THE INDONESIAN RIGHT TO DEVELOPMENT: FROM A PERSPECTIVE OF MARITIME TRANSPORT SERVICES (MTS) SECTOR UNDER WTO GATS

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ABSTRACT

Human rights, globalization and development are three big issues entering the 21st century. Globalization is argued to be positive in development. Consequently, it promotes human rights. On the other hand, globalization is also argued to threaten human rights when globalization dominates the development process especially for the developing countries.

This essay highlights those relations whether globalization marked by the WTO/GATS threatens or supports the Indonesian right to development for implementing the Maritime Transport Service (MTS) under the auspices of the GATS rules.

It reveals that the globalization is a foe rather than a friend. As a fact, it needs many steepy structural and infrastructural adjustments on the MTS in Indonesia. So, reform on MTS is a must to cope with.

1. Introduction

Indonesia ratified the establishment of the World Trade Organization (WTO) in 1994 including all its annexes. Consequently, Indonesia is bound to liberalize trade in goods as well as trade in services according to the WTO legal frameworks. In particular, Indonesia has given its specific commitments to liberalize maritime transport services (hereinafter MTS), a specific annex in the General Agreement on Trade in Services (GATS).

However, after giving its commitment to liberalize services under WTO GATS, the Indonesian MTS has not been able to compete with foreign fleets, nor provide services

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2 Act Number 7 of 1994.
3 The sector is still under negotiation to reach a multilateral agreement. The reason for giving the commitment is that the Indonesian development is heavily dependent on maritime transport for immaterial as well as for domestic trade because of its archipelagic nature. As a result, the development of shipping, ancillary services and port services is the most important policies regarding maritime transport development in the 5-year quick-fix agenda or the Gairang Beban Hukum Negeri (GIRHN)1994-2004.

MIHBAR HUKUM
International and international demands. Between 1996 and 2002, foreign fleet companies supplied 97% of international shipping (export and import) for Indonesian maritime service demands. Further, for domestic demands, foreign fleets supplied supply 54% of the services compared with 46%, although Indonesia enacts the cutover principle, e.g. national maritime needs must be supplied by the national maritime armada.

Moreover, the objectives for the development of maritime transport cannot be achieved because it is calculated that more than US $3.5 billion flows from Indonesia every year, and most Indonesian maritime companies are now collapsing. This situation is significant challenge for Indonesian development because according to the research by Japan International Cooperation Agency (JICA), the Indonesian volume of export and import carried by WTO GATS, known as the three pillars of the MTS in the Decision on Negotiations Group on Maritime Transport Services (NGMTS), i.e. to liberalize international shipping, to access auxiliary services, and to use port facilities, threaten the Indonesian development. In brief, the liberalization of the maritime transport services threatens human rights, in particular the Indonesian right to development because this field creates true 'winners and losers', makes


2 Indonesia has no National or multinational cargo reservation scheme except the application of national companies in MOT that provide the service for national needs, Kompani Cyber Media, Perusahaan Nasional Maritim Indonesia, 27 August 2000. Further, many port services have been privatized from Government Management and ownership (Badan Udara Milik Daerah (BUMD) to public. The reality was very different before 1996 in which national fleets provided 80% of the maritime services for national demands, and supplied 57% of international exports, and Fady Sulaiman Lubis, "Kompaan Pelaiwai Nasional," in Raja Maritim Pemerintah Republik Indonesia, ed. Y. J. May, ed. 1996, ed. Compendium of the National Needs. Research held by the Indonesian Department of Transport in '96, compared with Kompani Cyber Media, Perusahaan Nasional MDMR, 2002. As a result, the large share of maritime services has been leased by foreign fleet companies, and the effect of those regulations, the Indonesian fleet companies have become foreign fleet agents, Kompani Cyber Media, Perusahaan Nasional Tidak Dapat Dapat Perusahaan Perusahaan, http://www.kompani.com/kompani-req0111/20091203.htm, Biro Hukum, visited on 14 November 2002, and in a matter of Dec. many Indonesian maritime companies have created memorandum of understandings which oppose government policies regarding tariffs, forwarding charge, export fees, and permission. Raja Maritim (inci-jinci), Kompaan Pemerintah Indonesia of Understanding, http://www.maritim.com/rita/2009-September25-kompani-req1110.htm, visited on 2 December 2002.


Indonesia "a guest in its own home," and limits the right to development based on national policies.

