

WTO DISPUTE SETTLEMENT MECHANISM: INDONESIA'S PROSPECTIVE IN INTERNATIONAL TRADING SYSTEM*

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Abstract

A rule-based system of World Trade Organization (WTO) should be supported by effective mechanism of disputes that ensure the Dispute Settlement Body (DSB) rulings toward the respondent could be enforced. The WTO DSM aims to provide predictability and security in international trade by providing strict time-frames, and was designed to be mutually agreed by the disputing members, flexible and binding. For the developing countries in the WTO, they need major effort in terms of training and institutional reform to meet the challenges of participation in the WTO DSM. Indonesia has involved in the WTO DSM.

Keywords: WTO, DSU, dispute settlement mechanism.

Intisari

Sistem perdagangan WTO harus didukung oleh mekanisme penyelesaian sengketa yang efektif. Kepatuhan pada putusan Dispute Settlement Body (DSB) sangat penting agar manfaat perdagangan dapat dirasakan oleh seluruh anggota WTO, termasuk negara-negara berkembang. Dispute Settlement Understanding (DSU) WTO memberikan keamanan dan prediktabilitas atas proses sengketa di WTO yang dibutuhkan oleh seluruh anggota WTO sehingga memberikan kesempatan luas bagi negara-negara anggota WTO untuk berpartisipasi dalam mekanisme penyelesaian sengketa di WTO, termasuk Indonesia.

Kata Kunci: WTO, DSU, mekanisme penyelesaian sengketa.

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A. Introduction

International trade has grown dramatically in the past 60 (sixty) years due to the world's nations have cooperated in eliminating protectionist domestic legislation and in promoting free exchange of goods.¹ Global trade flows are dominated by exchanges within and between the three major regions of the global economy (the so-called triad): Europe, North America, and East Asia. Intra-EU and intra-North America trade accounts for 52 percent of industrial trade.² On the contrary, developing countries share of world exports of goods accounted 29,8 percent.³ Indonesia share in world total export only 0,97 percent, and share in world total import only 0,99 percent.⁴ Regardless of the different percentage on share of total world trade, the central challenge that the world faces today is to ensure that globalization becomes a positive force for all the world's people. In fact, many developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Nevertheless, the most remarkable trend of international trade law during the past six decades has been the steady movement away from tariffs and quota towards free trade among states.

In the globalization era, every state is encouraged to keep their economic pace with the economic development. As Kofi Annan said, "the benefits of globalization are obvious, [...] faster growth, higher living standards, and new opportunities, not only for individuals, but also for better understanding between nations, and for

common action".⁵ In other words, globalization era opens new challenges for developing countries to prosperous their region regardless inequality of distribution of welfare in the world. However, as stated by Kofi Annan in international trading system, "instead of open markets, there are too many barriers that stunt, stifle and starve. Instead of fair competition, there are subsidies by rich countries that tilt the playing field against the poor [...]."⁶ Therefore in term of size and contribution to world trading, there is inequality among WTO member countries. In order to make the trading system more secure and predictable, the international community needs a reliable and comprehensive mechanism to solve trade disputes that arise from the international trade.⁷ The number of complaints brought to the WTO DSM has increasing substantially for the last decade which currently in total of 452 cases. This number indicates that the WTO DSM be regarded as the prevalent channel of peaceful settlement of trade dispute compare to other international tribunal boasting a much longer history of existence.⁸

Moreover, WTO dispute settlement mechanism (WTO DSM) is regarded as a multilateral system of settling disputes that replaced unilateral mean that has been utilized by WTO member countries especially developed countries before the establishment of WTO. WTO DSM does accommodate each nation an equal say in the Dispute Settlement Body (DSB) regardless of their size even though it has dominated by developed countries.

¹ WTO, "Understanding the WTO", www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm, accessed on 19th February 2015.

² B. Hoekman and M. Kostecki, 2001, *The Political Economy of the World Trading System*, Oxford University Press, Oxford, p. 9.

³ WTO, "International Trade and Market Access Data", http://www.wto.org/english/res_e/statist_e/statist_e.htm, accessed on 19th February 2015.

⁴ WTO, "Country Profile: Indonesia", <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=ID>, accessed on 19th February 2015.

⁵ United Nations General Assembly, UN Millennium Declaration, Resolution adopted on 8 September 2000, paragraph 11.

