

THE EXCEPTION OF NATIONAL TREATMENT PRINCIPLE OF GATT IN INDONESIA

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Abstrack

The purpose of this study is to describe clearly and carefully about the exception of National Treatment principle of the GATT/WTO whether it is justifiable or not. It also aims to analyze the obstacles that hinder Indonesia in implementing international agreements, in particular the National Treatment principle of GATT/WTO completely, and to find out the consequences if Indonesia continues to apply the exceptions of the National Treatment principle of GATT/WTO. Based on the result of this research showed that the exceptions of the National Treatment principle that was imposed by Indonesia was violating the rule of GATT/WTO. Furthermore, the uncertain regulation and the confusion are the obstacles that hinder Indonesia in implementing the National Treatment principle of GATT/WTO completely, thus Indonesia should make a clearly decision whether it is a Monism or a Dualism country to determine which law should be more supreme, International Law or National Law?. The consequences impose on a state when violating a GATT/WTO agreement is very influential and harms the state itself, because it would be excommunicated from the international trade. **Keyword: International Trade, International Law, National Treatment, GATT/WTO.**

Abstrak

Tujuan dari penelitian ini adalah untuk mendeskripsikan secara jelas dan hati-hati tentang pengecualian prinsip National Treatment GATT/WTO tersebut dapat dibenarkan atau tidak, untuk menganalisis hal yang menjadi penghambat Indonesia dalam menerapkan perjanjian internasional, khususnya prinsip National Treatment GATT/WTO secara menyeluruh, dan untuk mengetahui konsekuensinya jika Indonesia terus menerapkan pengecualian prinsip National Treatment GATT/WTO. Berdasarkan hasil penelitian ini menunjukkan bahwa pengecualian prinsip Perlakuan Nasional yang dilakukan oleh Indonesia telah melanggar peraturan GATT/WTO. Lebih jauh lagi, kebingungan dan ketidakpastian hukum merupakan penyebab yang menghambat Indonesia menerapkan prinsip National Treatment GATT/WTO, oleh karena itu Indonesia harus membuat keputusan yang

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jelas apakah akan menjadi negara Monisme atau Dualisme untuk menentukan hukum mana yang harus lebih tinggi, apakah itu Hukum Internasional atau Hukum Nasional. Konsekuensi yang diperoleh ketika sebuah negara yang melanggar perjanjian GATT/WTO akan sangat berpengaruh dan membahayakan negara itu sendiri, karena akan seperti dikucilkan dari perdagangan internasional **Kata kunci: Perdagangan Internasional, Hukum Internasional, National Treatment, GATT/WTO.**

A. Background

Several factors have played an important role in the recent expansion of trade, the growing integration of economies, and the increasing contribution of trade to development. Globalization in the international world, trade and free markets, essentially emerging discussed today, especially in the World Trade Organization (WTO).¹ As a result of economic globalization makes it clearly stand out that the complexity and the intense level of mutual need between nations, therefore it needs more individual's involvement in international relations. This will lead to the creation of a universal law for people.

One of the main products of trade negotiations in the Uruguay Round was the General Agreement on Tariffs and Trade (GATT) regarding tariffs and trade in goods, in addition to other agreements, namely the General Agreement on Trade in Service (GATS) trade in services, The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) that sets down minimum standards for many forms of intellectual property (IP) regulation as applied to nationals of other WTO Members, trade dispute settlement goods (dispute settlement Understanding) and the Agreement on Trade-Related Investment Measures (TRIMs) are rules that apply to the domestic regulations a country applies to foreign investors, often as part of an industrial policy.

In principle, the General Agreement on Tariffs and Trade (GATT) is considered as one of the major accomplishments of multilateral trade diplomacy because it was successful in bringing the trade so expansive and complex into an international treaty. This Agreement shall be regarded as a pro-development deal and the most flexible of the agreements reached in the Uruguay Round, especially from the interests of developing countries and the Least-Developed Countries (LDCs).

