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THE DISCRIMINATION UNDER THE PRINCIPLE OF NATIONAL TREATMENT UNDER THE GATT AND THE GATS: *DE FACTO* OR *DE JURE* DISCRIMINATION

Mahfud*

Abstract

Both the GATT and the GATS provisions have the same points of view on defining discrimination as an unequal treatment given to foreign providers compared to treatment given to domestic providers. Discrimination under the national treatment of the GATT and the GATS is considered as a practice that prevents foreign providers from enjoying all comfortable facilities that are given to domestic providers. Non-discriminatory application in both provisions might also be interpreted in the market access issue. Moreover, it is not considered as discrimination of national treatment of both provisions if it concerns on laws, regulations, or requirement regulating the procurement by government agencies. Both provisions use likeness and treatment no less favourable test in order to determine whether or not there is a discrimination against foreign products or services or services suppliers. There are several distinctions of discriminations between the principle of national treatment under the GATT and the GATS. The discrimination under the principle of national treatment of the GATT has general application to all trade in goods. On the other hand, the discrimination under national treatment obligation for trade in services under the GATS only applies if commitments have been scheduled. It can be concluded that the discrimination of national treatment under the GATT and the GATS seems to be de facto discrimination because both provisions do not provide the sufficient measures in order to find a violation. It results from; the GATS national treatment is derived from traditional concepts of the GATT that the application of the national treatment of the GATT is adduced by the GATS.

Keywords: *discrimination, national treatment, GATT and GATS*

I. INTRODUCTION

As one of the main principles of non-discrimination in World Trade Law (WTO), the principle of national treatment prohibits a member from discriminating against other members¹. The key provision of the General Agreement on Tariffs and Trade (GATT) 1994 describing dis-

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¹ P. Van den Bossche, *The Law and Policy of the World Trade Organization* (2nd edn Cambridge University Press, New York 2008) p.396

crimination of the principle of national treatment obligation is Article III, and the key provision of the General Agreement on Trade in Services (GATS) dealing with discrimination in trade in services against other countries or the national treatment obligation is Article XVII².

One of the main impediments to trade in goods and trade in services is derogation from national treatment³. According to Bossche, the relevant part concerning the GATT provisions on national treatment are regulated in Article III⁴ entitled ‘National Treatment on Internal Taxation and Regulation’, which are stated in paragraphs 1, 2, and 4⁵, and the principle of national treatment under the GATS is worded in Article XVII, paragraphs 1, 2, and 3⁶, which entitled ‘National Treatment’.

² P.Van den Bossche, *Op.cit.* p.396

³ T. Warren and C. Findlay, ‘Measuring Impediments to Trade in services’ in P. Sauve and R.M.Stern (eds), *GATS 2000: New Direction in Services Trade Liberalization*, (Brooking Institution Press, Washington D.C. 2000) p.59

⁴ Article III of the GATT 1994 (1) The [Members] recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so to afford protection to domestic production. (2) The products of the territory of any [Member] imported into the territory of any other [Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph. (3)... (4) The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

⁵ P.Van den Bossche, *Op.cit.* p.344

⁶ Article XVII of the GATS (1) In the sectors inscribed in its Schedule, and subject to any conditions and any qualifications set out therein, each member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers (2) A member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers. (3) Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like

Warren and Findlay define national treatment in Article XVII: 1 of the GATS “as treatment no less favourable than that accorded to like domestic services and service providers, subject to the limitations and conditions set out in the country’s schedule of commitments”⁷. According to the definition, it is clear that discrimination under national treatment of the GATS is an unequal treatment between domestic and Foreign Service suppliers, hence, an official decision to limit foreign investment is considered as a breach of national treatment⁸. Pursuant to Article III, paragraph 1 of the GATT, national treatment is considered as the treatment provided to foreign goods that must be as good as that provided to national or domestic goods⁹. Bossche clearly states that “the principal purpose of the principle of national treatment of Article III of the GATT 1994 is to avoid protectionism in the application of internal tax and regulatory measures”¹⁰. Similarly, the Appellate Body explains that the broad and principal purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures¹¹. The purpose is resulted from Article III: 1, which aims at ensuring that there, should not impose internal measures on imported and domestic products in order to afford protection to domestic production¹². In other words, it is compulsory for Members of the WTO to provide equality of competitive conditions for imported goods in relation to domestic goods.¹³

It can be seen that there is a distinction between Article III of GATT and Article XVII of GATS in terms of national treatment. Li states that Article XVII of GATS does not differentiate between border and internal restriction; it covers all measures, which might be differentiating foreign services or service suppliers.¹⁴ The wording of “all measures affecting the supply of services” shows *prima facie* a wide coverage

services or service suppliers of any other Member.

