

Special and Differential Treatment under the World Trade Organization : Perspective on International Trade Law

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Abstract : GATT/WTO regulates the principle of special and differential treatment in part IV as a way to address international trade inequality for developing countries. This study aims to examine the theoretical and practical principles of Special and Differential (S&D). The study employed a normative juridical method involving a statutory and conceptual approach. The study revealed that the S&D principle theoretically aims to attain justice for developing countries. This is in line with the theory of justice from John Rawls mentioning justice as fairness. In the context of international trade, this is also in line with Frank J Garcia. Based on these theories, S&D demands a different treatment betwixt developed and developing countries. Generally, the S&D principle is an instrument to attain fairness in international trade. In its implementation, the S&D provisions aimed at helping developing countries. This involves market access, protecting the interest of the developing countries, and flexibility and transition period. However, the latter seems hard to enforce because developed countries frequently sue developing countries to the WTO panel once the S&D principles are utilized by them.

Keywords: Justice, Special and differential treatment, WTO

Prinsip Perlakuan Khusus dan Berbeda dalam World Trade Organization Perspektif Hukum Perdagangan Internasional

Abstrak : GATT/WTO mengatur prinsip Special and Differential treatment dalam Bagian IV sebagai cara untuk mengatasi ketimpangan perdagangan internasional bagi negara berkembang. Artikel ini bertujuan untuk mengkaji Prinsip Special and Differential (S&D) secara teoritis dan praktis. Metode penelitian yang digunakan adalah yuridis normatif dengan pendekatan perundang-undangan dan konseptual. Hasil penelitian menunjukkan bahwa secara teoritis prinsip S & D bertujuan untuk mewujudkan keadilan bagi negara-negara berkembang. Hal ini sesuai dengan teori keadilan dari John Rawls bahwa *justice as fairness* dan Frank J Garcia dalam konteks perdagangan internasional. Berdasarkan teori tersebut S&D menghendaki adanya perbedaan perlakuan antara negara-negara maju dengan negara sedang berkembang. Prinsip S&D merupakan instrumen untuk tercapainya keadilan dalam perdagangan internasional. Dalam implementasinya, ketentuan S&D yang ditujukan untuk membantu negara berkembang yang terdiri dari akses pasar, kepentingan negara berkembang yang dilindungi, fleksibilitas dan masa transisi sulit diterapkan karena negara-negara maju sering menggugat negara berkembang ke panel WTO ketika prinsip S&D diterapkan.

Kata Kunci: Keadilan, Perlakuan khusus dan Berbeda, WTO.

INTRODUCTION

International trade is highly important for every country. Accordingly, an orderly and fair trade relationship between countries is needed. Justice covers universal moral values which are basic human rights and needs around the world. The moral value of justice becomes the ideal of every nation involving the interests of various groups.¹ In this case, justice becomes an agreement between all elements of society who desire a just and prosperous state life. Likewise, the international trade law system which is one of the social systems.² The instruments of international law governing trade

¹ Richard A. Posner, *The Problematics of Moral and Legal Theory*, Cambridge, Massachusetts, London, England, The Belknap Press of Harvard University Press, 1999, p.19.

² Emmy Latifah, "Eksistensi Prinsip-Prinsip Keadilan Dalam Sistem Hukum Perdagangan Internasional", *Padjadjaran Jurnal Ilmu Hukum*, Volume 2 Number 1 year 2015.

relations between countries are stated in the GATT document signed by countries in 1947 and applied since 1948. GATT was refined through the Uruguay Round negotiations which succeeded in establishing the World Trade Organization (WTO).³

The WTO has given the concept of trade liberalization to the world, especially to member countries whose refers to the removal of barriers in international trade as a basic concept. In its implementation, This concept forms globalization whose meaning is universal and covers an immense subject. In the last two decades, the acceleration process of globalization has fundamentally changed the structure and pattern of international trade and financial relations. This turns to be the key phenomenon and is called an "era or regime". The free trade regime is a pattern built in the post-capitalist. Nevertheless, it is also necessary to comprehend the idea of pre-capitalist. Meanwhile, capitalism is an economic system characterized by respect for private property ownership, entrepreneurship benefits, technological innovation, the binding power of contracts, payment of wages in money, and the availability of a credit system from financial institutions. In this case, the property rights are for sale freely.⁴ Liberalization, the breath of international trade law, can be tracked down since the adoption of a grounded paradigm, economic theories by Adam Smith, David Ricardo, and other views. This also includes the advantage of absolute and comparative theories in particular.⁵