¹ The World Trade Organization (WTO) is an intergovernmental organization which regulates international trade. The WTO officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. In addition, Indonesia in the same year signed and ratified the Agreement Establishing the World Trade Organization through *Undang-undang No. 7 Tahun 1994* regarding *Pengesahan Agreement Establishing the World Trade Organization*, dated 2 November 1994, Lembaran Negara (*Staatblat*) Republik Indonesia Tahun 1994 Nomor 57. Tambahan Lembaran Negara (*Bilaaat*) Republik Indonesia Nomor 3564 Tahun 1994.

The General Agreement on Tariffs and Trade (GATT) is a multilateral trade agreements were agreed in 1988 in which the ultimate goal was to create an international trade that is free, helps create economic growth and development. In the development, GATT has five (5) basic principles, namely:²

1. Most-favoured-nation (MFN): treating other people equally

Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

This principle is known as most- favoured- nation (MFN) treatment. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the Article 2 of General Agreement on Trade in Services (GATS) and the Article 4 of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

2. National treatment: Treating foreigners and locals equally

Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of “national treatment” (giving others the same treatment as one’s own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these.

3. Transparency

Provisions on notification requirements and the Trade Policy Review Mechanism are set out in the WTO Agreement and its Annexes, with the objective of guaranteeing the fullest transparency possible in the trade policies of its Members in goods, services and the protection of intellectual property rights.

4. Predictable and growing access to markets

Predictable and growing access to markets for goods and services is an essential principle of the WTO. This principle is fulfilled through various provisions so as to guarantee security, predictability and continued liberalization of trade.

5. Trade in goods

² China Trade in Services. *Basic Principles of WTO: A Teaching Course*. Available online from: <http://tradeinservices.mofcom.gov.cn/en/h/2007-10-24/7836.shtml>. [Accessed December 21, 2016].

In the case of goods, a basic GATT postulate is that tariffs should normally be the only instrument used to protect domestic industry. Furthermore, tariffs should be predictable and stable.

In 1994, the Indonesian government has ratified the Final Act Embodying The Result of Uruguay Round of Multilateral Trade Organization by Indonesian Act No. 7 Year 1994 regarding Ratification of Agreement Establishing The World Trade Organization (*Undang-undang Nomor 7 Tahun 1994*). By ratifying these legal instruments, Indonesia was bound by the whole of the attachment agreement of the World Trade Organization (WTO). Recently, Indonesia as one of the Contracting Parties of the World Trade Organization (WTO) was violate the principles of GATT/WTO, in particular the principle of National Treatment. And if Indonesia has done the process for the ratification of an international treaty, then Indonesia must consequently obey to the clauses of the agreement and implements it in the Indonesia's legislation.

In 1996, the Indonesian government implemented policies that were stated in Presidential Instruction No. 2 Year 1996 (*Instruksi Presiden Nomor 2 Tahun 1996*) regarding National Car Programme (*Program Mobil Nasional*), later followed by Presidential Decision No. 42 Year 1996 (*Keputusan Presiden Nomor 42 Tahun 1996*). Implementation of this policy is an exceptional case of the principle of National Treatment committed by Indonesia's most international public spotlight. Which caused Indonesia was sued by three (3) members of the World Trade Organization (WTO), namely Japan, the United States of America and the European Union because they assume that Indonesia has violated the provisions on the principle of National Treatment stated in Article III of the General Agreement on Tariffs and Trade (GATT).

B. Research Questions

The researcher has identified some core problems and obstacles based on the background of the research above. The research questions are as follows:

1. Did the exception of international agreements, in particular the National Treatment Principle of The General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO), which has been ratified was justifiable?
2. What obstacles that hinder the Indonesian government in implementing international agreements, in particular the National Treatment principle of The General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO) completely?
3. What are the consequences if Indonesia continues to apply the exception of National Treatment principle of the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO)?