⁷ T. Warren and C. Findlay, *Op.cit* p.59

⁸ *Ibid.* p. 60

⁹ S. Lester and others (eds), *World Trade Law: Text, Materials and Commentary* (Hart Publishing, Portland 2008) p.280

¹⁰ P.Van den Bossche, *Op.cit.* p.396

¹¹ S. Lester and others, (eds) *Op.cit.* p.280

¹² P.Van den Bossche, *Op.cit.* p.396

¹³ *Ibid.* p.396

¹⁴ Guojun Li, National ‘National Treatment Under the General Agreement on Trade in Services’ (2010) 6 Cambridge Student L. Rev. 74, p. 77

of national treatment application that could embrace the six types of market access restrictions if they are imposed discriminatorily.¹⁵

This paper aims to compare and contrast the discrimination under the principle of National Treatment under the GATT with the GATS in order to clarify if there is any difference, and whether the discrimination is *de facto* or *de jure*. Section two deals with the comparison and contrast between the discrimination of national treatment obligation under the GATT and the GATS. Section three concludes.

II. THE COMPARISON AND CONTRAST BETWEEN THE DISCRIMINATION OF NATIONAL TREATMENT OBLIGATION UNDER THE GATT AND THE GATS.

Wang states that Article III: 1 of GATT is a general national treatment regulation of trade in goods aiming at preventing any contracting party from protecting domestic products by imposing different internal taxes, other internal charges, laws, regulations and other related requirements.¹⁶ In Japan-Alcoholic Beverages, the Appellate Body decided that Article III:1 expresses a general principle that informs the remains of Article III.¹⁷ Pursuant to Article XVII paragraphs 2 and 3, it can be interpreted 'treatment no less favourable' and there is the fact that Article XVII: 1 is a reflection of Article III of the GATT.¹⁸

Both provisions of the GATT and the GATS concerning discrimination of non-domestic products and services or services suppliers under both national treatment have the same purpose of preventing a Member of the WTO from conducting such practice. Therefore, there is no less favourable treatment for imported products or services or service suppliers. Nevertheless, it seems that the GATS is still possible not to remove barriers of trade in services by either discriminating regulatory requirement imposed only on foreign services or by restrictive regula-

¹⁵ *Ibid.* p.77

¹⁶ Wei Wang, 'National Treatment in Financial Services in the Context of the GATS/WTO' (2003-2004) *Stud. Int'l Fin. Econ. & Tech. L.* 149. p.151

¹⁷ *Ibid.* p. 151

¹⁸ *Ibid.* p.161

tions applied to both domestic and foreign services¹⁹. Similarly, national treatment under the GATT also provides an opportunity for a Member to prevent any other Member from taking advantage of its national treatment obligation by setting out the regulation restricting the domestic products from enjoying low internal taxes. Consequently, suppliers of imported products have no reason for complaining such regulation in order to get lower internal taxes. Based on the resemblance of the purpose of the national treatment obligation between the GATT and the GATS, it seems that the concepts and terminology in the GATS are adopted from the traditional definition of the GATT, hence, this application is confusing because the concepts and terminology are used in ways that are not similar to their application in GATT, or it does not make the intent of the commitments in the services context much more clearer²⁰.

Thus, it can be inferred that the definition of national treatment under the GATT and the GATS seems to be similar regarding the non-discriminatory application of domestic regulations to foreign products or services or service suppliers. According to Feketekuty, such application has caused that quantitative limits placed on foreign services or service suppliers might fall under both the market access and national treatment provisions²¹. Such overlapping regulation could confuse a Member of the WTO in scheduling commitments due to the fact that national commitments concerning the discriminatory application of quantitative regulatory controls could fall under either the schedules as market access or as national treatment commitments²². Lester believes that “Article XVII has been the subject of some limited interpretation in the case law”²³. By exemplifying there are a lot of views in terms of interpreting the meaning of non discrimination in Article III of the GATT, Lester states that it would result in the interpretation and application of Article XVII of the GATS might not always be clear and consistent²⁴. To avoid such problem, Article XX: 2 on the scheduling commitments

