



## Netflix's Problems With Net Neutrality and Gats Principles With Indonesian National Regulations

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**Abstract:** *This research discusses the need for the application of strict regulations, especially for the Netflix Over The Top (OTT) service, as an Information Technology service run by telecommunication services with content in the form of data, information or multimedia that runs through the internet network, the services delivered are through the internet network. , infrastructure owned by the operator, but without any cooperation with the operator or the government in Indonesia. The presence of Netflix in Indonesia can be likened to a trader selling in a house without asking the owner for permission, because it does not respect state sovereignty by not taking care of licensing, and there is no protection for the user community. Regulations related to OTT services such as Netflix have not been explicitly regulated in existing laws in Indonesia, only in broad terms are regulated in regulations on telecommunications. The government should immediately issue regulations related to OTT services such as Netflix to ensure legal certainty and justice for parties in conducting business, especially in the telecommunications sector, according to Indonesia's international commitments and the state's commitment to protect the rights of all Indonesian citizens.*

**Keywords :** *Services, regulation, Telecommunications*

### I. Introduction

In his research entitled "*Comparative case studies in implementing net neutrality: a critical analysis of zero rating*", Christopher Marsden identifies two forms of discrimination that can violate the principle of net neutrality, namely negative discrimination and positive discrimination. Negative discrimination occurs when the flow of content on the internet is inhibited through blocking access or reducing bandwidth. Meanwhile, positive discrimination takes the form of content or applications that are given preferential treatment more than others. For example, by providing "*fast lane*" access or fast lanes such as toll roads so that the content flows faster than content or applications that pass through ordinary lanes or "*slow lanes*". Internet users

can pay more to use those fast lanes if they don't want their network to falter on normal lines and reduce their internet quality.

Not only that, positive discrimination can be done by imposing a *zero rating* system. *Zero rating* systems are usually found in internet service systems that use quota limits or data caps. In a *zero rating* system, a content or application will not be counted on the internet usage quota or paid bill, so internet users are given free access to the content or application without consuming the quota. This system is called *zero rating* because the use of the application or downloading of the content is counted at zero.

For some proponents of net neutrality, such positive discrimination violates that principle. In a "*fast lane*" system, internet users will only be able to access applications or heavy content such as *videos* or *online games* of the same quality if they pay more. As Vox writes, this happened in 2013 to streaming app Netflix when its streaming access began to slow down. Comcast, as the ISP, said that the slow connection was caused by congestion on its network. But this bottleneck was avoided after Netflix negotiated with Comcast by paying more so that Netflix streaming connections returned to normal.

Meanwhile, the practice of *zero rating* violates net neutrality because owners of certain apps or content can work with ISPs to provide access to their apps or content for free. This will benefit application owners who are quite famous and have enough capital to collaborate rather than new applications. Because, internet users will prefer to use free applications or content rather than having to spend their quota on new applications. You can imagine if applications that have large capital such as Facebook, Twitter, or Instagram work with ISPs to provide free access to their applications. Startup applications that may provide new innovations will have difficulty finding users. If this system is implemented before, then applications such as Facebook, Twitter, or Instagram will not be able to be famous because access has been dominated by large and well-known applications before such as *Myspace* or *Friendster*.

The term "net neutrality" was first coined by Team Wu in 2003. In his article "*Network Neutrality, Broadband Discrimination*", he explains the concept of net neutrality which means banning ISPs "to limit what users do with internet access" so that internet users are free to use their access for any application or content. However, he assumed that ISPs were also given "general freedom to regulate *bandwidth*

consumption". For Wu, the internet network can be called neutral if the quality of *service* of one internet user is not disturbed by other internet users. This disorder occurs when someone uses the internet network for applications or content that consume a lot of bandwidth such as online games or videos, causing congestion in the network.

Therefore, it is natural for him that companies are given the opportunity to manage their bandwidth to prevent network congestion and provide equal quality of service to users.

Wu's opinion may contradict most proponents of net neutrality, because if he prioritizes equality in service quality, proponents of net neutrality prioritize equal access. They put forward the so-called *end-to-end* argument as an alternative to a system that allows interference in bandwidth management by ISPs as proposed by Wu.

