



The interaction of the non-discrimination principle in the procedure of the World Trade Organization with the theory of international public services

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Abstract

The World Trade Organization is the only international organization with general jurisdiction in relation to trade rules between governments and is one of the basic pillars of world governance. At the center of the World Trade Organization are trade agreements that cover all three sectors: goods, services, and intellectual property. The principle of non-discrimination is one of the basic principles of the multilateral trade system, which is stated in the preamble of the WTO Agreement as the main tool to achieve the goals of the organization. In this introduction, the members of the World Trade Organization have explicitly declared their desire to eliminate discriminatory behavior in international trade relations. The principle of non-discrimination is divided into two principles, the behavioral commitment of the entire El-Wodad government and the national behavioral commitment. And these two principles are expressed in all three areas of trade in goods, services and intellectual property. In this research, an attempt has been made to investigate the interaction of the principle of non-discrimination in the procedure of the World Trade Organization with the theory of public services with the analytical descriptive method and the use of library resources and international documents. According to the results of the World Trade Organization's research, there are several fundamental principles for trade that must be followed: "The principle of non-discrimination" This principle itself has two sub-rules: 1) "The rule of conduct of the state of totality" in the sense of adopting equal treatment with people from different countries, according to which the goods, services and intellectual works of all foreigners should be treated the same in principle. 2) "Rule of national behavior" means adopting equal treatment with domestic and foreign persons, according to which, in principle, there should be no discrimination between the goods, services and intellectual works of foreigners and domestic ones.

Key words: interaction, prohibition of discrimination, World Trade Organization, public services.

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Introduction

The idea of public service has been suggested to rulers by philosophers, moralists, and reformers of society in all periods of governments, even authoritarian governments. In the social, political and literary history of France, those government activities that are used by the public and have the aspect of public services; Such as: dam construction, road construction and reservoirs, caravanserais, etc., have been more or less influenced by the idea of public service (Ansari, 1384: 76).

The theory of public service appeared and was established in the votes of the French State Council and in the vote of February 8, 683 "Blanco" the theory of public service was accepted for the first time. Blanco was

a little girl who was driven on the street by a wagon belonging to the government that was driven by the workers of the government tobacco factory; He was injured. His father claimed damages against the government and workers based on the civil law. The case was disputed by the administrative and judicial courts of France, and finally, the decision of the Court of Distinction and the French State Council on the civil liability of the government due to the performance of the duties of their employees - without determining whether the duties performed are of the affairs of the government or of the administration - was issued, and the foundation of Markesh" and another about the dangerous madman "Fotri" established the theory of public service (Mohammednejad, 1395: 110). According to the public service, it does not have a special nature compared to other services; except that its purpose is to provide public benefits and this is the personal factor that gives a public character to a service (Mousizadeh, 2007: 50).

The principle of national treatment is one of the principles of the Agreement on Trade in Services of the World Trade Organization, and in order to ensure the elimination of discrimination in the international trade of goods and services, it has been established under the regulations of the World Trade Organization. The aforementioned principle implies that countries that want to become members of the World Trade Organization must avoid any action or regulation that leads to granting some kind of exemption or privilege to their nationals (Sadeghi and Suleimanzadeh, 2014: 51).

The World Trade Organization is one of the largest economic organizations at the international level, which includes 153 permanent member states, 30 observer states, and many international organizations. Despite its nascent life since 1995, this organization is an evolved product of the General Agreement on Tariffs and Trade (GAT), which started its activities to facilitate trade between countries since 1945. The most important features of this organization, which has shown the purpose of its establishment, is face-to-face dialogue between governments to regulate commercial regulations and resolve disputes arising from commercial activities. The scope of activity of this organization, as its name suggests, is wide throughout the world and includes issues and issues related to agriculture, banking, industries, communications, government transactions, industrial standards, food hygiene, intellectual property and many others, so that today more than 90% of global trade takes place between the members of this organization. This organization has put five important principles at the forefront of all its activities, which are 1- Trade without discrimination between governments and domestic and foreign nationals, 2- Free trade gradually and with agreement, 3- Predictability and transparency of trade, 4- Creating fair competition and 5- Encouraging development and economic consensus (Nawazni, 2010: 1).