⁶ WTO, "Message of the UN Secretary-General", http://www.wto.org/english/thewto_e/minist_e/min03_e/statements_e/12.pdf, accessed on 19th February 2015.

⁷ In the WTO context, typically, a dispute arises when a country adopts a trade policy measure or takes some action that another member considers to be a violation of a WTO Agreement. A dispute may also arise if a member feels that, as a result of another country's action, it has been denied WTO benefits to which it is entitled, see WTO, "Dispute Settlement in Commercial Diplomacy", http://www.commercialdiplomacy.org/manuals/wto_dispute.htm, accessed on 21th February 2015.

⁸ For example the ICJ (established in 1945) has 152 cases, the GATT (established 1948 – 1994) is 300 cases, the ITLOS (established in 1994) 20 cases, and the NAFTA (established in 1992) 3 cases.

Table 1. Top 10 Users of WTO DSU⁹

No.	Member	As Com-plainant	As Res-pondent	As Third Party
1.	USA	113	98	97
2.	EU	85	70	125
3.	Canada	33	17	83
4.	Brazil	26	14	73
5.	Mexico	21	14	67
6.	India	19	20	80
7.	Argentina	15	17	44
8.	Korea	15	14	69
9.	Japan	14	15	129
10.	Thailand	13	3	1

Some say that this mechanism can erode sovereignty of the WTO member states as it provides retaliation against violations of the trade agreements with unilateral sanctions especially for developing country members. The purpose of this article is to assess the validity of this claim in light of the actual functioning of the DSM, especially for developing countries, such as Indonesia.

B. Discussion

1. WTO Goals

WTO is best described as an umbrella organization under which the agreements that came out of the Uruguay Round are gathered.¹⁰ As the WTO Agreement states, the WTO is meant to provide the ‘common institutional framework’ for the implementation of the WTO agreements.¹¹ The WTO thus serves four basic functions:

- a. To implement, administer, and carry

out the WTO Agreement and its annexes;¹²

- b. To act as a forum for ongoing multilateral trade negotiations;¹³
- c. To serve as a tribunal for resolving disputes;¹⁴
- d. To review the trade policies and practices of member states.¹⁵

Principally, one of WTO goals is to improve global welfare by helping the citizens of Member countries to gain the most benefit from participation in the global economy. The WTO is the successor of the old GATT 1947. GATT itself in 1970s has succeeded to bring the tariff of major industrialized countries down, so there was no tariff’s problem except the non-tariff barrier problems.¹⁶ The WTO was created as a unified administrative organ to oversee all of the Uruguay Round Agreements. The establishment of WTO, at least, has resolved two problems that hampered the old GATT. **First**, it has comprehensively handled trade problems that WTO agreement covers trade services and the protection of intellectual property rights. The WTO Agreement, which provides “separates institutional concepts from the substantive rules” eliminates the difficulty relates to trade of goods.¹⁷ **Second**, the WTO rectifies the structure problem of old GATT due to inexistence of the International Trade Organization (ITO).¹⁸

2. WTO DSM Jurisdiction

The dispute settlement procedure of the WTO is governed by the Understanding on Rules and

⁹ Jan Bohanes and Fernanda Garza, “Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement”, *Trade, Law, and Development Journal*, Vol. IV, No. 1, Summer 2012. See also Mon-Mog Choi, “Korea’s Experience of Peaceful Settlement of WTO Disputes: Some Lessons for Asia”, *Korean Journal of International and Comparative Law*, Vol. 1, No. 1, 2013, p. 17.

¹⁰ For the further description of WTO see WTO, “What is the World Trade Organization?”, www.wto.org/english/thewto_e/whatis_e/whatis_e.htm#intro, accessed on 20th February 2015.

¹¹ Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154, Article II, paragraph 1.

¹² *Ibid.*, Article III, paragraph 1.

¹³ *Ibid.*, para. 2.

¹⁴ *Ibid.*, para. 3.

¹⁵ *Ibid.*, para. 4.

¹⁶ Anne O. Krueger, “Challenges Facing the Multilateral Trading System: An Overview”, in Lee-Jay Cho and Yoon Hyung Kim (Eds.), 2000, *The Multilateral Trading System in a Globalizing World*, Korean Development Institute, Bangkok-dong, p. 6.

¹⁷ Uruguay Round Legislation, March 23, 1994, Hearing before the Senate Finance Committee, 103rd Congress, Second Session, p. 195 (testimony of John H. Jackson), quoted from Ray August, *et al.*, 2013, *International Business Law: Text, Cases, and Readings*, Pearson, United Kingdom, p. 367.