The principles and basis for the WTO formation are to seek openness of territorial boundaries, provide guarantees for the Most Favored Nations Principle (MFN) and non-discriminatory treatment by and among member countries, as well as a commitment to transparency in all its activities. The opening of national markets to international trade is seen to encourage and assist sustainable development, increase prosperity, cut poverty, and build peace and stability. Nevertheless, This is only applicable with appropriate exceptions or adequate flexibility. Simultaneously, market openness must be balanced by appropriate national and international policies. Thus, they can contribute to economic growth and development based on the needs and aspirations of each country member. WTO membership is not only dominated by developed countries' participation. Developing countries also play a primary role in the WTO. This is not only due to their number, but it is needed in the era of the global economy. This is because these developing countries increase trade as the main tool in development. Accordingly, the WTO classifies the countries into four parts; developed countries; developing countries; least developed countries; and net food-importing developing countries. Despite this classification, the WTO does not define or set the boundaries of these countries. In general, developed countries are defined as countries with high income which is usually industrialized countries. Developing countries, on the other hand, refer to countries with low income. However, there is also the term that countries with high-level income than in so-called developing countries do not fully show signs of being developed. Thus, they are grouped under the term newly industrialized countries such as China, India, Brazil, and Mexico.

The WTO agreement covers regulations called Special and Differential Treatment (hereinafter abbreviated as S&D). In general, S&D refers to the special treatment provisions given to developing countries. This includes the various elements of the WTO agreement which aims to increase the developing countries' participation in multilateral trade and assist the implementation of all WTO agreements.⁶ Indonesia has ratified the WTO Agreement with Law No. 7 of 1994 dated November

³ Syahmin AK, *Hukum Dagang Internasional (Dalam Kerangka Studi Analisis)* PT Raja Grafindo Persada, Jakarta, 2007, p. 12

⁴ Ade Maman Suherman, *Rezim Perdagangan Bebas dan Ketidakberdayaan Negara Berkembang Berlitigasi pada Dispute Settelement Body-WTO*, Pidato Pengukuhan Guru Besar, Unsoed, 2013, p.11

⁵ Ade Maman Suherman, *Hukum Perdagangan Internasional, Lembaga Penyelesaian Sengketa WTO dan Negara Berkembang*, Sinar Grafika, Jakarta, 2014, p.11

⁶ Nandang Sutrisno, "Efektifitas Ketentuan-ketentuan *World Trade Organization* tentang Perlakuan Khusus dan berbeda Bagi Negara Berkembang : Implementasi dalam Praktek dan Dalam Penyelesaian Sengketa",

2, 1994, concerning the ratification agreement establishing the World Trade Organization. Indonesia has officially become a member of the WTO. All agreements mentioned in it have become part of the national legislation. As a developing country, further developments on the S&D issue need to be fully observed by Indonesia (hereinafter abbreviated as NSB). This is because Indonesia can obtain special rights to secure national interests. In practice, it turns out that the implementation of S&D principles aimed at developing countries has encountered problems from developed countries. Moreover, several cases on the application of S&D have become disputes in the WTO panel. Accordingly, this study examines the principles of special and differential treatment in the WTO referring to the theory of justice. Besides, this study is also to find out the implementation practice of S&D for countries.

RESEARCH METHODS

The study employed a normative juridical approach by studying and reviewing legal principles on related provisions. The descriptive analysis aimed to provide a complete and comprehensive picture of the principles of Special and Differential Treatment in the WTO with the theory of justice. In addition, the study also aimed to find out the implementation practice of S&D for countries. This can be done by collecting secondary data which covers primary legal material. It includes relevant statutory provisions to the object under study. Meanwhile, the secondary legal materials cover the concepts and opinions related to the aims of the study.⁷ Finally, the data analysis was carried out qualitatively without involving formulas and numbers.

RESULTS AND DISCUSSION

1. The analysis of special and differential principles in WTO based on the theory of justice

Before analyzing the principles of S&D according to the theory of justice, an explanation on trade liberalism, the principles in WTO, and the principles of S&D will also be discussed. Trade liberalization is a condition in which companies and individuals are free to sell goods or services beyond the borders of their countries. It includes the freedom to set up companies in other countries and for individuals to work in other countries. Free trade dispels any barriers set by certain countries which may affect the trade transaction with other countries. Countries of the world or those directly involved in free trade have the right to sell products, goods, or services to other countries. They are free from tax restrictions or import duties.⁸

The WTO liberalization paradigm is based on the idea that trade liberalization will more focus on the principle of comparative advantage on the trade growth. According to this principle, each country will specialize in trade. This means each country will trade its products. It can be goods or services, which have competitiveness in the international market. In this way, prosperity can be flourished by the improvement of the specialized trade goods and services. WTO has implemented trade liberalization which is stated in the basic rules regulated in the 1994 General Agreement on Tariffs and Trade (GATT) as follows:⁹

- a. Most Favored Nation (MFN). MFN is the obligation of WTO member countries. They treat all WTO member countries equally or in the case where they give a privilege to a specific member, they must do the same to other members too.