Considering that there have been different interpretations of the concept of public service principles; Some of the principles of public services have been questioned by jurists and that the formation and recognition of many principles have been in the opinions and judicial procedures of countries, and the principles of administrative law, especially the principles governing public services, can be provided to judges as a complementary tool in the interpretation of the relevant law, and that Iran's legal system lacks a codified general administrative law, although several principles have been mentioned in the civil service management law and the employment law (Mohammadnejad, 2015: 107). Therefore, it is necessary to review the judgments and judicial procedure of the Court of Administrative Justice.

Fields of evolution in the concept of public services and its necessity

In the classic literature of public services, it has been very common that the jurists put the provision of public services in the monopoly of the public sector (administration) and in the definitions they provided of public service, they specified the allocation of public services to the administration and public person. For example, they have said: the activity of a private institution cannot be considered as an activity providing public service (bilouseac, 2012: 241). Some have also said that: public service is often used as a synonym for government service and includes all those who work in the public sector (Perry, 1990: 368). It seems that such views are caused by the lack of nobility in the new generations of public services and are more related to the period before the popularization of privatization and downsizing of governments. In fact, the allocation of public services to the public sector "... has been mostly for countries with a socialist policy and a centralized economy" (ngowi, 2008: 98). This is despite the fact that, in Leon Dogi's view, "the

concept of public services... is very broad and this concept goes beyond the concept of the public sector as a sector that provides services" (Kia, 1391: 17).

Although in the past "providing public services has been one of the key duties of the public sector", today the private sector is also involved in providing public services and has responsibilities. Therefore, considering the new generations of public services, confining public services to the public sector does not seem correct. Because in this case, due to the governments giving up their tenure and accepting the governance roles and handing over examples of public services to the non-governmental and private sector, it should be considered the deterioration of the example and consequently the dissolution of the concept of "public services" in public law. This is while the requirements of changes in the role of the government in managing economic and social affairs and theoretical revision in explaining the role of the government require that instead of believing in the deterioration of public services, it is believed in its conceptual evolution. For this reason, Denhardt emphasized in the article "The Future of Government Management" in 2013 that new skills and abilities will be needed to provide public services in the future (Denhardt, 1999: 279).

Of course, in order to distinguish the public services provided by the private sector from other private sector activities, it is necessary to provide a precise criterion to identify public services from other private sector activities. Otherwise, "if public service is not clearly defined and has a lot of room for interpretation, it can leave opportunistic behavior free" (Cox, 1999: 164).

The principle of non-discrimination

The definitions of discrimination in international conventions, except for one case in Article 26 of the Covenant of Civil and Political Rights, are faced with two major problems in using them to provide a definition of discrimination against minorities: firstly, that these definitions are limited to the same agreement, and secondly, that these treaties or articles related to the definition of discrimination are not specific to minorities and can only be interpreted with a broad interpretation. It also applies to minorities. The above article lists the reasons for discrimination in twelve cases, which are: race, color, gender, language, religion, political opinion, any other opinion, national origin, social origin, property, birth, any other status.

Important questions are raised regarding the prohibition of discrimination against minorities. First, is any discrimination against minorities illegal? According to the Human Rights Committee, the mere allegation of discrimination is not considered a reason for discrimination, but the occurrence of discrimination is established when it has an objective effect, consequence or goal.