As quoted by Hart, *End-to-End* argument means choosing to "fix the entire internet network system to solve service quality problems rather than prioritizing one data packet over another." For proponents of this argument, the problem of bandwidth bottlenecks that have an impact on poor service quality is a problem of poor network quality itself, not because of the type of application or content accessed by users.

## II. Discussion

### 1. Internet neutrality

Based on Marsden's research, several countries such as Norway, the Netherlands, Brazil, India, and Chile have implemented net neutrality rules. Interestingly, developing countries such as Brazil, India, and Chile strictly prohibit positive discrimination in the form of a *zero rating* system in favor of the principle of net neutrality. All three countries oppose a decision by Mark Zuckerberg, founder of Facebook, to establish free internet access called *Internet.org* and *FreeBasics* in 2015. The reason they refuse is because the free access is only limited to certain applications such as Facebook. In times of high economic inequality, *Internet.org* and *FreeBasics* will only continue this inequality into the realm of internet access. According to Ramos in Marsden,

"the distance between those who can pay for data caps and those who cannot pay for it could create an internet consisting of two levels: an 'internet for the rich', or an internet for those capable enough to buy unlimited access; and the 'internet for the poor', which is given access to few applications that the less fortunate can get."

One of the first regional trade agreements to explicitly regulate network neutrality was the Comprehensive and Progressive *Trans-Pacific Partnership* (CPTPP) agreement. TPP negotiations involve 11 countries in the Pacific Ocean region (the US withdrew in 2017), and are projected to be the world's first megaregional trade agreement given the size of the market set out in the agreement. The TPP represents a groundbreaking new form of free trade agreement, which differs from existing bilateral and plurilateral trade negotiations.<sup>43</sup> The TPP specifically regulates electronic commerce in its own chapter, chapter 14 on e-commerce. In that chapter, the principle of network neutrality can be found in Article 14.10, namely, TPP member states recognize the right of consumers to obtain consumer-choice services and applications available over the Internet, connect consumer-preferred devices to the Internet, and access to information about network management used by ISPs. However, ISPs can still perform based network management, and ISPs can still have the right to prevent access to devices that harm existing networks. With the formulation of these arrangements, TPP adheres to a transparency regulatory model where network management is still allowed on the condition that consumers can access information about ISP practices.<sup>1</sup>

In principle, net neutrality prohibits all forms of discrimination against content on the internet, either negatively (through inhibition) or positively (by providing special access). That way, all internet users are given free and equal access to all content contained on the Internet. The debate on net neutrality is very relevant for developing countries, especially for Indonesia, which still does not have regulations regarding it. While some ISPs have expressed opposition to net neutrality, the absence of such rules provides an opportunity for ISPs to

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<sup>1</sup> Rizki Banyualam, Permana, "Net Nuetrality : Standar Baru Tata Kelola Internet," *Jurnal Mimbar Hukum* 31, no. 3 (2019).

discriminate. On the other hand, Netflix uses the principle of net neutrality as a tamen to escape its obligations as a Business Actor based on regulations in Indonesia, while Indonesia itself still plans to ratify the CTPP.

## 2. Netflix

Netflix is a film live streaming site founded on August 29, 1997 by two *visionary film* business entrepreneurs *namely Reed Hastings and Marc Randolph* in *Scotts Valley, California*. In the beginning, Netflix was just a business selling DVDs and BluRay. But along with its development, Netflix expanded its business to *live streaming film sites* (cnbcindonesia.com). Throughout the fourth quarter of 2019 or in the last four months of 2019, the number of Netflix subscribers increased to 8.8 million. This number has exceeded previous estimates of 7.6 million additional subscribers. Netflix's revenue in the fourth quarter of 2019 reached 5.47 billion US dollars and earnings per share reached 1.30 US dollars. The total number of Netflix paid subscribers worldwide reached 167 million and of that number 100 million subscribers came from outside the United States. <sup>2</sup>

Netflix movie live streaming site was present in Indonesia on January 7, 2016 and not even 1 (one) month of its presence Netflix *movie live streaming* site was blocked by PT. Telkom Indonesia (Persero) started January 27, 2016 at 00.00 WIB because it was considered not to meet the regulations and was considered to display content containing pornographic elements. As a result of this blocking, people cannot access Netflix shows on several networks such as Telkomsel, Indihome, and Wifi.id (tekno.kompas.com) Within 4 (four) years after the blocking of Netflix by PT. Telkom Indonesia (Persero), there are the latest developments conveyed by the CEO of PT. Telkom Indonesia (Persero) stated that Netflix shows will soon reopen in the near future. With the opening of Netflix shows by Telkom Indonesia (Persero), Netflix must meet and comply with several regulations in Indonesia, including:

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<sup>2</sup> Fatimah Kartini Bohang, "Akhirnya Masuk Indonesia, Netflix Itu Apa?," Tekno Kompas, 2020, <https://tekno.kompas.com/read/2016/01/07/13085347/Akhirnya.Masuk.Indonesia.Netflix.Itu.Apa>.

First, Netflix must create an Indonesian legal entity such as a limited liability company when it will carry out its Indonesian business activities. This is based on the provisions of Article 5 paragraph (2) and paragraph (3) of Law No. 25 of 2007 concerning Foreign Investment it is said that foreign investment must be in the form of a limited liability company based on Indonesian law and domiciled in the territory of the Republic of Indonesia, unless otherwise stipulated by law. Domestic and foreign investment in the form of a limited liability company is carried out by taking shares at the time of the establishment of a limited liability company, buying shares, and doing other ways in accordance with the provisions of laws and regulations.

Second, Netflix must fulfill tax obligations in Indonesia. Based on the provisions of Article 2 paragraph (4) and number (5) of Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax (Law on PPH), the subject of foreign tax consists of:

- a. Individuals who do not reside in Indonesia, individuals who are in Indonesia for no more than 183 (one hundred and eighty three) days within a period of 12 (twelve) months, and entities that are not established and domiciled in Indonesia, that carry out doing business or conducting activities through a permanent establishment in Indonesia; And
- b. Individuals who do not reside in Indonesia, individuals who are in Indonesia for no more than 183 (one hundred and eighty three) days within a period of 12 (twelve) months, and entities that are not established and domiciled in Indonesia, which may receive or obtain income from Indonesia not from running a business or carrying out activities through a permanent establishment in Indonesia.

In Article 6 of Law Number 2 of 2020 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the *Corona Virus Disease* 2019 (COVID-19) Pandemic and/or in Dealing with Threats that Endanger the National Economy and/or Financial System Stability into Law, it is said that tax treatment in Trading Through Electronic Systems activities (PMSE) in the form of:

- a. Imposition of Value Added Tax on the utilization of Intangible Taxable Goods and/or Taxable Services from outside the Customs Area within the Customs Area through Trade Through the Electronic System (PMSE); And
- b. Imposition of Income Tax or electronic transaction tax on Electronic Trading System (PMSE) activities carried out by foreign tax subjects who meet the provisions of significant economic presence. The VAT rate imposed on PMSE activities is 10% (ten percent) as stipulated in the Minister of Finance Regulation (PMK) Number 48/PMK.03/2020 concerning Procedures for Appointing Collectors, Collections, and Deposits and Reporting of Value Added Tax on Utilization of Subject Goods Taxes from Outside the Customs Area in the Customs Amount Through Trade Through the Electronic System (PMK No 48 of 2020). Based on the description above, in order to be used as a foreign tax subject based on the Law on PPH, you must establish a permanent business entity (BUT) in Indonesia, both in the form of a management domicile, company branches and representative offices. In practice, while operating in Indonesia, Netflix cannot be taxed because it does not establish a BUT. Therefore, when the government reopens broadcast access, Netflix must establish a BUT in Indonesia. In addition, Netflix will also be subject to PPH and VAT while carrying out its business activities in Indonesia.<sup>3</sup>
- c. Netflix must adjust its shows by limiting or closing access to streaming movies that contain pornographic elements, violate decency, and violate ethics, norms, and values that live in Indonesian society because this has been guaranteed in Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (Law on ITE) and Law Number 44 of 2008 on Pornography (Law on Pornography). Article 27 of the Law on ITE

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<sup>3</sup> Diakses dari "Resmi! Sri Mulyani Kenakan Pajak Ke Netflix Dan Zoom, Berlaku 1 Juli 2020," Kumparan.com, 2020, <https://kumparan.com/kumparanbisnis/resmi-sri-mulyani-kenakan-pajak-ke-netflix-dan-zoom-berlaku-1-juli-2020-1tQ5MLBAbfO/full>.