Deviating from the common ideas of the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), development, as unalienable human rights is a comprehensive economic, social, cultural and political process aiming to improve human beings as individuals and a population based on their active, free and meaningful participation in development, and fair distribution of benefits.

This essay will critically examine the Indonesian commitments MTs under WTO GATS based on the application of the corpus of right to development. It will focus on two questions: first, whether the commitments, i.e. to liberalize international shipping, to access auxiliary services, and to use port facilities highlight national interests or not. Secondly, whether the commitments are in particular based on the corpus of human rights, such as equality, accountability, non-discrimination and participation.

II. The Liberalization of the Maritime Transport Services (MTS) under WTO GATS, Human Rights, the Right to Development, and the Indonesian Perspective

Entry into force on January 1, 1995, the WTO is a legal and institutional framework for multilateral trade, although the WTO is not complete and unwieldy in terms of its normative frameworks, particularly in service sectors.

The General Agreement on Trade in Services (GATS) is still being debated with regard to terms of application, ambiguous stipulations, unclear terms of service itself, and unfinished negotiations, such as on maritime transport services. As a multilateral and enforceable normative rules of international trade in services, the GATS covers general principles, main texts (obligations), annexes


11 Entered into force 23 March 1976, 992 UNTS 171; 966 UNTB 193; 777 UTS 6.

12 Entered into force 3 January 1976, 993 UNTS 3; 986 UNTB 170.


14 The WTO agreement consists of 79 individual texts related to trade in goods, services, government procurement, related issues and institutional property which have evolved through collective informal negotiations and adjudications. In addition, the negotiations in the Uruguay Round aimed to create a specific legal framework, the General Agreement on Trade in Services (GATS). Chakravorti Kishan. A New Trade Order in a World of Demand, in Ja Marie Gonzalez and Hermann G Guenther (eds). World Trade: Beyond Fast and Free in the Twenty-first Century (1993) 4; Teaching Material For Trade, Human Rights and Development, University of Melbourne 2002 (understanding material), 128 compared with WTO Noncestral Trade in Service Disciplines, An introduction to the GATS, [http://www.wto.org/english/respublic/sc/scgene/en/scgene_e.htm]


dealing with rules of specific sectors, and individual country specific commitments to provide access to their markets which bind all Member States.

The GATS has three key principles which are designed to regulate the broad terms of services, and not be used as guidelines for trade in services. They are, first, Article II of the GATS relating to the application of the Most-Favoured-Nation or non-discrimination principle, and the national treatment principle under Article XVIII which both of them apply directly and automatically. Secondly, market access commitments must be made by all members under Article XVI of the GATS. Thirdly, Member States have to ensure liberalization under WTO GATS pursuant to Article XIX.

The application of the three principles above creates a roof of unresolved debate in terms of substances and processes within WTO GATS, which the WTO secretariat itself has called fact and fiction, particularly in relation to trade liberalization, human rights and development.

With regard to those issues and debate, many experts, professionals, lawyers and

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18. Article III (1) of the GATS, in brief, these-paragraphs determine that Member States should guarantee equal treatment of national and foreign-service-providers, including foreign-service-providers in their countries.

19. Under Article XVI, the commitments given by Member States for market access is a strict rule determining the trade in services because "Each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under this term" Essentially, this Article stipulates that Member States can make commitments relating specific sector sections negotiated as multilateral and regional agreements for conducting international trade in services in four countries.

20. Report Number 9, Op. Cit., No. 16, p. 7. In this regard, some examples are presented, firstly, the application of the MFN and national treatment principles. Although the MFN and national treatment principles apply unconditionally and automatically, there are certain exemptions which are fairly determined persons of Article XIV GATS; the obligation to protect public moral or aesthetic public order, protect human, animal or health, and secure compliance with laws or regulations consistent with the Agreement. In fact, developed countries often create similar application of the MFN and national treatment exemptions excluding the application of Article XIV GATS. They are relevant to give other members (developing countries) a "free ride" to enjoy their marks for trade in goods as well as trade in services by applying non-trade related barriers and implement anti-dumping duties. These measures are in contradiction to the MFN and national treatment principles because they apply the reciprocity principle. Moreover, the application of progressive liberalization and market access commitments create issues of rights to regulate by Member States. The national treatment obligation, as we may use the Sao Paulo. The national treatment obligation, as we may use the Sao Paulo...
economists claim that the WTO GATS system contributes to development, fulfilling human rights needs3. This argument is true if this argument is viewed from the objectives of the WTO GATS as a whole. Therefore, liberalization of trade under WTO GATS in line with development promotes human rights, i.e. rights to social, economic, cultural and environmental development4. This achievement relies on the fact that the GATS creates credible and reliable trade rules in services, ensures fair and equitable treatment of trade (equality) to all members, stimulates economic activity, and promotes trade and development through progressive liberalization of services5. Moreover, the WTO GATS rules highlight the need for law and adjudication principles since they are applied as constitutional basis to solve disputes among member states.

