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REGULATORY TRADE RESTRICTIONS TO PROTECT THE DOMESTIC ENVIRONMENT: THE CASE OF MALAYSIA

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Abstract

This article is about the role of Malaysia as a developing country in balancing free trade and environmental protection. The objective is to explore whether the government of Malaysia is imposing any trade restrictions in terms of regulation and whether it is effective. One of the trade restrictions which could be imposed in order to protect a country domestic environment is by restraining imports on products and services that do not comply with domestic environmental norms. For example, in the case of United States- Imports Prohibition of Certain Shrimp and Shrimp Products, a dispute that went before the WTO Dispute Settlement Panel in 1997; United States had imposed an embargo which ban all the imports of shrimps and shrimps products from India, Pakistan, Thailand and Malaysia because these countries had harvested shrimps and shrimps product without using a turtle exclusion device (TED). These countries' act had contravened Section 609 of the US Public Law 101-102. Thus, the question here is how can Malaysia effectively implement its environmental related trade restrictions in order to protect its domestic environment and at the same time, without affecting its international trading. This is a doctrinal research where the study is on international trade agreements such as the General Agreement on Tariff and Trade (GATT), World Trade Organization (WTO) agreements; Multilateral Environment Agreements (MEA), Malaysia trade policy, Malaysia domestic laws which apply and implement trade related environmental provisions; and relevant cases which involved trade and environment conflict. This research will determine whether or not Malaysia is able to implement regulatory trade restrictions in view of environmental protection.

Keywords: Malaysia, free trade, environmental protection.

1. Introduction

The balance between environmental protection and free trade has started to become an international agenda in the early 1970's. The United Nations (UN) has held two major conferences in view of environmental protection and development. The first one is the United Nations Conference on the Human Environment (UNCHE) which was held in 1972 in Stockholm, Sweden. This conference produced the Stockholm Declaration which was adopted by 113 states and it paid more attention on matters relating to the relationship between human and the environment (Gardiner, 2003). Its' preamble states:

> "The protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world; it is the urgent desire of the people of the whole world and the duty of all Governments."

The agenda of Stockholm Declaration was mainly for environmental protection and to call for governments and human to work together to protect the environment. This conference discussed issues relating to environmental management, atmosphere, marine environment, national and international energy policies. It also acted as a guideline for the management in applying future international environmental protection (Sands, 2003).

The second conference is the United Nation Conference on Environment and Development (UNCED) which was held in 1992. This conference adopted the Rio Declaration. The element of integration between environment and development is recognized in this Declaration and it represents the commitment of developed and developing countries in establishing and maintaining the balance between environmental protection and economic development (Gardner, 2003).

Principle 3 and Principle 4 of the Rio Declaration expresses that every country should take into consideration environmental protection in their economic and development project. These principles provide:

> Principle 3
>
> The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.
>
> Principle 4
>
> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

The integration of environmental protection and economic development is expressly stated in Principle 3 and 4 of the Rio Declaration. Both the developed and developing countries have to work together to make this declaration a fair and balance norms in international environmental governance (Mann, 1992). The developing countries have expressed concern that the Rio Declaration would be another environmental text. However, they have succeeded in incorporating developmental aspects into the Declaration especially in Principles 3, 5, 7 and 12 of the Declaration (Fuentes, 2002). Principle 5 and 12 further provides:

> Principle 5
>
> All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.
>
> Principle 12
>
> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.

This Declaration reaffirms the principle in the 1972 Stockholm Declaration but pressing more on the issue of development (Roch & Perez, 2005). Mainly, the aim of the 1992 Rio Declaration is to create norms that would reflect the issue of environment and development and the incorporation of both the environment and development concerns. The UNCED focused on the balance between environmental protection and economic development, recognizing that the relationship between the environment and development must be given an equal attention (Roch & Perez, 2005).

Principle 12 states the actual steps that need to be taken by developed country in order to pursue the right balance between environmental protection and development. It states:-

> "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in every countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means or arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environment challenges outside the jurisdiction of the importing party should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus".