¹⁹ G. Feketekuty, ‘Assessing and Improving the Architecture of GATS’ in P. Sauve and R.M.Stern (eds), *GATS 2000: New Direction in Services Trade Liberalization*, (Brooking Institution Press, Washington D.C. 2000) p.95

²⁰ *Ibid.* p.95

²¹ *Ibid.* p.95

²² *Ibid.* p.95

²³ S. Lester and others (eds) *Op.cit.* p.629

²⁴ *Ibid.* p.629

provide that “measure inconsistent with both Articles XVI [on market access] and Article XVII [on national treatment] shall be inscribed in the column relating to Article XVI”²⁵. Albeit it could overcome potential confusion relating to the scheduling of discriminatory quantitative restrictions, it caused a discrepancy between the text of the provisions on market access and national treatment on the one side and the market access content and national treatment columns in the national schedules on the other²⁶. The distinction between the articles and schedules has resulted in wrong assumption of some countries that national commitments would only have effects when a commitment on market access has been made²⁷. The mixture of commitments on discriminatory and non-discriminatory barriers has the further impact of combining two ideas, but different purposes of trade liberalization and domestic regulating reform²⁸. To remove discrimination regulation, whether in quantitative or qualitative form, is all connected to trade liberalization, while removing non-discriminatory constraint on services is frequently considered as a practice of domestic regulatory reform²⁹. The application of non-discriminatory quantitative constrains more often than not reflects a country’s approach to the regulation of service sector activity³⁰. Such overlapping commitments increases a barrier for countries those are willing to tackle the barriers of trade liberalization or the reform of domestic law in a service sector, but both do not happen at the same time³¹. It is clear that the influence of traditional definition of market access and national treatment of the GATT on GATS structure and terminology has caused a significant confusion among peoples involved in trading activities who do not really understand the details of the agreement³². As a result, they consider that market access in services is similar to tariff binding in GATT, and national treatment under the GATS is equal to national treatment under the GATT³³.

²⁵ G. Feketekuty *Op.cit.* p.95

²⁶ *Ibid.* p.95

²⁷ *Ibid.* p.95

²⁸ *Ibid.* p.95

²⁹ *Ibid.* p.95

³⁰ *Ibid.* p.95

³¹ *Ibid.* p.95

³² *Ibid.* p.95

³³ *Ibid.* p.95

Bossche also mentions other paragraphs of Article III of the GATT in relation to specific measures such as paragraphs 5-7 regarding internal quantitative regulations concerning the mixture, processing or use of products in specific amount; paragraph 8(a) regarding government procurement; paragraph 8(b) governing subsidies to domestic producers; paragraph 9 regulating internal maximum price control measures; and paragraph 10 dealing with internal quantitative regulation concerning cinematographic films³⁴. In accordance with paragraph 5, local content requirements are not allowed, and paragraph 8(a) states that the national treatment obligation is not allowed intervening to laws, regulations or requirements ruling government procurement³⁵.

In terms of exemption of government procurement from the GATT's intervention as mentioned in Article III: 8 (a) above, Article XIII of the GATS clearly declares that the Most Favoured Nation (MFN) as worded in Article II: 1, national treatment as mentioned in Article XVII, and market access articles should not apply to laws, regulations or requirements regulating the procurement by government agencies in terms of purchasing services only for governmental purposes and not with the purpose of business or with the view to use in the supply of services for commercial sale³⁶. Due to the fact that the principle of national treatment under the GATT and the GATS are not allowed to deal with laws, regulations or requirements regulating the government procurement as discussed above, it could be deduced that regarding such government procurement's issue, the principle of national treatment obligation under the GATT is similar to the national treatment obligation of under the GATS. Both provisions have prevented Members of the WTO from interfering laws, regulations or requirements governing government procurement of other Members.

Article III of the GATT obliges Members to treat imported products equal to like domestic products when the imported products have entered the domestic market³⁷. The objectives of Article III could be found in *Korea – Alcoholic Beverages* as 'avoiding protectionism, requiring

³⁴ P.Van den Bossche, *Op.cit.* p.344

³⁵ *Ibid.* p.344

³⁶ C. Arup, *The World Trade Organization Knowledge Agreements* (2nd edn Cambridge University Press, New York 2008) p.193

³⁷ P.Van den Bossche, *Op.cit.* p.344

equality of competitive conditions and protecting expectations of equal competitive relationship³⁸. In addition, Panels and scholars state that one of the main goals of Article III is to assure that domestic measures of WTO Members do not undermine their commitments concerning tariffs under Article II³⁹. Nevertheless, the Appellate Body stressed that the purpose of Article III is wider; it can be seen in *Japan – Alcoholic Beverages II*⁴⁰, the Appellate Body stated:

“The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*. Although protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that ‘one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II’ should not be overemphasised. The sheltering scope of Article III is not limited to products that are subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III⁴¹.