However, viewed from the decision making process in the WTO GATS framework when the creation of GATS rules applies the "built-in agenda" principle under Articles VI, XII, XV and XIX, rules in the WTO GATS are expanded considerably. Further, the expansion of rules increase the gap between government and its citizen when the government must meet its citizen needs, and must continue sustainable and equitable development6. This condition breaches human rights, although the legal frameworks in the WTO GATS highlight the collective right to development, in particular the equality between developed and developing countries7.

Therefore, the relationship among trade (liberalization under WTO GATS), development and human rights is acceptable as fact and fiction depending on the point of views, positions, interests and impacts. However, the liberal impacts of the WTO GATS have shaped development into real facts rather than fiction. These facts have become universal concern, which was stated at the Rio da Janeiro Conference on the World Summit on Sustainable Development in Johannesburg 2002.

As a specific area of the WTO GATS, the MTS sector also applies those key principles mentioned above, and is also full of those debates as well. The Trade Negotiations Committee at the end of Uruguay Round adopted the Decisions on Negotiations Group on Maritime Transport Services (NGMTS) its function was to comprehensively negotiate the MTS sector among Members States is scope, to reach commitments in international shipping, auxiliary services, access to and use of port facilities (three pillar of the MTS) up to June 1996. On 28 June 1996, the Council for Trade in Services adopted several important decisions as follows: 1st, to suspend the negotiations on MTS; to resume the negotiations and to conclude the negotiations no later than the end of the first round of progressive liberalization on NTS (2010)2. Secondly, to keep the

3 See for example Mike Moore in the Guardian, 26 February 2001: “Firing up trade in commercial services... often huge benefits for every part of the world.” Richard告诉我们, UK Advisor for Trade, in World Development Movement, Ibid, p. 8
6 World Development Movement, Op. Cit. No. 20, p. 1
7 This stipulation is clearly determined in the preamble of the GATS, para 2.4 and 5 and Article IV of the GATS.
10 WTO, Trade in Services, the Council for Trade in Services, Decision on Maritime Transport Services, S/W/24, 5 July 1996.
11 Decision number 1, Ibid.
commitments given and to improve them\textsuperscript{a}, and thirdly, to constitute the suspension of the application of the MFN principle and its exemption under Article II GATS until reaching a conclusion of negotiation on MTS\textsuperscript{b}.

"there are two reasons for the failure to reach an international agreement on MTS\textsuperscript{c}. They rely on conflicts over the best means to achieve the most appropriate values of efficiency among Member States. Pursuing efficiency by cumulatively facilitating inter-carrier cooperation and rationalization of MTS or keeping highly competitive market is the first value\textsuperscript{d}. The second value is the existence of choice to be taken where 'long term of market efficiency is sacrificed in pursuit of short term economic goals'\textsuperscript{e}. The significance of the human rights consideration, as Hans-Ulrich Petersmann argues, is that 'human rights law gives WTO legal frameworks moral, constitutional, and democratic legitimacy far beyond the traditional economic and utilitarian justification for the future WTO negotiations and agreements, because between human rights and WTO rules are based on the same values: individual freedom and responsibility\textsuperscript{f}.'

Because there is no multilateral agreement on MTS, the basic legal framework for the application of MTS is the application market access commitments pursuant to Article XVI of the GATS which have been listed to the country scheduled by Member States. The commitments are given to liberalize three pillars of MTS, i.e., international shipping (29 countries), auxiliary services (26 countries), and to use and access port services (11 countries). In fact, those commitments are very different ranging from foreign equity ceiling, nationality registration, duty to appoint local agents, discriminatory taxation and limitation government cargoes, warehousing, custom clearance and port dredging\textsuperscript{g}.

For Indonesia, the liberalization of the MTS sector under WTO GATS can be viewed from two significant aspects generally. Those aspects are supporting and promoting international trade as well as domestic trade for the fulfillment of its socio, cultural and economic developments, and dependency of thousands of domestic operators and many people relying on the MTS industry\textsuperscript{h}.