¹⁸ *Id.* The ITO Charter, the Havana Charter never entered into force. It never approved by the US Congress, and other states were not interested in establishing international organization for trade without the US as the world’s leading economy and trading nation. The ITO was ‘still-born’. Peter Van den Bossche, 2005, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, Univ. Cambridge Press, Cambridge, p. 81.

Procedures Governing the Settlement of Disputes (DSU). The WTO DSM has jurisdiction over any disputes that may arise between WTO member states, above and beyond the provisions of any of the 'Covered Agreements' provided for in Appendix 1 of the DSU, and it covers 83 (eighty three) distinct matters, including settled and inactive cases (see table 2: WTO Dispute cases by industry). That means, a dispute that violates WTO agreements rather than solved by the unilateral or regional forum it can only be dealt with the multilateral forum.

Table 2. WTO Dispute Cases by Industry¹⁹

No.	Industry	Number of Cases
1.	Agricultural Products	32
2.	Alcoholic and other beverages	6
3.	Textile and Clothing	10
4.	Animal Skin Products	2
5.	Electronics	3
6.	Telecommunications	3
7.	Automobiles	5
8.	Aircraft	2
9.	Satellite System	1
10.	Chemical Products	6
11.	Pharmaceutical Products	5
12.	Other Industrial Products	4

WTO members should respect the rules and WTO agreements in the interests of safer and more reliable multilateral trading system. In this sense, when WTO members consider that another WTO member's trade policy measure or its' action has violated the WTO's agreement; they shall refer the matter to the WTO DSM rather than adopting unilateral measures, so that the trading system more secure and predictable. It was stated that:

[w]ithout a means of settling disputes, the rules-based system would be worthless because the rules could not be enforced. The WTO's procedure underscores the rule of

law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case.²⁰

The WTO's procedure for resolving trade quarrels under the DSU is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. The DSU provides the primary legal means of settling trade related conflicts in the WTO. Settlement of disputes is the responsibility of the DSB that composed of all Members of the WTO. DSB has the sole authority to establish panels of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a WTO member does not comply with the ruling.²¹

3. The WTO DSM is A New Paradigm on International Tribunal

The former WTO Director-General characterized the WTO dispute settlement system as the most active international adjudicative mechanism in the world today.²² Although much of the procedure resembles a court or tribunal, the preferred solution is for the countries to settle the dispute by themselves. Unlike the dispute settlement mechanism under the General Agreement on Tariffs and Trade (GATT), which preceded the WTO, the WTO DSM is much more comprehensive and categorized as a new paradigm of international tribunal.²³ The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. The principal achievements of the WTO DSM as a new paradigm of international tribunal are summarised as follows.

¹⁹ The International Economics Study Center, "Chapter 2: The Dispute Resolution Mechanism", <http://internationalecon.com/wto/ch2.php>, accessed on 20th February 2015.

²⁰ WTO, "Trading into the Future", http://www.wto.org/english/res_e/doload_e/tif.pdf, accessed on 20th February 2015.

²¹ Article 2 Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

²² Supachai Panitchpakdi, et al., 2006, *WTO at Ten: the Contribution of the Dispute Settlement System*, p. 8, as cited in JHUMUNC, "Background Guide WTO", http://www.jhumunc.org/media/attachments/WTO_2014J.pdf, accessed on 19th February 2015.

²³ R. Read, "Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT", <http://www.lums.lancs.ac.uk/publications>, accessed on 19th February 2015.

a. The WTO DSM Has Fixed Time Limit

There are three main stages to the WTO dispute settlement process: (1) consultations between the parties; (2) adjudication by panels and, if applicable, by the Appellate Body; and (3) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling. The DSU introduced a more structured process with more clearly defined stages in the procedure and time limits for every stages. Thus, every stages of the process has fixed time table. In total the time period of the WTO DSM is 1 year and 3 month or 1 year without appeal.

