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Website: www.diktum.upstegal.ac.id | email: diktum@upstegal.ac.id

Legal Protection For Indonesian Fishery Products In Facing Environmental Protection In International Trade

Tiyas Vika Widyastuti[1]
Universitas Pancasakti Tegal
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Abstract
International trade principally aims to exploit the market, thus traditionally speaking, have a little concern about protecting the environment. Only after entering this new era of international trade, the Indonesian government then finds the challenge in controlling the trade's speed and market since the everything is regulated under a specific international trade regulation that is not entirely concern with protecting national interests. Many Indonesian popular products could not compete internationally, since they tend to fail in fulfilling the international standards of exported goods. This will inevitably hinder the national economy, more specifically in gaining foreign investments. One example of the challenges posed by regulation that interfere with the economic growth in the context of international trade is the way environment regulation dampens the effort to export the Indonesian fishery products. The primary problem is that even though Indonesian domestic regulation has put some sort of legal protection for Indonesian fishery products, they still fail to fulfil the environmental standard set by some export-destination countries, such as the USA and the European. Against this backdrop, this research aims to analyze the application of domestic regulation on fishery in Indonesia. We are using the socio-legal approach to understand the way the domestic regulation has failed to fulfill its legal aim, which is to implement the act of law related to fishery, environment, and quality standards to fit the market's demand, as well as to improve the environment surrounding the fishery industry according to the Code of Conduct for Responsible Fisheries. Based on primary and secondary data from observations and interviews, we contend that there are at least three issues surrounding the failure: 1. The problem regarding the substance of the regulation itself, 2. The disorganized authority within the institutional structure, and 3. The legal culture surrounding the people involved as resulted from their beliefs and personal economic consideration
Keyword : Legal Protection, Environmental, International Trade, Fishery Products

Introduction

The relationship between free trading and environment is one of the results agreed upon in the World Summit on Sustainable Development is further redefined by Perrez who stated that "the agreement includes two things; first, strengthening the aspect of mutual support in trading, environment and the development to realize

[1] Coresponding author:
tiyasvikawidyastuti@gmail.com

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sustainable development. Second, fostering the mutual support between the system of multilateral trading and the multilateral environment agreement, along with the target of sustainable development". However, there is a difference of interests between the Developed Countries and the Developing Countries in maintaining the environmental issue in terms of International Trading. Birnie and Boyle[3] have expressed the following view: Whereas many Western states, including the European Community, now support further environmental controls, developing states accord priority to development and have made in clear in the UNCED Preparatory Commission that they are not prepare to accept further environment control, without such financial assistance and transfer of technology as is necessary to offset the economic restrictions otherwise involved. (Perrez, 2003)

According to Birnie and Boyle, there is no common perception regarding the economic interest in international community, especially about the importance of environmental protection. Developing countries emphasize more on the development so that they could catch up and fill their gap compared to what the developed countries have, while the developed countries are more concern with providing supports for global environmental protection. Carlo also asserted that there are some concerns that the developing countries tend to produce and export the goods that could cause the environmental damage, such as the extinction of tropical rain forests or the combustion of minerals that causes greenhouse gases. Hence, the developed countries have demanded the developing countries to pay more attention to the environmental issue in their development projects. (Birnie, 1994)

According to Rajagukguk and Khairandy, this demand is manifested through the regulation of international trading agreement that stated at least two objectives, namely to terminate the tendency of the businessmen in the developing countries to pollute the environment and to make sure that the exported goods sent to the developed countries are free from harmful contamination. (Rajagukguk, 2001) In fact, there is a tendency that the developed countries use environmental issue to hamper

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the goods and services to come from some developing countries. On this issue, Trebilcock and Howse expressed the following view: the effort to protect citizens from the hazards of everyday life has become a virtual minefield for trade policy-maker, as such differences can often the manipulated or exploited to protect domestic industry from international competition. Even where there is no protectionist intense on the part of lawmakers, through a lack of coordination, mere differences in regulatory or standard- setting regimes can function to impede trade.