However, in practical, it is not easy to reconcile environment and development and it is difficult to resolve them (Fuentes, 2002). The development of the environmental protection has been pursued at the expense of international economic law and the concept of sustainable development does not really reflect the balance that international law is trying to achieve (Fuentes, 2002). All these instruments expressed that environment and development should be integrated but although it is a success in putting these rules down into writing, it is difficult to bring them into practice as developing countries depend highly on trade and their economy to develop. The concept of sustainable development which has been introduced in the United Nations' declarations is also included in multilateral environmental agreements. Even if it is expressly stated in the United Nations Declarations and Multilateral Environmental Agreements (MEA) that states should endeavour to maintain environmental protection while undergo development, and that the concept of sustainable development should be carried out, it is difficult to implement them in practice.

Only 20 multilateral environmental agreements have incorporated trade measures (World Trade Organization Web site). Nevertheless, the terms in some of the multilateral environmental agreement are conflicting with the WTO concept of liberalization and free trade (Boer, Ramsay, & Rothwell, 1998). For example, the 1987 Montreal Protocol is an agreement which is entered into for the protection of ozone layers. It was agreed that the developing nations were only to consume 0.3 capita of chlorofluorocarbons (CFC) in view of environmental protection (Sani, 1993). These had affected the developing nations' economic development as these countries need CFC the most. As for Kyoto Protocol, the terms of the said agreements provides different treatment to members and non- members. The term really contradicts the WTO aims for free trading among its members. Further, the 2003 Cartagena Protocol agreement contain and limit the movement of genetic modified organisms (GMO) and this may affect the trading of biotechnology and nanotechnology products (Triggs, 2002).

The 1994 Agreement which was signed during the Uruguay Round is a supplement to the 1947 General Agreement on Tariff and Trade (GATT) and this has brought about the establishment of

the WTO. The aim of GATT is to make members to lower their trade tariffs, taxes and other trade barriers. Equal treatment on import products is also instigated so as to avoid discrimination. The World Trade Organizations (WTO) through its' Dispute Settlement Panel has the duty to differentiate between a legitimate environmental protection measure and a measure that is used as a disguise restriction to trade (Ghei, 2007).

The preamble of the Marrakesh Agreement Establishing the World Trade Organization (WTO) states:

> " Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development ,seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development..."

From this preamble, we could understand that the WTO objective is also to pursue sustainable development and not only to avoid discrimination in international trading. The WTO is trying its' best through its' Dispute Settlement Panel to ensure that any environment protection measure taken out by members are genuine and not an action to discriminate and protect domestic market. Every environmental protection measure should not be a technical barrier to trade and should not discriminate between members of the WTO. A member could lodge a complaint if there is a violation of the WTO Agreements and the Dispute Settlement Panel will decide on any issue that arises.

Protection of the environment is not an objective of the WTO and the GATT but environmental protection was instilled in its' provisions (Shih, 2006). The environmental provisions which were instilled in the WTO agreement will only be applied to environmental protection measures if such measures would affect international trade (Matshushita, Schoenbaum, & Mavroidis, 2006). This article is in respect to trade restriction which a state needs to invoke in order to protect their domestic environment. The import restraint will be applied against the products or services that do not comply with domestic environmental norms.

2. Issues concerning the implementation of environmental related trade restrictions

The meaning of "environment" differs politically and scientifically. It varies according to different multilateral trade agreements and conventions. The 1972 Stockholm Declaration refers "air, water, land, flora and fauna" as natural resources. In the GATT Article XX (b) and (g) states "human, animal, plant life or health and exhaustible resources" and do not mention "environment" per se (Sands, 2003).

The environment will affect trade and development when a country or an institution starts to set up rules and regulations that could restrict trade in view of environmental protection (Sands, 2003). Thus the parties which need to take out environmental protection measures has to proof that their effort is necessary, non-discriminatory and it is not a disguised restriction to trade. Environmental protection measures usually will be in the form of environmental related trade restrictions. A state which need to protect their domestic environment would carried out there (3) kind of trade restrictions. These restrictions are:

i) import restraints against products or services that do not comply with domestic environmental norms;

ii) requirement that imported as well as domestic products comply with regulations involving such matters as labeling, packaging and recycling;

iii) export restrictions to conserve natural resources (Birnie, Boyle, & Redgwell, 2009);

There can be 2 types of environmental measures which may restrict trade and they are product standards and production standards. Product standards refer to characteristics that goods must possess, such as performance requirements, minimum nutrient content, maximum toxicity or noxious emissions. Production standard on the other hand refers to conditions under which products are made (Khatun , 2009). Developing countries would apply trade restrictions against developing or least developing countries if they find that those countries produced goods that would threaten the environment and developing countries would have to deal with these restrictions despite all their difficulties.

