Panel and Appellate Body Interpretation on the Most-Favoured Nation Treatment Obligation under the General Agreement on Trade in Services

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ABSTRAK

Artikel ini membahas beragam penafsiran terhadap ketentuan yang mengatur kewajiban perlakuan *Most-Favoured Nation* (MFN) sesuai *General Agreement on Trade in Services* (GATS) dalam kerangka *World Trade Organization* (WTO). Tulisan ini merupakan suatu penelitian hukum normatif dengan menggunakan pendekatan instrumen dan pendekatan kasus. Tulisan ini menyimpulkan bahwa *Panel* dan *Appellate Body* WTO memberikan sejumlah penafsiran terhadap ketentuan-ketentuan GATS berkaitan dengan kewajiban perlakuan MFN, yang kemudian menjadi yurisprudensi.

Kata kunci: Penafsiran, *Most-Favoured Nations, World Trade Organization.*

ABSTRACT

This article discusses various interpretations of the provisions that govern the Most-Favoured Nation Treatment (MFN) obligation in accordance with the General Agreement on Trade in Services (GATS) within the framework of the World Trade Organization (WTO). It is a normative legal research that uses instrumental (statutory) and case approaches. This writing concludes that the Panels and Appellate Bodies of the WTO have provided a number of interpretations of the provisions of GATS related to MFN treatment obligations, which later became jurisprudence.

Keywords: Interpretation, Most-Favoured Nation, World Trade Organization.

I. INTRODUCTION

1.1. Background

The General Agreement on Trade in Services (hereinafter GATS) is regulation concerning trade in services that is an integral part of World Trade Organization Agreements (hereinafter WTO Agreements). One of the key provisions that reflects the non-discrimination principle in the GATS is Article II that covers the issue of the Most-Favoured Nation Treatment (hereinafter MFN) obligation.

Article II:1 of the GATS implies a member will treat the services and services suppliers of different members in a non-discriminatory way.[1] In the light of outgrowth of services, lots of disputes of GATS arise to give more relevant interpretation where the GATS itself does not define it.[2] It may be occurred as each WTO members has practiced defining any kind of services to be recognized in its territory.

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[1] Das, Bhagirath Lal, 1998, *An Introduction to the WTO Agreements*, Zed Book, London, p. 111.

[2] See Canada-*Certain Measures Affecting the Automotive Industry* (hereinafter Canada-*Autos*), European Communities-*Regime for the Importation, Sale and Distribution of Bananas* (hereinafter EU-

Article 31 of the Vienna Convention on the Law of Treaties entitled 'General Rule of Interpretation', stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of the treaty and one of the provisions shall be taken into account with the context any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Under the WTO system, the application of the treaty shall be found in the dispute settlement process which is conducted by Disputed Settlement Body through Panel and Appellate Body.

1.2. Objective

The primary objective of this writing is to analyze the Panel and Appellate Body interpretations on the Most-Favoured Nation Treatment obligation stipulated in the General Agreement on Trade in Services. The subsequent explanation of research method will outline the ways to achieve this objective.

II. CONTENT

2.1. Research Method

Research method applied within this writing shall be a normative legal research combined with statutory and case approaches. It reads both primary authorities (e.g. instruments enforced by state)[3]and secondary authorities (publications that discuss the meaning of primary law).[4]Statutory approach is used to analyze the relevant provisions provided in some WTO instruments, especially GATS while case approach is used to analyze decisions and interpretations adopted by WTO Panel and Appellate Body. This writing will first read thoroughly the rules of the GATS. Secondly, it will analyze the rules in concern by using relevant publications and case laws.

2.2 Result and Analysis

The Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding /DSU) determines some provisions that enable DSU

Bananas III), China-*Certain Measures Affecting Electronic Payment Services* (hereinafter China-*Electronic Payment Services*), Argentina-*Measures Relating to Trade in Goods and Services* (hereinafter Argentina-*Tax Transparency*), etc.

[3] Cohen, Morris L., and Kent C. Olson, 1992, *Legal Research In A Nutshell*, West Publishing Co, USA, p. 3.

[4] Harris, Myra A., 1997, *Legal Research, FUN-damental Principles*, Prentice Hall Paralegal Series, p. 3.

settlement bodies to interpret any ambiguous or unclear rules stipulated in WTO Agreements related to specific case laws. As a driven member international organization, the WTO members recognize that the WTO dispute settlement system serves to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[5] Basically DSU determines the rights of Members to seek authoritative interpretation.[6] Article 17 (6) DSU also makes clear that the Appellate Body has limited authority to legally interpret any issues of law covered in the panel report that developed by the panel.

