TRADE BARRIER MEASURES UNDER THE OBLIGATIONS OF THE INTERNATIONAL AGREEMENT OF THE EUROPEAN UNION AFFECTING THE THAI FISHING CRISIS

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Abstract: This article is aimed to study Thailand’s obligation to comply with European Union (EU)’s rules concerning the measures issued for the control of fishing activities. As the developing and underdeveloped countries are not ready to comply with such obligation which they are required to change for the use of high technological equipment for the fishing, the obligation therefore seems like trade barrier measures to these countries, including Thailand, which is one of the developing countries. This is because Thailand has been criticized that its fishing industry brings about the deterioration of marine and fish environment because the country has not complied with the requirements under the EU’s Illegal Unreported and Unregulated (IUU) measures, leading to the issuance of “yellow card” to the Thai’s fishing industry. In fact, there should be a grace period for Thailand before complying with the obligation as the Thai fishing industry lacks sufficient funds to procure modern equipments and boats. This article argues that the seizure of the licenses and the suspension of the fishing industry inevitably affect Thailand’s economy, and are not in line with the WTO’s principle which encourages members to apply the Non-Discrimination Principle among themselves. Furthermore, the exploitation of the sea should be free according to the Law of Seas under the United Nations Convention on Law of the Seas (UNCLOS).

Keywords: IUU Fishing, critical Thai Fishing, EU-regulations effected to Thai Fishing

I. Introduction

Thailand is in a good stronghold where there are capes surrounded by the sea of Indochina Peninsular. Thailand thus has its sovereignty over the coasts of Andaman Sea and Thai Gulf. That Thailand has its sovereignty over both coasts causes great benefit for its fishing which is national great benefit. Thailand was ranked a world leader of aquatic animal exports. In the past, the exports value of frozen seafood which were shrimp, squid, fish, and tuna was about three hundred billion baht. Fishing is hence the main economic earning of the country. The exploitation of natural resources in the stronghold and the fishing, which has been in the country for years, have brought about deterioration of marine environment and marine natural resources. Fishing has destroyed marine environment. Unregulated fishing increases a number of fishing vessels. Moreover, the application of modern technology to fishing destroys natural harmony and instantly causes Illegal, Unreported and Unregulated Fishing: IUU Fishing in Thai fisheries, where IUU Fishing is committed by Thai fishing vessels and foreign fishing vessels. The Fishing is also committed in offshore fisheries (Thawatchai Suvanpanich and Team, B.E. 2560).
In contrast, there has been the development of both fishing equipment and fishing methods which are friendly to nature and environment in European countries.

As a result, Food and Agriculture Organization discussed with its member states so as to launch the measure to prevent illegal fishing and to maintain sustainable fishing which has come into force since 1 January 2010 called Illegal Unreported and Unregulated Fishing (IUU Fishing). Thailand has put its effort to reform its control of fishing vessels committing illegal fishing. The Ministry of Agriculture and Cooperative has been in charge of being a focal point for both government agencies and private sectors. At that time, the urgent measure was to immediately launch an announcement to inform people about the laws of the European Union and punishment which shall be given according to individual offense. Thus, a number of Thai vessels which were not given a license or failed to comply with the rule were not permitted to sail in the sea. This affected Thai seafood export business. According to the exportation analysis of frozen seafood, it found that in 2017, value of global frozen seafood exports was at 110 billion dollars. Top 5 exporting countries were China, Norway, India, Vietnam, and the US. The proportion of them took 1/3 of the global export (Thailand took 16th). Top frozen seafood products are presented as follows 2 (Chaiwat Sowcharoensuk, B.E.2562).

1) Frozen fish (fish and sliced fish meat) possessed export value at 60.7 billion dollars or 60.6% of the value of global frozen seafood exports. Top exporters were European countries (possessed 47.3% of the value of global frozen fish exports). Most of the exports were intra-regional trade. Consequently, Europe has possessed the highest value of frozen fish imports calculated at 43.4%. As for the exporters, China possessed 10.8%, and the U.S. possessed 5.5% respectively. Thailand was in 29th of the world with global market share at 0.7%.