Table 3. Time Table of WTO DSM²⁴

These approximate periods for each stage of a dispute settlement procedure are target figures, the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.	
60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total: 1 year (without appeal)	
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total: 1 year 3 months (with appeal)	

In practice, the time period in the WTO DSM in total is 15 (fifteen) months (from consultations to the report of AB), and 10 month for average duration of the 'reasonable period of time' for implementation of DSB rulings. To achieve satisfaction it needs more less 2 (two) years not include the possi-

bility of compliance under art. 21.5 that add 2 (two) years, this lengthy of time period due to the panel stage, namely, negotiation stage and translation problems. However, if the case is considered urgent (e.g. if perishable goods are involved) then the allowed time is shorter. In terms of developing country Members of WTO, the DSU takes into account their particular situation. Within the dispute settlement system, the special and differentiated treatment they receive consists an additional or privileged procedures such as longer time periods. Therefore, the WTO DSM provide equality to all of the WTO member countries regardless of their country size and status.

b. The WTO DSM Utilized Informal Consultations

Parties on dispute are expected to first seek to resolve dispute through bilateral discussion in capitals before invoking any of the WTO DSM. Most of the non-DSU WTO mechanisms for resolving disputes are easier and quicker to use than the DSU process. These mechanisms include informal consultations, raising the matter in the meetings of the relevant WTO committee, such as the Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT) or Agriculture Committee and using some of the dispute settlement tools in specific agreements, such as the Subsidies Agreement. Article 7 of the DSU states that: A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.²⁵

If the consultation between parties fails, they can also ask the WTO Director-General to mediate or try to help in any other way (good offices and conciliation) with the view to assisting members to settle a dispute especially in cases involving a less

²⁴ WTO, "Understanding The WTO: Settling Disputes", https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm, accessed on 19th February 2015.

²⁵ Article 7 Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

developed country.²⁶ Along with good offices, conciliation and mediation, consultations are the main non-judicial or diplomatic instrument in the WTO dispute settlement system.

c. The WTO DSM Has Established A New Appellate Procedure

The creation of the DSU was an integral element of the WTO Agreements. The DSU incorporates the rules and precedents established under the initially consensus-based GATT system into a formal rules-based judicial procedure. Although the DSU is founded upon GATT Articles XXII and XXIII, its scope and implementation represents a significant improvement over previous GATT disputes system. This includes the establishment of appellate body in the WTO DSM. This can be categorized as an innovation of international tribunal, that has not exist before. This will substitute for some of the council approval process of a panel report, and overcome blocking of a dispute-settlement panel report.²⁷ Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues.

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days,

with an absolute maximum of 90 days. The DSU requires a negative consensus for the acceptance of an appellate ruling.

d. The WTO DSM Has Established A Negative Consensus

The WTO DSM evolved out of the ineffective means used under the GATT for settling disputes among WTO members. Under the GATT, procedures for settling disputes were ineffective and time consuming since a single nation, including the nation whose action was the subject of complaint could effectively block or delay every stage of the dispute resolution process. This was happened since the GATT dispute mechanism was founded upon the principle of consensus between GATT contracting parties.

In its early days, the system emphasized diplomatic negotiation and consensus. This required both parties to a trade dispute to accept the outcome of any finding. Panel reports were presented to the GATT Council for ratification. If a consensus accepted a Panel report, its findings became binding on the parties involved. Countries defending a complaint however could veto the ratification procedure and thereby avoid being obliged to bring their trade policy into GATT compliance. It was this right to circumvent the ratification of Panel findings that was deemed to be the most significant defect of the GATT dispute settlement system.

The WTO DSU fixed the old system by using the negative consensus. Under the DSU the country losing a case cannot unilaterally block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection (including from the country which lost the case) could block the ruling. Under the DSU the situation is reversed;

²⁶ Article 5.6 Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

²⁷ John H. Jackson, 1997, *The World Trading System: Law and Policy of International Economic Relations*, The MIT Press, Cambridge, p. 125.

rulings are automatically adopted, unless there is a consensus to reject a ruling. Any country that wants to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

The negative consensus requirement means that the adoption of Panel reports can no longer be blocked by losing respondents and thus triggers the right of plaintiffs to retaliate. A strict, and therefore predictable, timetable for the dispute settlement process is provided in article 20. As a general rule, the DSB make decisions by consensus. However, when the DSB sets up panels, adopts reports or authorizes retaliation, the decision is adopted automatically, unless there is a consensus to the contrary (a negative consensus).²⁸ Thus, the DSU incorporates the automaticity as a pivotal element of the dispute settlement process. The DSU is more effective dispute settlement mechanism for all WTO members than the GATT system, as this is primarily because the GATT system of consensus was vulnerable to political pressure while the WTO DSM utilizes a quasi-judicial system.

