



OVERUSE OF CONSUMER PROTECTION DOCTRINE AND ITS ADVERSE IMPACT ON INTERNATIONAL TRADE

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Abstract

Consumer protection doctrine helps to remind people that we have a right to have safe food, and that it is a basic human right. The doctrine also provides grounds for nations to make their own policies in order to protect their citizens by providing a lot of technical regulations and standards for foods. However, with the downward trend of tariff barriers, the import countries, especially developed countries, are using such doctrine as a basis for creating non-tariff measures for products. By overusing the doctrine, international trade is hampered leading to an adverse impact on both domestic and international markets. This paper's aim is to analyse the downside of overusing customer protection doctrine and point out the adverse impact of such the conducts on: (i) importing country; (ii) exporting country; and (iii) international trade.

Keywords: International trade, adverse effect, consumer protection, safe food

INTRODUCTION TO CONSUMER PROTECTION DOCTRINE

The right to be protected from harm according to Howells et al., (2017, p19-20) is one of the basic human rights, belonging to the health and life group of rights, which is also considered as one of the third-generation human rights (Harding, Kohl and Salmon, 2016). In the twentieth century, the doctrine of consumer protection was strongly promoted by the then US President

J.F Kennedy. In his 1962 speech to the US House of Representatives, he emphasized that it was necessary to improve the legal framework to protect consumers, thereby identifying the following four basic rights of consumers (UNTACD, 2017).

Firstly, the right to be safe, i.e. the right to be protected from adverse health effects if they use the product strictly according to the instructions.

Second, the right to be informed; this right requires businesses to provide consumers with adequate information so that they can make informed choices. Product information provided by an enterprise must always be complete, accurate and truthful.

Third, the right to choose goods; the implication of this right is that the goods should be diversified in production and distribution (antitrust) and consumers are free to choose between goods and services.

Fourthly, the right to be heard; this right asserts that consumers have the right to complain about the quality of goods to the manufacturer, distributor and the relevant authority. This right also states that customers can voice their views concerning regulations relating to goods quality assurance.

On top of the four basic rights above, according to Lumen (2020), the International Union for Consumer Protection has added four rights: (i) the right to have basic needs; (ii) the right to rectify (repair, pay compensation if any damage occurs from the use of the goods); the right to be trained (skills, knowledge to use products in the most effective way); and (iv) the right to have a fresh environment.

In 1985, the United Nations officially adopted the United Nations Guide to Consumer Protection. The main content of this guideline is a set of principles providing the main characteristics of consumer protection laws, enforcement organizations and corrective systems (Benhor, 2020). Furthermore, the Guideline supports member states in developing and enforcing domestic laws, rules, and regulations that are appropriate to each country's economic, social and environmental circumstances. It also helps to promote cooperation in international enforcement among member states and encourages sharing of experience in consumer protection (UNCTAD, 2016).

In 1999, under the effect of the 1992 Earth Summit in Brazil and the successful advocacy of a number of civil society organizations, the guidelines were expanded to include a basic framework for sustainable consumption that government agencies could apply to integrate prevailing regulations on this issue at a national level. By 2015, these guidelines had been reviewed again and updated with additional content on good business practices, national consumer protection policies, e-commerce and financial services. In addition, the sections on consumer troubleshooting and international cooperation were expanded to deal with challenges

arising from the then prevailing enforcement and dispute resolution guidelines. Moreover, it expanded sections related to new specific areas such as energy, public utilities, tourism and introduced a mechanism to periodically monitor the implementation of commitments on customers protection (Pearson, 2017).

ADVERSE EFFECTS OF CONSUMER PROTECTION DOCTRINE ON THE INTERNATIONAL MARKET

It is undeniable that consumer protection rights have a positive impact on protection of human health and the environment. Therefore, both the Agreement on Sanitary and Phytosanitary Agreement (SPS Agreement)¹ and the Agreement on Technical Barriers to Trade (TBT Agreement)² affirm that the member states may take necessary measures to protect human and animal health. However, it also requires member states to commit to ensuring that the applied measures do not exceed the necessary level and do not negatively affect international trade. Although most countries are now members of the World Trade Organization (WTO), with the tendency to reduce tariff barriers, countries, especially developed ones, are creating a lot of non-tariff barriers to protect the domestic industry with the pretext of protecting the health of consumers.