2) Frozen shrimp possessed value of global exports at about 20.3 billion dollars or 21.1% of the value of global frozen seafood exports. Top exporter countries in Asia (possessing 51.4% of values of global frozen shrimp exports) were India (20.0%), Vietnam (10.2%), Indonesia (6.2%), Thailand (4.5%), and China (4.4%).

3) Frozen squid possessed value of global exports at 9.0 billion dollars or 8.1% of the value of global frozen seafood exports. Top exporter countries were Chiba (possessing 29.2% of the value of global frozen squid exports), Spain (9.0%), Morocco (9.0%), and India (8.4%). As for Thailand, the country possessed its market share at 3.9%.

According to the analysis of the Bank of Ayudhya, a financial institution, it revealed that factors affecting Thai’s processed seafood exports are prescribed as below.

Frozen seafood: in 2013 – 2017, exports shrank by average 2.6% per year. This was caused by following factors. 1) Aquatic animals were decreased (as shown in picture 10 and 11). 2) Thailand lost GSP of seafood on 1 January 2558. Thus, import tax of the products from Thailand was higher. For example, tax on frozen shrimp imports increased from 4.2% to 12.0%, and tax on frozen splendid squid increased from 2.5% to 6.0%. 3) Many trading partners applied Non Tariff Barriers: NTBs. For instance, in 2014 the US placed Thailand in “Tier 3” as provided in US’s Trafficking in Persons Report: TIP Report[7]. Although the US promoted Thailand to “Tier 2 Watch List” in 2016, Thailand was in lower level in comparison to other countries, such as, India, Indonesia, and Vietnam. Besides, in 2015, EU sentenced Thailand to “yellow-carded countries” according to the regulation of IUU Fishing [8] due to illegal unreported and unregulated fishing which affected the exports of Thai products’ brand image. As a result, value
of Thai frozen seafood exports decreased to lower level in comparison to the decreasing happening in word market,\textsuperscript{3} (Chaiwat Sowcharoensuk, B.E.2562).

II. \textbf{International law and domestic law relating to fishing crisis in the Kingdom of Thailand}

Such as Council Regulation(EC) No 1005/2008

Article 1\textsuperscript{4}: Subject matter and scope

1) This Regulation establishes a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing.

2) For the purposes of paragraph 1, each Member State shall take appropriate measures, in accordance with Community law, to ensure the effectiveness of that system. It shall place sufficient means at the disposal of its competent authorities to enable them to perform their tasks as laid down in this Regulation.

3) The system laid down in paragraph 1 shall apply to all IUU fishing and associated activities carried out within the territory of Member States to which the Treaty applies, within Community waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas. IUU fishing within maritime waters of the overseas territories and countries referred to in Annex II of the Treaty shall be treated as taking place within maritime waters of third countries.

Article 6\textsuperscript{5}: Prior notice

1) Masters of third country fishing vessels or their representatives shall notify the competent authorities of the Member State whose designated port or landing facilities they wish to use at least three working days before the estimated time of arrival at the port, of the following information: (a) vessel identification; (b) name of the designated port of destination and the purposes of the call, landing, transshipment or access to services; (c) fishing authorization or, where appropriate, authorization to support fishing operations or to transship fishery products; (d) dates of the fishing trip; (e) estimated date and time of arrival at port; (f) the quantities of each species retained on board or, where appropriate, a negative report; (g) the zone or zones where the catch was made or where transshipment took place, whether in Community waters, in zones under the jurisdiction or sovereignty of a third country or on the high seas;

(h) the quantities for each species to be landed or transshipped. Masters of third country fishing vessels or their representatives shall be exempted from notifying information contained in points (a), (c), (d), (g) and (h), where a catch certificate has been validated in accordance with Chapter III for the full catch to be landed or transshipped in the territory of the Community.

2) The notification set out in paragraph 1 shall be accompanied by a catch certificate validated in accordance with Chapter III if the third country fishing vessel carries on board fishery products. The provisions laid down in [X1 Article 13] on the recognition of catch documents or port State control forms which are part of catch documentation or port State control schemes adopted by regional fisheries management organizations shall apply mutatis mutandis.

