10-31-2013

THE LESSON OF IMPLEMENTING NON-DISCRIMINATION PRINCIPLE ON INDONESIA-US CLOVE CIGARETTES CASE

Eva Johan

Faculty of Law, Sultan Ageng Tirtayasa University, Banten, evajohan@gmail.com

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Johan, Eva (2013) "THE LESSON OF IMPLEMENTING NON-DISCRIMINATION PRINCIPLE ON INDONESIA-US CLOVE CIGARETTES CASE," *Indonesian Journal of International Law*: Vol. 11 : No. 1 , Article 6.

DOI: 10.17304/ijil.vol11.1.269

Available at: <https://scholarhub.ui.ac.id/ijil/vol11/iss1/6>

This Article is brought to you for free and open access by UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

THE LESSON OF IMPLEMENTING NON-DISCRIMINATION PRINCIPLE ON INDONESIA-US CLOVE CIGARETTES CASE

Eva Johan¹

Abstract

The Indonesian government recently won for keeping its rights on Clove Cigarette Case in WTO. It became a winning diplomacy on Indonesia trade. Indonesia has an objection on United States cigarette policy, which prohibit product of clove cigarette (mostly imported by Indonesia) in United States, because such policy violate one of the most important principle on WTO, Non-Discrimination Principle, which are Most Favoured Nations (MFN) and National Treatment. Indonesia won this case in both, Panel and Appellate Body. This winning is not only important for Indonesia but for all country, mainly for Developing and Less Developing Country member of WTO. This paper will examine the significance and contents of Non Discrimination Principle from the perspective of Indonesia-United States Tobacco Case.

Pemerintah Indonesia baru-baru ini memenangkan perkara dalam kasus Clove Cigarette Case yang dibawa ke hadapan Badan Penyelesaian Sengketa World Trade Organisation (WTO Dispute Settlement Body). Hal ini menunjukkan posisi diplomasi Indonesia yang kuat di dalam bidang perdagangan. Indonesia mempertanyakan kebijakan Pemerintah Amerika Serikat terkait impor cengkeh di mana Indonesia menjadi pengimpor utamanya. Kebijakan yang dibuat oleh Pemerintah Amerika Serikat diduga melanggar salah satu prinsip non-diskriminasi WTO, yaitu Most Favourite Nation (MFN) dan National Treatment. Indonesia menang dalam tahap pemeriksaan di Panel Body dan Appellate Body. Kemenangan ini bukan saja penting bagi Indonesia melainkan juga bagi semua negara, khususnya negara berkembang dan negara kurang berkembang yang menjadi anggota WTO. Tulisan ini akan membahas signifikansi dan isi dari prinsip non-diskriminasi dari perspektif kasus tembakau antara Indonesia dan Amerika Serikat.

Keywords: international trade, WTO, GATT

I. INTRODUCTION

Open market access will increase international trade, and in return it becomes a wider economy activity which is able to develop economy of each member. GATT as an international organisation has some sides, depends on which point a view. Some GATT sides are described as a connecting system with some components. One of the GATT compo-

¹ Lecturer at Faculty of Law, Sultan Ageng Tirtayasa University, Banten.

nent is Dispute Settlement Forum, whose main activity is as a dispute settlement forum when there are violation concerning rights and duty of Member parties² which regarding to principle of trade in GATT system.

It is very rare, in the issue of international trade between developed country and developing country. Some measures on WTO provisions will give some advantages for developing country. There will always be different point of few from both developed and developing country, as members of WTO on how international trade principle grows in WTO system. Hikmahanto Juwana said that developing country believes that international trade principles, such as Most-favoured-nation (MFN) in article 1 paragraph 1 GATT, assume if every country has equality. But the facts show that among countries there is no equality. Developed countries try to 'create' their own international trade principle which will give advantages only for themselves.³ This case can be one exception to those statements above.

In the early 2012, World Trade Organization (WTO) again won the position of Indonesia in the case of 'cigarette' with the United States (U.S.). The decision was issued through statements of Appellate Body (AB) on 4 April 2012 which stated that the U.S. violated WTO provisions and policies of the U.S. were considered as a form of trade discrimination. Indonesia won both at the panel and appeal; this is a success for our trade diplomacy. This victory was important not only for Indonesia, but all the countries in this respect the decision of the WTO.

Cigarette case between Indonesia and the U.S. came from the enactment of the Family Smoking Prevention and Control Act in the U.S. Tobacco. The legislation aims to reduce youth smoking rates among U.S. communities by banning the production and trade of flavoured cigarettes, including cigarettes and tobacco-scented fruit. However, these provisions exempt menthol-flavoured cigarettes in the U.S. domestic production.