regulates actions prohibited in this law, namely everyone intentionally and without the right to distribute and/or transmit and/or make accessible Electronic Information and/or Electronic Documents that have content that violates decency; has gambling content; has the charge of defamation and/or defamation; and has the charge of blackmail and/or threats. This prohibition is also in line with the regulations contained in Article 4 of the Law on Pornography where there is a prohibition for everyone to:

- a. Producing, Making, Reproducing, Duplicating, Disseminating, Broadcasting, Importing, Exporting, Offering, Trading, Renting, or Providing Pornography That Explicitly Contains Sexual Violence, Child Pornography, and Others
- b. Providing pornographic services which can be in the form of explicitly presenting nudity or showing nudity; explicitly present genitals; exploit or exhibit sexual activity; or offer or advertise, either directly or indirectly, sexual services. Based on the three points above, there are several things that need to be done by Netflix after PT. Telkom Indonesia (Persero) reopens its blockage as a foreign legal entity that will operate in Indonesia must be in the form of a limited liability company or but, must fulfill tax obligations in accordance with the provisions of laws and regulations in Indonesia, and limit or delete content containing pornographic elements , violating decency, and violating ethics, norms, and values that live in society.

### **3. Netflix Service Concept**

Basically Netflix is an OTT (Over The Top) service which is a service for an activity or process that is offered by one party to another. services are delivered over the network, providing value to customers, but without any carrier service provider involved in planning, selling, supplying, or servicing them - and certainly without traditional telco ordering direct revenue from them. The impact of the OTT

service business model is based on the views of cellular operators using the nine building blocks of the Business Model Canvas: <sup>4</sup>

1. Customer Segments OTT services have a customer segmentation that is similar to operators, namely customers of productive age because it is in this segment that customers have very high communication needs. The majority of these internet users are users of free services, but there are also those who later become premium users in order to get more facilities from a service.
2. Value Propositions The value of an OTT service is a different user experience. OTT services offer services with varied functional uses, and are generally free/no-paid, so they offer a different feel compared to existing operator services. With this uniqueness, OTT services have succeeded in creating dependence on their users.
3. Channels OTT service is an internet-based service, for several OTT services such as Facebook and Twitter, it uses operator SMS services to communicate with its users.
4. Customer Relationships Users have the freedom to choose an OTT service without having any meaningful connection with the service provider.
5. Revenue Streams OTT services get income from payment revenue which can be in the form of subscription fees or in-app purchases, as well as from advertising. OTT is also ad-funded in that they bridge advertisers and users, so that OTT service providers get revenue from advertisers.
6. Key Resources OTT requires a platform as an aspect that forms their OTT service. To create a good service platform that always displays the latest updates, OTT requires human resources to manage the platform and server or cloud which has the role of storing various kinds of data.

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<sup>4</sup> "Studi Sinergisitas Penyelenggara Layanan Over-The-Top (OTT) Dengan Penyelenggara Telekomunikasi," Badan Penelitian dan Pengembangan Sumber Daya Manusia, 2020, <https://balitbangsdm.kominfo.go.id/berita-studi-sinergisitas-penyelenggara-layanan-over-the-top-ott-dengan-penyelengg-19-540>.

7. **Key Activities** In OTT services, service development is needed that is dynamic and in accordance with the needs of its users. Really ensures the continuity of OTT through continuous service innovation.
8. **Key Partners** Not all OTT businesses have their own content, so it is very important to make it easy to access content through their services. Device providers also become device providers to access OTT services, especially for mobile device providers, considering that currently the use of mobile devices is increasing as a result of the shift in trend towards a mobile lifestyle.
9. **Cost Structure** Due to the nature of the service which is internet-based and free of charge, OTT services have a cost-efficiency concept, so keeping costs down to a minimum is important. The costs that arise in OTT services are intended for research and development purposes as well as platform maintenance costs.