The negative impact on the importing country

The legislative purpose of states when using the consumer protection theory is to ensure that their citizens use quality products for work and life. In order to do this, the process of producing goods must be improved, but when joining the WTO or bilateral or multilateral trade agreements, countries are bound by the principle of national treatment. This means that the requirements for imported goods will also apply to domestic goods. Schoenbaum (1993) states

¹ The Preamble of the SPS Agreement: “Reaffirming 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”. Article 2.1 of this Agreement regulates “Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.”

² The Preamble of the TBT Agreement: “Recognizing 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 considers 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”. Article 2.2 of this Agreement rules that “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create...”.

that, according to a report of the US Department of Agriculture, it has been proven that subsidy policy only brings benefits to large producers (minorities) while small producers (the majority) do not have the ability to access loans and technology support to upgrade their manufacturing processes in order to meet government regulations. In addition, Windham (2007) avers that, many studies have shown that not all agricultural workers in the United States benefit from government subsidy policies, but two-thirds of the value of subsidy packages are received by around 10 percent of the richest producers in the United States.

It is worth noting that consumers may use better quality products, but it also means that they have to spend more, and such safety requirements place the products beyond the reach of the average consumer. Therefore, the fact that countries abuse consumer protection doctrine in order to impose stricter requirements on goods, especially agricultural products, does not only bring practical benefits to consumers and, the majority of domestic manufacturers of similar products, but it also raises consumer costs, production costs or even leads to the bankruptcy of small manufacturers, creating a potential risk for social instability, unemployment and widening the gap between the rich and the poor in society (Cheng, 2014).

The impact on the exporting country

As analysed above, the positive impact of the consumer protection policy is to improve the quality of goods. Product coordination must constantly improve processes, techniques, production equipment, processing, transportation, distribution etc. The manufacturers have to upgrade their manufacturing process and the exporting countries must improve their product quality in order to meet international standards, however, the goal of promoting international trade is to create a level playing field and aim to reduce poverty, as well as reduce the development gap among countries and territories, yet when participating in the international market, it is obvious that the developing and least developed countries may hardly compete with developed countries in terms of science and technology, investment capital and also quality of life. Although the WTO Agreements require developed countries to provide preferences and differential treatment as well as technical assistance to developing and least developed countries, such rules are not effectively implemented (Hoekman and Ozden, 2005).

Once again, according to Chang (2002) by overusing consumer protection doctrine, developed countries have created a “fair playground” rather than an “equal playground”. Developed countries apply general standards for goods and lack specific consideration for agricultural products such as differences in environmental factors, production conditions, development level of trade partners, and by so doing, they are kicking away the ladder that they used for their previous development.

A typical example is the regulation on the maximum residue level of plant protection drugs (MRL). European Union issues Regulation EC 396/2005 to regulate the level of residues of plant protection products in food (European Commission, 2005). All foods will be expelled from the European market if they contain illegal pesticides or residues of pesticides that are higher than the EU limits. For pesticides that are not on the list of the Regulations, a default MRL of 0.01 mg/kg is applied as a precaution. This is particularly relevant to imported products grown outside the EU and the use of non-regulated pesticides. The problem, however, is that the EU's default MRL is very low (it means very high requirement), while the number of EU-approved pesticides is far less than in China and the US (New Zealand and Canada also set the default MRL (0.1mg / kg) and this is 10 times higher than EU's) (VCCI, 2019).

In theory, according to USTR (2014) an exporting country could require the EU to set an MRL level for pesticides that are not on the EU Regulation list. But in reality, this requirement is very difficult to fulfil, because the application and approval process is complicated and expensive. In addition, it should be noted that the list of drugs used in the production and processing of agricultural products in general issued by the above countries is very short and is revised annually or several times in year; thus, if exporters do not regularly update new regulations, they may face many difficulties when exporting goods to those markets. In addition, these regulations will limit the application of new drugs and new inventions in production because these drugs are not on the promulgated list.