After a long consultation process that took place without any agreement, Indonesia finally proposed the establishment of the Panel to the

² Syahmin AK, *Hukum Dagang Internasional (dalam Kerangka Studi Analitis)*, PT. Rajagrafindo Persada, Jakarta, 2006, hlm. 43.

³ Hikmahanto Juwana, *Bunga Rampai Hukum Ekonomi dan Hukum Internasional*, Lentera Hati, Jakarta, 2002, hlm. 186.

WTO Dispute Settlement Body (DSB) on the basis of the U.S. violated WTO provisions on National Treatment obligation contained in Article 2.1 of the Technical Barrier to Trade (TBT) Agreement.

In the National Treatment principle, any WTO member country is obliged to provide equal treatment of similar products both domestically produced and imported from other WTO member countries.

The WTO panel found that U.S. policy is not in accordance with the provisions of the WTO because menthol cigarettes and smoking are similar products (like products) and both have the same appeal for young people. According to the WTO, the policy that distinguishes the treatment of two similar products is unfair (less favourable).

The U.S. government is not satisfied with the panel decision issued on 2 September 2011, an appeal to the WTO on 5 January 2012. The results of Appellate Body issued an appeal yesterday reiterated that the previous Panel's decision is correct and the U.S. government has issued policies that are inconsistent with WTO provisions. In addition, the AB found that the U.S. violated the provisions of Article 2 Paragraph 2 TBT Agreement in which the U.S. does not allow sufficient time (reasonable interval) between the dissemination of policy and policy-setting time. Furthermore, the AB recommended the DSB to request the U.S. government to make policy in accordance with the provisions of the TBT Agreement.⁴

Indonesia took the case to the WTO cigarettes not only to increase the export of tobacco products to the U.S., but also to secure market access for Indonesian clove cigarettes in the U.S. and to prevent U.S. government implemented rules emulated by other countries, including countries of destination. The main export of Indonesian is clove cigarettes. Indonesia strongly supports the principle of fair trade to contribute to maintain international commitments agreed in the WTO TBT Agreement in particular. All countries should respect, and a decision is expected other member states do not follow U.S. policy.

⁴ "Kemenangan di WTO Posisikan Indonesia [Confirmed Indonesian Position after the Win in the WTO]", available at: http://ditjenkpi.kemendag.go.id/website_kpi/index.php?module=news_detail&news_content_id=1018&detail=true, accessed on 25 November 2012, 22:31 WIB.

According to Black's Law Dictionary⁵, Principle is a fundamental truth or doctrine, as of law; a comprehensive rule of doctrine which furnishes a basis for others, a settled rule of actions procedure or legal determination. A truth or preposition so clear that it cannot be proved or contradicted unless by preposition which is still cleaner. That which constitutes the essence of a body or its constituent parts. That which pertains theoretical part of a science.

What does MFN treatment mean? Essentially, it is an obligation to treat activities of a particular foreign country or its citizens at least as favourably as it treats the activities of any other country. For example, if nation A has granted MFN treatment to B, and then A grants a low tariff to C on imports from C to A, nation A is obliged to accord the same low-tariff treatment also to B and its citizen. The result of a nation being a beneficiary of an MFN clause is that nation can comb all the treaties and all of the actual treatment of the granting nation, to see if some obligation or real treatment is more favourable than that granted to it, in which case beneficiary can argue that such better treatment is owed to it.⁶

Most-Favoured Nation (MFN) Principle stated that a trade policy shall be implemented based on non-discrimination. According to this principle, all members bound to giving an equal treatment to others in implementing export and import policy in relation with others cost.⁷ National Treatment Principle is a principle stated that product of a country which imported to a country must have an equal treatment as a domestic product. Both principles are basic principle comparing other principles in WTO.⁸

⁵ Hendry Campbell Black, Black's Law Dictionary, St. Paul Minn: West Publishing, 1983.

⁶ John H. Jackson, "Equality and Discrimination in International Economic Law (XI): The General Agreement on Tariffs and Trade", Yearbook of World Affairs 37, 1983, p. 225.

⁷ Huala Adolf, *Penyelesaian Sengketa Dagang dalam World Trade Organization (WTO)*, CV. Mandar Maju, Bandung, 2005, hlm. 10.

⁸ *Ibid*, hlm. 13.