In this situation, environmental issue in part has turned into an economic tool to pressure some developing countries instead of solely aims to protect the environment. This gives the developed countries some leeway to dodge from a real commitment to protect the global environment on the pretext of protecting national economic interests. The departure of the United States from Global Climate Change agreement is one of the examples of how a developed country can decide to put the national economic interest above a global environmental policy. (Fish, 2002)

Kartadjoemena (1996) defined that Indonesia as a developing country depends on export as one of its main source of economic growth. Considering the geographical condition of Indonesia as an archipelago where two thirds of its area is covered by oceans, including coasts, high seas, and bays, the fishery industry is one of the national strong economic points. Hence, the problem posed by the failure of Indonesian fishery products to enter the global market is potentially harmful for the national economy. (Kartadjoemena, 1996)

According to the data released by the Indonesian Quarantine and Inspection Agency of the Ministry of Marine Affairs and Fisheries (*Badan Karantina Ikan, Pengendalian Mutu dan Keamanan Hasil Perikanan Kementrian Kelautan dan Perikanan*) in 2016, the potential of fish catching is nearing 6.4 million tons/ year. Indonesia has exported around 83,516 tons of dead fishery products throughout March 2017, while the total volume of exported products of live fishery from Indonesia is as much as 510,006,523 tons.

As informed by Dahuri, along with the improvement of the national production capacity and the intensity of international trade, Indonesian exporting efforts have been significantly improved. The current challenge, however, is non-tariff and taking a form of environmental issue. One of the examples is the case of when Singapore rejected fish products from Indonesia in 2006, claimed that the fishes have been contaminated. Similarly, they rejected shrimp paste from Indonesia with the basis of accusation that the shrimp-catching method is harmful and contributed in killing the sea turtles. The United States of America also rejected tuna fish from North Sulawesi in, claimed that the tuna fishery industry in that area has contributed in spreading the mercurial waste along the Buyat Bay. The data of the Ministry of Commerce (*Departemen Perdagangan*) per November 2016 shows that more than 50% of Indonesian fishery products is marketed to the USA, Japan, China, Singapore, Malaysia, and the European Union. Coincidentally, those countries are very strict in their environmental policy. This huge market share puts Indonesia under pressure to adapt into a higher level of environment-friendly criteria. This also indicates a huge expectation set by the global environmental policy for Indonesia to improve its exporting performance. This research intends to answer the following questions What should we do to overcome the practice of abusing the environmental protection in international trade? and How do we implement legal protection to Indonesian fishery products in relation to the environmental protection in international trade? What are the steps that need to be taken by the Indonesian government in addressing this issue?

Research Methods

This research mainly employs a non-doctrinal approach in socio-legal issue. According to Wignjosoebroto, non-doctrinal method was used by the science of law to study real social factors. Such approach did not just end at law as legal act. Rather, it views law as a concept that lives within a community. Samekto defines the socio-legal research as a research that combines sciences, skills, and experiences of two or

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more disciplines to answer the legal questions. Irianto and Shidarta stated that such interdisciplinary method may explain vast legal phenomena, such as power relation in the context of social, cultural, and economy that do not see law as social symptoms. (Irianto, 2009). By using analytical and qualitative descriptive method, this research implements the analysis to describe; which is to analyse and to present the facts systematically so that it is easier to understand and to conclude. (Santana, 2002). Here, we take a holistic approach in understanding the available data with deep understanding of the issue. (Wignjosoebroto, 2002)

Results and Discussion

1. Overcoming the Abuse of Environmental Protection in International Trade

According to Schoenbaum, liberalization of the trade should run in parallel with the efforts to protect the environment[17]. While, Roesad[18] (as cited in Pangestu et al.,) asserted that: (Schoenbaum, 1997)

> The efforts to combine the policy of environment and the policy of international trade caused some tensions amongst the nations, since there had been serious concerns towards green protectionism; protectionists' hidden efforts behind the policy of international trade as if they wanted to protect the environment, which actually it did not contribute any positive benefits towards the environment.