3) The Commission, in accordance with the procedure referred to in Article 54(2), may exempt certain categories of third country fishing vessels from the obligation stipulated in paragraph 1

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for a limited and renewable period, or make provision for another notification period taking into account, inter alia, the type of fishery product, the distance between the fishing grounds, landing places and ports where the vessels in question are registered or listed.

4) This Article shall apply without prejudice to special provisions set forth in fisheries agreements concluded between the Community and third countries.

Article 20: Flag State notifications and cooperation with third countries

1) The acceptance of catch certificates validated by a given flag State for the purposes of this Regulation shall be subject to the condition that the Commission has received a notification from the flag State concerned certifying that:

(a) it has in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels;

(b) its public authorities are empowered to attest the veracity of the information contained in catch certificates and to carry out verifications of such certificates on request from the Member States. The notification shall also include the necessary information to identify those authorities.

WTO - GATT on “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 one of GATT 1994 which stipulates that “…any advantage, favors, 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. Such as Most Favored Nations Treatment Principle (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, etc.

Article XX thus offers general exceptions from international trade obligations for unilateral trade measures in pursuit of specified purposes, including "the conservation of exhaustible natural resources" (Jaruprapa Rakpong B.E.2560)

As the EU considered that IUU measure should come into force in every country which exports marine products to the EU, European Commission has launched Council Regulation (EC) No. 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing on 29 September 2010. European Commission then inspected and forced every country that exported marine animals to the EU to implement National Plan of Action on Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing: NPOA-IUU and to urgently deal with their problems in order to meet conditions of IUU-Fishing so as to be permitted to export their products to the EU.

In comparison to other countries located in ASEAN coast, the crisis in Thailand was similar to the situation in those countries. For example, in Japan, vessels and fishing equipment did not meet standard as prescribed by IUU. To deal with the fishing problems does not depend on the
intention of each country to comply with the international agreements, but it depends on the readiness of entrepreneurs to invest in improving such crisis. Hence, the card decision of the EU issuing Thailand a yellow card was like a barrier to Thailand. This is not a tax measure, but it is an indirect measure which is a trade barrier to Thailand. Thus, the exemption as provided in Article 20(b) and (g) cannot be enforced in the member states of World Trade Organization, as the provision of Article 20 XX provides that arbitrariness is prohibited. Appellate Body of World Trade Organization states that the Article shall be carefully applied to all member states of World Trade Organization with single standard. The EU needed to inspect the application of IUU in other trading parties before issuing Thailand a yellow card. As there were trafficking in persons cases taking place in Thai fishing.\textsuperscript{10} International Labour Organization Convention No. 188 Work in Fishing Convention A.D. 2007 (B.E. 2550) which intends to ensure that fishers on board shall have quality of working lives should be applied. It provides minimum standard for condition of working on board including working environment, accommodation, meal, safety, health care, medical service, and social security. Thailand has already ratified the Convention. As seen, there are 10 EU’s member states, which are France, Estonia, and Lithuania etc., of 44 EU’s member states has ratified the ILO Convention C188\textsuperscript{11}(International Labour Organization). Other countries which have ratified the Convention are countries where fishing plays less important role. Besides, there has not been evidence identifying that the US has given its ratification to the Convention. Nevertheless, the EU and the US had been forcing Thailand to deal with forced labor and human trafficking\textsuperscript{12}. In addition, there has not been shown that the 36 coastal states in Asia-Pacific region, which major income is from fishing, have ratified the Convention. It should thus consider that weather there has been discrimination against Thailand or not. As known to all those fishing industry countries, working hours on board is subject to change depending on the weather. Consequently, working hours on board cannot be set as settled as working hours on land is set. To set the working hours on board requires awareness of healthcare of the crew which shall be single standard to be applied by every country. Furthermore, Article 1 Council Regulation No. 1005/2008 states that all the EU member states shall launch appropriate measure conforming to EU laws so as to guarantee effectiveness of the system. It shall place sufficient means at the disposal of its competent authorities to enable them to perform their tasks as laid down in this Regulation. It is acceptable that the EU orders its member states to legislate domestic law, and it is acceptable that the EU urges its people to give cooperation. However, Thailand is not its member state, so legal enforcement in Thailand shall be different from legal enforcement in its member states, as Thailand is not under the same obligation as those countries. Legal enforcement shall concern economy, social, way of lives, fishing vessels, and fishing equipment of the fishers in developing countries. For example, there are divergent fishing vessels in Thailand. Though Thailand was issued a yellow card, it should not be required to launch domestic law like those member states. In contrast, what Thailand is required should be the changing of vessels’ physical, fishing equipment, and fishing methods in order to sustainably preserve ocean resource and meet international standard. Therefore, to amend Thai law and to launch Emergency Degree on Fisheries, B.E. 2558 (2015) which was amended in B.E. 2560 was to comply with the obligations of the EU without concerning for marine local tradition and the United Nations Convention on the Law of the Sea which pays
respect to rights of coastal states and provides that coastal states shall have sovereignty over the territorial sea and shall have rights to exploit benefits from marine resources in exclusive economic zone where committing of some activities are not permitted.