Therefore, it could be concluded that “the national treatment of Article III of the GATT is an obligation of general application that applies both to product with regard to which Members have made tariff concessions and to products with regard to which Members have not done so”⁴².

On the other hand, the GATS provisions on national treatment provided in Article XVII of the GATS are not similar to the national treatment obligation of Article III of the GATT 1994⁴³. In accordance with Article XVII: 1 of the GATS, national treatment only could be imposed

³⁸ Appellate Body Report, *Korea-Alcoholic Beverages*, para.120.

³⁹ Panel Report, *Japan – Alcoholic Beverages II*, para. 613

⁴⁰ P.Van den Bossche, *Op.cit.* p.346

⁴¹ Appellate Body Report, *Japan- Alcoholic Beverages II*, 16

⁴² P.Van den Bossche, *Op.cit.* p.346

⁴³ *Ibid.* p.391

if commitments have been scheduled⁴⁴. It results from this provision is worded differently from the obligation of Article III of the GATT⁴⁵. Consequently, Article XVII of the GATS seems to arrange some jurisprudence of Article III of the GATT through its explicit wording that both formally identical and formally unequal treatment is included, and its reference to modification of the condition of competition⁴⁶. As Bossche mentioned above, the national treatment obligation set out in Article III of the GATT 1994 has general application to all trade in goods⁴⁷, however, Article XVII of the GATS regulating the national treatment obligation for trade in services does not have such general application because it does not concern generally to all measures influencing trade in services⁴⁸. Similarly, Kariyawasam states that “the obligation for national treatment under the GATT is a *general* one as opposed to one that depends on the level of specific commitments undertaken and inscribed in Members’ Schedules under the GATS”⁴⁹. It is clear that the national treatment obligation under Article XVII of the GATS has an effect only if WTO Members have explicitly agreed on granting national treatment regarding specific sectors⁵⁰. The commitments are regulated by Members of the WTO in the national treatment column of their Specific Commitment Schedules⁵¹. Trebilcock and Howse believe that the schedules of specific commitments are considered as the essential matter and substance of the GATS⁵². Such specific commitments used to grant national treatments are often arranged amount to certain circumstances, qualifications and limitations that are also ruled in the schedules⁵³. According to Bossche, there are several typical national treatment restrictions embodied in Schedules connected to “nationality or residence requirements for executives of companies supplying services,

⁴⁴ S. Lester and others (eds) *Op.cit.*, p. 628

⁴⁵ *Ibid.* p. 628

⁴⁶ *Ibid.* p. 629

⁴⁷ P. Van den Bossche, *Op.cit.* p.391

⁴⁸ *Ibid.* p.391

⁴⁹ R. Kariyawasam, *International Economic Law and the Digital Divide: A New Silk Road?* (Edward Elgar, Massachusetts 2007) p. 128

⁵⁰ P. Van den Bossche, *Op.cit.* p.391

⁵¹ *Ibid.* p.391

⁵² M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (3rd edn Routledge, Oxon 2005) p.358

⁵³ P. Van den Bossche, *Op.cit.* p.391

requirement to invest a certain amount of assets in local currency, restriction on the purchase of land by foreign suppliers, special subsidy or tax privileges granted only to domestic suppliers and differential capital requirements and special operational limits applying only to operations of foreign suppliers”⁵⁴. Article XVII of the GATS includes the principle of National Treatment because of which a Member must agree with services and service suppliers of any other Member concerning all measures affecting the service supplies, treatment no less favourable than which it accords to its own like services or service suppliers⁵⁵. Such commitments are produced by WTO Members in the national treatment column of their Schedule of Specific Commitments, and these commitments are often required to certain circumstances, qualification and limitations, that are also arranged in the schedules⁵⁶. Kariyawasam states that the principle of national treatment under the GATS is an essential point because a Member might be able to restrict its national treatment to protect domestic industries or to achieve domestic policy objective⁵⁷.