According to Esty, the primary issue between international trade and the environment lies on the different scope and obedience to the standard of the environmentally-accepted across the country. This difference of standards hinders the practice of exporting and importing and causes global inefficiency to achieve global prosperity. Harmonization is a the only solution to synchronize different standards amongst the countries and it is expected to be able to expand the market, develop specialization, strengthen the economic position and competitiveness. However, according to Hewison et al., it is not easy to produce the same standard. The difference of environment, social, and economy factors amongst the countries are the the main reason why different standards exist. Such application of standard influence the access of market and

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the competitiveness in a product.

The difference of product and process standardization was not entirely clear and some of them fall into the "grey area". According to Hufbauer et al., product standardization relates to the product characteristic, such as performance, quality, and safety, while process standardization determines how the goods should be produced. Charnovitz asserts that the difference of product and process standardization occur for a couple of reasons: firstly, the technique of scientific analysis becomes more advance, and consequently, some methods could be identified as part of product characteristics. Secondly, some new standards such as the rule regarding recycled materials in a product could not be firmly differentiated as product standardization or process standardization in imported/ exported goods.

Furthermore, the controversy surrounding the attempt to harmonize the environmental policies for international trade has existed for the last twenty years. As Stevens explained:

> Agreement Technical Barriers to Trade (the Standards Code) encourages standard harmonization internationally to avoid trade distortion. Similarly, the OECD Guiding Principle concerning the International Economic Aspects of Environmental Policies of 1972 recommends the needs of standard harmonization of environment to facilitate international trade.

The principle behind the OECD harmonization effort suggests that international harmonization of the environmental policies where there is no good reason for the occurring differences does not determine the similar standard of environment that could reduce the prosperity of human being around the world and distort international trade. Developing countries with lower standard of environment-friendly criteria could face the possibility of increased production cost without the harmonization. However, developing countries may request a technical assistance to ensure the preparation and application of technical regulations to avoid unnecessary obstacles to the

expansion of exports from developing country Members as stated in article 12.7 of Agreement of Trade Barriers to Trade.

2. The Implementation and Efforts of Legal Protection towards Indonesian Fishery Products in Facing Environmental Protection in International Trade.

Friedman explains that in order to know whether a law system run effectively, we need to consider the three aspects that form it: its structure, its substance, and the legal culture [28]. The legal system changes continuously though not as fast as the other parts. Allott defines that to consider whether an act is effective or not, it can be seen from its substance. It needs to see the clarity of the instruction or the message of the act, the possibility of conflict between the objective of the act-maker and the community, as well as whether the norms, the instruction, the institution, or its process of application are adequate[2].

In the beginning, the main basis of law to maintain the fishery resources is the Fishery Act 1985 No.9[30]. The act principally rules the area of fishery, its result management, the use of fishery result, and the development, monitoring, and controlling guidance. However, from the perspective that scrutinize the law's substance, the act contains the following weaknesses:

a. The fishery act is overly centralized, thus gives a huge authority to the central government to manage the fishery resources[31];
b. The discussion about the act did not involve fishermen and the community who are directly involved in the use of fishery resources. It causes the value contained within the act to become deviated from the actual aspiration represented by the act[32];
c. The fishery act tends to be designed based on the doctrine that the sea is the natural resource that belongs to everyone. Even though article 10 determines the licences required for each person or legal entity that would try to make business in fishery from the Indonesian sea, the fact is that only businessmen with strong capital who always come out on top[33];

d. The fishery act does not clearly define some key terms, such as fish-catcher boat and fish-catching. In addition, the act does not determine the instrument of fishery planning, as well as the provisions related to the law enforcement. This act includes only few rules to monitor, where it also does not determine the protected sea area;
e. The fishery act is considered as old-fashioned since it does not reflect the development of international law in the field of fishery, modern fishery management, new technology utilization, and the division of authority based on the decentralization policy