C. Research Methodology

The type of research in this paper is normative legal research. According to Peter Mahmud Marzuki, object in the research of law is an intrinsic legal condition, in example law as a legal system of values and social norms. The result to be achieved in the research of law is to provide prescriptions about what should. Normative legal research is a research done by reviewing the laws and regulations that apply to a specific legal issue. Normative legal research is the objects of the law's research are legislations and other documents library materials. Therefore, the normative research is often referred to as the doctrinal research.³

D. Research Findings and Discussion

1. The Exception of International Agreements, in Particular the National Treatment Principle of the General Agreement on Tariffs and Trade (GATT) / the World Trade Organization (WTO)

The National Treatment Principle along with the Most-Favored-Nations (MFN) Principle constitutes the two pillars of the non-discrimination principle that is widely seen as the foundation of the GATT/WTO multilateral trading regime. National Treatment is an integral part of many World Trade Organization agreements. It is found in all three of the main WTO agreements viz. GATT, GATS and TRIPS. It is a concept of international law that declares if a state provides certain rights and privileges to its own citizens; it also should provide equivalent rights and privileges to foreigners who are currently in the country. This concept of equality can be found in bilateral tax treaties and also in most World Trade Organization agreements.⁴ Under National Treatment, if a state grants a particular right, benefit or privilege to its citizens, it must also grant those advantages to the citizens of other states.

National treatment means imported and locally-produced goods should be treated equally. This principle of "national treatment" (giving others the same treatment as one's own nationals) is found in Article 3 of GATT.⁵ The principle of National Treatment as embodied in Article III of General Agreement on Tariffs and Trade (GATT) prohibits discrimination between domestic and foreign goods in the application of internal taxation and government regulations after the foreign goods satisfy customs measures at the border. The objective of national treatment is to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties.

³ Soerjono and H. Abdurahman. (2003). *Metode Penelitian Hukum*. Jakarta: Rineka Cipta, p. 56.

⁴ Investopedia. (2012). *National Treatment*. Available online from: <http://www.investopedia.com/terms/n/nationaltreatment.asp>. [Accessed July 6, 2017].

⁵ WTO. (2001). *Legal Context*. Available online from: https://www.wto.org/english/docs_e/legal_e/legal_e.htm#GATT94. [Accessed July 6, 2017].

National treatment only applies once a product, service or item of intellectual property has entered into the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax. Under the National Treatment Rule, Members must not accord discriminatory appropriate treatment between imports and like domestic products.

Although national treatment is a basic principle under the GATT, the GATT provides for certain exceptions as follows:

1) Government Procurement

GATT Article III: 8(a) permits governments to purchase domestic products preferentially, making government procurement one of the exceptions to the national treatment rule.

2) Domestic Subsidies

GATT Article III:8 (b) allows for the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule, under the condition that it is not in violation of other provisions in Article III and the Agreement on Subsidies and Countervailing Measures.

3) GATT Article XXIV

Members of the WTO are allowed to establish regional, bilateral and custom union trade agreements, but the commitments of each WTO member incorporated in such trade cooperation could not be changed.

4) GATT Article XVIII: C

Members in the early stages of development can raise their standard of living by promoting the establishment of infant industries, but this may require government support and the goal may not be realistically attainable with measures that conform to the GATT.

5) GATT Article XIX

GATT Article XIX and article regarding Safeguards allowed a state to use quotas on an imported product which has a substantial increase which is harmful to the domestic industry.

6) Exceptions to Economic Development

The purpose of this exception is to assist developing countries. Almost all agreements in the WTO regulate it specifically in Special and Differential Treatment for developing country members to facilitate their entry into the world trade system and to encourage their economic development.

7) Other Exceptions to National Treatment

General Exceptions would also apply on the principle of national treatment. The provisions of GATT Article XX on general exceptions, Article XXI on security exceptions and GATT Article IX on waivers also apply to the national treatment rule.⁶

In operation national treatment serves to limit the exercise of sovereignty. It provides the basis on which trade liberalization proceeds or international markets are opened up. It allowed a margin for social and cultural differences between member countries. The foregoing analysis has shown that while national treatment remains a key principle in ensuring that municipal laws do not discriminate against the nationals of other Member States. In this regard, the role of the national treatment principle reflects the erosion and re-conceptualization of the traditional idea of national sovereignty.