In addition, Warren and Findlay discriminate between national treatment under the GATT and the GATS based on categories of impediments⁵⁸. They explain that national treatment obligation under the GATS does not describe a distinction between frontier and internal restrictions but embraces all policies that might discriminate between domestic and foreign providers; hence, Article XVII of the GATS encompasses both national treatment and market access⁵⁹. On the other hand, national treatment obligation under the GATT extends to matters of internal taxation and regulation only⁶⁰.

Moreover, Lester believes that one significant difference between the GATT and the GATS regarding the national treatment principle is the distinction in modes of delivery between the GATT and the GATS⁶¹. There is only one mode of delivery, which is called cross border regu-

⁵⁴ *Ibid.* p.391

⁵⁵ R. Kariyawasam, *Op.cit.* p.128

⁵⁶ P.Van den Bossche, *Op.cit.* p.391

⁵⁷ R. Kariyawasam, *Op.cit.* p.128

⁵⁸ T. Warren and C. Findlay, *Op.cit.* p. 59

⁵⁹ *Ibid.* p. 59

⁶⁰ *Ibid.* p. 59

⁶¹ S. Lester and others (eds), *Op.cit.* p. 629

lated in the principle of national treatment under the GATT.⁶² However, there are four modes of delivery under the GATS, namely: cross-border supply (Mode 1⁶³), consumption abroad (Mode 2⁶⁴), commercial presence (Mode 3⁶⁵), and presence of natural persons (Mode 4⁶⁶)⁶⁷. These modes are set out in Article I: 2 of the GATS. Lester defines the modes as following: Mode 1 is defined as the mode that “is most analogous to trade in goods, in that a service (like an exported goods) crosses a national frontier”⁶⁸. Mode 2 is defined as the mode that “involves the movement of consumers to the territory of supplier”⁶⁹; Mode 3 is defined as “the mode of supply effectively means foreign investment, which can take various forms”⁷⁰, and Mode 4 is defined as the mode that “involves services provided through the movement of citizens of one country to another country”⁷¹.

Kariyawasam states that in terms of the GATT only concerns on cross-border trade in goods, the GATS also regulates cross-border trade besides governing three other modes of supply: consumption abroad, commercial presence (Mode 3), and movement of natural persons⁷². Therefore, it can be inferred that there is a similarity between the principle of national treatment under the GATT and the GATS in terms of both provisions regulate cross-border supply (Mode 1). Karsenty ex-

⁶² *Ibid.* p. 629

⁶³ The supply of service from the territory of one Member into the territory of any other Member: GATS Article I: 2 (a)

⁶⁴ The supply of service in the territory of one Member to the service consumer of any other Member: *ibid.*, Art I: 2 (b)

⁶⁵ The supply of a service by a service supplier of one Member through commercial presence in the territory of any other Member: *ibid.*, Article I:2(c). The term ‘commercial presence’ is defined at Article XXVIII (d) GATS: Commercial presence means any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office, within the territory of a Member for the purpose of supplying a service.

⁶⁶ The supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member: *ibid.*, Article I:2(d)

⁶⁷ R. Kariyawasam, *Op.cit.* p.135

⁶⁸ S. Lester and others (eds), *Op.cit.* p. 601

⁶⁹ *Ibid.* p. 601

⁷⁰ *Ibid.* p. 601

⁷¹ *Ibid.* p. 601

⁷² R. Kariyawasam, *Op.cit.* p.128

plains that cross-border supply (Mode 1) regulated in the national treatment obligation of the GATS is similar to the traditional notion of trade in goods as regulated in the national treatment obligation of the GATT, in which situation both the consumer and the supplier of product remain in their respective territories when the product is delivered⁷³. Concerning trade in services, such situation might happen if the service could be kept in a transportable medium, such as a paper document or on diskette of computer, or could be digitized and delivered by means of telecommunication links⁷⁴.

In contrast, national treatment under the GATS not only regulates cross-border trade in goods (Mode 1), but also covers the rest modes of supply; consumption abroad (Mode 2), commercial presence (Mode 3) and presence of natural persons (Mode 4). National treatment commitments under the GATS are negotiated levels of commitment that a member might qualify or restrict in some circumstance of specific categories of service or modes of supply⁷⁵. It results from a national treatment obligation under the GATS only arises if a service has been scheduled⁷⁶. It is possible for Members to grant national treatment in a specific service sector only concerning certain modes of supply, for example cross border supply, and not others such as, consumption abroad, commercial presence, or presence of natural persons⁷⁷. Therefore, it makes possible for a Member to limit its national treatment in order to give protection for domestic services or service suppliers. Nevertheless, Lester states that due to the fact that there are four modes of supply provided by national treatment under the GATS, it would raise question how the GATS national treatment obligation should apply to foreign services or services suppliers using not similar modes⁷⁸. It must be remembered that national treatment commitments are made for each individual mode⁷⁹. It would be difficult to reach an agreement between