Secondly, is banning some discriminations preferable to others? In other words, are some discriminations considered more important than others? The Human Rights Committee often does not use language that shows extreme sensitivity to one of the reasons for discrimination, making it more prominent than other reasons; But in international forums, interpretations about elements such as nationality, gender, age or being weaker attract more sensitivity and reasons such as other cases have almost never been interpreted. Especially racial, gender and religious reasons have attracted the most attention from the Human Rights Committee. Thirdly, in case of contradiction or conflict in the concept of discrimination in international documents, which document is preferable? In connection with the conventions approved by a single authority, such as the conventions approved by the institutions affiliated to the United Nations, one should refer to the opinions and procedures of the same authority. In relation to the conflict between the concepts in two covenants or between the covenant of civil and political rights and any other covenant, the provisions of the covenant of civil and political rights are preferable. The human rights committee has raised this preference in two cases. In many cases, discrimination against minorities is done indirectly.

The committee in charge of the Convention on the Elimination of All Forms of Racial Discrimination has been positive towards identifying this type of discrimination and has considered it to be valid, provided that the presence of an unjustified and disproportionate impact on minorities is verified. This is while the human rights committee was unstable in accepting indirect discrimination. Between 1993 and 1997, this

committee issued contradictory votes in this regard. Finally, in 2003, this committee explicitly recognized indirect discrimination and, accordingly, prohibited indirect discrimination. Since 2002, the Economic, Social and Cultural Rights Covenant Committee has explicitly pointed to the hidden forms of discrimination and its verification depends on creating a discriminatory effect.

The principle of non-discrimination in GATT

GATT is an international agreement that was concluded in 1947. It contains rights and obligations that have governed for half a century between countries called contracting parties. The GATT governing rules for the multilateral trading system involve a series of negotiations or rounds. Until 1986, GATT was the leader of world trade, and despite being a temporary agreement, it lasted and was implemented for about half a century, with the beginning of the Uruguay Round (1986-1994), new issues were raised, and since GATT never had a legal source as an organization and was not recognized as an organization in terms of international law, on the other hand, the expansion and complexity of issues related to multilateral trade and GATT's lack of response to them caused gradually the members of this organization sought to create precise and responsive structures for this purpose. This step was taken in the Uruguay Round negotiations and with the signing of the Morocco Agreement, and with the approval and commencement of work of the World Trade Organization from the beginning of 1995 at the end of the same year, the role of the GATT as a temporary international organization ended and its agreements were followed in the framework of the newly established organization. The rules of the World Trade Organization are actually considered as the basic law of trade in such a way that other international organizations seek to include their own regulations in this organization due to having the executive guarantee of the rules of this organization. The principles of the World Trade Organization consist of the principle of non-discrimination, the principle of transparency and predictability¹⁰, the principle of trade liberalization, the principle of special and special treatment with developing countries, among which the principle of non-discrimination is extremely important among other principles. This principle itself is divided into two principles, the perfect state and the principle of national behavior, each of which has its own unique rules and has been implemented since GATT. In the case of trade in goods, the principle of conduct of the state of Kamele Al-Wadad stipulates the non-discrimination between two similar products of the origin of the member countries among the members, while in the national conduct, the prohibition of discrimination between imports and similar domestic products is the same. In the case of service business, this principle applies to services and service providers. And in intellectual property rights, this principle applies to nationals of countries and their intellectual works. The principle of national behavior combined with perfect behavior is the best possible way to prevent the two-sided nature of GATT negotiations in the world trade system, because practically every country tends to give more commercial advantages to its main trading partners than other member countries. On the other hand, regarding the European Union, it can be said that among the three most important goals of this union, the economic goals have a special place, according to Article 2 of its founding document, the goal is to provide a common framework for guiding and developing free trade relations between the member states in order to ensure sustainable development, protection of the environment, elimination of discriminatory behavior, and removal of obstacles in international trade relations (Pourzangbar, 1391: 1).