Jurnal Hukum UII special edition Vol 16 October 2009, p 2 available at <http://www.law.uui.ac.id/images/stories/Jurnal%20Hukum/5%20Nandang.pdf>, accessed on February 12, 2016.

⁷ Kornelius Benuf dan Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer", *Jurnal Gema Keadilan*, Vol. 7, No. I, 2020, p. 26.

⁸ Pengertian liberalisasi perdagangan Internasional dan Sejarah Perkembangannya Tersedia di <http://www.landasanteori.com/2015/10/pengertian-liberalisasi-perdagangan.html> accessed on February 25, 2016.

⁹ Huala Adolf, *Hukum Perdagangan Internasional*, PT Rajawali Press, Jakarta, 2005, p.108

- b. National Treatment. According to this principle, a country's product imported to another country must be treated evenly to domestic product
- c. Quantitative Restrictions. In principle, It refers to the limited number of exported goods entering the national territory of country members
- d. Exports enter the national territory of country members
- e. Protection principle through tariffs (Non-Tariff Barriers). This principle allows protective measures against domestic industries through tariffs (increasing import duty rates) and not taking other trade measures, such as trade barriers sanitary and phytosanitary, and technical barriers.
- f. The principle of reciprocity. This principle is stated in the preamble of the GATT and applies in tariff negotiations based on reciprocity and mutual benefit for both parties.
- g. The principle of special treatment for developing countries. Around two-thirds of the GATT's members are from developing countries. They are still in the early stages of economic development. Part IV recognizes the need for developing countries to enjoy more profitable market access.

In the GATT, special treatment for developing countries is known as special measures and more favorable and acceptable conditions. In the WTO regulation, they used some terms such as special treatment, special regard, and special attention¹⁰. There are 145 provisions of S&D scattered in various WTO agreements, a total of 107 were adopted in the Uruguay Round, and 22 are specifically intended for underdeveloped countries.¹¹ The WTO Secretariat classifies S&D provisions into the following six categories:

- a. Provisions aimed at increasing the trade opportunities of developing countries;
- b. Provisions requiring WTO member countries to protect the interests of developing countries;
- c. Provisions that provide flexibility in commitment, action and use of policy instruments;
- d. Provisions that give a transition period;
- e. Terms of technical assistance
- f. Special provisions for underdeveloped countries.

In general, in the S&D of WTO, there are two waivers granted to developing countries, market protection and market access. The WTO recognizes the need for developing countries to enjoy more profitable market access.¹² Nowadays, S&D is widely recognized including the explicit and implicit terms in the GATT and the WTO. This is because the GATT is an integral part of the WTO. Thus, the GATT provisions cannot be separated from the WTO provisions. The S&D provisions are numerous. However, no explicit definition can be found in either the GATT or the WTO. Therefore, observers define S&D according to their own perspectives. John Whalley, for example, simply defines S&D as rights and privileges granted to the NSB and not to other developed countries.¹³

Based on the aforementioned definition of S&D and several classifications, it is arduous to place this S&D theoretically, particularly in the context of international trade liberalization under WTO. This is because the characteristics of S&D clash with the characteristics of liberalization. S&D

¹⁰ [Http://www.scribd.com/doc/39308488/Eksistensi Ketentuan Khusus Bagi Negara Berkembang Dalam Perjanjian WorldTrade Organization](http://www.scribd.com/doc/39308488/Eksistensi_Ketentuan_Khusus_Bagi_Negara_Berkembang_Dalam_Perjanjian_WorldTrade_Organization), accessed on January 12, 2021

¹¹ *The WTO secretariat, Implementation os Special and Differential Treatment Provisions in WTO Agreement and Decisions, Committee on Trade and Development, WT/COMTD/W/77 (25 October 2000), p. 3*

¹² S. M. Hassan Razavi, "Theory of Justice and Asymmetric Trade Liberalization : Limited Reciprocity as a Rule", *Manchester Journal of International Economic Law*, Volume 10, Issue I : 2013 p.112

¹³ John Whalley, 'Special and Differential Treatment in the Millennium Round,' *Working Paper* No. 30/99, Centre for the Study of Globalisation and Regionalisation, University of Warwick, Coventry, UK, Mei 1999) dalam artikel ilmiah Nandang Sutrisno, *Op.Cit.*, p. 5

demands a different treatment between developed countries and the NSB due to significant differences in the development level within the two groups of WTO country members. Different levels of development require a different set of rules or policies to achieve economic growth and development. In addition, S&D also tolerates significant state intervention in economic development.¹⁴