⁷³ G. Karsenty, 'Assessing Trade in Services by Mode of Supply' in P. Sauve and R.M.Stern (eds), *GATS 2000: New Direction in Services Trade Liberalization*, (Brooking Institution Press, Washington D.C. 2000) p.35

⁷⁴ *Ibid.* p.35-36

⁷⁵ R. Kariyawasam, *Op.cit.* p.128

⁷⁶ *Ibid.* p.128

⁷⁷ P.Van den Bossche, *Op.cit.* p.391

⁷⁸ S. Lester and others, (eds) *Op.cit.* p. 629

⁷⁹ *Ibid.* p. 629

Members if each Member offers different modes of supply, and it would happen that the only national treatment commitment possibly applied between Members is mode one of supply regulating cross-border supply⁸⁰. Therefore, the desire for reciprocity at a negotiating level would play an important role in shaping specific commitments arranged under the auspices of GATS, as it has in other areas of multilateral trade negotiations⁸¹. Regarding such problem, Lester suggests that “examination of a claim of violation of the national treatment provisions would require a comparison of the foreign service or service supplier at issue with the various competing domestic services and service suppliers, to determine whether they are ‘like’⁸². Kariyawasam exemplifies that “in terms of restricting content delivered by way of electronic intangibles, a GATS classification would obviously offers greater flexibility than a GATT classification”⁸³. The United States that is known as the states strong on exporting of electronic intangibles could recognise national treatment under the GATS as a great opportunity for member to make restriction on their national treatment obligations by enacting new domestic regulation that could be possible to limit the United States imports based on content limitation such as restriction on television broadcasting or electronic books or other content rich products⁸⁴. Regarding such national treatment application, Kariyawasam refers to its application in Europe, where terrestrial television content is limited by applying the Television Without Frontiers Directive (TWFD), Directive 89/552/EEC (as amended)⁸⁵.

As discussed earlier that the main purpose of national treatment obligations of Article III of the GATT is to secure prevention of protectionism in terms of applying internal tax and regulatory measures. In addition, the objective of national treatment regulated in the Article III of the GATT is to secure equality competitive conditions between imported products and domestic products. Therefore, it requires the test of consistency of internal taxation whether or not it is relevant to the

⁸⁰ *Ibid.* p. 629

⁸¹ T. Warren and C. Findlay, *Op.cit.* p. 61

⁸² S. Lester and others (eds), *Op.cit* p. 629

⁸³ R. Kariyawasam, *Op.cit.* p.128

⁸⁴ *Ibid.* p.128

⁸⁵ *Ibid.* p.128

national treatment obligation of Article III: 2⁸⁶. In order to determine such consistency, first sentence of the GATT obliges the necessary of examination of “whether the measure at issue is an internal tax, whether the imported and domestic products are like products and whether the imported products are not taxed in excess of the domestic products”⁸⁷.

Moreover, the second sentence of the Article III: 2 of the GATT also still focuses on national treatment regarding internal taxation, but it considers a wider category of product than mentioned in the first sentence, and it rules directly competitive or substitutable products⁸⁸. Test of consistency provided in the second sentence is different from the previous sentence, it requires the examination of whether the measure in the scope of internal tax, whether between the imported and domestic products are directly competitive or substitutable, whether these products are taxed unequally, and whether the purpose of unequal taxation is to give protection to domestic products⁸⁹.

Furthermore, national treatment obligation under the GATT also concerns on internal regulation as regulated in Article III: 4. In determining whether or not a measure is relevant to the national treatment obligations of Article III: 4 of the GATT, there are three types of examination, namely: whether the measure at issue is a law, regulation or requirement falls under Article III: 4 of the GATT, and whether there is an agreement regarding treatment no less favourable of imported products⁹⁰.

