THAILAND'S EXPERIENCE IN INTERNATIONAL TRADE LAW AND GATT

This article examines Thailand's experience in GATT and international trade and suggests that Thailand has yet to exploit fully her comparative advantage in international trade.

I. INTRODUCTION

A developing country can rely on the General Agreement on Tariff and Trade, hereafter GATT, to negotiate with the developed and economically powerful trading partners. GATT provides a forum for trade negotiations. It helps to reduce transaction costs. Economic standards and legal norms adopted by GATT facilitate international trade. GATT's preamble provides that member states recognize:

> … that their relations in the field of trade and economic endeavour 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, developing the full use of the resources of the world and expanding the production and exchange of goods.

Is GATT really a reflection of liberalism; aiming at liberalizing world trade? Or is it a justification for economic imperialism and protectionism. This paper outlines Thailand's experience in GATT and in international trade, and highlights Thailand's inability to exploit fully its comparative advantage in international trade.

II. GATT AND SOME OPERATING PRINCIPLES

A. *Basic Principles of GATT*

GATT is based on the following basic principles:

(a) Trade is to be conducted on the basis of non- discrimination. Parties are obliged to apply tariff and duties without discrimination on the basis of origin of goods. This principle is spelled out in Article 1, the article of which requires parties to adhere to the most-favoured-nation treatment (MFN).

(b) Government restraints on the movement of goods should be kept to a minimum. Governments should not raise tariffs and duties. If a tariff is to be changed it should be reduced and not increased.
(c) The reduction of tariff and duty should be negotiated through multilateral trade negotiation (MTN). The tariff concession granted binds the parties.
(d) Quantitative restrictions or quotas are prohibited.
(e) Dumping and subsidy are illegal, and are subject to retaliatory measures.

B. *Tariff Concessions under GATT*

Article 2 provides a basic guideline for tariff concession. It provides that parties shall accord MFN treatment to other contracting parties (Article 2 [l][a]). However, article 2[2] exempts the tariff concession under article 2[1] by allowing, among other things, anti-dumping duty or countervailing duty to be applied consistently with the provision of article 6. However, the application of the tariff concessions under this article can be avoided by dividing the tariff schedule into different sub-categories. GATT members usually grant tariff concession in items that are of little impact to their domestic markets. Another tactic is to grant concessions on the goods that others cannot enjoy or produce. In practice, concessions are negotiated through a process of multilateral trade negotiation (MTN). There have been eight rounds of negotiations, and each round focused on different issues. For example, the Kennedy Round focused on the across-the-board reduction of tariff and the Tokyo Round, on supplemental agreements like the Subsidy Code. The present round, the eighth round, is referred to as the Uruguay Round. The negotiation is being conducted in Geneva.

Article 28 provides that tariff concessions can be modified, if the reasons for modification meet the conditions described therein. Article 28[1] provides that concession can be modified at the end of a three year period. Parties wishing to do so may negotiate with each other to "unbind" the concession at the beginning of the three year period. The negotiation must be conducted between July and September of the preceding year, the period of which is usually referred to as "open season". Article 28 [4] and [5] provide exceptions to article 28[1]. The exception permits parties to conduct negotiation to modify tariff concession at any time before the "open season" if "special circumstances" so require, or if other parties have made a reservation to modify the tariff. Article 28[1] provides that the modification of concession must be approved by three parties: (a) the principal supplier, (b) the initial supplier and (c) parties having substantial interests. Article 28[2] provides that the agreement to modify may include a provision for "compensatory adjustments" to maintain a general level of reciprocal advantage. If the agreement cannot be reached before the expiration of the period (1 January) the proposing party is free to modify or withdraw the concession. Others having supplying interests or substantial interests may within six months withdraw substantially equivalent concessions.