II. CASE POSITION OF INDONESIA-US CLOVE CIGARETTES CASE⁹

The panel in *US—Clove Cigarettes* found that by enforcing the flavoured cigarette ban only three months after enactment, the United States had acted inconsistently with TBT Article 2.12, which requires members to allow a reasonable interval between publication and entry into force of technical regulations, except in urgent circumstances. In reaching this conclusion, the panel relied on a November 2001 WTO Ministerial Decision adopted by consensus at the Doha Ministerial Conference, which indicates in paragraph 5 subparagraph 2 that the words “reasonable interval” in TBT article 2 paragraph 12 normally means not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued. The Appellate Body agreed for different reasons that paragraph 5 subparagraphs 2 is relevant in interpreting TBT Article 2 subparagraph 12 and that the United States had failed to comply with Article 2 paragraph 12. The Appellate Body’s reasoning on this point is based on systemic importance, given the large number of WTO Ministerial decisions and declarations.

The Appellate Body first considered whether paragraph 5 subparagraphs 2 of the Doha Ministerial Decision could constitute a multilateral interpretation of TBT Article 2 paragraph 12, pursuant to Article IX paragraph 2 of the Marrakesh Agreement, which grants the WTO Ministerial Conference and the General Council the exclusive authority to adopt interpretations of the WTO agreement. The Appellate Body rejected this possibility, because paragraph 5 subparagraphs 2 had not been adopted on the basis of a specific recommendation by the Council overseeing the functioning of TBT Agreement, as required by Article IX paragraph 2. This suggests that WTO Members must observe procedural formalities under Article IX paragraph 2 if they intend to adopt a multilateral interpretation. Similar considerations may apply to waivers under Article IX paragraph 3, amendments under Article X, and accessions under Article XII of the Marrakesh Agreement. The Appellate Body Report leaves question opened whether a Ministerial deci-

⁹ United States - Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes WT/DS406/AB/R, 4 April 2012 (Report of the Appellate Body) [hereinafter *US—Clove Cigarettes*]; see also, *United States—Clove Cigarettes* WT/DS406/R, 2 September 2011 (Panel Report).

sion taken by consensus would be regarded as satisfying provision that requires decision-making by a specified majority.

The Appellate Body then concluded that paragraph 5 subparagraph 2 of the Doha Ministerial Decision amounts to a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions within the meaning of Article 31 paragraph 3 subparagraph a of the Vienna Convention on the Law of Treaties ("VCLT") and therefore is interpretative clarification to be taken into account in interpreting TBT Article 2 paragraph 12. The Appellate Body determined that although multilateral interpretations pursuant to Article IX paragraph 2 of the Marrakesh Agreement are most akin to such subsequent agreements, decisions other than those adopted under Article IX paragraph 2 may also constitute subsequent agreements.

III. NON-DISCRIMINATION PRINCIPLES ON GATT

There are two main principles of non-discrimination in WTO-law which every Member State is obliged to do: the most-favoured-nation (MFN) treatment and the national treatment. In simple terms, the MFN treatment obligation prohibits a country from discriminating *between* other countries; the national treatment obligation prohibits a country from discriminating *against* other countries. The key provisions of the GATT 1994 that deal with non-discrimination in trade in goods are Article I, on the MFN treatment obligation, and article III, on the national treatment obligation.¹⁰

1. Most-Favoured-Nation Treatment (MFN)

Despite some confusions derived from the phrase "most-favoured", which seems to imply especially *favourable* treatment, the concept is one of equal treatment, but to that *other* party which is most favoured. In the GATT the MFN obligation calls for each contracting party the most favourable treatment which it grants to any country with respect to imports and exports of products.¹¹

¹⁰ Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and materials*, Cambridge University Press, 2006, p.17.

¹¹ John H. Jackson and William Davey, *Legal Problems of International Economic Relations*, 3rd ed, St. Paul: West Publishers, 1995, chapter 7.

Cornerstone of the General agreement, Article I prescribes most-favoured-nation treatment in trade relations between the member countries: ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.¹²

So that, a country cannot give special treatment to other country or do discrimination to it. All country should be treated in the same base and enjoying advantages from trade policies. It means, every country is able to ask to be treated equally on their import and export product by other contracting parties.¹³

2. National Treatment

The second obligation of non-discrimination is the obligation to treat foreign goods equally to domestic goods, once the foreign goods have cleared customs and become part of the internal commerce.¹⁴

In accordance with GATT Article III, the products of a member country imported into another member country are treated, as far as internal taxation and regulations are concerned, on the same footing as like domestic products. This rule is very wide in scope. It applies to all kinds of taxes and other internal charges. It concerns that laws, regulations and requirements affect the sale, purchase, transportation, distributions or use of products on the domestic market. National treatment accorded imported products in this way provides defence against protectionism resulting from internal administrative and legislative measures. Customs duties and other border measures are outside the scope of these provisions.¹⁵

¹² Oliver Long, *Law and Its Limitations in the GATT Multilateral Trade System*, Graham & Tortman/Martinus Nijhoff Publishers, The Netherlands, 1987, p. 9.

