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Appellate Procedures And Dispute Settlement Mechanism For Indonesian Trade Disputes

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Abstract

This study aims at explaining and understanding the functions of a dispute settlement mechanism along with appellate procedures as evident from these select cases via comparative qualitative research methods. As a result, Indonesia proves weaker in cases against the western powers that have an influence in the World Trade Organization's Dispute Settlement Body and also resources to manipulate its rulings. In conclusion, the WTO in general and DSB, in particular, have acted as a custodian of trade rights in most of the developing countries like Indonesia.

Key words: Dispute Settlement, Trade, Panel, WTO.

Procedimientos de apelación y mecanismo de solución de controversias para disputas comerciales de Indonesia

Resumen

El objetivo de este estudio es explicar y comprender las funciones de un mecanismo de solución de controversias junto con los procedimientos de apelación que se desprenden de estos casos seleccionados a través del método de análisis comparativo cuantitativo. Como resultado, Indonesia se muestra más débil en los casos contra las potencias occidentales que tienen influencia en el Órgano de Solución de Controversias de la Organización Mundial del Comercio y también en recursos para manipular sus fallos. En conclusión, la OMC en general y el OSD, en particular, han actuado como custodios de los derechos comerciales en la mayoría de los países en desarrollo como Indonesia.

Palabras clave: solución de diferencias, comercio, panel, OMC.

1. INTRODUCTION

World Trade Organization (WTO) is the custodian of all the trade carried out among its member nations. In the case of trade disputes caused due to a violation of trade rules, all cases are discussed according to internationally accepted procedures (Hoekman and Bown, 2005; Davey, 2000). With the expansion of trade across the globe, and owing to varying socio-economic conditions, often marred by political situations, the number of disputes has increased (Nordström, 2005). In all such situations, members have shown a complete trust and endurance in the WTO's multilateral dispute settlement mechanism

(Srinivasan, 2005). Instead of retaliating unilaterally, the members prefer to approach Disputes Settlement Body (DSB) under the flagship of WTO and agree to abide by its procedures and respect its rulings. The DSB hears cases of the breach of WTO trade agreements or violation of its policies and procedures. The procedure under DSB stands different from its predecessor's body set up under General Agreement on Tariffs & Trade (GATT), which lacked fixed schedules, exceptions and manipulations of laws, with cases remaining pending and inconclusive for a long time.

The Uruguay Round agreement in 2009 had brought a few reforms in the functions of DSB by introducing a more structured process with well-defined procedures and time deadlines to resolve disputes. The time limits for each stage of the dispute settlement were though kept flexible except where perishable goods were involved. The Uruguay Agreement also emphasized more on prompt settlement of disputes to ensure smooth and effective trade relations among the WTO members. Under the new agreement, it also became mandatory for all members to adopt the ruling unless there is a consensus to reject it— with all or a majority of other WTO members to agree on this rejection. This was contrary to the old GATT procedure, where the ruling was adopted by consensus, and a single objection was enough to block it. The DSB almost functions as a court or tribunal, offering an opportunity to parties concerned to discuss their problems and settle the dispute by themselves (Alter, 2016). Even it encourages the governments concerned to enter into consultations allowing them to intervene at any stage of the proceedings, provided the mediation leads to dispute settlement. This study examines DSB in the light of a few cases with Indonesia either as a defendant or a complainant. The

purpose of this study is to evaluate the effectiveness of the role of DSB in resolving trade disputes amicably, without any bargain (Steinberg, 2002).

1.1. Disputes settlement body

In the case of WTO members, there is the Disputes Settlement Body (DSB), comprising all the WTO members, which is the sole authority to settle disputes of its members caused due to a breach of trade agreements. It functions through panels of experts appointed to settle each case by first hearing both sides, investigating the facts before giving its regulations. It is also responsible to monitor the compliance of such regulations and recommendations and can penalize a member country if it does not comply with any regulation. A DSB panel functions like an arbitration tribunal, except that the panelists are appointed in consultation with the countries in dispute, unlike any other normal tribunal. These panelists are well-qualified experts nominated by WTO who offer their services individually, and not governed or dictated by any government or agency. In the event of two sides do not have consensus over the names of panelists, the WTO director-general can intervene and appoint them. A panel consists of three to five experts from different member nations. It examines the case along with its evidence and gives its ruling to the DSB. It is mandatory for every member country to accept and implement the panel's report as well as the judgment. A rejection of the report is possible only by consensus of all or a majority of members.