1. *Non-Discrimination and MFN*

The principle of non-discrimination as stated in the preamble of GATT renders the application of the MFN treatment unconditional. The MFN treatment under GATT is an important means to reduce trade barriers. Any advantage given by a State in favour of another will be made available automatically to all GATT parties. Some commentators argue that the MFN principle introduces the free rider situation. Parties with major interests would bear the costs of negotiation while others reap the benefits from tariff concessions. However, the MFN principle allows small producers to enter major markets and thus promote the efficient allocation of resources. It also increases and promotes trade, including international trade.

Two important American cases clarify the scope of MFN.

(1) In *John T. Bill Co. Inc. et al.* v. *United States,*[1] the US Custom Court held that the 50% ad valorem tariff levied by Germany on US imported bicycles was not a violation of the MFN clause if the tariff applied equally to the like products imported from other countries. The fact that US import duty on the same item was only 30% did not warrant the claim of MFN violation.

(2) *Star Industry Inc.* v. *United States,*[2] relates to a "chicken war" between the US and EEC. Chicken imported from the US was subject to an increase in tariff because Germany adopted the EEC schedule. The US contended that under article 28, it was entitled to compensatory adjustments and asked the GATT panel to determine the value of the concession withdrawn by the EEC. The US also withdrew concessions on four products of important export interest to members of the EEC. In accordance with article 28, the US raised tariffs for selected products from the EEC. Star Industry, a Spanish importer, complained that it should be exempt from the retaliation because it had not been accused of any illegal restraint on trade. The US Custom Court held in favour of the importer. On appeal, the Court of Custom and Patent Appeals reversed the Custom Court decision holding that the US did not violate article 28[3] nor derogate from the principle of MFN.[3]

2. *Dumping and Subsidy*

Article 6 defines dumping as an export of goods by a producer or seller at a price "less than the normal value". Article 6[2] authorizes a contracting party to offset dumping by imposing an anti-dumping duty. The purpose of an anti-dumping duty is to restore the original comparative advantage. Typically an anti-dumping duty is directed at particular producers or exporters and not at a country. Anti-dumping duty is imposed if it threatens to cause "material injury" to the domestic industry or "retards the establishment of a domestic industry".[4] In recent years, the question of dumping became more complex especially within

[1] 73 Cust. Ct.
[2] 65 Cust. Ct. 662 (1970).
[3] 462 F. 2d 577.
[4] Article 6[1].

the context of transfer-pricing. The problem of "hidden dumping" is difficult to resolve as production costs are always hard to determine.

3. *Subsidy and Countervailing Duty*

Governmental aid to domestic producers comes in two forms – export subsidy and production subsidy. Not all subsidies are subject to countervailing duty (CVD). GATT recognizes certain types of subsidies in article 16 which require only notification and consultation. Article 6[3] limits the amount of a CVD to the amount of the foreign subsidy, regardless of the legality of the subsidy under Article 16. The application of CVD, however, is conditioned upon the injury requirement under article 6[6][a]. The Minibea case is a good example. Minibea is a Thai company which is wholly owned by the Japanese. Minibea produces precision ball bearings. It receives promotional preferences under the Investment Promotion Act which includes exemptions from income tax, duty and tariff for raw materials, and estate and property tax. Its products are exported to the US to another sister company within the same conglomerate. Last year, the US industry filed a petition against Minibea on the ground that Minibea had received bounties from the Thai government. This was alleged to have caused material injury to them. The US authorities found that Minibea products were countervailable under the US law. The Thai government went into negotiations with the US authorities without the active participation of the company. In the end, the Thai government agreed to a "suspension agreement" with the US. This case is a classic example of the free rider situation. The Thai government bore the costs of negotiation and received no benefits in return. Minibea's products were not sold in the domestic market. Its production technology had not been effectively transferred and the government did not receive any revenue from the company' s operations. The only benefit to the Thai government, from Minibea's operations in Thailand, is the creation of job opportunities and the levy of export tax in accordance with the suspension agreement with the US.