Therefore, the Indonesian perspective in the liberalization of the MTS sector under WTO GATS can be viewed from two folds of the right to development as human rights, i.e. the fulfillment of individual rights and collective rights. Garcia-Amador defines individual rights as the consequence of the recognition, both internally and internationally, of the economic, social and cultural rights of man to live in complete life\textsuperscript{i}. Further, he defines collective rights as a right of States to conduct or to choose their own policies relating their development which 'highlights the fulfillment of the self-determination right, the rights of States to exercise permanent sovereignty over their wealth, natural resources and economy, the

\textsuperscript{a} Decisions number 2, 3, 5 and 6.

\textsuperscript{b} Decision number 4, ibid.


\textsuperscript{d} Ibid., compared with the International Chamber of Commerce (ICC), Op.Cit, No. 14, p. 2.

\textsuperscript{e} Delegation of Australia, ibid.

\textsuperscript{f} Petersmann, Op.Cit, No. 20, p. 21 and 24.

\textsuperscript{g} WTO Council for Services, Op.Cit, No. 27, p. 10.

\textsuperscript{h} Extracting from the Article 3 of the act 21/1992 relating to the Indonesian Maritime Transport, see Country Report, Op.Cit, No. 4, p. 5.

\textsuperscript{i} F.V. Garcia-Amador, The Emerging International Law of Development (1990), 37 quoting from Cees Fruyt who also quotes from the International Dimension of the Right to Development as a Human Right, etc., Report of the Secretary General, UN Doc. E/CN.4/1334 (2 January 1979), p. 33-34.
From legal perspective, in line with Amador’s views and several international human rights law conventions and resolutions on the right to development, the Indonesian Constitution and the act 21/1992 expressly support, recognize, determine and apply individual and collective human rights, e.g. the right to development in relation to maritime sector.

The Constitution gives general legal frameworks on how to exercise policy relating the Indonesian development based on the rules of law principle, and Act 21/1992 articulates those stipulations specifically in terms of maritime transport development in Indonesia. Under Article 33 (A) of the Constitution, the Indonesian economic development must be conducted on the basis of sustainable, self-reliance, just, and balance development, which under Article 28 (E), every body has a right to participate in the development process, to form association and to participate in the decision making process further, under Article 28 (G), everyone has a right to live in complete life, which pursuant to Article 28 (I), this right is unalienable human rights. In addition, Article 2 of Act 21/1992 stipulates that the Indonesian maritime transport must be conducted based on just and equitable benefits, collective right to provide the services, balance of rights, imposing character of public sector, rule of law and self-reliance principle.

Consequently, under the existing domestic rules, there are two significant principles to conduct maritime transport in Indonesia. They are, firstly, maritime sectors both national and international shipping and harbor activities are part of public services provided by Government. This principle applies to maritime services in the Indonesian territory, and to the Indonesian flag ships beyond the Indonesian territory which all policies and improvements of services must be regulated under Government authority. The second principle is that Indonesia has the right to regulate in pursuit of its development, especially on maritime transport sector.

Viewed from the objectives of development in the MTS sector, the level of national development should be prudently taken into account because there are conflicts of interests on how to accelerate and how to balance national development, and international development as a whole through progressive liberalization under WTO GATS. In Indonesia, the role of Government is central and determinative to cope with, to regulate on or to limit aspects of MTS based on its national policies.

As a matter of fact, two patterns show clearly Government positions for the liberalization of MTS under WTO GATS. The government has tended to sacrifice the long term market existence of national MTS, particularly for national and international shipping in pursuit short term economic goals, e.g. improving the export quantities as the first pattern. This policy exists before and after the commitments given to WTO GATS by promulgating several improper regulations in the MTS sector. It is argued from legal perspective that the impacts of those regulations are in breach with the basic principles for the Indonesian development pursuant to the Indonesian Constitution and

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Amador, ibid.

Articles 34 (3) of the Indonesian Constitution and the article 5 of the act 21/1992.


They are the President Instruction Number 4/1985 which opens all foreign maritime transport companies supplying maritime services, the 28 November package deregulation of 1998 which opens 137 Indonesian ports to foreign maritime companies, and the promulgation of the Government Regulation 70/1996 relating to the Opened and Closed Form inspired by the commitments to liberalize maritime transport services under WTO GATS.

Kemp, Cyber Media, Loo. Cit. No. 5.

Kemp, The G. Naro.