The DSB also functions as an arbitration agency and it allows a consultation period up to 60 days to the countries in dispute to negotiate and settle their differences on their own. The WTO director-general can also act as a mediator in such negotiations. If this fails, the DSB appoints a panel to help the DSB to make rulings or recommendations over the dispute. When the panel is appointed, each side submits its petition to the panel. The panel gives the opportunity to both the complaining country and the defending country to present their cases in its first hearing. Also, other WTO member countries who may have any interest or stake in the dispute could present their argument at the panel's first hearing. At the second meeting of the panel, written rebuttals and oral arguments by all concerned can be presented. Consequently, upon hearing the two sides, the panel prepares a descriptive, factual written report of the entire case and presents to the two sides for giving their comments (Unterhalter, 2014).

Having reached its findings and conclusions, the panel subsequently prepares an Interim report within two weeks. The two sides review this report and may also hold meetings with the panel. Based on such meetings and discussions, the panel submits the final report within three weeks. The two sides now cannot appeal for a review or discuss this report. If the panel deems that either of the two parties has violated a WTO agreement or a trade procedure or any act of its norms, it can recommend that such a procedure be made to conform to WTO norms. Hence, the final report is also circulated to all WTO members. The two sides are given 60 days to appeal or draw a rejection by consensus, after which the report becomes a ruling. The appellate procedures are also very complex and must observe certain procedures.

1.2. Appellate procedures

In order to settle disputes between the WTO members, an appellate procedure exists. For this purpose, in 1995, a seven-member Appellate Body (AB) was set up at Geneva under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The members of AB are professionals recognized in their respective fields of law and international trade but not affiliated to any government agency. They are appointed for a term of four years. These members are required to hear appeals of WTO members against the Panel reports. An appeal is heard by a three-member subcommittee formed out of the seven members of the AB and nominated by the Dispute Settlement Body (DSB). This subcommittee can uphold, modify or reverse the panel's verdict and forward it to the two parties as well as the DSB within 60 days. The DSB subsequently studies the verdict and may accept or reject the report within 30 days. The case of rejection must be by consensus and a majority vote of the DSB members. The following communication, dated 11 July 2017, was issued by the WTO Panel to the Dispute Settlement Body.

Article 12.8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that the period in which a panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. Article 12.9 of

the DSU provides that, when a panel considers that it cannot issue its report within six months, it shall inform the Dispute Settlement Body (DSB) in writing accordingly and indicate the reasons, together with an estimate of the period within which it will issue its report. 2015. For this reason, appeals against the Panel or the AB could be by either or both parties and must relate to points of law and undergo regular legal interpretation prior to submission before the AB. For this reason, once the verdict is given and submitted to the DSB and also accepted by both parties, the DSB cannot be asked to reexamine the evidence nor can be asked for submission of the new ones. (Hoekman & Bown 2005; Gregory et al., 2016). Once the DSB accepts the report, it is irrevocable and the disputant parties cannot appeal anymore to the Dispute Settlement Body (DSB) or to the WTO. The following two cases were sampled for this study to exemplify the functioning of DSB and the role played by the Appellate Body (AB) to reexamine the verdict. These cases have been selected also to examine the treatment meted out to Indonesia as a developing nation by the more developed nations and members of WTO in the midst of several other Agreements simultaneously functioning along with DSB (Tanoos, 2017).

2. CASE DISCUSSIONS

2.1. Case No ds477/ ds478: Indonesia — Import licensing regimes

Complainant-- New Zealand/ United States; Respondent-- Indonesia.

