymmetric economic powers. The pure open competition can harm the poorer countries. Developed countries have power to demand more from developing countries without giving equal benefits. Besides, in the process of negotiation of schedules, reciprocity principle applies. Particular developing countries, due to their size and resources, are not attractive enough for other countries in spite of their willingness to open their markets (Aaditya Mattoo & Arvind Subramanian, 2004: 406). This systematic weakness is fixed with the inclu-

sion of special provisions giving developing countries limited discrimination. Special and Differential Treatment (SDT) and Generalized System of Preferences (GSP), among others. Other special provision such as article XVIII is not promoted anymore. In GATT 1947, article XVIII section B "to protect balance of payment" was wrongly used as disguise of protectionism. Under WTO this measure is improved with the use of price–based measure and phasing-out however it is "only to avert disaster, not to spur economic growth". Section A (withdrawal or modification of schedule) has limited economic benefit. Section C (protection to infant industry) not effectively used. Section D (particular industry exception) never been invoked (Matsushita, Schoenbaum, Mavroidis, 2003: 382).

These special provisions in the WTO are improvements from what had been established previously under the General Agreement of Tariffs and Trade. However, some valuations suggest that these improved special provisions have not effectively brought developing countries to participate fully and benefit significantly in their economic development. The blame is primarily put on the developed countries: The current GSP schemes are "best effort" and unilateral in nature, and limited in product coverage, excluding imports of products most important for the developing countries (agriculture, textile, etc.). Additionally the developed countries impose onerous rules of origin, burdensome standard, and therefore make them costly. Some experts employ economic cost-benefit analysis and mainly say that the ineffectiveness of these special provisions is inherent in the structure of the programs which often don't make economic sense (J. Michael Finger, unyear: 385, Aaditya Mattoo, 2004: 398). In other words they have not been structured for the recipients' benefit but for the developed countries' interests (Donald McRae, unyear: 604.). It is also noticed that the success of employing SDT is not merely about giving longer period for transition and technical assistance which are only two of the six categories of SDT, but mainly about the correct approach of industrialized countries towards market access under the general rule of the WTO, GSP and SDT. The other categories of SDT are provisions: (i) aimed at increasing the trade opportunities; (ii) safeguard of the interest of developing countries, (iii) flexibility of commitment, action, and use of policy instrument; (iv) related to least-developed countries (Matsushita, 2003: 386). The concepts and contents of SDT and GSP sometimes overlap. For instance, The 1979 Enabling Clause which gives trade preferences under GSP permanent status also provides legal cover for SDT for developing countries. Additionally, there is "growing

use of non-tariff barriers to restrict developing country exports" in wider range of products (Asoke Mukerji, 2000: 38 and 40).

The developed countries' protectionism is pointed out as causing the failure of the WTO in supporting the development agenda. The Nobel laureate Joseph Stiglitz referred to a study of the United Nations Development Program (UNDP) which says "70% of the gains of the Uruguay Round will go to developed countries, with most of the rest going to few large export-oriented developing countries" (Joseph E. Stiglitz and Andrew H. Charlton, 2004: 496). Since it is necessary to make the WTO more responsive to the challenges facing developing countries, these issues are brought as special agenda within the Doha Development Round. However, the result of the last Ministerial Conference in Hong Kong is not satisfactory. It is seen as "a lost opportunity to make trade fairer for poor people": one example is the phase out of export subsidies in agriculture by 2013 although it actually constitutes only 3.6% of overall the European Union's (EU) farm subsidies, and in fact the EU export subsidies have been falling for years and would have largely been phased out by 2013 [illegible]

The result in Hong Kong is very disappointing. Facing this reality, what can be said as the strongest reasons for developing countries in joining the WTO with the view to maximize their economic growth?

III. THE WTO DISPUTE SETTLEMENT MECHANISM CREATES SIGNIFICANT DEGREE OF LEVEL PLAYING FIELD

The WTO dispute settlement mechanism is an effective means to ensure compliance with the WTO agreements and negotiated schedule, reducing the potential unilateral action by powerful members to the detriment of their weaker developing trade partners. To some degree, a level playing field is created by the third party institutionalized body with "impartial standard of procedural rules to evaluate the policy according to rules accepted by all participants". An article by Christina L. Davis is summarized here (Christina L. Davis, [illegible]

1. The *E*[illegible] *EC* [illegible] 24 May [illegible] marketing [illegible] des-

cription "noix de coquille Saint-Jacques"(what scallops are traditionally called in France) but under the name "petoncles" (a less esteemed word used for scallops). Canada asked for consultation and then establishment of the panel, arguing that this French's technical-barrier-to-trade measure was a violation of French's National Treatment obligation. Peru and Chile requested to join with Canada in consultation and then asked for the establishment of a panel of the same members with Canada. It is possible under Dispute Settlement Understan-ding (DSU) article 9.3 which calls for the same panelists for case of multiple complainants on the same matter. This "legal bandwagoning" procedural technique gave the two developing countries benefit of coalition with Canada, a developped country who had the strong legal resources to whom they could learn and joined the legal argumentation and evidences. The case was closed with mutually agreed settlement within the period for comments on the panel's interim ruling.