In the case of United States-Import Prohibition of Certain Shrimp and Shrimp Products (United States- Import of Certain Shrimp and Shrimp Products, 1998), India, Pakistan, Thailand and Malaysia filed a complaint against the United States for invoking an embargo on their exports of shrimps and shrimps product because the US claimed that these countries harvested shrimps without using the turtle harvesting devise. The issue which the Dispute Settlement Panel had to decide was whether the United States justified in invoking the environment measure and whether the ban on the imports of shrimps and shrimps products from these countries for the protection of sea turtles was necessary. The Appellate Body of the WTO had decided in favour of the United States when they agreed that the United States could still maintain the ban and remedied only whichever regulation which was claimed to be unjustified.

In the case of United States- Standards for Reformulated and Conventional Gasoline (United States- Standards for Reformulated and Conventional Gasoline, 1996), Brazil and Venezuela complained to the WTO in regards to the United States Clean Air Act which they claimed to have breached Article III of GATT. This Act introduced two gasoline programs in order to limit pollution from gasoline combustion to 1990 levels. The Act required that all gas sold at certain areas be “reformulated”. The 1990 baseline was heavily relied on by domestic producer in order to comply with the Act. However, the rule did not provide any baseline for foreign producers. The Panel found that the Act was not justified under Article III. It found that the domestic and foreign gasoline are ‘like products’ and that the Act has treated the product differently.

It would seem impossible for a country to invoke environmental protection measure if they have to comply strictly with the GATT rules. The WTO provisions which have an impact on environmental protection and in turn could be affected by it in respect to trading of goods are Article I, Article III, Article XI, Article XIII, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT). Article XX of GATT, however, has provided exceptions to WTO members’ obligation. Members can apply environmental protection measures if they could provide evidence which could justify their measures. The exceptions that provides for trade related environmental measures can be found in Article XX (b) and (g) of GATT. This Article states 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 shall be construed to prevent the adoption or enforcement by any contracting party of measures...
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold and silver;
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade mark and copyrights, and the prevention of deceptive practices;
>
> (e) relating to the products of prison labour;
>
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> (h) undertaken in pursuance of obligation under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
>
> (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
>
> (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have cease to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960;

The WTO Dispute Settlement Panel is using a 'two step' test in order to decide whether an environmental measure carried out by a country could satisfy Article XX (b) and (g) and justified under its "chapeau". First, the measure must satisfy either exception (b) or (g) of the Article. Therefore, the measure should be found to be necessary to protect human, animal or plant life or health and that it relates to the conservation of exhaustible natural resources. The country which carried out the measure should show evidence that the measure is necessary. They must also provide evidence that their action is important to conserve exhaustible natural resources and that the resources are really exhaustible, for example, oil or even animal such as turtle (Ghei, 2007).

After satisfying the exceptions in Article XX (b) and (g), then the Panel will decide whether the measure is discriminatory or not, and not a disguised restriction to international trade as required

by the "chapeau" of Article XX. The WTO Panel succeeded in using this test in cases such as the United States- Standards for Reformulated and Conventional Gasoline and United States-Import Prohibition of Certain Shrimp and Shrimp Products in distinguishing whether an environmental measure is a legitimate environmental protection or just a technical barrier to trade and an excuse for protectionism (Ghei, 2007).

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement of Technical Barrier to Trade (TBT) are the WTO which has environmental provision. The SPS Agreement allows Members to take out measure in order to protect human, animal or plant life or health. However, Members have to show that the standard of measure which has been invoked is high and that they have strong scientific evidence to prove that the measure is necessary (Cheyne, 2007).