The national treatment obligation under the GATS also obliges a Member that has made a specific commitment in order to reward national treatment to fulfil the national treatment obligation of Article XVII of the GATS, hence, in order to determine whether a measure is in accordance with the national treatment obligation of Article XVII of the GATS, there is a three-tier test requiring the examination of “whether the measure at issue is a measure covered by the GATS, i.e. a measure by a Member affecting trade in services; whether the foreign and domestic services or service suppliers are ‘like services’ or ‘like service

⁸⁶ P.Van den Bossche, *Op.cit.* p.397

⁸⁷ *Ibid.* p.397

⁸⁸ *Ibid.* p.397

⁸⁹ *Ibid.* p.397

⁹⁰ *Ibid.* p.397

suppliers'; and whether the foreign services or service suppliers are granted 'treatment no less favourable'"⁹¹.

In regard with such like service or like service suppliers, Article XVII does not suggest that the mode of supply is a consideration in defining "likeness" of service, the structure of schedules provides that a member's commitments are mode-specific.⁹² There is the fact that in commitment on market access Article XVI of the GATS, the dramatic discrimination between modes is permitted, members may let the supply of a service through one mode and not through another.⁹³ Even, Article XVII does not refer to the modes of supply, Members' commitment to provide national treatment have been specified mode by mode. For example, a member may have offered to provide national treatment under modes 1 and 2 but not 3 and 4; hence this agreement of scheduling commitments would seem to indicate that members may legitimately keep the right to discriminate between the same service supplied by different modes.⁹⁴

Concerning treatment no less favourable, Arup states that the national treatment of the GATS requires that foreign services and service suppliers be accorded no less favourable treatment than is accorded to local counterparts.⁹⁵ Article XVII: 2 of the GATS suggests that "a member may meet this requirement by according to foreign services and services suppliers either formally identical or formally different treatment to that which it accords to its own like services or service suppliers".⁹⁶ Article XVII: 3 of the GATS provides that such treatment could be considered as less favourable if it modifies the conditions or competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member. Trebilcock and Howse pose that Due to the fact that Article XVII of the GATS contains a national treatment obligation regarding sectors listed in a Member's schedule, formally different treatment of foreign pro-

⁹¹ *Ibid.* p.398

⁹² Aaditya Mattoo, 'National Treatment in the GATS, Corner-Stone or Pandora's Box' (1997) 31 J. World Trade 107. p.119

⁹³ *Ibid.* p.119

⁹⁴ *Ibid.* p.119

⁹⁵ C. Arup (n.31) p.189

⁹⁶ *Ibid.* p.189

viders might be consistent with national treatment obligation because based on the commitment such formally different treatment would be no less favourable⁹⁷. Trebilcock and Howse consider that such national treatment application is very much a double-edged sword concerning formally identical treatment, and it might be considered to infringe the national treatment obligation if it modifies the competition conditions in favour of domestic service providers⁹⁸. Such approach to national treatment might circumvent a prohibition on intentionally discriminatory measures; it reflects the view that equal treatment implies adaptation of domestic regulations so that foreign providers have substantively equal competitive opportunities⁹⁹. It is resulted from Article XVIII of the GATS that states explicitly that Members might negotiate and bind within their schedules additional commitments although it is not consistent with Article XVII¹⁰⁰. WTO Secretariat also allows Members to lodge reservations with respect to national treatment by stating that

“a Member may wish to maintain measures which are inconsistent with both Articles XVI and XVII. Article XX: 2 stipulate that such measures shall be inscribed in the column relating to Article XVI on market access. Thus, while there may be no limitation entered in the national treatment column, there may exist a discriminatory measure inconsistent with national treatment inscribed in the market access column. However, in accordance with Article XX: 2, any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under Article XVII and subject to the provision of that Article. When measures inconsistent with both articles XVI and XVII are inscribed in the column relating to Article XVI (as provided for in Article XX: 2), Members could indicate that this is the case (e.g. by stating ‘also limits national treatment’ in the market access column)”¹⁰¹.

On the other hand, due to the fact that there is no specific agreement in the GATT national treatment, hence, there is no circumvention such provided in the GATS national treatment. Nevertheless, a measure dis-

⁹⁷ M.J. Trebilcock and R.Howse (n.47) p. 366

⁹⁸ *Ibid.* p. 366

⁹⁹ *Ibid.* p. 366

¹⁰⁰ *Ibid.* p. 366

¹⁰¹ *Ibid.* p. 366

criminating between ‘like products’ does not suffice to claim that this measure is irrelevant to Article III: 4 of the GATT regulating treatment no less favourable¹⁰². As the appellate Body noted in *EC-Asbestos*:

There is a second element that must be established before a measure can be held to be inconsistent with Article III: 4... A complaining Member must still establish that the measure accords to the group of ‘like’ *imported* products ‘less favourable treatment’ than it accords to the group of ‘like’ *domestic* products¹⁰³.