2. The second case started when Peru requested for consultation and then establishment of the panel, challenging the labeling measure imposed by the european commission(EC) which required Peru to market its sardine fish in the EC under the name "pilchards" or "sprats" since the name "sardine" only allowed for the European species. Peru argued that it was only a disguised protectionism, a violation of Technical Barrier to Trade (TBT) Agreement article 2.4. Peru was helped by the Advisory Center on WTO Law (ACWL), a legal service center for developing countries which established in 2001, with only US$100/hour fee. This solves the developing countries' problem of "lack financial and legal resources to adjudicate cases". There was also participation of four other developing countries and particularly of two developed countries, the US and Canada, as third parties in the process who all submitted opinions in support of Peru. On 29 May 2004 Panel ruled in favor of Peru. On the appeal by the EC, the Appellate Body upheld the panel ruling.

The case of labeling and anti-dumping measures against Vietnam within the framework of the US Vietnam Bilateral Trade Agreement is provided to be a comparison of what the non WTO member developing countries do not have. The US Association of

Catfish Farmers of America(CFA) representing the catfish farmers lobbied for measures to restrict the importation of catfish from Vietnam and successfully made their political representatives to amend the Food and Drug Administration (FDA) regulation, preventing the FDA from processing fish labeled as catfish unless it was the species raised in the US "ictaluridae". Noticing that the measure to prevent Vietnam from selling its product under the name catfish did not really affect the market, CFA changed their tactic by claiming that Vietnam was selling it in the US markets at prices below the cost of production, causing injury to the US catfish industry, and requested for the government to impose anti-dumping measure against Vietnam. To achieve this goal CFA must argue that Vietnam catfish and the US catfish are like products, a totally different basis from what CFA argued in the context of labeling. Nevertheless CFA was successful in its effort. Dumping duties of 37-64% were called for. Assessing that the use of the dispute settlement mechanism available in their bilateral agreement would not lead to the expected result, Vietnam did not go further to appeal against this unilateral action.

The effectiveness of this mechanism is questioned in the case correcting the implementation of Generalized System of Preferences (GSP). In the EC-Banana cases, the Latin American banana producers which were joined by the US challenged the preferences given by the EC to 79 African-Caribbean-Pacific (ACP) countries under Lome Convention and Waiver as discriminatory against other developing countries. The Appellate Body ruled that both the preference and waiver were inconsistent with the EC obligations under the WTO agreements (Matushita, 2003: 384). The real dispute however was not settled until the 4th Ministerial Conference in Doha November 2001. This shows the limit of the mechanism but can not disregard its role at all. If Latin America countries hadn't brought the case before the Dispute Settlement Body there would have not been corrections to this GSP scheme in the form of phasing-out period and transparency (Matushita, 2003: 13).

Besides, not in all situations the trade relations between developed countries and developing countries end up in the tragic situation as in the Vietnam case. On one hand, it depends on how the dispute settlement mechanism is structured in the respected agreement. On the other hand, it happened that the settings of the Peru and Chile cases were such that everything went well, but how if

in fact there is no developed country initiated the proceeding or no other complainants or third party with whom the developing country member can be together in giving economic pressure to the powerful losing member who doesn't want to comply with the ruling voluntarily? The available Special and Differential Treatment (SDT) such as additional time for consultation and answer a complaint (article 12.10 DSU) is a help but not the goal. Another SDT provision, that members must exercise "due restraint" in raising dispute and asking for compensation (article 24 DSU) is only soft law. It means that the level playing field created by the WTO dispute settlement mechanism is conditional or situational.

Thus, in relation to developing countries, the two most distinguishing features in the dispute settlement mechanism under the WTO are: (i) it serves as the forum to bring out legal issue related to arbitrary measure employed by the developed country members, and (ii) it provides dependable legal assistance from the ACWL with affordable fee, allowing developing countries to stand tall against their more powerful trading partners.

IV. JOINING THE WTO WITH A VIEW TO MAKE INTERNAL REFORM

The benefits from WTO dispute mechanism for developing countries work in the context of trade concession implementation, but not in reciprocal game for structuring the concessions. That is the main problem which solution is being worked on in the ongoing Doha Round. The developing countries are relying on the good faith of the developed countries to bring about the development issue into reality. There is another situation however: due to the consensus-decision-making, theoretically the position of developing countries can not go worse. But it certainly takes more than just employing the self-protective vote in dead-lock situation for developing countries to take the benefit of this multilateral trading system. Developing countries must build capacity to participate fully and responsibly in the system (Donald McRae, unyear: 608), by seriously making commitment in liberalization policy and in ensuring equitable socio economic development (Asoke Mukerji, 2000: 35).

This explains the truth of some experts' assessment that developing countries often fail to make use of the special provisions in adjusting their economic policy, making the SDT and GSP only

have "a marginal effect on country economic performance" (Donald McRae, unyear: 604 and 606) and discourage effective efforts to integrate into the world economy"(J Michael Finger, unyear: 390).

This can be done by implementting trade-competitive policies in domestic level: eliminating economically unjustifiable subsidies, promoting wise privatization, increase regulatory transparency and decision making. In short, allowing the process of reallocating the resources on the basis of market driven economy. It is done along with appropriate training for the public servants and civic education in order to build a strong government and society supportive to the concept of development by means of economic liberalization.

V. CONCLUSION

The WTO is a problematic system. It may serve the alleged hidden "new colonialism" agenda of the developed countries, as well as the capitalists' narrow interests. But it is also a system in the making, and the developing countries which are majority in the organization can surely change the course. Strategically, staying out of the system is very unlikely to bring any benefit for any particular country and for the more positive system in the future. Technically, the system provides a better forum for settling trade dispute. It sets the rules of the game, seriously put restrains on the stronger trade partners, not to "play God" against the weaker ones. Additionally, the membership also put developing countries into conditions that motivate and/or give some pressures to make internal reforms.

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