The legal framework of non-discrimination

- Range of support

The purpose of non-discrimination in international economic law and European law is to protect foreign products and people from unfair treatment in foreign markets. The protection of goods and persons, as considered in the fundamental rights, has not been expanded in accordance with the compensatory function (and nature) of international law. The principle of non-discrimination faces some limitations. Basically, based on the right of sovereignty, countries can impose a more favorable treatment on foreigners and imported goods than what is allowed on their own goods and nationals (reverse discrimination). In fact, the way of looking at these conditions is as if the internal factors do not see any harm from the existing internal laws and discriminations. But in fact, the rights of the World Trade Organization and the European

Union guarantee non-discrimination outside the borders, and the region under the jurisdiction of the countries is not covered by the protection and guarantee of the World Trade Organization and the European Union, and this (non-inclusion) is a challenge to the principle of non-discrimination. It should be mentioned that the borders are disappearing in European law. Firstly, it is possible that the access of nationals to the foreign market will be disrupted as a result of internal measures applied to nationals, and these measures will affect the rights protected by European law.

A situation similar or comparable to this case may also occur in the law of the World Trade Organization. Second, the principle of equality in European law applies to all internal operations of the European Union, regardless of nationality (which is affected by internal and governmental measures).

- Supervisory approaches to achieve non-discrimination

The basis for creating a non-discrimination environment for domestic and foreign products is provided with different regulatory approaches in accordance with the independent regulatory power. In the following, we will describe different approaches that can be useful for non-discrimination, from concentration to cooperation. The best conditions for guaranteeing non-discrimination occur when the power of supervision is transferred to the international legislator to establish uniform laws for all members of the international community. In the World Trade Organization, this issue (supervision by the legislator) is partly related to the application of rules by the judicial branch (such as investigation boards and appeals branch). In addition, the World Trade Organization is not inherently transnational and does not have the legislative power to implement its principles. In the European Union, in some cases, the exercise of power has been transferred to the preliminary rulings of the Court of Justice, and in some cases, according to Article 288 of the Treaty of the European Union, the operation of the European Union in the field of common commercial policies and competition rules is subject to the approval of the law.

Motives to eliminate discrimination

Beyond the principle of equality, international and European trade regulations have also prohibited some incentives that lead to unequal behavior and have no legal origin. Identical and non-identical (similar and dissimilar) are concepts that are discussed more in law than in philosophy, religion and ethics. The laws of the World Trade Organization and the European Union have definitely prohibited discrimination based on the origin or nationality of products or people. According to paragraph 1 of Article 1 of the General Agreement on Tariffs and Trade, the principle of the complete state of Al-Wadad also emphasizes the prohibition of unfavorable (unequal) treatment towards products based on their origin or destination. In paragraph 4 of Article 3 of the General Agreement on Tariff and Trade, it is emphasized on the same behavior of one party to the agreement towards all the parties of the agreement in importing goods.

The General Agreement on Trade in Services is also based on similar principles. As stated in the agreement related to the commercial aspects of intellectual property rights, the rights of all real and legal persons who have the right in all member countries of the agreement are protected. In World Trade Organization law, discrimination based on the origin of the product or the nationality of competitors, as well as making exceptions, is illegal. This principle is also true in the field of providing government needs (government purchases). According to Article 3 of the General Tariff and Trade Agreement and the multilateral agreement (among several parties) on government purchases, the purchase of goods and services must be done without considering the origin and nationality of the bidders and suppliers. But developing countries strongly resist joining this agreement, and this shows the prevalence of local (or regional) purchasing methods and discriminatory behaviors. In these conditions, the lack of discrimination and access to the free market in these countries is out of reach due to corruption, lack of competition and the desire to create start-up industries.

Equality and non-discrimination inherently implies the feature of comparability of products, both goods and services. Therefore, the concepts of non-discrimination and equal treatment are meaningful only for similar and competitive products and have no meaning for non-similar products (due to differences). While similar products are competitive, dissimilar products are, at most, interchangeable. Discrimination

between the above two categories of products (similar and non-similar products) has been rejected, although these two imply different concepts. Therefore, explaining the similarity and competitiveness of products is the main component of non-discrimination in the World Trade Organization.