Thus, it basically stated that National Treatment principle prevent the discrimination in the international market among the members country. There are some exceptions to the principle of national treatment as like government procurement, production subsidies and general exceptions. To understand the national treatment principle we need to understand the concept of like products mentioned under the provisions of GATT 1994.

2. The Obstacles that Hinder Indonesia in Implementing International Agreements, in Particular the National Treatment Principle of the General Agreement on Tariffs and Trade (GATT) / the World Trade Organization (WTO) Completely

Based on the Indonesian National Car Program,⁷ the complaining parties in their presentations to the Panel focused: first, on the alleged violations of the national treatment provisions of GATT Article III; second, on the alleged WTO TRIMs Agreement violations; third, on the alleged violation of MFN provisions of paragraph 1 of GATT Article I, and finally, on the alleged violations of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Japan, the EU and the United States as the complainants, all claimed that the domestic content requirements of the February and June 1996 National Car programs violated GATT Article I, GATT Article III, paragraphs 2 and 4, and Article 2 of the TRIMs agreement. The EU and United States also claimed that the National Car Program caused serious prejudice within the meaning of Article 5(c) of the SCM Agreement.

⁶ Peter Van Den Bossche dkk. (2010). *Pengantar Hukum WTO (Word Trade Organisation)*. Jakarta: Yayasan Obor Indonesia, p. 79.

⁷ WTO. (2001). *WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R*. Available online from: https://www.wto.org/english/tratop_e/dispu_e/54r00.pdf. [Accessed July 5 July 2017].

Indonesia claimed as a general defense to all of the Article III and TRIMs claims brought against it that the measures in question were subsidies. Therefore, the only WTO provisions applicable are those regarding subsidies in GATT 1994 Article XVI and the SCM Agreement. Indonesia argued that the provisions of GATT Articles III and I conflict with the SCM Agreement and that the conflict should be resolved by applying only the latter agreement. Further, Indonesia argued that if GATT Article III is not applicable, then the TRIMs Agreement is not applicable.

In particular, Indonesia showed that the local content measures were subsidies as defined in the SCM Agreement. Indonesia then invoked the international law concept of “*lex specialis*” to argue that the SCM agreement dealt specifically with subsidies while Article III of GATT was more general and therefore the SCM provision should prevail since the two agreements were in conflict.

From the Indonesian National Car Program above, it was proven that Indonesia has recognized the position of international law. As respondent, Indonesia used international law concept of “*lex specialis*” to argue that the SCM agreement dealt specifically with subsidies while Article III of GATT was more general. But, in fact, many commentators have criticized Indonesia for failing to comply with international agreements it has ratified, including some concerning human rights and international trade. Of course, state sovereignty demands that nations decide how international legal obligations and rights are received into their own domestic legal systems, and what status and rank in the hierarchy of municipal sources of law to assign to them.

Indonesian laws covering international agreements focus almost entirely on the processes of entering into and negotiating treaties. Indonesia’s Constitution, for example, is silent on the status of international law within the Indonesian legal system. Its only reference to international agreements is found in Article 11, which states:

“(1) The President, with the approval of the National Parliament, declares war and peace and creates agreements with other nations;

(2) When creating international agreements that give rise to consequences that are broad and fundamental to the life of the people, create financial burdens for the State and/or require amendments to legislation or the enactment of new legislation, the President must obtain the agreement of the National Parliament;

3) Further provisions on international agreements are to be regulated by statute.”

According to Monism, International Law is directly applicable in the National legal order. There is no need for any Municipal implementing legislation; International Law is immediately applicable within National legal systems unlike Dualism, without any incorporation or transformation.

Dualism Theory emphasizes the difference between National and International Law, and requires the translation of the latter into the former. Without this translation, International Law does not exist as Law. International Law has to be National Law as well, or it is no Law at all. If a state accepts a treaty but does not adapt its National Law in order to conform to the treaty or does not create a National Law explicitly incorporating the treaty, then it violates International Law. But one cannot claim that the treaty has become part of National Law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to Dualism Theory, National judges never apply International Law, only International Law that has been translated into National Law.⁸

The system appears to be primarily dualist in practice because many government officials will not act on international norms until they are transformed into Indonesian law. The result is that Indonesia does not in fact comply with many treaties until domestic laws are issued to bring those treaties into effect. As a Dualism country, Indonesia has to strengthen the enactment of the Supremacy of Law Theory. Specifically, which law should be more supreme, is it International Law or National Law. Furthermore, a society may consist of many categories of people in order to apply the same laws to them. Within each category people will all be equal before the particular law that applies to them.