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Act 21/1992, e.g. the application of the self reliance principle in pursuit the development of the MTS sector.

The second pattern is that Government has tended to approach the development of the national MTS sector partially by ignoring the multidimensional aspects of the MTS industries. Related aspects, such as institutional infrastructures: human resources, capital (modal), bank credit and bureaucracy, and institutional level: lack of legal and regulatory frameworks, do not take into account comprehensively for development of the national MTS sector. As a result, many negative maritime stereotypes emerge. For example, Indonesia is a high risk maritime transport country,6 high risk for bank credit to MTS which is approximately 18%-24% per annum, and high economic cost for shipping. Further, as a public sector, Government only gives limited subsidy to the improvement of six Indonesian medium ships without adding the number of the ships.

These stereotypes cause imbalance for bargaining position in trade using maritime transport services, such as in the determination of terms of trade between national fleets and foreign ones. Commonly, the Free on Board (FOB) and Cost, Insurance and Freight (CIF) terms are used in Indonesia which FOB is for export, and CIF is for import. The FOB term means that buyers (foreigners) have authority to choose transports, insurance and destinations, whilst the CIF term means that the sellers have the authority to deliver goods to the destination (Indonesia)7. Further, recently, foreign fleets have used the Free on Track (FOT) term to supply the services. The FOT term means that all means from producers to consumers are provided by exporters for all commodities carried by MTS.8 This means that national fleets do not obtain values in terms of 'maritime service' itself.

It can be summed up that the Indonesian perspective in the liberalization of the MTS sector under WTO GATS in relation to human rights, and in particular the right to development is acceptable as fact rather than fiction. As a fact, in short term development perspective, the liberalization of the Indonesian MTS under WTO GATS supported by imbalance regulations and policies is a predator for the existence of national MTS.

As a fiction in long term development perspective, the liberalization of the MTS under WTO GATS will be an alternative way to obtain and to improve national sources of income for the Indonesian development beyond oil and gas contributions, if (as a fact) there are structural, legal, socio, cultural and economic reforms in the MTS sector. Therefore, human rights must be used to facilitating those reforms. Those reforms should be taken by applying the corpus of human rights, such as equality, accountability, non discrimination, participation and rule of law in the decision making process and in the distribution of the benefits. The government should be active conducting real reforms. Real reforms, applying Susan George's metaphor, e.g. it must be wiser to get off the bicycle, put our feet on the ground, and have a look around to see where we are9, must be made.

III. Analysis of the Indonesian Commitments in the MTS Sector under WTO GATS

Required to have a schedule of specific commitments on MTS, Member States guarantee market access and national

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6 Kompas Cyber Media, Loc. Cit, No 4

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treatment, and attach any limitations for liberalization of trade in services. Indonesia gave its specific commitments on 15 May 1996. The government has insisted recently on keeping the given commitments an international shipping, auxiliary services and port services, as specified in the '93 initial commitments'.

Commonly, commitments in the liberalization of the MTS sector cover three pillars. They are, firstly, international transport services: passenger and freight service (CPC 7211 and 7212), and exclusion of the cabotage principle applied under Article XVI (market access commitment). The second pillar is auxiliary services: cargo handling (CPC 741), storage and warehousing (CPC 742), custom clearance, container and depot, maritime agency, and freight services (CPC 748) applied pursuant to Article XVI (market access commitment).

The last pillar is access to and use of port facilities: pilotage (CPC 7452), towing and tug assistance (CPC 7214), provisioning, fuelling, watering, garbage collection, ballast waste disposal, port captain services (CPC 7459), navigation aids (CPC 7453), water and electric supplies, emergency repair facilities and anchorages (CPC 8065), and berth and berthing facilities (CPC 7452) scheduled under Article XVII (additional commitments). Those commitments are classified in the GNS/W/20 classification. This classification contains differences in coverage and scope of commitments by Members States. Those kinds of services cause wide range of commitments in the MTS sectors.

Although they vary in term of scope and coverage, those commitments aim to provide secure and predictable conditions of access to markets benefitting to traders, investors and ultimately consumers. In particular, those commitments are created to minimize or even to abolish barriers or obstacles in the MTS sector. As identified by the '97-98 European Communities Shipowners Association Report', the barriers are called 'negative factors to market', i.e. restricted access to port services, preferential cargo allocations, restrictions on the establishment of armed branch offices, discriminatory measures favoring the use of national carriers, cumbersome procedures, abusive tariffs and unjustifiable liability claims of customs.