Riyatno explained that the ineffectiveness of the *Fishery Act 1985* is also caused by the weak law apparatus. The first problem is regarding the small number of boats being used to monitor the 5,8 million km2 wide of Indonesian sea. With only 100 boats, Indonesian Navy has to face the complexity of problems occurs in whole area; from from human trafficking, wood smuggling, environmental pollution, and illegal fishing. Even the Department of Maritime and Fishery only has 12 boats to maintain the whole sea resources. The second problem is related to the weak coordination amongst institutions with the rights to issue license for foreign fishing boats. They are :

a. Department of Transportation under the Directorate General of Sea Transportation who issues a registrated certificate based on the measuring certificate that stated the NDA gross, certificate of feasibility and boat manning, operational license for non-sailing company, and license for sailing;
b. Department of Law and Human Rights under the Directorate General of Immigration who issues passports for foreign cabin crew;
c. Department of Labor and Transmigration who issues permits for foreign employment;
d. Department of Finance under the Directorate General of Customs who

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issues the notification of imported goods for foreign fishing boats. The third problem is concerning the reinforcement of the fishery act that is highly influenced by the legal culture of the involved community. Personal economy consideration is the primary factor, especially with the lack of proper incentive for the officers and limited operational funds. Bribery is a common practice performed by the boat owners to have their licenses issued by the officers. Therefore, it can be concluded that the command-and-control approach in the *Fishery Act 1985* no. 9 does not work effectively.

The *Fishery Act 2004* no. 31 was issued to replace the *Fishery Act 1985* no.9 based on the reason that the old act has failed to accommodate all aspects of fish resource management and to anticipate the development of demand as well as technology in order to manage the fish resources. However, not even five years after being issued, there are some propositions to replace the *Fishery Act 2004* no. 31[36] since it is considered to be failed at anticipating the technology development and the legal needs to manage and maximize the potential of fish resources.

Gunningham stated that the Indonesian government has issued various rules to overcome the obstacle faced by Indonesian products in entering some export-destination countries. The approach that is taken by of Indonesian government is dominated by the rules of act which command and control, indicated by the existence of certain standard requirements, license issuance, and the sanction for those who break the act. The rules try to fulfil the requirements addressed by the developed countries to protect the environment in its relation with a certain commodity trade. In the field of fishery, there are at least four rules related to the environment and the quality standard issued by the government in responding the market's demand: (1) The Decree of The Ministry of Marine and Fishery No: Kep.21/Men/2004 about the System of Monitoring and Quality Control of Fishery Product for European Union

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Market; (2) The Decree of Ministry of Marine and Fishery No: Kep.01/Men/2002 about The System of Integrated Management of Fishery Product; (3) The Decree of Ministry of Marine and Fishery No: Kep.17/Men/2004 about the System of Sanitation of Indonesian Shells; (4) The Decree of Ministry of Marine and Fishery no. 29/Men/2003 about The Implementation of System of Fishing Boat Management.

According to Santoso, other than issuing acts, the Indonesian Government cooperates with some countries to improve the access to the fishery products' market. Some of these cooperations take form in Memorandum of Understanding (MoU), Mutual Recognition Arrangment (MRA), and participations in international organizations or conventions. Currently, Indonesian Government has just signed an MoU in fisheries with Australia and in the process to finalize another one with the United States of America. Another move to improve the export of fishery products is by making a MRA with the European Union and Canada. The MRA with the European Union is based on the Decree of European Commission No: 324/94/EC on May 19, 1994 about Laying down Special Condition for Importing Fish and Fishery Products Originating Indonesia. In addition to those efforts, Indonesia becomes a member of International organizations/conventions in the field of fishery such as Indian Tuna Commission (IOTC) and Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

The efforts to minimize the environmental damage through rules-making are still a work in progress. The economy experts focus on the market or the intensive-based approach, while the legal experts focus on the rule of command-and-control, while the business practicioners mainly focus on self-regulation. In implementing the efforts to protect the environment and advancing international trade on Indonesian fishery product, a change in the way of thinking must also be done, especially regarding two issues: 1. The

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change of policy from one of exploitative to one of a conservative, 2. The change from the command-and-control approach to making smart regulation. Gunningham et al., explains that the rules of environment needs to be redesigned so that it could work optimally. A better strategy is utilizing the power of each instrument and compensating their weaknesses by the use of additional instruments. Such combination is the essence of smart regulation. In understanding how to change the policy approach from explorative to conservative, first and foremost, we need to look at the *Fishery Act 1985* no. 9, article 3 (Ind.) which shows that the main objective of the act is to optimize the use of fishery resource. While in the new *Fishery Act 2004* no.31, article 3 and 6 (Ind.), one of the main objectives is to guarantee the sustainability of fishery resources.