Another example is the case that some Kenyan fresh food shipments were rejected by the EU for failing to meet the requirements for plant protection drug content limits (VCCI, 2019). Accordingly, in 2011, the EU reduced the MRL level of the pesticide Dimethoate from 0.2 mg/kg to 0.02 mg/kg. This change cost about 192 million USD to Kenyan exporters. There were two causes of the above losses: (i) 0.02 mg/kg is very low residue level and difficult to meet for Dimethoate; Codex Alimentarius (2020) (ii) Kenya lacked information on a change in EU regulations, as a result, it still exported products to the EU according to the MRL standard of 0.2 mg/kg and eventually was rejected (ITC, 2014).

The impact on international trade

In the view of Adam Smith, free trade requires countries to have policies to remove barriers in cross-border trade in order to promote economic activities and create more wealth and jobs (Seth, 2019). Bossche and Zdouc (2013) state that, to limit the abuse of trade barriers and support developing countries in the process of integration into the world economy, international trade law, in particular international trade agreements, which require member states not to create discrimination in commerce and even to protect the health and lives of humans and

animals, the measures taken must be based on reasonable grounds and be not a cause of disruption to commerce. Moreover, the application of non-tariff barriers must comply with certain conditions and procedures.

In addition to boosting trade liberalization and against the use of non-tariff measures to distort trade activities, many scholars advocate for “fair competition”, “healthy competition”. In Black's Law Dictionary, first published in 1999, the concept of “fair competition” was mentioned by American lawyer Bryan A. Garner as a form of open, fair and upright competition among competitors in business. According to Garner, the core of fair competition is to provide consumers with increasingly high quality products, diversified products on demand, and reasonable prices; the rationality in using economic resources such as capital, labor and raw materials. As for businesses, healthy competition will be a fair arbitration when assessing businesses that are competent, brave enough to survive and do business effectively (Behr, 2014). In addition, the requirements for “Fair competition” also aim to ensure that individuals, companies and governments will be aware of worldwide trade rules, there will be no sudden policy changes, and trade rules must be transparent and predictable (Ferrato and Arruda, 2010).

Behuria (2019) argues that, as developed countries make excessive use of the negative side of consumer protection doctrine, they set standards higher than the necessary level of protecting the health of consumers or animals and plants. Furthermore, they require that exporting countries must have a production process similar to their own process (conformity assessment) without considering differences in environmental conditions, development level and above all, the goal of reducing poverty in developing and least developed countries as well. Such conduct has had a negative impact on international trade, causing major obstacles to the development strategies of other countries, contributing significantly to increasing level of unemployment and poverty. In a report of the United Nations Development Program (UNDP), it is estimated that developing countries lose 34 million USD annually due to overuse of protectionist policies by developed countries (Cheng, 2014). On the other hand, Wollner and Risse (2019) argue that additionally, if subsidy measures are reduced and trade liberalization of goods and services is promoted, the world economy may increase by USD151 billion, of which developing countries may get approximately USD34 billion.

According to the July 8, 2019 report of the World Trade Organization's Trade Policy Review Body (WTO), between October 2018 and mid-May 2019, import countries currently apply a lot of import restrictions, these measures had an estimated value affecting trade activities of 339.5 billion USD, the second highest figure after 588.3 billion USD in the previous

period. The report also pointed out that, since mid-2017, there had been a sudden increase in trade restrictive measures by developed countries (WTO, 2019)

CONCLUSION

The right to be protected and the right to have clean food are very basic human rights, and the fact that governments issue regulations to enforce these rights is a vital conduct, practical and encouraging. Besides, the overwhelming purpose of the doctrine is to ensure people have clean and safe food. It also aims to build clean production and processing processes, optimizing the use of raw materials and minimizing the negative impact on consumers and the environment. In other words, consumers' right to protection is directed towards the goals of sustainable economic, environmental and social development. However, abusing this doctrine does not only make it difficult to achieve these goals, but it also has negative effects on consumers, trade policies and the environment. In order to eliminate the issue of overusing the doctrine, it is necessary to have clearer and binding rules for both import and export countries. In formulating and implementing measures regarding to customer protection all of measures must be based on scientific evidence and at an appropriate level considering the different conditions of developing and least developed countries (Marques, 2020). Further research will be conducted to analyse developed countries' SPS and TBT measures and there positive as well as negative impacts on developing exporting countries.

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