In Indonesia, the applicable theory that related to Supremacy of Law Theory is *Hukum Pembangunan* Theory (Legal Development Theory). This theory was a deep thought by Mochtar Kusuma-Atmadja. In Mochtar's essay entitled "*Pengembangan Filsafat Hukum Indonesia*" (The Development of Philosophy of Law in Indonesia), he stated that in Indonesia, since 1970 the thought about the role of law in society not only regulates human life, but also as a tool of society renewal has been raised. Furthermore, Mochtar stated that the best society renewal is the reform of the regulation because it is the fastest and the most reasonable option.⁹

When he discussed about the effort to develop National Law, he mentioned the importance of the principles of National Law must be strengthened for the sake of continuity of National Law as a positive law. This statement aligned with the Supremacy of Law Theory. Moreover, based on the explanation above, Indonesia's government should strengthen the national law specifically for the sake of the legal development. If Indonesia can do the enactment of this theory, the uncertainty position of International Law within National Law will be solved.

⁸ Malcolm N. Shaw QC. (2008). *International Law*, Fifth edition. New York: Cambridge University Press, p. 121.

⁹ Tim Kontributor. (2012). *Mochtar Kusuma-Atmadja dan Teori Hukum Pembangunan: Eksistensi dan Implikasi*. Jakarta: Epistema Institute, p. 30.

3. The Consequences If Indonesia Continues to Apply Exceptions to the National Treatment Principle of the General Agreement on Tariffs and Trade (GATT) / the World Trade Organization (WTO)

The essence of the liberalism system is freedom in economic activity in production, consumption and trade by seizing the market without any interference from any parties. All economic activities happen due to market mechanisms of supply and demand. As a fight, free fight liberalism that carried by the era of globalization lately becomes harder than before. The competition between multinational corporations with home industry and medium-sized businesses is certainly not fair competition, competition between developed and developing countries is also forced to fight freely as well. Predictably, the weak one will surely lose and certainly die in the fight. Therefore, GATT / WTO became a kind of referee in global free fight liberalism.

The consequences obtained when a country violating a GATT / WTO agreement will be very influential and harm the state itself, because it would be like being excommunicated from the international trade. The national policies and regulations of the state must be aligned to the GATT / WTO agreement, so that the national interest to protect the national industry and for improving of the people's welfare as if become the second thing. Although the GATT / WTO still tolerates and excuses developing countries to apply the WTO agreement by giving longer time for preparing the necessary infrastructures, but in the end it still requires all WTO members to be in the spirit of free fight liberalism without any exception. Thus, globalization is a certainty for all countries in the world and just waiting for the right time to be true.

E. Conclusions and Recommendations

The exception of International Treaties, in particular the principle of National Treatment of The General Agreement on Tariffs and Trade (GATT) of The World Trade Organization (WTO) which has been ratified was justifiable with special requirements. But, the uncertain regulation and the confusion are the obstacles that hinder Indonesia in implementing International Agreements, in particular the Principle of National Treatment the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO) completely. Many commentators have criticized Indonesia for failing to comply with international agreements it has ratified, including some concerning human rights and international trade. Furthermore, the consequences obtained when a Contracting Parties violating GATT/ WTO will be very influential and harm the state itself, because it would be like being excommunicated from the international trade. Although the GATT / WTO still tolerates and excuses developing countries to apply the WTO agreement by giving longer time for preparing the necessary infrastructures, but in the end it still requires all WTO members to be in the spirit of free fight liberalism without any exception.

Hence, Indonesia has to make a clear statement about its position regarding international law, especially regarding international agreements.

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