According to Dahuri, to develop our fishery industry, other than the change of paradigm, we also need to pay attention to the demand of the community involved which push for more democratization. This means a change in the governmental function from provider to facilitator and governmental approach from centralization to decentralization of power. It also means a change of paradigm in the service bureaucracy approach from normative to flexible-responsive and a change in the approach to decision-making from top-down to bottom-up. The change of paradigm is also expected to influence the stakeholders of the coastal and sea area development.

In addition to support the change from a command-and-control approach into smart regulation, we need to prepare all of the parties involved. In the past, the Department of Marine and Fishery is the only responsible party in implementing the management of fishery resources. However, during the period of major reformation and transformation, the Indonesian bureaucracy has realized that not all public duties are only reserved to be performed by the government. They also need participation from the community in handling the

instruments, namely command and control, economic instrument, self-regulation, and proprietary rights.

Gunningham,et.al., explained that there are four stages involved in designing a smart regulation in the field of fishery. In the first stage, we need to combine different rule instruments, since not all fishery managements are the same, thus a combination of different strategies would be more suitable. In the second stage, we need to involve various parties with significant stakes and genuine interest in developing the fishery industry, hence it is important to understand the hierarchy in fishery management[43]. In the third stage, we need to give an adequate economic incentive to manage fishery sustainability, especially in managing the resources and the environment. Even though the *Fishery Act 2004* no. 31 has addressed the issue, it is considered as inadequate in the practical level[44]. In the fourth stage, we need to involve a third party as *quasi regulator*, regardless commercial or non-commercial actors. The third party, in this case a Bank, is expected to use the environmental requirement for the fishery industry during the selection process in determining which business actors deserved to get credit from the Bank[45].

Conclusion

The current implementation of legal protection to Indonesian fishery products does not work effectively. There are at least three issues behind this ineffectiveness: there is a problem in the rules' substance, there is an authority disorder within the governmental body, and the legal culture surrounding the industry that is highly influenced by personal economy consideration and lack of proper incentive. In brief, the existing legal implementation is in contrast with the International rules. To better the exporting performance related to fishery products, Indonesia implements several adjustments such as putting environmental and standard quality requirements into the existing legal acts to respond to the market's demand. Other than that, Indonesian Government has established international cooperation initiatives to improve the

market's access for fishery products through Memorandum of Understanding (MoU), Mutual Recognition Arrangement (MRA), and participations in international organizations and conventions.

In addressing the issue of negative effects from the environmental requirement for Indonesian fishery products in international trade, Indonesia has no choice but to follow the quality standard set by the developed countries. Therefore, the change of paradigm is needed from the command-and-control approach to smart regulation, in which one of its clauses introduces the importance of economic incentive. On one hand, smart regulation is a better solution compared to the command-and- control approach for many reasons. One of the reasons is related to the extensive geography of Indonesian sea that does not match the number of state apparatus who are in charge to command and control the area. Not to mention, most of these officers are hesitant in implementing the rule without proper incentives. On the other hand, the option of designing and implementing a smart regulation might encounter certain challenges. Especially in preparing the third party to work properly as *quasi regulator* and to prepare the government to face a possible outcome, namely public participation in the form of public pressure to protect the environment. Public pressure is enabled by the advancement of information technologies and the raising public awareness of the global warming threats, hence the public may seek to actively participate in supervising the effort to protect the environment. It is worth to note that smart regulation does not reduce the role of government in enforcing public policies. It also does not cancel out sanction for the violators, but rather it adds a factor that encourage a regulation restructuring through the use of economic incentive.

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