The theories of justice that will be used as a knife to analyze the application of S&D principles are the theories of justice by John Rawls and Frank J Gracia. In English, the term justice is referred to several terms, justice, fairness, equity, and impartially. The term justice means the fair treatment of people, the quality of being fair or reasonable, the legal system used to punish people, the quality of treating people equally or in a way that is reasonable. Equity is defined as a situation in which everyone is treated equally and impartially is defined as treating all rivals or disputants equally, fair and just.¹⁵ According to Aristotle, legal justice is identical to general justice. Justice is characterized by good relations with one another, not prioritizing oneself, but also not prioritizing other parties and an equality.¹⁶ Aristotle distinguishes the theory of justice into two, distributive justice and commutative justice. Distributive justice is a justice that gives each person a share according to his achievements. Meanwhile, commutative justice gives the same amount to everyone without discriminating based on their achievements. In this case, it relates to the role of exchanging goods and services.¹⁷

John Rawls' theory of justice is known for Justice as fairness.¹⁸ Rawls's principle of justice consists of two things. First, it states that every person or citizen must get the same rights from the entire social system. It includes obtaining the most essential freedoms offered to humans. Second, it requires that economic and social inequalities be arranged. Thus, (a) they can provide the greatest benefit to those who are least fortunate, and (b) for those who are least fortunate to have the same opportunity and treatment to occupy positions which is open to everyone.¹⁹ Rawls's thinking is an effort to form Justice as Fairness which was originally part of seeing the social reality occurs in a liberal society. Inequality is always present in every society, The liberal, the socialist societies, or even in societies that are present in totalitarian regimes. The difference achievements of an individual in society and in his own life is largely determined by the natural order that exists without the individual ever choosing it.

In the context of international trade, these principles mean that every country has an equal right to access primary social goods, and that the problem of inequality between them must be addressed. Based on the concept of justice as fairness, first, S&D, in theory, looks identical to the issues for the justification of economic development, the inequality. This further emphasizes that S&D is a moral obligation of developed countries to address the inequality problem. Second, this emphasizes that S&D is needed by the NSB to promote its economic development. Thus, the concept of justice as fairness will strengthen the S&D concept. This is based on the justification of economic development. The debated problem lies in the appropriateness of liberalization or S&D provisions in addressing inequality. This is still uncertain whether the S&D provisions can be an effective instrument for enhancing the economic development of the NSB. On the other hand, if it is positioned as a moral obligation, the S&D provisions have a stronger basis because they stand on a

¹⁴ *Ibid.*, p. 10

¹⁵ A.S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, Sixth Edition, Oxford University Press, 2000, p. 444

¹⁶ Bernart L Tanya dkk., *Teori Hukum Strategi Tertib manusia Lintas Ruang dan Generasi*, Genta Publishing, Yogyakarta, 2013, p.42

¹⁷ I Dewa Gede Atmadja . *Filsafat Hukum-Dimensi Tematis dan Teoritis*.Malang: Setara Press. 2013, p. 72

¹⁸ Menurut Black's Law Dictionary 8th edition, 2004, hlm.633, *justice diartikan sebagai impartial, just, equitable, disinterested, free bias or prejudice.*

¹⁹ John Rawls, *Teori Keadilan*, diterjemahkan oleh Uzair Fauzan dan Heru Susetyo, Pustaka Pelajar, Yogyakarta, Cet 11, 2011, p. 72

more universal and neutral concept. The principle function of S&D is to provide a standard for evaluating social responses to inequality naturally. Secondly, it is to provide guidance for social institutions to make distribution allocations.²⁰ This principle justifies the difference in treatment for all members since inequality applies to less advantaged countries. Thus, it is intended to correct and modify inequalities that occur in international trade relations.²¹

According to Rawls, these principles will ensure the fair implementation of the entire system for the allocation of primary social goods. The first principle states that everyone has an equal right to the totality of basic system liberties. This is based on equality and in line with a generally accepted freedom. Thus, according to the concept of justice as fairness, justice refers to the equitable distribution of social goods in international trade transactions between developed countries and the NSB.