Existing motivations for discrimination

Trade liberalization and economic integration can challenge some legitimate goals of establishing equality. Therefore, the laws of the World Trade Organization and the European Union provided exceptions in which there is a small amount of discrimination (in these cases, discrimination is legally permitted). 24 General Agreement on Tariffs and Trade has provided exemption from the conduct according to the principle of the complete state of sovereignty regarding identical products in free trade zones and customs unions in favor of developing countries and with a necessary decision. In comparison with Article 24 of the General Agreement on Tariff and Trade, in Article 5 of the General Agreement on Trade in Services, the members, under certain conditions, can use the exemptions of the regional agreements on the liberalization of trade in services and behave against the principle of the complete state of El Wadad. In Article 20 of the General Agreement on Tariffs and Trade, granting exemptions is not necessarily equivalent to discriminatory behavior. According to the general agreement on trade in services, there is no discrimination against foreign services and their providers regarding the services specified in the agreement. But even according to this table of services, members may face inequality and discriminatory restrictions in different modes of service supply. Only the services that are under Article 14 of the General Agreement on Trade in Services and its corresponding Article 20 of the General Agreement on Tariffs and Trade are fully exempted from non-discriminatory behaviors. Articles 3 and 4 of the Agreement on Commercial Aspects of Intellectual Property Rights (TRIPS) grant a limited number of exemptions for behaviors in accordance with the principles of sovereign state and national behavior, the main of which are reciprocal policies found in other international agreements, especially the provisions of the Paris, Berne, and Rome Conventions. The TRIPS agreement does not have provisions on general exemptions. Legitimate conditions and motivations for discrimination are mentioned in Article 20 of the General Agreement on Tariff and Trade and Article 14 of the General Agreement on Trade in Services.

Equal conditions in competition

The basis of non-discrimination in international economic law and European law is to create equal conditions of competition between competitors and domestic and foreign products in the field of trade in goods, services, work and investment. Equality of opportunities lies in the heart of the concept of non-discrimination.

Non-discrimination does not guarantee the results and consequences, but it acts as a factor in creating an equal position in market access, and neutralizing unfair restrictions imposed by governments and other effective powers. Equality of opportunities creates real conditions in competition and does not stop (prevent) legal discrimination, but becomes legal discrimination.

This fact is equally true in the laws of the World Trade Organization and the European Union. In the real world, firstly, due to the reduction of protective measures at the borders and the increase of non-tariff barriers to trade with the increase of import and export regulations, and secondly, the conditions are favorable to hide the real intention of protecting domestic products and the need to file a lawsuit and prove this intention in court (and the length of the legal process), indirect discriminations occur more than direct discriminations. The interesting cases in the lawsuits filed in the World Trade Organization and the European Union are related to indirect discrimination. The members of the World Trade Organization, the Appellate Division and the Court of Justice (European Union) pay close attention to the real effects of the measures according to the conditions. The main structural difference between the rights of the World Trade Organization and the European Union is not related to non-discrimination, but to the effects of the four categories of freedom that the law has established for the internal market.

The Court of Justice (European Union) has developed basic freedoms beyond non-discrimination and unnecessary restrictions through judicial procedure. Therefore, if non-discriminatory measures require

unnecessary limitations and are not appropriate to the conditions, it may not be considered non-discriminatory in itself. For this reason, limitations must be evaluated so that proportionality is observed as an inherent part of freedom. In the following, the necessary fields for the implementation of the rules of the World Trade Organization will be examined.