4. Indonesia and The Global Economy

Indonesia is the largest economy in Southeast Asia and is the 16th largest economy in the world with GDP of \$870 billion. Indonesia is a model of resilience as it has mounted an impressive recovery from the Asian financial crisis in 1998. Since the turn of the millennium, Indonesia has grown on average by 5,4% per year, easily surpassing the global average of 3,7%. Its rate of expansion has also been above the average of the other advanced ASEAN member countries. Growth is expected to rise further to 6% in the next few years. At this rate

its economy will grow to \$1 trillion by 2017 at the latest.

Indonesia now is the 20th largest exporter of merchandise goods, which totaled of \$183 billion in 2013.²⁹ Indonesia's commercial services export were about \$21.7 billion in 2013. Other indicators of economic performance confirm Indonesia's upward trajectory. FDI flows have grown nearly tenfold from only \$1.9 billion in 2004 to \$18.4 billion in 2013.³⁰ Indonesia was ranked by the World Economic Forum's (WEF) global competitiveness ranking on 34 out of 144 economies included in the rankings in terms of competitiveness. Indonesia's ranking even higher than some EU and G-7 members. Indonesia's strong economic performance is now leading global investors to include her in the "Next Eleven" list, a select group of emerging economies that together with the BRICS,³¹ have the potential of becoming the world's largest economies in the coming decades.

5. Indonesia's Role in The Multilateral Trading System

Indonesia has played very important role in the establishment of regional organization in the Southeast Asian region and in the world. Indonesia is one of founding member of ASEAN and hosted the headquarters of the organization. Indonesia is a member of some groups in the negotiations, namely, Asian developing members (33 member states), APEC, ASEAN, Cairns group, G-20, G-33, NAMA-11, and "W52" sponsors.

Together with other ASEAN member states, is actively working to boost trade and investment ties with other countries in the Asia-Pacific region through initiatives like the ASEAN Plus Three, ASEAN-India, ASEAN-Japan, ASEAN-China, and ASEAN-CER, etc. Indonesia also one of the

²⁸ The negative consensus provisions are in article 6.1, 16.4 and 17.14 of the DSU, which is considered that the decision making of WTO DSB essentially automatic. See Andrew D. Mitchell, 2008, *Legal Principles in WTO Disputes*, Cambridge University Press, Cambridge, p. 98.

²⁹ WTO, "Indonesia Statistic Data", <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=ID>, accessed on 23th February 2015.

³⁰ *Ibid.*

³¹ BRICS is the acronym for an association of five major emerging national economies: Brazil, Russia, India, China and South Africa, is a powerful bloc of emerging economies which, according to the International Monetary Fund, will account for as much as 61% of global growth in three years' time, see South Africa Info, "New Era as South Africa Joins BRICS", <http://www.southafrica.info/global/brics/brics-080411.htm#.VOr4ey6qk3w>, accessed on 22th February 2015.

founding members of the Asia-Pacific Economic Cooperation (APEC),³² which is a leading proponent of 'open regionalism' as well as a member of the G-20³³ that played such a vital role in coordinating the economic policy response to the global economic crisis.

In the WTO, Indonesia is an important member of the G-33,³⁴ which is one of the more influential developing country groupings in the WTO. As a member of G-33 and individually as well, Indonesia is a strong supporter of the multilateral trading system. Indonesia also a member of NAMA³⁵ and "W52" sponsors, which is one of members of sponsors of TN/C/W/52, a proposal for "modalities" in negotiations on geographical indications (the multilateral register for wines and spirits and extending the higher level of protection beyond wines and spirits) and "disclosure" (patent applicants to disclose the origin of genetic resources and traditional knowledge used in the inventions).

The list includes as groups: the EU, ACP and African Group. Dominican Republic is in the ACP and South Africa is in the African Group, but they are sponsors of TN/IP/W/10/Rev.2 on geographical indications. Indonesia also joined the group of Cairns.³⁶ Cairns is a coalition of agricultural exporting nations lobbying for agricultural trade liberalization. Indonesia is not only joined to some

groups of negotiation in the WTO system, but also exercised the WTO DSM to solve a dispute with another WTO member country. Indonesia has involved in the WTO DSM as complainant for 9 cases, as respondent for 11 cases, and as third party for 13 cases.