This does not mean that all inequality must be repelled. Only unjust inequalities that harm the most disadvantaged (NSB) must be eliminated. Therefore, only inequalities aimed at the benefit for the most disadvantaged as mentioned in the S&D provisions can be justified. As seen from its definition, S&D demands unequal treatment to unequal parties.²² The S&D principle is an instrument for achieving fairness in international trade. S&D has been integrated into legal instruments in which justice becomes an essential element. The concept of justice as fairness, as reflected in Rawls' Theory of Justice, deserves consideration, although Rawls himself applies this concept only in national scope and refuses to expand the concept in an international context. When Rawls is confronted by the view that his theory of justice is only appropriate for the context of national law, in his work, *Law of Peoples* which discusses international justice asserts that all nations must organize their national economy not only to fulfill the basic needs of human rights of all its members, the livelihood and security problems but must also pay attention to the mutually beneficial relationship of all existing groups at all times.²³ The expansion of the concept was carried out by other experts such as Frank J. Garcia. This is because they saw parallels between problems in the national and international scope. The basic idea of the concept of justice as fairness is all primary social goods such as freedom and opportunity, income and welfare, and the basics for self-respect, are distributed equally. The unequal distribution of these goods occurs when it is intended for the benefit of the most disadvantaged. Accordingly, there are two principles that can be drawn from this concept: the principle of equal liberty and the principle of difference.

In this context, S&D provisions play an essential role in realizing the concept of justice, fairness concept. As Garcia points out:²⁴

“the principle of special and differential treatment, a key element of the developing world’s trade agenda, plays a central role in satisfying the moral obligations that wealthier states owe poorer states, as a matter of distributive justice. Seen in this light, the principle of special and differential treatment is more than just a political accommodation: it reflects a moral obligation stemming from the economic inequality among states.”

S&D principles have been integrated into legal provisions. Thus, it creates not only moral obligations but also legal obligations. Garcia mentioned that international trade law should be formulated to protect the moral equality of all individuals, specifically for those who are affected by

²⁰ Frank J. Garcia, *Global Justice and Bretton Woods Institution*, *Journal of International Economic Law*, 2007, p 466

²¹ S.M. Hassan Razavi, *Op.cit.*, . p.110

²² Eko Priyanto Sudrajat, *Free Trade dan Fair Trade Dalam Konsep Hukum*, available at <http://www.jdih.kemendag.go.id/files/pdf/2014/02/14/4-1392378243.pdf> accessed on February 10, 2016

²³ Ade Maman Suherman, “Perdagangan bebas (*Free Trade*) Dalam Perspektif Keadilan Internasional”, *Jurnal Hukum Internasional*, Volume 5 Number 2 January 2008, p. 254

²⁴ Frank J. Garcia, ‘The Law of Peoples: By John Rawls’ (2001) , *Houston Journal of International Law Dalam Artikel Ilmiah Nandang Sutrisno*, Eksistensi Ketentuan Khusus Bagi Negara Berkembang Dalam WTO, available at staf.uui.ac.id, accessed on February 20, 2016

international trade. Based on Garcia's study, in his book, *Trade and Inequality: Economic, Justice and The Developing World*, it is stated that the inequalities of the international environment, the social and economic fields, can only be considered as a fair situation for these inequalities. This covers providing a better situation for countries that are less fortunate in the social and economic fields.²⁵ This statement is reinforced by the principle of special and differential treatment. Furthermore, Frank J Garcia developed a theory of Justice consisting of three categories, utilitarian²⁶, libertarian²⁷, and egalitarian²⁸. If these three categories are associated with the field of international trade, They would have the following characteristics:²⁹

- a. Fair international trade law must be formulated in such a way to protect the moral equality of all individuals affected by it. This includes a commitment to free trade as an economic principle to maintain the liberal preconditions for justice;
- b. The liberal theory of fair trade demands the international trade law to operate in such a way for the interests of the least advantaged countries. Thus, there should be a highlight point on the importance of the principle of special and differential treatment, particularly the justification for international trade law. Thus, each party could get the same playing field;
- c. Liberal justice requires the international trade law to not sacrifice human rights and provides effective protection of human rights. Thus, the profit could be manifested.

John Rwls's theory has received criticism from legal experts because there are two weaknesses. from the empirical concept, distributive justice cannot suffice the substantial and normative studies for modern international law. This is because according to the view of distributive justice, international justice has always appeared from domestic justice in a country. The second weakness, from John Rawls's theory, is actually an empirical normative perspective. John Rvals referred to the original concept of Emanuel Kant's equality. It emphasized that justice between countries must begin with justice in the country. Thus, the analysis of inequalities in international trade could be implemented³⁰ These weaknesses became the key point of the development of distributive justice theory by Frank J. Garcia. The point is Garcia tries to explain justice based on international trade law. It states that international trade law must be formulated to protect the moral equality of all individuals who are affected by it. Garcia's concept of trade fairness must be operated in such way for the interest sake of the least advantaged country. Lastly, Garcia also mentioned the must-existed factor in fair international trade is international trade must not sacrifice human rights and must provide the effective protection of human rights.³¹

2. Implementation Practice of S&D by Developing Countries

As mentioned previously, the number of S&D provisions is quite large. However, the lack of implementation of WTO agreements is still found in practice. This includes S&D provisions that have become a major factor of concerns and complaints in a developing country. This issue is often

²⁵ , Dikutip dari Joost Pauwelyn, *Trade Inequality, and Justice: Toward a Liberal Theory of Just Trade*,: The George Washington International Law Review, New York, 2005, p. 1.