III. THAILAND AND INTERNATIONAL TRADE LAW

Prior to 1982, Thailand enjoyed trade preferences and privileges through other treaties and trade agreements. In the early 80's, the world economy changed dramatically. Protectionism was rising. Thailand felt that she could no longer effectively defend her interests in the market place. The following case-studies would explain the circumstances in which Thailand entered and worked within the GATT system.

A. *Thailand – EEC Cassava Trade Issues*

Under the Common Agricultural Policy (CAP), the EEC allowed its cereal prices to stay well above the world price levels. These high prices discouraged the consumption of cereals in the EEC, particularly as animal feed. It was very quickly found that non-cereal substitutes could just as well be used as animal feed. The cassava trade with the EEC was initiated by Brazil and Indonesia, both of which have large cassava production. They were, however, quickly overtaken by Thailand. Between 1967 and 1980, production of cassava roots in Thailand doubled every 3-4 years. By 1982 the EEC market for cassava was worth $770 million to Thailand, cassava being her second largest export commodity after rice. Within the EEC, the Netherlands and Germany consumed most of the Thai cassava imports. The purchasers were the Dutch and German livestock producers. As a result there was reduced demand for French and Italian cereals. The surge of cassava exports benefitted Thailand at the expense of France and Italy. Consequently, France and Italy pressured the EEC to restrict Thai cassava imports. This brought about intense negotiations between Thailand and the EEC. In 1982, the EEC entered into a major agreement with each of the three cassava exporting countries; namely, Thailand, Indonesia and Brazil. The EEC was bound by its tariff concession commitment under the 1967 Kennedy Round. It had to follow procedures set out in Article 28 of GATT before it could modify such concessions. Article 28 requires the concession grantor to seek agreement with the principal supplier, the initial supplier with which the grantor negotiated the concession, and any other supplier who may have substantial interests in the matter. The negotiation process may include compensatory adjustments. In 1982, Indonesia and Brazil, both GATT contracting parties, were treated as the principal supplier and initial supplier respectively under GATT. Thailand was not at that time a contracting party to GATT, and as a result the EEC was not obliged to follow Article 28 procedures with respect to Thailand.

The essence of the agreements with Brazil and Indonesia is to set up a tariff quota system. The agreements allow a high tariff to be levied on the amount in excess of the quota. The agreements allocated generous quotas to GATT members. The increased quota seem to be a part of the compensatory adjustments under Article 28.

The EEC convinced Thailand, at that time a non-GATT member, to enter into a voluntary export restraint agreement (VRA). The agreement is entitled the Cooperation Agreement between the Kingdom of Thailand and the EEC on Manioc Production, Marketing and Trade. The 1982 agreement has six features. First, the EEC contracted with Thailand as a non-GATT contracting party. There were, consequently, no Article 28 negotiations involved. Second, the quota system is a declining one; 5 million tonnes between 1983 and 1984 and 4.5 million tonnes thereafter. Third, the agreement allows Thailand to issue export licences, and the EEC to issue import licences. Fourth, assistance would be given for rural development and crop diversification projects in Thailand. Fifth, the EEC vaguely agreed to secure Thailand's position on the EEC cassava market against increases of cassava imports from other countries. Sixth, the agreement was scheduled to expire in December 1986, but it could be extended for a further 3 years.

Prior to the 1982 agreement, Thailand had exported as many as 7.3 million tonnes of cassava to the EEC. There was a widespread perception then that as Thailand was not a GATT member, it had little bargaining power against the EEC. It was felt that the agreement was probably the best Thailand could obtain, since the EEC might have acted unilaterally against Thai cassava exports. Some commentators argue that Thailand should not have entered into such an agreement. The Thai government should delay the agreement until Thailand became a GATT member. Some commentators also argue that the MFN treatment under the EEC-ASEAN agreement should have been a relevant consideration, and Thailand's market share vis-a-vis Brazil and Indonesia should have been retained.