The MTS sector covers two models of services under Article I (2) of the GATS, i.e. supply of services from the territory of 'one Member into the territory of any other Member for international shipping, and supply of services by one Member through commercial presence in the territory of any other Member for auxiliary services and access and use of port facilities. In general, the Indonesian commitments apply to all three pillars with certain exceptions or reservations under Article XVI for the market access commitment. These restrictions only apply to international shipping, i.e. restriction to the requirement to appoint local agents and exclusion for government cargoes. Meanwhile, for auxiliary services and port facilities, there are no limitations for their application in Indonesia.

In analyzing those commitments, their formation process and their applications will be
taken into consideration as determinant aspects by outlining motives and application of the corpus of right to development. They will be outlined below:

A. The Motives

In pursuit short-term economic goals, e.g. improving the export quantities beyond oil and gas contributions is the main motive for the creation of three commitments for the liberalization in the MTS sector in Indonesia. This motive is based on global trends in the early 1990's that global capitals flow increased sharply. Further, Asia capital had proved as a promising destination for the foreign investments, including Indonesia which had economic growth of 7% per annum before the economic crisis hit this region. This economic motive, as Misdud Machfud, an Indonesian economic analyst argued, is a main condition for the Indonesian development which employment, income, and State financial budget could be sustained for improving national resilience.

Therefore, as an alternative substitution for the oil and gas contributions to the economic, development, trade in services, e.g. maritime transport services pose a significant role to Indonesian development. The basic guideline for trade in services in Indonesia, as Tursky Ari, the Minister of Commerce in the last Soeharto cabinet stated that “the main destination of the Indonesian services is service-products which have competitive aspects in line with the international ethics in the international business needs”. As a result, Government promulgated many regulations supporting the economic motive, such as the President Instruction Number 4/1995, the 28 November-package Detegulation of 1988, the Government Regulation 70/1996, the Government Regulation 82/1999, and the Minister Transportation Decision 33/2001 relating to Maritime Transport Industry.

It is argued that those regulations neglect other aspects of the development, such as the socio and cultural aspects as part of the rights to development components in the MTS sector. Those socio and cultural aspects are recognized and must be used to conducting maritime transport pursuant to Act 21/1992. Further, this argument is supported by cultural existence of the traditional maritime transport services conducted by traditional groups applying the adat laws for maritime transports especially in the Eastern Indonesia Region or Kawai- an Tisiru Indonesia (KTI). The traditional Maritime transport operated by adat groups, i.e. Panggang Law and Panggang Sawi applies family management. It has several benefits, such as independence from port infrastructures, ability to reach hinterland ports, low tariffs, and resistance from economic crisis.

Further, the most important aspect is that the sea worthiness of traditional ships is in accordance with the International Maritime Organization standards, e.g. 360 Gross Rate Tonnage (GrT). The content for shipment are people needs or daily needs, such as wheat, rice, sugar, salt, corn, coconut, candle nut, etc.

67 Articles 3 and 5 the Act 21/1992
69 ibid, p. 6
70 ibid, p. 4.
Amidst, oil, fertilizer, cement, rattan, log and asphalt. Therefore, this traditional maritime transport services are able to fulfill the distribution of daily needs accounting for 16% of the domestic fleet ability.

Consequently, not only the economic involve but also socio and cultural aspects must be taken into consideration to find and to apply the commitments to liberalize maritime transport services under WTO GATS in the future. As a comparison, Philippines recognizes socio and cultural values of the maritime transport services when Philippines develops its maritime policies under WTO GATS. The reasons for this argument are that socio and cultural aspect highlight the nationalism self-reliance principle, and they also highlight the existence of many people (thousands of people) depending on this sector financially, in particular for the existence of the traditional maritime transport services.

This exclusion of limitation and exception is based on three legal arguments. They are the application of the right to regulate, the level of national development, and the application of the emergency safeguard principle under WTO GATS. If the inclusion of the traditional or cultural way of life is assumed to be negative factors to liberalize maritime transport services under WTO GATS, let other Member States negotiate with Indonesia. Or, let the Dispute Settlement Understanding (DSU) and Dispute Settlement Body (DSB) under Article XXI of the GATS resolve this matter.