From the examinations used above in determining whether internal taxation is relevant to the national treatment obligation ruled in Article III: 2 of the GATT, and whether a measure made in a specific commitment is in accordance with national treatment regulated in Article XVII of the GATS, it can be seen that both provisions include likeness and treatment no less favourable tests in the examination in order to determine whether the conducts have been consistent with the both national treatment provisions. Therefore, national treatment obligations under the GATT and the GATT have the same way in determining whether there is a violation of national treatment obligation of both provisions or not.

It can be seen that there is a similarity between the national treatment obligation under the GATT and the GATS in terms of regulating products, services or service suppliers which are like¹⁰⁴. Articles III: 2, first sentence and III: 4 of the GATT and Article XVII: 1 of the GATS only apply to like products, services or service suppliers¹⁰⁵. The Appellate Body pointed that “the concept of ‘like products’ is like an accordion whose width varies depending on the provision under which the term is interpreted, but the determination of whether products are ‘like products’ is, in essence, a determination of the nature and extent of the competitive relationship between these products”¹⁰⁶. In determining whether or not imported goods are being discriminated against domestic goods, it requires that there must be the treatment of a similar domestic goods

¹⁰² P.Van den Bossche, *Op.cit.* p.398

¹⁰³ Appellate Body Report, *EC-Asbestos*, para 100

¹⁰⁴ P.Van den Bossche, *Op.cit.* p.398

¹⁰⁵ *Ibid.* p.398

¹⁰⁶ *Ibid.* p.398

of which could serve as the basis for comparison¹⁰⁷. Whether there are ‘like’ between imported and domestic goods as worded in Article III: 2, first sentence of the GATT, it results from being imposed a tax by government or other charge that varies among goods that are part of closely connected group, for example alcoholic beverages¹⁰⁸. The same approach can be said in determining whether or not services or service suppliers are ‘like’¹⁰⁹. Unlike in the case of products, there is no the physical qualities in the case of services could be compared in order to ascertain whether these services are like services or not¹¹⁰. As a result, the distinction of the services is not easy to be identified¹¹¹. Therefore, it requires for comparison of the treatment of like services. There are several indicators in determining ‘likeness’ are “the characteristics of the products, services and service suppliers, the classification of the products, services and service suppliers, consumer tastes and habits regarding the products, services and service suppliers and for product their end-use”¹¹².

III.CONCLUSION

In conclusion, the discrimination of national treatment under the GATT and the GATS seems to be *de facto* discrimination because both provisions do not provide the sufficient measures in order to find a violation. It results from the GATS national treatment is derived from traditional concepts of the GATT that the application of the national treatment of the GATT is adduced by the GATS

There are several similarities between national treatment of the GATT and the GATS concerning discrimination between foreign and domestic products or services. Discrimination under the national treatment of the GATT and the GATS is considered as a practice that prevents foreign providers from enjoying all comfortable facilities that are given to domestic providers. Non-discriminatory application in both

¹⁰⁷ S. Lester and others (eds), *Op.cit.* p. 280

¹⁰⁸ *Ibid.* p. 280

¹⁰⁹ P.Van den Bossche, *Op.cit.* p.398

¹¹⁰ S. Lester and others (eds), *Op.cit.* p. 191

¹¹¹ *Ibid.* p. 192

¹¹² P.Van den Bossche, *Op.cit.* p.398

provisions might also be interpreted in the market access issue. Moreover, it is not considered as discrimination of national treatment of both provisions if it concerns on laws, regulations, or requirement regulating the procurement by government agencies. Both provisions use likeness and treatment no less favourable test in order to determine whether or not there is a discrimination against foreign products or services or services suppliers.

There are distinctions between both provisions in terms of discriminating against foreign products. The discrimination under national treatment of the GATT is an obligation of general application that applies both to product with regard to which member have made tariff concession and have not been made. However, under the GATS the discrimination only exists if commitments have been scheduled. Moreover, under the GATT, discrimination extends to matters at internal taxation and regulation only. But under the GATS this is not clear between frontier and internal restrictions, the GATS embraces all policies that might discriminate between domestic and foreign providers. Furthermore, discrimination under the GATT would only happen in one mode of delivery while under the GATS it would happen for all modes of deliveries. In terms of treatment no less favourable, it is possible for the GATS to circumvent a ban on intentionally discriminatory measures. In contrast, it is not recognised under the GATT.

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