Launching of EU controlling measure of fishing in trading partners under the regulation of World Trade Organization European Commission enacted Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a community system to prevent, deter and eliminate Illegal, Unreported and Unregulated Fishing: EU-IUU Regulation. The Regulation, entering into force on 1 January 2010, has been enforced on all fishing vessels of EU member states mooring alongside piers and enforced on goods shipping. The Regulation has moreover been enforced on fishing vessels of the third countries mooring alongside piers in the EU, which is the market state by virtue of the Regulation approved by WTO, and enforced on fishing products imported and exported to the EU.

EU-IUU Regulation puts emphasize on that each country shall certify that sources and methods of fishing and producing processed seafood (except for freshwater animals, animals from husbandry, ornamental fish, bivalves as prescribed in the Regulation) are accurate in accordance with related laws so as to ensure that the countries comply with natural conservation, domestic management, international standard, as well as, the Regulation. Traceability is consequently applied to inspection of fishing products importing from and exporting to the EU. If such products are inspected that they are from or related to IUU Fishing, and if the countries which export and import such products cannot comply with the agreements under international laws to prevent, deter, and eliminate IUU Fishing, the Commission shall notify (issue a yellow card) and suggest the countries resolve such problems within limited time. If they are able to improve such worries, the Commission shall permit them to export the products to the EU (issue a green card). If not, the Commission shall not permit them to export the products to the EU (issue a red card) after EU-IUU Regulation enters into force.

III. Thailand’s Fulfillment of the Agreement Causing Fishing Crisis

Thailand’s policy on resolving the problems in accordance with the EU’s agreement dramatically affected operation of fishing business. The impact that large business got was greater than an effect that local fishing got. Both fishing business and export industry which are in similar business cycle have been stagnant. Currently, there are some fishing businesses operating. They operate their business in oversea areas and apply for a catch certificate in exclusive economic zone and in the sea of other countries.

The Commission considered that Thailand could not comply with international agreement as a flag state, port state, coastal state, and market state. Besides, the country inadequately prevented, deterred, and eliminated Illegal, Unreported, and Unregulated Fishing. The reason why Thailand was not able to perform its duties as prescribed by the international agreement were that the country did not comprehend the agreement made by rich countries. Readiness preparation of related agencies, inadequacy of cooperation with neighboring countries, inadequacy of laws and administrative tools, as well as, attempt to enforce law were also causes of failure of Thailand to comply with the agreement which can be detailed as below.

1) As a flag state, Thailand failed to deter Thai vessels from joining in IUU Fishing as prescribed by UNCLOS 1982. It was reported that fishing vessels with Thai flag infringed measure of fishing area preservation and administration. The fishing activities were committed without valid certificate and without permission granted by a flag state or coastal state and without Vessel
Monitoring System: VMS installation in the high sea and in the sea of coastal states. Vessel registration and certificate verification in Thailand were controversial. Additionally, there was inadequacy of enforcement of vessel registration in Thailand.