8. The Application of the Corpus of Right to Development

The concept of rule of law of a state reflects that its constitution recognizes the supremacy of law, equality before the law, and human rights, because in practical terms, it constitution may be undermined as an authoritative change, or a solemn covenant, between the government and its people. Indonesia is a "representative governance" under the rule of law, which human rights are recognized, guaranteed and enforced by the Indonesian Constitution. The skeleton of the Indonesian Constitution highlights the supremacy of law, equality before the law, and human rights. The concept of supremacy of law and equality before the law principle are fundamentals for the Indonesian judiciary system, which consists of impartial, independent and competent bodies. Human Rights, i.e., rights to life, rights to form family and to have children, rights to education.
rights to equality, rights to freedom, rights to communication and participation and rights to protection are exhaustively guaranteed by it. Further, pursuant to Article 281, rights to life, rights to freedom, rights not to be tortured, and equality before the law are fundamentals of human rights which no derogations are permitted.

The principle of rule of law applies the bottom-up mechanism relating to the decision making process by taking real true participation, non discrimination, adequate progress, and effective remedy principles in the development process.

It is argued that the creation and the application of the Indonesian commitment in the MTS sector ignore the principle of rule law, i.e., true participation, non discrimination, adequate progress, and effective remedy principles increase the gap between government and its citizen.

This argument is based on the reality that active participation from individuals, associations, and NGOs is not taken into account. The recent example clearly supports this argument when Government reneged on the Government Regulation 2/1999 relating to the Maritime Transports.

One of its consequences determines that all national maritime companies must have their own ship armadas. Many maritime associations, such as the Indonesian National Ship Owner Association (INSA), the Indonesia Shipping Agency Association (ISAA), the Freight and Delivery Agency Association (FDAA), and the Joint Export and Import Association (Gafeksi) reject this regulation. They argue, first, this regulation is inconsistent with higher regulations, i.e., the Constitution and Act 21/1992. Second, the application of this regulation will make national maritime transport companies collapse. Meanwhile, Government counters the argument that this policy is the best way dealing with national and international interests for the liberalization on the MTS sectors in Indonesia.

There are two results for this situation. Firstly, the application of this regulation is suspended until now because of that debate. Essentially, the true participation, non discrimination, adequate progress, and effective remedy principles make equivalence among NGOs (associations), individuals and government in the decision making process.

Inconsistency of regulations is the second result which creates uncertainty for the existence of domestic maritime transports. This uncertainty in the domestic MTS sector is identified in three categories of problems. They are legal bases for ownership of ship to conduct the MTS business, inequalities of regulations, and unfair competition among national maritime companies.

Based on Government Regulations 5/1954 and 2/1969, and Act 21/1992, maritime companies must have their own ship armadas to conduct such services. Therefore, before GATS era, there were true strong legal bases for the existence of domestic maritime transport companies because the requirement of ownership of ships simulated the resilience principle for conducting MTS in Indonesia. However, based on Act 6/1996 relating to the Indonesian Waters and the delayed Government

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* Article 2 (1) ICCPR.
* Ibid.
* Ibid.
Regulation 82/1999, the requirement of ownership of ships is abolished due to assumptions of conducive ways, application of the governments under WTO GATS, and economic positive goals. Exception to appoint local agent commitment for international shipping under WTO GATS is the inspiration for the creation of Act 61996 and Government Regulation 82/1999 in fact, this exemption has shaped national maritime companies from maritime operators to maritime service providers, or from "real owner" to "real skipper".

Inequity of treatments in favor with foreign fleet companies both on the application of income tax and cost of facilities in the second uncertainty category. Although the national treatment principle under Article XVIII GATS determines an equal treatment between national and foreign-service suppliers or providers, national maritime companies and their employees have to pay high income tax. While, foreign maritime companies and their employees including Indonesian are free from income tax. Further, foreign fleets can build and maintain their ships in all Indonesian port facilities, meanwhile national fleets only enjoy maintenance without having access to build those facilities in Indonesia.

Because of these two uncertainty categories mentioned above, unfair competition among national maritime companies categories as the third uncertainty category. Quality of services is the key for the existence of maritime services. In fact, "war on maritime service tariff" among maritime companies creates unfair competition benefiting for the exporters only by conducting illegal ship charters in the bidirectional maritime industry.

As a sector that needs multidimensional approach, MTS must be regulated, maintained and supported by all related aspects. If Government is truly consistent with the two folds of the objectives of MTS, i.e. supporting development of national, regional and international economic growth and employment of benefits of thousand of peoples relying in the MTS sector. Government must improve the current commitments on MTS under WTO GATS by approaching all aspects comprehensively in scope, aims and applicability in the MTS sector. As a comparison, Malaysia recently enacted the "Sea Bound Trade Policy" aiming to reach a comprehensive maritime development. This policy is based on real policy willing from Malaysian government to stimulate economic, socio and cultural development via MTS sector.