²⁶ Utilitarianisme menegaskan bahwa moralitas suatu tindakan menurut konsekuensinya dimaksudkan untuk suatu agregat kemanfaatan individu atau aggregate of individual utility

²⁷ Teori Libertarian berpendapat bahwa fundamental primacy dari hak-hak individu dalam hak-hak tertentu dalam property

²⁸ Egalitarianisme menganggap bahwa keadilan merupakan equitable distribution daripada basic social goods seperti sumberdaya dan kesempatan menurut beberapa konsep keadilan.

²⁹ Frank garcia, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade*, (New York: Transnational Publishers, 2003), p. 72

³⁰ Domingo Bruga, *Justice and inequality in the World Trading System : a Critical Assesment*, tersedia di www.studentpulse.com/.../justice-and-inequality-i accessed on February 15, 2021

³¹ Frank J. Garcia, *Building A Just Trade Order fo A New millenium*, *George washington International law Review*, Vol 33 , 2001, p. 1061-1062

raised inside and outside the WTO. The Singapore Ministerial Declaration of 1996, for example, acknowledged that some members expressed dissatisfaction. They mentioned that some S&D provisions were non-operational and not legally binding. Apart from that, the non-binding character of S&D provisions can also cause serious implications. S&D provisions cannot be enforced effectively in the dispute resolution process. Developing countries cannot refer to S&D provisions to force developed countries implement certain provisions. Simultaneously, they also cannot defend their rights under S&D provisions. As reflected in the community report on Trade and Development (CTD), developing countries expressed their doubts about the effectiveness of the enforcement of S&D provisions. Furthermore, they also uncertain whether the S&D provisions could be enforced in dispute resolution practice. In general, the implementation of S&D provisions such as the practice of WTO country members is not effective. This can be seen from several indications: NSB's market access to developed countries' markets has always been hampered; NSB's trading interests are not protected; inadequate transition period; no flexibility for the NSB in applying WTO provisions; and inadequate technical assistance from developed countries. This is established as follows:³²

a. Market access for NSB is hampered

The S&D provisions aim to improve NSB's market access to developed countries' markets. Several provisions of the GATT and WTO agreements containing S&D provisions as follows: the Enabling Clause; Part IV of the GATT 1994; the Agreement on Agriculture (AA); the General Agreement on Trade in Services (GATS); and the Agreement on Textiles and Clothing (ATC). In contrast to its regulations, the implementation of the S&D provisions has encountered various difficulties. This is due to the significant trade barriers in developed countries, especially those related to agricultural products, textiles, and apparel,³³ which are the main products of NSB. Barriers to agricultural products include dirty tariffication.³⁴ In the textile and apparel sector, trade barriers include: inaccuracy in product selection; insignificant increase in quotas; burdensome administrative and customs procedures; and misuse of special safeguard and anti-dumping mechanisms.

In the anti-dumping sector, for example, Indonesia should be able to utilise the S&D provisions. In fact, they cannot do it because of the misuse of the anti-dumping policy. As seen from the US – Offset (Byrd Amendment) case, the S&D provisions stipulated in Article 15 of the Anti-Dumping (AD) Agreement cannot be implemented effectively in practice. This is because of the issuance of the US – Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), the United States has hampered NSB market access including Indonesia to the country's market. Indonesia often becomes the target of anti-dumping petitions and actions by other countries, especially the developed countries. According to the Indonesian Anti-Dumping Committee, in September 1996, there were 37 national products accused of dumping in 10 countries. The majority of these allegations (32.4%) were unfounded and, therefore, were not subject to anti-dumping tariffs. By March 2002, dumping accusations against Indonesia had risen to more than 100 cases, of which only 30 were proven. This indicates there is a tendency to use dumping accusations arbitrarily to protect domestic products and block NSB products.

b. NSB Interests Unprotected

³² Nandang Sutrisno, *Op.Cit*, p. 11-16

³³ *The WTO Secretariat, 'Developing Countries and the Multilateral Trading System: Past and Present', (Background Document dipresentasikan dalam the High Level Symposium on Trade and Development, diselenggarakan oleh Development Division World Trade Organisation, Geneva 17-18 March 1999)*, p. 25.