#### **4. KPI and Netflix**

One tool that functions to distribute messages or information is the media. In order to carry out its proper function, the media must carry out regulations professionally. Currently, broadcasting has been regulated in Law Number 32 of 2002 concerning Broadcasting (hereinafter referred to as Law No. 32 of 2002). The definition of broadcasting according to the Broadcasting Law is a broadcasting activity in terms of broadcasting through broadcasting facilities or transmission facilities at sea, land or in space that uses a radio frequency spectrum via cable, air or other media so that it can be received simultaneously and simultaneously by the public with broadcast receiving devices. Various new digital media that are currently emerging in Indonesia add work to the Indonesian Broadcasting Commission (hereinafter referred to as KPI). This cannot be considered trivial, because the existence of various new digital media has an impact on society, both positive and negative influences. These new digital media include: Youtube, Facebook, Instagram, Netflix and so on. The presence of the internet creates a new paradigm regarding the process of delivering information and messages. In terms of distribution, there are differences in the distribution process that occurs as a

result of the shift from conventional media such as television or radio to the new internet media.<sup>5</sup>

The Law on Broadcasting in Indonesia has undergone changes. Regulations regarding broadcasting were first regulated in Law Number 24 of 1997 concerning Broadcasting (hereinafter referred to as Law No. 24 of 1997), then Law No. 24 of 1997 amended and revoked to become the newest Broadcasting Law, namely Law Number 32 of 2002 concerning Broadcasting.<sup>6</sup> The two regulations have different principles. UU no. 32 of 2002 is thick with democratic nuances compared to Law no. 24 of 1997 concerning Broadcasting. This shows that at that time broadcasting was an instrument of power that was used solely for the benefit of the government. On the other hand Law no. 32 of 2002 in Article 6 paragraph (1) which essentially explains that broadcasting is organized into a national broadcasting system. Whereas paragraph (2) of Article 6 explains that as referred to in paragraph (1) above that in the national broadcasting system that controls the radio frequency spectrum used in the operation of a broadcasting for the maximum benefit of the people.<sup>7</sup> The existence of the latest Broadcasting Law, namely Law no. 32 of 2002 there was a paradigm shift when broadcasting institutions no longer controlled broadcasting. The role of the state is currently limited by the Broadcasting Law because it is considered too big for the broadcasting media. Freedom of opinion regulated in the 1945 Constitution is considered to have influenced a change in the paradigm of a democratic order. Therefore, through the Broadcasting Law, there is a paradigm shift and also a change in the model of broadcasting operators, where the broadcasting sector regulator is mandated to KPI.

The existence of KPI as an institution tasked with supervising broadcasting activities is expected to provide legal certainty to the public in matters of broadcasting. This is done so that the public can obtain useful broadcast content.

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<sup>5</sup> Muhammad Idris, "Regulasi Media di Indonesia Tinjauan UU Pers Dan UU Penyiaran," *Jurnal Dakwah Tabligh*, 2014.

<sup>6</sup> Friskanov Irzha, "Kedudukan Dan Kewenangan Komisi Penyiaran Indonesia Daerah (KPID) Atas Hak Publik Dalam Penyelenggaraan Penyiaran Di Provinsi Sulawesi Tengah", *Lex Renaissance*, 2016, 76–91.

<sup>7</sup> Denico Dolly, "Upaya Penguatan Kelembagaan Komisi Penyiaran Indonesia Dalam Perspektif Hukum," *Negara Hukum* 6, no. 2 (2015): 149–50.

The Indonesian Broadcasting Commission as a representation of the community is expected to be able to guarantee the rights of the public to obtain broadcast content or content as well as fair and free information and to be able to involve the public in managing institutions and also to guarantee the independence of broadcasting institutions in the field of broadcasting. Broadcasting of content that was originally broadcast using conventional broadcasting networks as stipulated in Law no. 32 of 2002 also began to migrate through internet networks, such as in the case of subscription TV offered by First Media or Indihome or content that repeats broadcasts from television and then uploads them on social media platforms.