The SPS Agreement is applied in order to (i) protect human life or health or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (ii) protect animal life or health or plant life or health from risks arising from the entry establishment or spread of pests, diseases, disease-carrying organisms or disease causing organisms; (iii) protect human life or health from the risks arising from : diseases carried by animals, plants or their products, or the entry establishment or spread of pests; (iv) prevent or limit other damages from : the entry, establishment or spread of pests (Boer, Ramsay, & Rothwell, 1998). SPS Agreement therefore encourages countries to impose measures which are consistent with international standards and believed such standard will conform to its requirement.

The preamble of Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) states that:

> " No Member should be prevented from adopting or enforcing measures necessary to protect human , animal or plant life or health , subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;"

SPS Agreement applies to regulations which made to protect human, animal, or plant life or health from "certain well defined 'food borne' or 'pest-or-disease-related' risks" (Eggers & Mackenzie, 2000). SPS Agreement has two main goals (Thayer, 2005). Firstly, to allow Members "to maintain the level of health protection they consider appropriate" and secondly "to ensure that sanitary and phytosanitary measures are not unnecessary, arbitrary, or scientifically unjustifiable".

The SPS purpose is to limit the use of SPS measures as a disguised restriction to trade. All standards and rules taken out for the purpose of sanitary and phytosanitary measures should be within the ambit of the SPS Agreement. To claim that a SPS measures is discriminatory or not is whether it can be justified by a non-trade purpose (Van Calster, 2008) and that by looking whether it is real and necessary (Hudec, 2003). The challenge before the negotiators of the new SPS was to create a set of rules which would strike a proper balance between allowing health and environmental protection while disallowing mercantilist regulatory protectionisms (Donna Roberts). SPS requires a measure to base on a scientific assessment of risks and to be applied only to the extent necessary to achieve its public health or environmental goals. Governments

undertake an obligation to ensure that SPS measures must be based on scientific principle and in certain cases, must be based on a proper risk assessment (Hudec, 2003).

Regulatory protection measures will have an effect on the trading of goods that are perceived to have an effect on human, animal and plant health. The issues concerning this matter are how far these measures will affect the trading of those goods and whether WTO laws are sufficient to regulate these protection measures. The WTO and the rulings of Dispute Settlement Bodies subjected 'health' measures to stricter scientific evidentiary requirements than environmental measures (Green & Epps, 2007). So far, the WTO Dispute Settlement Body has made rulings in the EC Measures Concerning Meat and Meat Products (Hormones) (EC Measures Concerning Meat and Meat Products (Hormones), 1998) dispute which concerned hormone-treated meat; European Communities –Measures Affecting Asbestos and Asbestos Containing Products (European Communities- Measures Affecting Asbestos and Asbestos-Containing Product, 2001) dispute where the French government banned asbestos and products containing asbestos; and European Communities – Measures Affecting the Approval and Marketing of Biotech Products (European Communities- Measures Affecting the Approval and Marketing of Biotech Products , 2006) dispute where the EC had restrained activities on the trading of agricultural biotechnology products by the US.

These cases involved the trading of goods which are produced with material and substance that might have serious health effect on human, animal and plant health. As have been perceived, goods that were produced through a technological process usually would affect the health of human, animal and plant health. Although it is necessary to protect health, sometimes such measure invoked by a party could be a disguised restriction to trade and act as protectionism.

As for the Agreement on Technical Barrier to Trade (TBT), its preamble also states that:

> "No country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, of the environment , or for the prevention of deceptive practices, at the levels it consider appropriate , subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement"

The TBT Agreement requires that technical regulations to be less trade restrictive even if they are discriminatory. This can be said to be a non- discriminatory regulation which are reasonably available to a member in order to achieve regulatory goal for matters such as environmental protection, public health, consumer safety and welfare or financial security. A member has to opt for a measure which will have the least trade restrictive consequences (Van Calster, 2008) .

The multilateral environmental agreement which is regarded as the first agreement where trade and environment protection was discussed is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. It was finalized and adopted in Montreal on 29 January 2000. The preamble of the Protocol provides:

> Taking into account the limited capabilities of many countries, particularly developing countries, to cope with the nature and scale of known and potential risks associated with living modified organisms, recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development...