³⁴ Istilah 'dirty tariffication' digunakan oleh Kym Anderson untuk mengacu kepada penerapan tarif yang tidak fair, khususnya oleh *the European Union and the United States*. Lihat Kym Anderson, 'Agriculture and the WTO into the 21st Century' (*Paper dipresentasikan dalam The Cairns Group Farm Leaders' Trade Seminar, Sydney, 2-3 April 1998*), p. 3

One type of S&D provision is a provision that aims to protect the interests of the NSB. This provision requires WTO countries members, the developed countries, to consider or refrain from certain actions or policies in the interest of the NSB. These provisions can be seen in almost all GATT and WTO provisions agreements such as in the Agreements on the SPS,³⁵ TBT,³⁶ and TRIMs.³⁷ Unfortunately, almost all of them cannot be implemented effectively. In TBT, for example, NSB exports often encounter undue obstacles, such as the use and enforcement of strict technical standards.

c. No flexibility

One of the S&D provisions that provide flexibility regarding national trade policies was taken by the NSB through various exceptions from WTO provisions. Flexibility is required by the NSB to address its internal problems. This includes correcting deviations, market failures, and externalities and addressing the sources of these problems. S&D provisions that fall into this category can be found in the AA, TBT agreements, TRIMs and SCM. However, these provisions have not been implemented effectively due to various difficulties in implementing flexibility. In fact, NSB was actually sued in the WTO dispute resolution forum when they implemented the flexibility. Likewise, when issuing a policy to develop its own automotive industry, Indonesia was sued at the WTO by Japan, the United States, and the European Union. As reflected in the case of Indonesia – Automobile, Indonesia is accused of violating several WTO provisions. This means that no real flexibility actually applied.

4. Insufficient Transition Period

Transitional granting is one of the most common categories of S&D in WTO agreements. This provision is intended to provide an opportunity for the NSB. They can make preparations and adjustments within a certain time to fully implement the WTO agreements. In the Indonesian context, the S&D provisions that provide a transition period are also ineffective. This is as reflected in the case of Indonesia – Automobile, Indonesia cannot utilise the transition period provided by several relevant provisions. This refers to the TRIMs Agreement and the SCM Agreement. Article 5.2 of the TRIMs Agreement, for example, provides a transition period for NSB for 5 years. At this time, NSB is not required to abolish all trade-related investment policies (TRIMs). Article 27.3 of the SCM Agreement provides a 5-year transition period for NSB to provide subsidies related to the fulfillment of local content requirements. However, in the transition period, when Indonesia uses policies that provide subsidies and contain local content requirements, Indonesia is actually being sued at the WTO by developed countries. Yet, S&D in WTO is still seen as an instrument that can help developing countries. This includes adapting to rapidly changing global trade that expected could also increase developing countries' participation in global trade. In fact, many people questioned the effectiveness of S&D implementation. Referring to the Doha Declaration, all countries members agreed that S&D provisions need to be reviewed. This is intended to strengthen its implementation and make it more effective and operational.

³⁵ *Sanitary and Pytosanitary Measures (SPS)* adalah tindakan yang dilakukan untuk melindungi kehidupan atau kesehatan manusia, tanaman dan binatang.

³⁶ *Technical barriers to trade (TBT)* adalah tindakan atau kebijakan suatu negara yang bersifat teknis yang dapat menghambat perdagangan internasional dimana penerapannya yang dilakukan sedemikian rupa sehingga menimbulkan suatu hambatan perdagangan.

³⁷ *Trade Related Investasion Measures (TRIMs)* dimaksudkan untuk mengurangi atau menghapus kegiatan perdagangan dan meningkatkan kebebasan kegiatan investasi

CONCLUSION

The WTO agreement has accommodated the interests of developing countries which are embodied in the provisions of the principle of special and differential treatment (S&D). Accordingly, it is concluded that the WTO provisions have reflected John Rawls' theory of justice, justice as fairness. Therefore, WTO should prioritize the principle of fair trade. This is because justice essentially formed from unequal treatment. People with low economies should be given greater rights and smaller obligations. Special treatment for people with lower economic levels will ultimately lead to a just situation. In the context of international trade, John Rawls' theory is extended by Garcia. The inequalities of the international environment, the social and economic fields, can only be considered as a just condition. In this case, the inequalities provide a better situation for countries that are less fortunate in the economic and social sector. Inequality treatment is emphasized in countries that do not get the benefit from trade liberalization. This is reflected in the provisions of Special & Differential Treatment.