In 1985, when the negotiation for an extension of agreement took place, the issue was whether Thailand should renounce the 1982 agreement. The issue attracted public debate. Some members of the Thai delegation were in favour of extending the 1982 agreement. To them the agreement provided certainty as it guaranteed the amount Thailand could export to the EEC. They viewed GATT as a paper tiger that could not be relied upon. Others took the view that, since Thailand is now a contracting party to GATT, it should be able to reap the benefits offered by the provisions of article 28.

Regrettably, Thailand did not exploit the legal arguments that could have been made in her favour under the GATT provisions. For example, Thailand's quota should be enlarged to include the potential imports of Spain and Portugal who were then becoming members of the EEC and were therefore subject to the cassava tariff quota restriction. In general, Thailand did not press the EEC to recognize her status under GATT as a principal supplier. Had she done so, it could have the effect strengthen her negotiating power.

In 1986, as a result of pressures from commentators and interest groups, the Cabinet instructed the Commerce Minister to seek an amendment to the Protocol. The EEC however, refused to negotiate. Under the Protocol, Thailand had for a period of four years, agreed not to raise objections and this remains in effect until 1990.

B. *Thailand-US Textile Trade Issues*

Half of the world's textile trade operates under the Multifibre Arrangement (MFA), a multilateral treaty consisting of textile importing and exporting countries. Although its inception in 1974 was a temporary exception to GATT article 19, the MFA has since gained acceptance as an international forum for negotiating textile trade agreements. Thailand is one of its participants. The MFA is not the only set of regulations to have an impact on the textile trade between Thailand and the US. There are other trade regulatory regimes both under and outside the MFA umbrella which affect Thailand's textile exports.

The MFA is not the origin of restrained textile trade. In 1962, the "Short Term" and then later the "Long Term" Arrangements regarding international trade and cotton textiles (STA & LTA) were concluded. The LTA allowed developed countries to impose restrictions on imports from developing countries which were considered to be a source of actual or protential market disruption.

In contrast, an arrangement under article 19 of GATT would require proof of "serious injury", and not mere "market disruption" before restrictions can be imposed. Despite this favourable feature of the LTA, less developed countries (LDCs) saw it as a set of rules concerning market access which guaranteed an increase in quota, and at the same time required the LDCs to undertake adjustments in their industries. The LDCs preferred the LTA to ad hoc restrictive measures.

The LTA was extended twice; in 1967 and 1970. In 1974, the arrangement was replaced by the Arrangement Regarding International Trade in Textiles (MFA) which was extended in 1977 (MFA II), 1981 (MFA III) and 1986 (MFA IV). The 1989 MFA is to continue until 1991. The MFAs have similar characteristics to the LTA, except that there are major differences in the extended coverage to non-cotton textiles and the criteria of market disruption. The latter are more precisely defined. Under the MFA IV there are many bilateral agreements. Thailand alone has bilateral agreements under MFA with 18 countries.

The general characteristics of the agreement between Thailand and those 18 countries are as follows:

(a) The Agreement must be mutual and be preceded by negotiation. There can be no unilateral restrictions.

(b) Thailand is an export licensor. It may allocate quotas to Thai exporters and may sell the quotas to the highest offer made by a buyer.

(c) The quota imposed covers only selected textile items. Those without quota restrictions can be freely exported.

(d) The quota for Thailand in subsequent years must be increased at the rate of 1-7% per annum.

(e) Products for sampling, handicraft products and products with values of less than US$250 are excluded from all quotas.

The first Thai-US agreement was concluded in 1971. The total quota was 15 million square yards. In addition to the general quota, the US had other quotas for specific items. A later agreement imposed a quota of no more than 216 million square yards between 1976 and 1978. The third agreement, covering the period 1978-1982, lifted the aggregate quota ceiling for textiles but maintained a ceiling for garments. The fourth agreement for the period 1983-1987 remained the same. It should be noted that Thailand exported a large volume of non-quota products which exceeded the total ceiling allowed. This led to an embargo by the US in 1985. In 1988, the present bilateral agreement would have expired. The negotiation is underway now. The US wants to extend the agreement beyond the expiration date of the MFA IV. Furthermore, negotiations for the new bilateral agreements are taking place amidst the Uruguay Round. One wonders why LDCs did not include the textile trade in the GATT round of negotiation. The result of this delay is that the MFA will never be discussed in the GATT forum.