Cartagena Protocol is one of the multilateral environmental agreements which was recently negotiated and introduce in 2003. It is an agreement that governs and contains the activities of biotechnology and genetic engineering with the intention to protect nature and the environment from any harmful effects of the genetic modified organisms (GMOs). Genetic Modified Organisms (GMOs) is also known as living modified organisms and classified as "organisms produced by fusing cells from different taxonomic families". The WTO has its own agenda in respect to the GMOs. As an organization that implement a free trade policy, WTO will uphold free trading and will ensure the control of the movement of these GMOs would not limit and restrict international trading (Laidlaw, 2005).

The act of controlling the movement of GMOs is done based on a precautionary principle. This principle requires that any action involving the GMOs will be deferred if that action lacks scientific proof that it is harmful to the environment. In other words this Protocol limits and restricts the movement of the GMOs in the market even if there is no scientific assurance that the particular GMOs will not have any harmful effect. There is no scientific proof yet that GMOs would be harmful to humans, animals and the environment (Laidlaw, 2005).

It is widely known that the WTO General Agreement on Tariff and Trade states in its Article XX that trade of any goods should not be restricted unless there is a clear evidence that such goods are harmful to humans, animals and the environment (Laidlaw, 2005). Therefore there appears to be a conflict between the multilateral environment agreement and the policy of the WTO. The issue here is whether this Protocol is justified and whether it could be upheld by the members of the agreement.

The Montreal Protocol on Substances that Deplete the Ozone Layer which was adopted in 1987 also raised a trade and environmental issue. It was adopted after governments recognized the need to reduce the production and consumption of a number of chlorofluorocarbons (CFCs) and Halons. The Preamble of this Protocol required the parties to be:

> "Mindful of their obligation under that Convention to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer"

This Preamble also mentioned that "special provision is required to meet the needs of developing countries, including the provision of additional financial resources and access to relevant technologies". Developing countries are permitted to consume up to 0.3 kilograms per capita. They are also given the right to delay compliance to the Protocol until 1999 considering their

condition. However, since it has been agreed in the Protocol that developing nations should only use 0.3 capita of CFCs, it is to their disadvantage as developing countries needed the chlorofluorocarbons most for their developments (Sani, 1993).

3. Application of the environmental related trade restrictions in Malaysia

Apart from being a member of the WTO, Malaysia has now participated and is a signatory to many conventions in its effort to combat the trade and environmental conflict. These conventions include the Convention on International Trade in Endangered Species (CITES) 1973, United Nations Convention on the Law of the Sea 1982, International Tropical Timber Agreement 1983, Vienna Convention for the Protection of the Ozone Layer 1985 and the Montreal Protocol 1987. Developing countries especially Malaysia has taken an active part in environmental protection especially through the multilateral environmental agreement. Malaysia has carried out its obligation toward these agreements by introducing new laws and incorporating the provisions into it.

The objective of this article is to examine whether Malaysia has invoked any import restraints against products which do not comply with its domestic environmental norms. The question that needs to be answered is whether the import restraints are effective. In respect to trade related environmental measures, Malaysia has the following laws that can be environmental related. The regulations are the Plant Quarantine Act 1976, Plant Quarantine Regulations 1981, Animal Act 1953 (Revised 2006), Fisheries Act 1985, Food Act 1983 and Food Regulations 1985. These regulations are enacted due to the country obligation under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) of the WTO. They were regulated for the handling of food and agricultural products. Due to the country's obligation under the SPS Agreement, any environmental measures invoked under these laws should be within the ambit of the SPS agreement.

The most recent one is the Biosafety Act 2007 which was enacted in conformity with the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. This act regulates the release and movement of living modified organisms and products of such organisms. This act regulated the trading of biotechnology product in the country. Malaysian government has taken out the following measures in order to control the trading or any activities relating to such products or goods in view of its domestic environment protection. Therefore, in order to ascertain whether Malaysia has implemented the trade related environmental measures, the analysis of the following law is required:-

i) Plant Quarantine Act 1976

In the introduction to the Plant Quarantine Act 1976, it is stated that:-

> "An Act to amend and consolidate the laws relating to the control, prevention and eradication of agricultural pests, noxious plants and plant diseases and to extend co-operation in the control of the movement of pests in international trade and for matters connected therewith."

Section 6 (1) and Section 6 (2) requires the Inspecting Officer to serve notice to the owner or the occupier of a land, asking the owner or occupier to eradicate or destruct plants that is of any pest.