According to Article 36 of Law no. 32 of 2002, the scope of content that is prohibited and under supervision is content that is slanderous, inciting, misleading and/or lying, elements of violence, obscenity, gambling, abuse of narcotics and illegal drugs. Contrasting ethnicity, religion, race and inter-group, making fun of, demeaning, harassing, ignoring the values of decency in society.<sup>8</sup>

### **MFN Principles and Their Implementation of Netflix**

The principle of *Most Favoured Nation* is also known as the principle of non-discrimination. *Most Favoured Nation* is a *general obligation* in GATS. This obligation is *immediate* and unconditional.<sup>9</sup> The regulation regarding the *Most Favoured Nation* principle in GATS provisions is regulated in Article II paragraph 1: "*With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to service and service suppliers of any other Member treatment no less favourable than that it accords to like service and service suppliers of any other country.*"<sup>10</sup> *Most Favoured Nation* is a facility given to a country that must also be given to other countries. Based on the principle of *Most Favoured Nation*, GATS wants equal opportunities for service products and service providers from other member countries. *Most Favoured Nation* means giving equal treatment to all trading partners of member

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<sup>8</sup> Mohammad Bernie, "Ramai-Ramai Menentang KPI Yang Ingin Mengawasi Netflix Dan Youtube," 2020, <https://tirto.id/ramai-ramai-menentang-kpi-yang-ingin-mengawasi-netflix-dan-youtube-ef5V>.

<sup>9</sup> John H. Jackson, *Legal Problem of International Economic Relations* (USA: West Group, 2002), 885.

<sup>10</sup> World Trade Organization, "The Legal Texts," n.d., [https://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](https://www.wto.org/english/docs_e/legal_e/final_e.htm).

countries. Under GATS, if a country allows foreigners to compete in a sector, equal opportunities should be provided to service entrepreneurs from other member states. To the application of the *Most Favoured Nation* principle, there are also exceptions stipulated in Article II paragraph 2 of GATS.<sup>11</sup> *A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.* Pursuant to Article II paragraph 2, Member States may exclude the application of the *Most Favoured Nation* principle in their domestic regulations provided that such regulations fall within the categories provided for in the *Annex on Article II Exemptions*. In the Additional Rules, exemptions are focused on the transportation services sector (especially maritime).

The special annex on such exemptions becomes an integral part of the GATS agreement and takes effect upon entry into force of the GATS agreement. Meanwhile, any new exemptions registered after the entry into force of the WTO establishment agreement will be subject to Article IX paragraph 3 of the *Agreement Establishing the World Trade Organization (Agreement Establishing The World Trade Organization)*. Such exemptions will be reviewed by the <sup>12</sup>*Council for Trade in Services* after a period of five (5) years from the entry into force of the agreement. These exemptions are generally intended as justification for trade preferences at the regional level, and Free Trade Area (FTA). Such convenience can be provided for trade in services produced and consumed by local borders.<sup>13</sup> While Article XIII paragraph 1 of GATS states that the *principle of Most Favoured Nation* as stipulated in Article II, does not apply to regulations or requirements governing trade in services carried out by the government for the benefit of the government and not for the purpose of resale or use as a service provider for commercial purposes. Services provided in relation to the government are services rendered not commercially or in competition with one or more service providers. There are things that need to be considered in order to apply the *Most*

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<sup>11</sup> Organization.

<sup>12</sup> World Trade Organization, "Annex on Article II Exemptions, Number 2. See Also Article IX Paragraph 3 of the Agreement Establishing The World Trade Organization," n.d., [https://www.wto.org/english/tratop\\_e/serv\\_e/7-iiexem\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/7-iiexem_e.htm).

<sup>13</sup> Pasal II ayat 3 GATS.

*Favoured Nation* principle, namely:<sup>14</sup> The application of the *Most Favoured Nation* principle in this GATS provision can only be applied to service products or service providers included in "like services" or "*like service suppliers*". Therefore, service products or service providers that are not included in "like services" or "*like service suppliers*" may be given different treatment. Basically, GATS provisions do not provide a specific definition of services. It's just that in Article I paragraph 3 letter c is categorized as the service sector included in the GATS regulation, namely the service sector which is not included in the sector controlled and managed by the government. GATS provides a definition for service providers as stipulated in Article XXVIII letter g. According to the article, what is meant by service provider is everyone who provides services including legal subjects who provide services in the form of commercial value. Furthermore, GATS apparently also does not provide a specific definition of "like service" or "like service suppliers", so the determination of what is meant by "like service" or "*like service suppliers*" is determined based on the characteristics of the service product or service provider concerned; or based on the classification and description of services according to *United Nations Central Product Classification* (CPC); or based on the behavior of consumers of the service itself.<sup>15</sup> There are keywords *Like Services* or *like service suppliers* to be able to categorize whether a country violates or does not violate the principle of *Most Favoured Nation* regulated in the *General Agreement on Trade in Services* (GATS). The text of the *General Agreement on Trade in Services* (GATS) does not provide guidance for defining the criteria that should be taken to determine *Like Services*. Discussions within the WTO, such as the existing Council Service specifically dealing with GATS, show that most members have little appetite for discussing the issue abstractly, but refer to case law to define concepts on a case-by-case basis.<sup>16</sup> In EC-Bananas III, reference is made to the "nature" and "characteristics" of *Like Services* and *Like service Suppliers*. "... to the extent that entities provide these like services, they are like service suppliers."<sup>17</sup> In