C. *Thailand-US Rice Subsidies Issues*

Since the late 1970s, there are two dominant players in the world rice trade; the US and Thailand. In 1980, the US was a leading exporter followed closely by Thailand. By mid 1982, prices in the US, as set by the loan rate, began to hit the floor. Unlike the EEC, the US had no export subsidy scheme. Consequently, US export quotations remained at the high loan rate level. On the other hand, Thai export prices fell continually. The only action taken by the Thai government was a steady reduction in its export tax. The difference between Thai rice and US rice widened steadily from about 15% to 80%. As a consequence, US exports steadily declined while the Thai exports continued to grow.

The US Rice Subsidy Scheme – The Rice Title of The Food Security Act 1985

The Rice Title of the US Food Security Act of 1985 appears to have one central aim – to prevent a repetition of the 1981-1985 market conditions. Section 1165 of the Act states that the US should get back, specifically from Thailand, its share of the world rice market. The provisions in the Act imply that Thailand is unfairly subsidizing its rice exports. The US subsidizes its rice production by several mechanisms.

To begin with, the target price mechanism sets price level to assure farmers of an adequate level of income. Rice farmers taking part in the government programme are assured that the rice that they produce from the area on which they are permitted to produce, will yield the target price.

In practice, the rice farmers are paid the difference if they sell below the target price. Similarly, they are also paid the difference if they pledge their produce for loan amounts lower than the target price.

As for the loan rate, the farmers can pledge the harvested rice as collateral for a non-recourse loan from the government. It should be noted that the US lost its share in world market because its rice did not have the comparative advantage. The US lost the market not because of the Thai export subsidy, but because of its unrealistic subsidy scheme.

IV. CONCLUSION

Thailand lags far behind the other trading nations in her grasp of the mechanics of international trade law, expecially GATT. Thailand has yielded to other trading partners on items that she has the most comparative advantage in, be it rice, cassava, or textile. Thailand desperately needs the help of "trade law specialists" who understand the dynamics of law, politics, and economics. Thailand's team of trade negotiators should consist of professionals such as economists, international trade lawyers and professional negotiators. Under the existing practice, the Thai Government approaches trade negotiations from a functional viewpoint. The Thai negotiation teams tend to consist of officials from different government departments. When Thailand negotiated with the US on the issue of intellectual property protection, the negotiation team consisted of a representative from the Fine Arts Department (a non-lawyer), an intellectual property specialist from the Department of Commerce (who was not trained to negotiate international trade), an under-secretary and the Secretary of Commerce and a public international lawyer from Ministry of Foreign Affairs. In view of past experiences, the failure of such a combination is inevitable. It should be stressed that trade negotiation is not the usual diplomatic negotiation where goodwill is given priority. The main objective of trade negotiation is in enhancing a country's economic gains. In the last negotiation, Thailand gave the assurance that it would protect, without resorting to GATT law, the US intellectual property rights in return for the GSP status. Had Thailand referred the issue to GATT, she could have gained more bargaining power. It is unfortunate that the politicians who negotiated trade agreements were not equipped to deal with the issues competently. Thailand should also seek consultation with other ASEAN countries with the view to adopting a unified approach on various relevant trade issues. It is submitted that Thailand should focus more on the political economy of GATT and the economic implications of multilateral and bilateral agreements. Extensive study and research should be conducted. The present GATT negotiation round is a good opportunity for Thailand to correct past mistakes and to assert its commitment in the creation of a fairer international trading system.

SUDHARMA YOONAIDHARMA