2) As a coastal state, Thailand failed to assure that the consumption of ocean resources in the Exclusive Economic Zone: EEZ was committed with awareness of science, environment, and economy so as to gain best benefit as prescribed by UNCLOS 1982 and IPOA-IUU. The provisions of Fisheries Act B.E. 2558 (2015) did not comply with international law and could not deal with complicate fishing activities, and problems of fishing product trade at such situation. The law was enforced just in the fisheries in Thai water and in EEZ. There was insufficient punishment to effectively deter IUU Fishing. Thai fishing vessels increased whereas fish stock decreased due to over fishing. Fewer 1/5 of Thai vessels (about 40,000 vessels) sailed with fishing logbook. This reflected that most of Thai fishing activities were not reported and the vessels sailed without VMS installation especially fishing vessels in oversea water. Thus, locations where there were fishing activities were not identified. It caused trouble with transmitting data with neighboring countries. Finally, this affected accuracy of Thai catch certificate verification to catch ocean animals13 (Wichan Sirichai Ekawat B.E. 2562).

3) As a port state, Thailand failed to assure that imported fishing products were not from IUU Fishing, since some ingredients of processed products were some ocean animals gathered from IUU Fishing on fishing vessels with a flag of the third countries where the Commission considered that failed to deter IUU Fishing. Some of the products besides were from the third countries which did not comply with EU-IUU Regulation. Marine Department does not have authorities to inspect, approve, and refuse vessels mooring at the piers to ship fishing products from vessels of the third countries.

4) As a market state, Thailand failed to comply with the agreement under international law to deter processed products produced by ingredients gathered from IUU Fishing, since Thailand could not assure that products shipped at piers and distributed to processing factory in Thailand were not from IUU Fishing. Thailand failed to enforce measure prescribed by CCRE and IPOA-IUU so as to improve transparency of the market so that risks of trading IUU Fishing products was decreased. Thailand failed to approve the transparency and failed to trace the products back to their origin before allowing them to be taken to the market as prescribed by IPOA-IUU. The EU was the first one who employed measure to prevent, deter, and eliminate IUU Fishing Measure as Non-Tariff Barrier under the condition of WTO with the claim that it promotes responsible and sustainable fishing, and that it promotes IUU Fishing in accordance with cooperation measure launched by Food and Agriculture Organization: FAO.

IV. Conclusion and Recommendation

Effects of complying with the agreement of the European Union to solve IUU Fishing problems on Thailand is to be compelled to accept indirect trade barrier, since Thailand failed to immediately lay down regulation on Thai fishing vessel to comply with rules of the EU, and Thai fishing entrepreneurs have limited budget and do not reach modern technology. As a results, to immediately and strictly solve the problems, Thailand issued a yellow card to the Thai fishing industry in accordance with the EU’s suggestion, inspection, and evaluation by discussing with powerful entrepreneurs, and gathering data about local fishing in order to support the
government in implementation. As there have not been gathering of fact, participating and opinion sharing of all the stakeholders concerned, the Thai fishers and Thai fishing entrepreneurs are affected throughout the country.

Fishing entrepreneurs and stakeholders both public and private sectors should study international agreement, such as, marine law, and law of WTO, so as to strengthen their knowledge to be ready for competition and to develop their fishing business. There should be environmental supports and courses about environment preservation.

The major aim of this study is to investigate international agreement which is unfair to be enforced in developing countries in the areas of investment of local fishing and medium fishing business. They have inadequate equipment and cannot afford to change their vessels size to meet international standard. Thailand and other developing countries that are facing the same crisis have lost their opportunity in fishing export competition. Only the developed countries are allowed to fully exploit benefits from the ocean by environment measure under obligations of WTO which cause loss of advantages of developing and undeveloped countries. This does not conform to the notion of freedom of the ocean under the United Nations Convention on the Law of the Sea and the United Nations Universal Declaration of Human Rights.

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