Government should actively review its policies and regulations on MTS by highlighting other relevant aspects as the application of internal reforms. These internal reform should be mainly conducted on shifting the economic motive to be balance with social and cultural motives, enacting tax holiday to national maritime fleet is practiced by Thailand in its specific commitment exemption on MTS under WTO GATS, creating national consortium on MTS funded by Government, reviewing inconsistent regulations, and stimulating bank investment on MTS. To avoid

\[\text{Kempas Cyber Media, Op.Cit., No. 4.}\]
\[\text{Kempas Cyber Media, Op.Cit., No. 5.}\]
\[\text{Kempas Cyber Media, Loc. Cit., No. 6.}\]
\[\text{Ibid.}\]
\[\text{Kempas Cyber Media, Loc. Cit., No. 2.}\]
\[\text{Jawara Cyber Media, Pelaburan Kajang Salleh Moh Ang, Loc. Cit., No. 4.}\]
\[\text{WTO, Council, Trade for Services, p. 16.}\]
\[\text{Agrupation from many national associations, NGOs and individuals, op. cit. and Kempas Cyber Media, th. Loc. Cit., No. 4.}\]
unsolved debated and to achieve the development objectives, the concept of right to development should be taken into consideration in the decision making process. This consideration applies the bottom up principle, and fulfill the enjoyment of right to development for individuals, groups, States and international community as a whole.

Pursuant to legal procedures in the paragraph 6 the Decision on Maritime Transport Services on 28 June 1996, and the application of Article XXI GATS, in theory, Indonesia has opportunity to improve, modify, or withdraw its commitments by fulfilling legal requirements contained therein.

There are several ways to deal with these procedures under the GATS rules. Firstly, under Article XXI, Indonesia can pay ‘compensation’ for amount of equivalence values of the commitments given. This process will take a long time. Or secondly, pursuant to Article XIV, Indonesia can apply the General Exception argument under the reason of national security for the existence of national MLS. Or thirdly, Indonesia may seek a temporary waiver from any obligation under the WTO Agreement based on various balance-of-payment difficulties due to current economic conditions. Or finally, Indonesia can use the application of the emergency safeguard measure because. Although the emergency safeguard measure is still in progress, it is argue this measure is the most reliable way to improve, modify or withdraw these commitments because the nature of damage on the Indonesian MLS can be proved by scientific evidence.

Although it seems impossible to reverse the commitments due to the application of Article XXI GATS, Government shall do these reforms to recover the national MLS condition. Because MLS is still under negotiation, intention to improve, to modify and to withdraw can be offered to other Members as a part of offer-request mechanism for progressive liberalization of MLS under GATS to reach a multilateral agreement on MLS.

Obligation to appoint local agent in international shipping sector must be replaced by requirement to appoint local partners (joint ventures), and add the requirement of ship nationality to avoid unreal ship charters.

Although requirement to appoint local agent is also a specific commitment given by Australia, agency creates sub ordinal position for the Indonesian maritime companies without having ability to operate maritime transport services directly. The requirement to appoint partner, as applied by Malaysia, creates balance position between foreign and national maritime companies to which national maritime companies are actively involved. Further, Indonesia should include the existence of traditional maritime transport in its exemption for international shipping sector especially for the fulfillment of domestic maritime needs in pursuant to the application of the cobouge principle.

IV. Conclusion

Because human rights play significant roles as “two fold of coin” depending on the view in relation to trade liberalization, human rights and development, the identification of

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66 Part 6 Decision of the Council for Trade in Services determines that “Notwithstanding Article XXI, a Member may improve, modify or withdraw as part of its specific commitments in this sector, during a period of sixty days after the end of which shall coincide with the conclusion of the negotiations referred to in paragraph 1. During the same period, Members shall finalize their requests relating to MFN Exceptions in this sector”.

67 WTO, Fact and Fiction, p. 4.

68 WTO, Council for Trade in Services, p. 13.

69 Ibid.

70 As a conclusion, Australia and New Zealand removed the cobouge principle to liberalize MLS in their countries due to their ability management to pursue their national level of development. See ibid, p. 8. In contrary, due the report of national development, Indonesia can apply the application of the cobouge principle for the existence of traditional maritime transport.
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