The eradication and destruction would be in the manner specified in the said notice so as to prevent the spread of the pest.

Section 12 gives the power to take action against a dangerous pest to the Chief Minister of a State of a Minister in charged with the responsibility of agriculture in Malaysia. They have the power to serve notice to the owner or the occupier of the land requiring the owner or the occupier to eradicate, destruct or treat any diseased plant which is affected by dangerous pest or of any plant liable to become so affected in a matter of necessity and urgency; or if the safety of any plant growing in such region is endangered by the existence of a dangerous pest.

Section 14 forbids any person except the Director General of Agriculture or the Director of Agriculture to import any noxious plant, possess or keep any noxious plant or allow the same to grow in or on any land of which he is the owner or occupier or import or keep any pest. Section 15 then requires the owner or the occupier to destroy the diseased plant by fire as soon as possible if they found it growing on their land. Section 19 further forbids any person without lawful excuse to move or convey or caused to be moved or conveyed within Malaysia any dangerous pest or noxious plant.

ii) Fisheries Act 1985

The Fisheries Act 1985 is an act which relates to:-

> "fisheries, including the conservation, management and development of maritime and estuarine fishing and fisheries, in Malaysian fisheries water, to turtles and riverine fishing in Malaysia and to matters connected therewith or incidental thereto".

Section 6 of the Act is about the preparation of fisheries plan. It requires:-

> "The Director General to prepare and keep under continual review fisheries plans based on the best scientific information available and designed to ensure optimum utilization of fishery resources, consistent with sound conservation and management principles and with avoidance of overfishing"

Section 27(1) further forbids "any person to fish for, disturb, harass, catch or take any aquatic mammal or turtle which is found beyond the jurisdiction of any state in Malaysia".

Section 40 is in regards to control of life fish. It states that:

> "Any person who imports or exports out of Malaysia or transport fishes within Malaysia without a permit or in breach of any condition in a permit issued by the Director General under this Section shall be guilty of an offence"

iii) Food Act 1983

As for the Food Act 1983, its preamble describes the Act as :

> "An act to protect the public against health hazards and fraud in the preparation, sale and use of food and for matters incidental thereto or connected therewith"

Section 5 allows an officer to take samples of the food for the purpose of analysis. Section 10 provides that a Director or an officer authorized can order that a premises or appliances be put

into a hygienic and sanitary condition if they found that the premises fail to comply with requirements provided. Section 14 prohibits any sale of food which is not of the nature, substance and quality demanded. Section 15 requires any person who prepares packages, labels or advertises any food to comply with standards prescribed. Section 29 provides that the importation of any food which does not comply with this Act and any regulation thereunder is prohibited. If any food which is imported does not comply with this act in respect to labelling, processing and conditioning, it needs to be relabelled, reprocess and reconditioning.

iv) Biosafety Act 2007

This regulation complies with the Cartagena Protocol of Biosafety is the Biosafety Act 2007. This act is introduce to :-

> "Establish the National Biosafety Board, to regulate the release, importation, exportation and contained use of living modified organisms, and the release of products of such organisms, with the objective of protecting human, plant and animal health, the environment and biological diversity, and where there are threats of irreversible damage, lack of full scientific evidence may not be used as a reason not to take action to prevent such damage, and to provide for matters connected therewith"

In the preamble it is stated that these regulation is necessary to protect human, plant, animal health and the environment. Further it pointed out that lack of scientific evidence may not be used as a reason not to take out action for the sake of environment protection. This act is also exercising the precautionary principle in implementing its provision.

The analysis as to whether the trade restrictions are properly implement and in accordance with the international agreement should be on these two parts of the act. Part III of the Act deals with approval for release and import. Section 3 of the Act define "release activity" as any intentional introduction of living modified organisms or products of such organisms into the environment through the activities or for the purposes specified in the Second Schedule;"

Section 12 states that :

> "No person shall undertake any release activity, or any importation of living modified organisms, or both without the prior approval of the board."

Section 13 further states :

> " An application for the approval of any release activity or any importation of living modified organisms, or both shall be submitted to the Director General in the prescribed manner, together with the prescribed fees, and shall be accompanied with a risk assessment and a risk management report, an emergency response and such other information as specified by the Board"

The Director General will refer the application to the Advisory Committee and the Advisory Committee will make recommendations on application for approval- Section 14 and 15 of the Act.