¹³ Huala Adolf, *Hukum Perdagangan Internasional*, PT. Rajagrafindo Persada, 2005, hlm. 109.

¹⁴ see note 11.

¹⁵ see note 12.

IV. THE LESSON OF IMPLEMENTING NON-DISCRIMINATION PRINCIPLE

The obligation contained in Article I (1) of the GATT entails that any advantage granted by a GATT member with regard to a product coming from or going to *any other country* is to be accorded to the like product coming from or going to any (other) GATT contracting party. The clause is restricted to trade advantages accorded to a product originating in (or destined for) any other country. Thus the advantages covered are, first, those regarding products or goods and, second, those provided in the trade with *any* trading partner, including non-GATT members. The trade advantages so covered are to be granted to all GATT parties.¹⁶

As it is already mentioned above, the MFN-clause forms one part of the general non-discrimination obligation, the other major part of which is formed by the national treatment rule of Article III.

It is evident that the trading nations wish to preserve the advantages of the MFN clause on condition, of course, that its application can be given the flexibility they consider necessary for the defence of their trade interests. This has been well brought out by G.A. Maciel:

*"If the MFN principle were done away with entirely there is no doubt that the results for international trade would be perilous, to say at least. There would be increased tendency towards the greater compartmentalization of world trade flows, with serious repercussions on the world economy as a whole. This, in an increasingly interdependent world, argues in favour of reasserting and strengthening the GATT's basic principle of non-discrimination ... Through ... certain very specific exceptions should be added to those already existing in the GATT, to favour a more dynamic diversification of the trade of developing countries"*¹⁷

The principal purpose of the MFN treatment obligation of Article I of the GATT 1994 is to ensure equality of opportunity to import from, or to export to, all WTO members. There are three questions which

¹⁶ JHJ. Bourgeois, et al., *Protectionism and the European Community*, Kluwer Law and Taxation Publishers, Deventer, The Netherlands, 1987, p. 21.

¹⁷ G.A. Maciel, "Brazil's Proposals for the Reform of the GATT System", *The World Economy*, vol 1, No. 2, 1978, p. 169.

must be answered to determine whether or not there is a violation of the MFN treatment obligation of Article I paragraph 1, namely whether:¹⁸

- The measure at issue confers a trade 'advantage' of the kind covered by Article I:1;
- The products concerned are 'like' products; and
- The advantage at issue is granted 'immediately and unconditionally' to all like products concerned.

The principle purpose of the national treatment obligations of Article III of the GATT 1994 is to *avoid protectionism* in the application of internal tax and regulatory measures. As is explicitly stated in Article III Paragraph 1, the purpose of Article III is to ensure that internal measure is not be applied to imported and domestic products so as to afford protection to domestic product. To this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products. The test of consistency of internal taxation with national treatment obligation of article III Paragraph 2, first sentence, of the GATT 1994 requires the examination of whether:¹⁹

- The measure at issue is an 'internal tax';
- The imported and domestic products are 'like products; and
- The imported products are not taxed in excess of the domestic products.

The national treatment obligation of Article III not only concerns internal taxation, but also internal regulation. The national treatment obligation for internal regulation is set out in Article III paragraph 4. To determine whether a measure is consistent with the national treatment obligations of Article III paragraph 4, there is three-tier test which requires the examination of whether:²⁰

- The measure at issue is a law, regulation or requirement covered by Article II paragraph 4;
- The imported and domestic products are 'like products'; and
- The imported products are accorded less favourable treatment.

It is not always easy to determine the way MFN obligation applies. In

¹⁸ see note 10.

¹⁹ *ibid*, hlm. 18

²⁰ *ibid*.

the GATT, the language of obligation speaks of MFN treatment for “like products”. So the question often arises as to what “like products” are.