6. The Developing Countries Members in WTO

The DSU contains several provisions directed to developing countries. The DSU states that members should give 'special attention' to the problems and interests of developing country members.³⁷ Furthermore, if one party to a dispute is a developing country, that party is entitled to have at least one panelist who comes from developing country. If a complaint is brought against a developing country, the time for consultations before the panel is convened) may be extended, and if the dispute goes to a panel, the deadlines for the developing country to make its submissions may be extended. The Secretariat is authorized to provide a qualified legal expert to any developing country on request. Still, settled disputes within the WTO DSM mainly on the basis of 'the rule of law'.

There are equal rights within the system among Member Countries, equal obligation to respect the results in keeping the fairness and objectivity of DSM. There are some obstacles

³² The APEC member states are Australia, Brunei Darussalam, Canada, Chile, China, Chinese Taipei, Hong Kong, China, Indonesia, Japan, Korea, Republic of, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russian Federation, Singapore, Thailand, United States, Vietnam.

³³ Argentina, Australia, Bolivia, Plurinational State of Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay, Viet Nam; This group of G-20 is a coalition of developing countries pressing for ambitious reforms of agriculture in developed countries with some flexibility for developing countries (not to be confused with the G-20 group of finance ministers and central bank governors, and its recent summit meetings), concern with agriculture issues, see WTO, "Agriculture: Negotiations", https://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm, accessed on 22nd February 2015.

³⁴ WTO members (23): Argentina, Bolivia, Plurinational State of, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, Bolivarian Republic of, Zimbabwe. Also called "Friends of Special Products" in agriculture. Coalition of developing countries pressing for flexibility for developing countries to undertake limited market opening in agriculture, see WTO, "Agriculture: Negotiations", *Ibid*.

³⁵ WTO members (46): Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Plurinational State of, Botswana, Côte d'Ivoire, China, Congo, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Republic of, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Bolivarian Republic of, Zambia, Zimbabwe; Coalition of developing countries seeking flexibilities to limit market opening in industrial goods trade, main concerned issues: NAMA, see WTO, "Agriculture: Negotiations", *Ibid*.

³⁶ WTO members that member of Cairns group are: Argentina, Australia, Bolivia, Plurinational State of, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay, Vietnam. The Cairns Group, see WTO, "Agriculture: Negotiations", *Ibid*.

³⁷ Gosego Rockfall Legkewe, "The WTO Dispute Settlement System: Why it doesn't Work for Developing Countries?", <http://ssrn.com/abstract=2045470>, accessed on 23rd February 2015.

when the WTO member countries participating in the WTO DSM, especially developing countries.³⁸ Firstly, they lack of expertise or capacity to litigate in the WTO. For instance, in negotiation phase, it can be said that negotiation is 'direct and bilateral' dispute settlement mechanism that based on 'bargaining power' this phase often can be used as 'a fact finding procedure' by opposing party, if one party in dispute has weak position. For example, Korea – measures concerning testing and inspection of agricultural products. It can be said that the WTO DSM should not be used as a last resort in settling trade disputes. But as alternative for both government of member countries on conflicted interests.

Basically, the private sectors are the aggrieved exporter not the government. But, only government can activate the WTO DSM. The common problem is the identification and communication of trade barriers to the government. In this context, the main problem is how to ensure that the government is made aware of the measure (as trade barrier) and to assess that is in violation of WTO agreements. In other words, within the domestic regulatory framework need formal mechanisms, for example, the MOFAT (Korea), Section 301 of the Trade Act of 1974 in the US, and the European Union's Trade Barriers Regulation.

The best mechanism regarding with the formal mechanisms within domestic regulatory framework is the Brazil's mechanism: is an informal but effective one. This mechanism is based on interaction of three bodies, namely the Chamber of Foreign Trade (CAMEX), Private sector Consultative Council (Conex), and the General Dispute Settlement Unit /CGC in the Ministry of Foreign Affair.

Another problem would be the enforcement of DSB recommendations upon the parties in dispute involving developing countries.³⁹ There is

fear of political or economic pressures on the part of respondent members. In this case the political or economic pressures will arise especially if the respondent countries have a higher level of development and as major trading partners or aid donors of the developing countries. To overcome this problem, WTO provides mechanism by instituting proceeding in the WTO DSM, challenging the large countries. Some instances of this case include, Korea versus the US on *DRAMS* (Dynamic Random Access Memory Semiconductors), Venezuela against the US over *gasoline*, Costa Rica versus the US on *underwear*, Ecuador, Guatemala, Honduras and Mexico against EU on *bananas* case, and Indonesia against UE on *fatty alcohol*.