Part IV is for notification for export, contained use and import for contained use. Section 21 of the Act states:-

> "Part IV shall apply to the exportation and contained use activities involving living modified organisms and importation of living modified organism for purposes of undertaking a contained use activity"

Section 22 (1) states:-

> (1) No person shall undertake any of the following activities without giving prior notification to the Board:
>
> (a) Exportation of living modified organisms;
> (b) Contained use involving living modified organisms;
> (c) Importation of living modified organisms for purposes of undertaking a contained use activity.
>
> (2) Any person who contravenes subsection (1) commits an offence and shall, on conviction be liable.

Section 23 is about the compliance with requirements of importing country. It states that :

> (1) Any person who intends to export living modified organisms shall comply with the requirements of the importing country on the importation of living modified organisms and shall inform the Board of such requirement, if any, and of his or its compliance with that requirement in the prescribed manner and accompanied by the prescribed fees;

The above measures are taken out in conformity to the Agreement on the Application of Sanitary and Phytosanitary Measures of the WTO and the 2003 Cartagena Protocol of Biosafety. Due to these, the government should take into account all the requirements that need to be followed in taking out the measures. The government needs to show that the restraining measures are necessary and are not a disguised restriction to trade. Any standard that is to be imposed need to be high and the measures taken out should be justified by scientific evidence. If the government could not provide any scientific evidence, the measures need to be carried out based on a precautionary approach as required by Article 5.7 of the SPS Agreement and the preamble of the Cartagena Protocol.

All trade restraints taken out by the Malaysian government should be within the ambit of these requirements. In order to view whether these measures are effective depends on the surrounding circumstances, implementation of the law itself and the interpretation of the law by institutions and panel or judges that need to analyse the law in question. For example in the case of United States-Import Prohibition of Certain Shrimp and Shrimp Products (United States- Import of Certain Shrimp and Shrimp Products, 1998), the WTO Appellate Body has decided that the United States did not do anything wrong in invoking the trade restraint although the WTO law stated clearly that any environmental measure invoke should not be discriminatory and a disguised restrictions to trade. The United States could continue with the measures as long as they have informed the parties affected by it.

4. Conclusion

It is made to understand that under the present world trading system every countries have the right to set and impose any standards, rules and regulations to protect the environment, health, plant and animal that they feel needs protection. However, such act and intention should be done in a good faith and it is justify and not to discriminate the parties concern. Therefore any move towards this cause is recognized as long as:-

1) an agreement to set up certain standards should be obtained multilaterally and not unilaterally;

2) the standard will not contradict the terms of the General Agreement on Tariff and Trade especially Article III; Article XI which prohibits "quantitative limits and quotas on imports" and Article XX (b) and (g) of General Agreement on Tariff and Trade (GATT) where the chapeau states:-

> "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 shall construed to prevent the adoption or enforcement by any contracting party of measures" ;

3) a measure must not breach the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barrier to Trade (TBT) of the WTO;

It is to be concluded that Malaysia can avoid any trade and environmental disputes that may arises in future when the country invoke any trade restraints. Firstly, through the multilateral agreements entered between the member countries of the WTO. Through the said agreements, better understanding of the trade practices between countries could be achieved. Then fair trade would be practiced without any discrimination and injustice and further, wider market access could be provided.

Secondly, Malaysia should continue to host conventions and conferences with other member countries at the international and also at the regional level. Thirdly, considering the impact of the 1987 Montreal Protocol has on the developing and undeveloped countries, Malaysia should be concerned and take an active role in the drawing up of the terms and condition of any agreement that is going to be entered in future. Fourthly, Malaysia should take the opportunity and make use of all the special treatments that the WTO provided to the developing and undeveloped countries.

The question whether the trade restraint issues would affect Malaysia's trade practice will depend on how the government handled the problems at hand. Being the member of the World Trade Organization has its advantage. Malaysia's trade practice may not be affected if the countries that Malaysia trading with, especially the member countries of the WTO, would in the first place have agreed on the trade practices and the measures that is carried out by the country.

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