Article II:1 of the GATS states that "with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." There are three elements which need to determine whether or not a measure can be exercise the MFN obligation of Article II:1 of the GATS, namely whether the measure at issue is a measure covered by the GATS; whether the services or service suppliers concerned are 'like service' or 'like service suppliers', and whether less favourable treatment is accorded to the services or service suppliers of a member.[7]

Measures covered by this agreement refer to Article I:1 of the GATS that states "This agreement applies to measures by Members affecting trade in services." Following that article, Article I:3(a) stipulates that "Measures by Members means measures taken by (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities." Under Article XXVIII(a) of the GATS, measure is conceived in a very broad application, as stated as follow "Any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."

The concept that specifically addresses the issue of 'measure affecting the trade in services' has been clarified by the Appellate Body in Canada-*Autos*. The Appellate Body stated that two key issues must be examined to determine whether a measure is

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[5] Article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

[6] Article 3 (9) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

[7] Bossche, Peter van den, 2008, *The Law and Policy of the World Trade Organization Text, Cases and Materials*, 2nd edition, Cambridge University, New York, p. 336.

one ‘affecting trade in services’, namely whether there is trade in services in the sense of Article I:2 of the GATS and whether the measure in issue affects such trade in services within the meaning of Article I:1 of the GATS.[8] Article I:2 of the GATS states that trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”

The Appellate Body in EC-*Bananas III* clarified that “the use of the term ‘affecting’ reflects intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the term ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application.”[9]

GATS does not make a clear definition with regard to services. Article I:3(b) of the GATS only states that “services includes any service in any sector except services supplied in the exercise of governmental authority”. Subsequently, Article I:3 (c) states that "a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.” Nonetheless, in a growing number of WTO members, some of the services that are traditionally considered to be services supplied in the exercise of governmental authority have in recent years been subject to privatization and may now fall within the scope of the GATS.[10] Therefore, the scope of the MFN obligation covered by the GATS applies is broad.

The second element is whether the services or service suppliers concerned are ‘like services’ or ‘like service suppliers’. GATS does not define ‘like services’ and ‘like service suppliers’ with regard to MFN, however some settled cases provide the interpretation. The term of ‘like service suppliers’ has found by the panel in Canada-*Autos* that stated “to the extent that the service suppliers concerned supply the same

[8] Appellate Body Report, Canada-Autos, WT/DS139/AB/R, WT/DS142/AB/R adopted 19 June 2000, p. 51.

[9] Appellate Body Report, EC-*Bananas III*, WT/DS27/AB/R, adopted 25 September 1997, p. 94.

[10] Bossche, Peter van den, *op.cit*, p. 337.

services, they should be considered 'like' for the purpose of this case"[11]while the term of 'like services' has found by the panel in Argentina-*Tax Transparency* that stated "like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market)".[12] Following with aforementioned terms, the panel in China-*Electronic Payment Service* stated that "determinations of 'like services', and 'like service suppliers', should be made on a case-by-case basis."[13]

Appellate body in Argentina-*Tax Transparency* stated that "the phrase 'like' services and service suppliers as an integrated element for the likeness analysis."[14] Therefore depending on the circumstances of the particular case, an origin-based distinction in the measure at issue would have to be assessed not only with respect to the services at issue, but also with regard to the service suppliers involved. Such consideration of both the services and the service suppliers may render more complex the analysis whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation may play in shaping, for example: the characteristic of services and service suppliers; consumers' preferences;[15] and the classification and description of the service in the United Nations Central Product Classification system.[16]

The third element is whether less favourable treatment is accorded to the services or service suppliers of a WTO member. Members must accord, immediately and unconditionally to services and service suppliers of members 'treatment no less favourable' than the treatment they accord to like services' and service suppliers' of any other country. Panel in Argentina-*Tax Transparency* found that the term of 'treatment no less favourable' in Article XVII of GATS, on national treatment obligation could be used in the context of Article II of the GATS. The Appellate Body in EC-*Bananas III* also stipulated that Articles II and XVII of the GATS cover both *de jure* and *de facto* discrimination, therefore the concept of "treatment no less favourable" under Article

[11] Panel Report, Canada-*Autos*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, p. 405.
[12] Panel Report, Argentina-*Tax Transparency*, WT/DS453/R, adopted 9 Mei 2016, p. 69.
[13] Panel Report, China-*Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, p. 179.
[14] Appellate Body Report, Argentina-*Tax Transparency*, WT/DS453/AB/R, adopted 9 Mei 2016, p. 31.
[15] *Ibid*, p. 33-34.
[16] Bossche, Peter van den, *op.cit*, p. 340.

XVII of the GATS has same definition with Article II of GATS which also hinges on the "conditions of competition", even though this is not explicitly stated."[17]

III. CONCLUSION

The lacks of provisions under GATS concerning MFN obligation cannot cease the finding of the broad interpretation that are used to settle disputes. Lots of settled cases have been used to become jurisprudences. These jurisprudences would beneficially guide WTO members, panel or appellate body in dispute settlement process.

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[17] Panel Report, Argentina-*Tax Transparency*, WT/DS453/R, adopted 9 Mei 2016, p. 81.