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<sup>14</sup> Van den Bossche and Peter, *The Law and Policy of the World Trade Organization Text, Cases and Materials, Sixth Printing* (Cambridge: Cambridge University Press, 2007), 320–24.

<sup>15</sup> Bossche and Peter, 324.

<sup>16</sup> Reports of the Council for Trade in Services (S/C/M/56; -59; 60) and Reports of the Working Party on GATS Rules (S/WPGR/M/26; -27)., n.d.

<sup>17</sup> Panel Report in EC – Bananas III. This Finding Was Made in the Context of a MFN Claim and Was Not Reviewed by the Appellate Body. To Be Fair, the Issue of Likeness of Service Suppliers Was Not Really Addressed by the Parties, n.d.

thecourse of the dispute in the United States, the Panel requested a rating of "likeness" for Like Service and *Like Service Suppliers* "... always a need to assess likeness for both " *Like services*" and "*service suppliers*"..."<sup>18</sup> In addition, there are concepts of "similar in fashion" and "in supply mode" If about <sup>19</sup>*Likeness* in GATT, several determinants of nature can be considered, including the following: <sup>20</sup>

- 1) Physical characteristics of the goods;
- 2) Habits and consumer preferences for these goods;
- 3) The final use of the item.

The connection with the case raised in this paper is regarding the blocking of sites against Netflix, whether there are Like Services or Like Service Suppliers with Netflix that lead to provisions or those specified in the General Agreement on Trade in Services (GATS). It is important to know because after Indonesia ratified the Uruguay Round agreement contained in Law Number 7 of 1994 concerning Ratification of the Agreement on Establishing the World Trade Organization/WTO (Agreement on the Establishment of the World Trade Organization). Having ratified it brings both external and internal consequences. External consequences, Indonesia must comply with all the results of the agreement in the WTO forum. The internal consequence is that Indonesia must harmonize national laws and regulations with the provisions of the WTO agreement, meaning that in harmonizing, Indonesia must always think about national interests but not violate the signs of WTO provisions. To be able to start discussing the comparison of likeness from Netflix, start with what Netflix is. Netflix can be categorized as Professionally Produced Content which is an internet television network in the world with more than 36 million subscribers spread across more than 40 countries around the world. Current television programming that is available on a television or cable television station's Internet site or that can be downloaded. These programs attract the majority of their audience on conventional television, and the

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<sup>18</sup> Panel Report in EC – Bananas III. This Finding Was Made in the Context of a MFN Claim and Was Not Reviewed by the Appellate Body. To Be Fair, the Issue of Likeness of Service Suppliers Was Not Really Addressed by the Parties, C–44.

<sup>19</sup> Panel report on Canada – Autos, 10,307.

<sup>20</sup> Peter van den bosche, Op.Cit,11.

Internet provides additional channels that attract additional audiences.<sup>21</sup> Apart from Netflix, there are others, including:

1. Hulu In short, Hulu is pay-TV streaming which is a joint venture of The Walt Disney Company, 21st Century Fox and several others. Hulu is currently headquartered in Los Angeles, California, United States of America.
2. Crackle Crackle is owned by Sony Pictures Entertainment, founded in San Francisco, United States but headquartered in Cluver City, United States until now. Crackle presents original films, especially those produced by Sony Pictures Entertainment.
3. Amazon Amazon is an e-commerce type company. Amazon does not only provide TV show content and movies, but also as a salesperson who buys and sells other things such as online bookstores and so on.
4. Vudu Vudu is a company specializing in net tv or internet television. This means that Vudu is not like Amazon, which has other ideas apart from presenting TV and film content, even though at first Vudu also provided software for games.
5. Comcast / Xfinity Briefly, xfinity is a telecommunications company that provides film and TV content via the internet. Xfinity is owned by Comcast cable based in the United States.
6. Iflix In short, Iflix is a Malaysian company that broadcasts film content and has collaborated with world film production houses such as MGM, Warner Bros, Paramount, NBC Universal, Fox, CBS, BBC, Sony Pictures and other names.
7. Hooq Hooq is a joint venture company of Sony Pictures, Warner Bros and Singtel. Hooq is based in Singapore. Hooq offers convenience for its customers, namely that Hooq can be accessed easily via a gadget or smartphone.
8. Mivo, Mivo is a streaming TV in Indonesia since 2009 and has become an online TV platform for various TV stations. Mivo has more than 40 TV channels that have been accessed in more than 100 countries.
9. UseeTV is the first Interactive TV service in Indonesia. Pay TV service (Pay TV) owned by PT. Telkom Indonesia, which provides a new experience, you don't just watch TV, but you can also take control as if you were the director.

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<sup>21</sup> R. Dominick and McGraw Hill, *The Dynamics of Mass Communication: Media in the Digital Age (Tenth Edition)* (New York: McGraw Hill, 2009), 268.

Thus, this paper can conclude that these telecommunication service companies can be equated with their products or *Like Service*. In addition, in the *General Agreement on Trade in Services* (GATS) it is known that there is a division or classification and what criteria regarding the forms of services, types / patterns of trade in services (*modes of supply*). Based on the provisions of Article I paragraph 2 of GATS, trade in services can be divided into four types depending on the existence of service providers and consumers at the time of the transaction (*modes of supply*), namely:

1. Trade in services carried out from the territory of a member country to the territory of another member country (mode 1 - Cross Border). A service firm is in country A and its consumer is in country B. This is the most direct form of trade in services, and there is a geographic separation between the seller and the buyer, as only the service crosses national boundaries.
2. Trade in services carried out in the territory of one member country and intended to serve consumers from other member countries (mode 2 - Consumption Abroad/Movement of Consumers). Consumers from country A go to country B to get the service they want.
3. Trade in services carried out by service providers of one member country through a commercial presence in the territory of another member country (mode 3 - Commercial Presence). The existence of a country A service company establishing a company or opening a representative office in country B. This is the most important mode of service provision, at least in the context of future development, and also creates difficult problems for the host country and in GATS negotiations. That is the entry of a person from country A to country B to provide services in country B. This model does not always require a permanent trade representative. In this case, the object of trade in services is the ability of human resources, which due to the occurrence of this trade results in the transfer of these human resources from their countries of origin to countries of consumers. From the distribution or classification of types/patterns of trade in services (*modes of supply*). Based on the provisions of Article I paragraph 2 of the GATS above, it can be seen that Netflix, hulu, crackle, amazon, vudu, xfinty, and Youtube are Modes of Supply of the first type,

namely: "Trade in services carried out from the territory of a member country to the territory of a member country others (mode 1 - Cross Border Trade).

### **Closing**

Netflix does not establish BUT as desired by the Indonesian government, which is regulated in the Minister of Communication and Information Circular Number 3 of 2016 that foreign Over the Top service providers are required to establish BUT. As previously discussed, until now the position of their head office is still abroad (Outside Indonesia). Service providers can be categorized as Over The Top providers as explained in the Circular Letter of the Minister of Communication and Informatics Number 3 of 2016 which explains that every service provider through internet media is referred to as an Over The Top service provider and is required for those who are Indonesian legal entities or for providers foreign over the top services are required to establish a Permanent Establishment (BUT). Companies with Permanent Establishment (BUT) are one of the taxpayers who occupy a special position in the taxation system in Indonesia. The conclusion from testing the most favored nation (MFN) principle is that there is a violation of the MFN principle in the GATS framework due to different treatment, namely only Netflix, while likeness from Netflix that meets the likeness criteria does not get the same treatment as Netflix. Netflix can carry out activities which in this case are not establishing a Permanent Establishment (BUT) according to regulations in Indonesia. The written suggestion is that this should be a consideration for the regulator to strengthen its position towards Netflix in order to have legal certainty.

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