conclusion

Today, the main and dominant theory in the field of discussions related to the basics of administrative law is the "public service" theory; According to this theory, public services are public benefit activities that are carried out through public institutions or private institutions under the supervision of public persons to meet public needs. Considering the principles of the constitution, including principles 3, 29, 30, 43, etc., this theory is considered as the main basis for the existence of the administrative apparatus of the government and is subject to the principles that govern it; These principles are: equality, progress, freeness, continuity and compatibility. Some of these principles, including equality and free public services (about free education and physical training), are included in the constitution, and some others are not clearly stated; But they can be extracted and identified indirectly from the concept of the principles of the constitution. The World Trade Organization¹ based on the Morocco Agreement² is known today as one of the cornerstones of international trade law³. It was created in 1995 during the long negotiations that took place in the General Agreement on Tariffs and Trade (GAT). Although the World Trade Organization and GATT⁴ are related, they also have differences. GATT is an international agreement that was concluded in 1947. It includes rights and obligations that have existed for half a century between countries called contracting parties. GATT's governing rules for the multilateral trading system include a series of negotiations or rounds. Until 1986, GATT was the leader of world trade, and despite being a temporary agreement, it lasted and was implemented for about half a century, with the beginning of the Uruguay Round⁷ (1986-1994), new issues were raised, and since GATT never had a legal source as an organization and was not recognized as an organization in terms of international law, and on the other hand, the expansion and complexity of issues related to multilateral trade and GATT's lack of response to them it caused the members of this body to gradually create detailed and responsive structures for this purpose. This step was taken in the Uruguay Round negotiations and with the signing of the Morocco Agreement⁸, and with the approval and commencement of work of the World Trade Organization from the beginning of 1995 at the end of the same year, the GATT's role as a temporary international body ended and its agreements were followed in the framework of the newly established organization. The rules of the World Trade Organization are actually considered as the basic law of trade in such a way that other international organizations seek to include their own regulations in this organization due to having the executive guarantee of the rules of this organization. The principles of the World Trade Organization consist of the principle of non-discrimination⁹, the principle of transparency and predictability¹⁰, the principle of trade liberalization¹¹, the principle of special and special treatment with developing countries¹², among which the principle of non-discrimination is extremely important among other principles. This principle itself is divided into two principles, the complete state of the nation¹³ and the principle of national behavior¹⁴, each of which has its own unique rules and has been implemented since GATT. but the history of implementing these principles clears this doubt. In the case of trade in goods, the principle of conduct of the state of Kamele Al-Wadad stipulates the non-discrimination between two similar products of the origin of the member countries among the members, while in the national conduct, the prohibition of discrimination between imports and similar domestic products is the same. In the case of service trade, this principle is applied to services and service providers. And in intellectual property rights, this principle is applied to nationals of countries and their intellectual works. The principle of national behavior combined with perfect behavior is the best possible way to prevent the two-sided nature of GATT negotiations in the world trade system, because practically every country tends to give more commercial advantages to its main trading partners than other member countries.

The World Trade Organization, as the largest trade organization in the world, must provide the necessary background for the economic growth of all members. Since all members of the organization are not at the same level in terms of development, the implementation of goals requires a special and different behavior.

One of the examples of this type of behavior is the use of the enabling condition, which allows developed countries to grant trade preferences to developing countries without the obligation to observe the principle of non-discrimination and the full government of the other members. The rules of the World Trade Organization are applied based on the generalized system of preferences, even in voluntary cases. The provision of empowerment is not outside the GATT obligations, but forms part of GATT 1994. The provisions of this condition and the procedure of the countries of the World Trade Organization make its application subject to the fulfillment of the three conditions of generalization, non-compensation and non-discrimination. The Claims Settlement Unit does not have the authority to deal with disputes arising from this condition, but if it observes the violation of the obligations of GATT Article 1 by the enabling condition, it can enter into the proceedings and resolve the disputes. The purpose of this condition is, first of all, to facilitate the economic growth and development of developing or underdeveloped countries, but due to the fact that developed countries consider the right to enjoy trade privileges to comply with their standards, this can be a means of deviating from the principles of the World Trade Organization. Determining the authority of developed countries in granting preferences is an obstacle for granting these privileges in accordance with the development and economic needs of developing countries, but the ambiguous legal situation and the lack of precise determination of the mechanism and guarantee of implementation can be a means of abusing this solution.

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