In practice, the implementation of S&D provisions is intended for developing countries. However, it does not apply effectively. This can be seen from several indications: NSB's market access to developed countries' markets has always been hampered; NSB's trading interests are not protected; inadequate transition period; the NSB has no flexibility in applying WTO provisions; and inadequate technical assistance from developed countries. Developed countries frequently sue developing countries to the WTO panel. Especially, when they are implementing S&D. This shows a difference between theory and practice. Theoretically, WTO regulations have reflected the theory of justice with S&D rules. In fact, developed countries do not support the enactment of these provisions. Accordingly, fair international trade cannot be manifested

REFERENCES

- Adolf, Huala, 2005, *Hukum Ekonomi Internasional*, PT Raja Grafindo Persada, Jakarta.
- AK, Syahmin, 2007, *Hukum Dagang Internasional (Dalam Kerangka Studi Analisis)* PT Raja Grafindo Persada, Jakarta, 2007.
- A.S.Homby, *Oxford Advanced Learned's Dictionary of Current English*, Sixth Edition, Oxford University Press, 2000.
- Garcia, J. Frank 2003, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade*, New York: Transnational Publishers, 2003
- Posner, A, Richard, 2003, *The problematics of Moral and Legal Theory*, Cambridge, Massachusetts, London, England, The Belknap Press of Harvard University Press, 1999.
- Rawls, John, 2011, *Teori Keadilan*, diterjemahkan oleh Uzair Fauzan dan Heru Susetyo, Pustaka Pelajar, Yogyakarta, Eds 11.
- Suherman, Ade Maman, 2014, *Hukum Perdagangan Internasional, Lembaga Penyelesaian Sengketa WTO dan Negara Berkembang*, Sinar Grafika, Jakarta.
- L Tanya, Bernart dkk., 2013 *Teori Hukum Strategi Tertib manusia Lintas Ruang dan Generasi*, Genta Publishing, Yogyakarta.
- I Dewa Gede Atmadja. 2013. *Filsafat Hukum-Dimensi Tematis dan Teoritis*. Malang: Setara Press.

Other sources

- Frank J. Garcia, *Building A Just Trade Order fo A New Millenium*, *George washington International law Review*, Vol 33 , 2001.
- Frank J. Garcia, "Global Justice and Bretton Woods Institution", *Journal of International Economic Law*, 2007.

- Joost Pauwelyn, “*Trade Inequality, and Justice: Toward a Liberal Theory of Just Trade,*” *The George Washington International Law Review*, New York, 2005.
Black’s Law Dictionary 8th edition
- S.M. Hassan Razavi, “Theory of Justice and Asimetric Trade Relation : Limited Reciprocity as a Rule”, *Manchester Journal of International Economic Law*, Volume 10, Issue I : 2013.
- Ade Maman Suherman, *Rezim Perdagangan Bebas dan Ketidakberdayaan negara berkembang Berlitigasi pada Dispute Settelement Body-WTO*, Pidato Pengukuhan Guru Besar , Unsoed Press, Purwokerto, 2013.
- Ade Maman Suherman, “Perdagangan bebas (*Free Trade*) Dalam Perspektif Keadilan Internasional”, *Jurnal Hukum Internasional*, Volume 5 Nomor 2 January 2008, p.254
- Emmy Latifah, *Eksistensi Prinsip-Prinsip Keadilan Dalam Sistem Hukum Perdagangan Internasional*, Padjadjaran Jurnal Ilmu Hukum, Volume 2 Number 1 year 2015.
- Nandang Sutrisno, “Efektifitas Ketentuan-ketentuan World Trade Organization tentang Perlakuan Khusus dan berbeda Bagi Negara Berkembang : Implementasi dalam Praktek dan Dalam Penyelesaian Sengketa”, *Jurnal Hukum UII Edisi Khusus Vol 16 October 2009*, available at <http://www.law.uui.ac.id/images/stories/Jurnal%20Hukum/5%20Nandang.pdf>, accessed on February 12, 2016.
- [Http://www.scribd.com/doc/39308488/Eksistensi Ketentuan Khusus Bagi Negara Berkembang Dalam Perjanjian WorldTrade Organization](Http://www.scribd.com/doc/39308488/Eksistensi_Ketentuan_Khusus_Bagi_Negara_Berkembang_Dalam_Perjanjian_WorldTrade_Organization), accessed on August 12, 2011.
- The WTO secretariat, Implementation os Special and Differential Treatment Provisions in WTO Agrreement and Decicions, Comittee on Trade and Development, WT/COMTD/W/77 (25 Oktober 2000)*, p.3
- Domyngas Bruga, *Justice and inequality in the World Trading System : a Critical Assesment*. Available at <http://www.studentpulse.com/articles/712/justice-and-inequality-in-the-world-trading-system-a-critical-assesment> accessed on February 3, 2016
- John Whalley, ‘Special and Differential Treatment in the Millennium Round,’ *Working Paper* No. 30/99, Centre for the Study of Globalisation and Regionalisation, University of Warwick, Coventry, UK, May 1999.