A 1952 GATT dispute case reveals an important consideration in the process of applying MFN clause. Norway and Denmark complained that a Belgian law levied charges on imported goods which differed according to the nature of family allowances in the exporting country. Although the language of the report in this case was not very clear, the report did conclude that Article I of GATT had not been fulfilled. The case can be interpreted to support the proposition that while treatment can differ if characteristics of goods themselves are different, differences in treatment of imports cannot be based on differences in characteristics of the exporting country which do not result in differences in the goods themselves.²¹

In *US—Clove Cigarettes*, Indonesia challenged U.S. measure that prohibits cigarettes and component parts containing a flavour, herb or spice that gives a characterizing flavour to the product, except for menthol and tobacco. While menthol and regular cigarettes are thus exempted from the ban, clove cigarettes are caught by it. This *Insight* examines the three key substantive issues addressed in the appeal of *US—Clove Cigarettes*: the meaning of (i) “like products” and (ii) “treatment no less favourable” under Article 2 paragraph 1 of the TBT Agreement, and (iii) the significance of a Ministerial Decision of the World Trade Organization (“WTO”) in interpreting Article 2 paragraph 12 of the TBT Agreement.²²

TBT Article 2.1 requires WTO Members to ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. The panel in *US—Clove Cigarettes* held that the challenged U.S. measure is contrary to Article 2 paragraph 1 of the TBT Agreement because it accords more favourable treatment to domestic menthol ciga-

²¹ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 6th printing, The MIT Press, Massachusetts Institute of Technology, Cambridge, Massachusetts, 1994, p. 138.

²² Tania Voon, “The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban”, *American Society of International Law Insight*, Volume 16, Issue 15, 2012.

rettes than to like imported clove cigarettes. The United States unsuccessfully appealed this ruling. The panel also found the U.S. measure consistent with Article 2 paragraph 2 of the TBT Agreement, which prohibits technical regulations that are "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create

V. CONCLUSION

Two main non-discrimination principles, MFN principle and national treatment principle, do not always benefit developed country, developing country even less developing country are able to use it to defend and to protect their export goods to other country.

The ruling against the discriminatory elements of the U.S. measure may in practice be judged depending on how the United States implements the decision and the subsequent impact on public health. The United States could ban menthol cigarettes, but only after a lengthy regulatory process involving risk assessments and cost-benefit analyses; such a ban would eliminate trade discrimination without assisting Indonesian exports of clove cigarettes. The United States could repeal the current ban on cigarettes with flavour other than menthol or tobacco, but this would require legislative action.

REFERENCES

Books

- Adolf, H. *Hukum Perdagangan Internasional*. PT. Rajagrafindo Persada. 2005.
- Adolf, H. *Penyelesaian Sengketa Dagang dalam World Trade Organization (WTO)*. CV. Mandar Maju. 2005
- Black, H.C. *Black's Law Dictionary*. St. Paul Minn: West Publishing. 1983.
- Bourgeois, J.H.J., et al. *Protectionism and the European Community*. Kluwer Law and Taxation Publishers. 1987.
- Jackson, John H. "Equality and Discrimination in International Economic Law (XI): The General Agreement on Tariffs and Trade", *Yearbook of World Affairs* 37. 1983.
- Jackson, John H., *The World Trading System: Law and Policy of International Economic Relations*, 6th printing. MIT Press. 1994.

- Jackson, John H., and William Davey. *Legal Problems of International Economic Relation*, 3rd ed. St. Paul: West Publishers. 1995.
- Juwana, H. *Bunga Rampai Hukum Ekonomi dan Hukum Internasional*. Lentera Hati. 2002.
- K, Syahmin A. *Hukum Dagang Internasional (dalam Kerangka Studi Analitis)*. PT. Rajagrafindo Persada. 2006.
- Long, O. *Law and Its Limitations in the GATT Multilateral Trade System*. Graham & Tortman/Martinus Nijhoff Publishers. 1987.
- Maciel, G.A. "Brazil's Proposals for the Reform of the GATT System", *The World Economy*, vol 1, No. 2. London. 1978.
- Van den Bossche, P. *The Law and Policy of the World Trade Organization: Text, Cases and Material*. Cambridge University Press. 2006.
- Voon, T. "The WTO Appellate Body Outlaws Discrimination in U.S. Flavoured Cigarette Ban". *American Society of International Law Insight*. Volume 16, Issue 15. 2012.

Internet Materials

- Kemenangan di WTO Posisikan Indonesia [Confirmed Indonesian Position after the Win in the WTO]", available at: http://ditjenkpi.kemendag.go.id/website_kpi/index.php?module=news_detail&news_content_id=1018&detail=true, accessed on 25 November 2012, 22:31 WIB.

International Materials

- Panel Report, United States - Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R, 2 September 2011.
- Report of the Appellate Body, United States - Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R, 4 April 2012.