In the WTO context, there is another thing that should be considered by the member states concerning their commitments covering part of trade agreement not covered by the WTO DSM. In some occasions, countries are get benefit from preferential access to developed country markets under the Generalized System of Preferences (GSP). Some countries also get benefit from Preferential Trade Arrangement, for example AFTA, NAFTA, CAFTA, etc. When in these agreements dispute arise then the WTO DSM cannot cover this dispute.

There is also a problem relate to inability of developing countries to enforce compliance with DSB recommendations. It should bear in mind, that the DSM mechanism should ensure that the losing respondent complies with the DSB recommendations contained in the panel report and brings its measures into conformity is through the suspension of equivalent measures (retaliation or reprisals). Problem of retaliation is when there is a substantial difference in size of economy. Based on data record of the WTO DSM, there are 19 arbitral decisions (Article 22.6 DSU) establishing the level of suspension and 17 (seventeen) authorizations by the DSB for measures of retaliation.

³⁸ Gregory Shaffer, "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies", http://www.peacepalacelibrary.nl/ebooks/files/ICTSD_Shaffer_How-to-Make.pdf, accessed on 23th February 2015, p. 26.

³⁹ Yetty Komalasari Dewi, "The WTO Dispute Settlement System: Issues on Implementation", *Indonesian Journal of International Law*, Vol. 5, No. 2, January 2008, p. 224.

Regarding retaliation problem involving developing country as complainant, it can be said that the Brazil in *cotton* case against the US as the best example.⁴⁰ In 2009, the arbitral awards was issued and authorized Brazil to take retaliatory measures calculated on the basis of yielding an annual amount varies as the amount of subsidies granted by the US. Also, the 'cross-retaliation' (suspend concessions under other agreements, including GATS and TRIPS) when the annual amount authorized for retaliatory measures exceeded a certain level. In 2010, Brazil announced its planned package of retaliatory measure, including increasing tariff on 102 items imports from the US would enter into force within 30 days. It also suspended the protection of the US' IPR. In April 2010, the parties adopted a MOU.⁴¹ The MOU consist of provision that in exchange for Brazil's undertaking not to impose retaliatory measures the US agreed to change in the operation of its export credit guarantee program, namely, to establish an annual fund of \$147 million to finance technical assistance and building capacity of Brazil cotton sector.⁴²

C. Conclusion

The WTO DSM aims to provide predictability and security in international trade by providing strict time-frames, decision of the Appellate Body is final and binding. The WTO DSM also is designed to be mutually agreed by the disputing members, flexible

and binding. It can be regarded as an efficient and effective resolution of trade disputes. The significant role of the WTO DSM is to balance the competing interest of the WTO member countries, by applying 'rules' rather than 'power', and provide multilateral mechanism rather than unilateral. Member countries are not keeping their commitments when a member country applies a trade policy measure that is considered by other members to be violating the WTO agreements. In other words, the WTO DSM concerns with the application of a member's domestic regulation against the interests of other members.

The function of the DSM in WTO is to restore the balance (the conflicted interest of WTO members) by interpreting and applying the rules of the trading system to particular circumstances. The WTO integrated mechanism includes the DSU, the Covered agreements, the special or additional or procedures (for panels, the Appellate Body, and other WTO Agreements). For the developing countries in the WTO, they need major effort in terms of training and institutional reform to meet the challenges of participation in the WTO DSM. Also, it is necessary to develop internal mechanism, to enable private parties sectors of the developing member countries and always seek creative solution and arguments by using guidance and support from WTO rules.

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⁴⁰ Randy Schnepf, "Status of the WTO Brazil – US Cotton Case", <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43336.pdf>, accessed on 22th February 2015.

⁴¹ Joint Brazil-U.S. communication, "Memorandum of Understanding between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding a Fund for Technical Assistance and Capacity Building with Respect to the Cotton Dispute (WT/DS267) in the WTO, Randy Schnepf, *Ibid*.

⁴² MOU also provided that the United States working jointly with Brazil "on an understanding that is mutually satisfactory that will provide a framework for reaching a mutually agreed solution to the cotton dispute". The joint work period started on April 22, 2010, and last for 60 days, during which Brazil would not impose countermeasures. See Raul A. Torres, "Use of WTO Trade Dispute Settlement Mechanism by the Latin American Countries-Dispelling Myths and Breaking Down Barriers", https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf, accessed on 22th February 2015.

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