2.2. Issues involved

These two disputes (DS477/ DS478) concerned with 18 measures about licensing regimes imposed by Indonesia on the import of, animals, animal products and horticultural products. The co-complainants (New Zealand and the United States) alleged that all these 18 measures amounted to quantitative import restrictions prohibited by Articles XI: 1 of the GATT 1994 and Section 4.2 of the Agreement on Agriculture. It was also alleged that such impositions of measures on imports had affected their respective businesses in their countries. Both New Zealand and Australia requested for a consultation over the issue. After filing the complaint, several other member nations expressed a wish to join the consultations including Thailand, Canada, the European Union and Chinese Taipei. Indonesia gave its consent to these member nations to join the consultations. After a few months of deliberations, a panel was established to settle this dispute. On 20 May 2015, the DSB established a single panel to examine both disputes DS477/ DS478 comprising member nations like Canada, China Thailand while the European Union acted as the third-party.

2.3. Summary of key findings

On 22 December 2016, the panel prepared its findings in a report and circulated to all WTO members. The ruling was against

Indonesia and favored the United States and New Zealand. The verdict declared that Indonesia had violated the WTO rules. It attested that the Indonesian import licensing system for horticultural and animal products was inconsistent with the WTO norms. The verdict also stated that Indonesian import measures were also inconsistent with the 1994 GATT norms. The reason behind giving the adverse verdict was that the WTO panel did not find Indonesia demonstrating any kind of compliance of GATT 1994 or the WTO norms. However, Indonesia defended its case under Article XX of the GATT 1994, arguing that the measures imposed were necessary to protect Halal as a public moral (Article XX (a)) and were required for the protection of human life and human health and to ensure food safety/food security (Article XX (b)), as well as necessary to secure compliance, It finally decided to appeal against the ruling (Yinka & Rafiu, 2018).

2.4. Appeal

Two months after the panel's verdict, Indonesia informed the DSB of its decision to appeal to the Appellate Body (AB) against the issues raised by the Panel. In its appeal, Indonesia sought to protect its measures under Article XI: 2 (c) (ii) of the GATT 1994, which allowed import restrictions if imports aimed to handle the surpluses of similar domestic products. However, the AB refused to accept the pleas and rejected Indonesia's defense under various articles of the GATT 1994 rendering the Act itself inoperative by virtue of another Agreement on Agriculture. Thus, the Appellate Body upheld the Panel's finding and the rulings against Indonesia. On 22 November 2017, the DSB adopted the Appellate Body report along with the modified panel report after

the appeal. The United States called it a resounding victory for their country as it would open new export opportunities for the US stakeholders (e.g farmers and horticulturalists) and also for the Indonesian consumer who would now have the access to high-quality US agriculture products. The rulings would also allow the US to introduce US beef to Indonesian customers leading to the expansion of Indonesia's beef market (Triana et al., 2019).

1. Case No DS467 DS435, DS441, DS458 and DS467: Australia — Tobacco Plain Packaging (Indonesia) Complainant-- Five countries (Ukraine, Honduras, Dominican Republic, Cuba and Indonesia), Respondent-- Australia

2.5. Issues Involved

The issues involved the jurisdictional rights of the Australian laws and regulations that imposed restrictions on trademarks, geographical indications, and other packaging requirements on tobacco products Indonesia, along with other nations like Ukraine, Honduras, Dominican Republic and Cuba approached the AB asking for consultations with Australia. Indonesia and other nations challenged the measures under regulations such as The Tobacco Plain Packaging Act 2011 and The Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 which discouraged the use of tobacco products and for related purposes; the complainants also referred to other related measures adopted by Australia, which implemented and complemented these laws and regulations. All parties aggrieved also claimed that Australia's measures were inconsistent with Australia's

commitments to the TRIPS Agreement, the TBT Agreement and GATT 1994. A record number of WTO Members (forty one in total, including the five complainants) indicated their intention to join one or more of the disputes as third parties.

2.6. Panel and Appellate Body proceedings

The WTO Director-General appointed panels for each of the five tobacco disputes on 5 May 2014. The same panelists were appointed to hear each of the disputes and the timetable for the panel proceedings was harmonized at the request of the parties, pursuant to a procedural agreement between the parties, to allow all five disputes to be heard together. On 13 March 2015 and 16 September 2015, Australia filed its two written submission in response to the complainants' arguments. In May 2017, WTO upheld the landmark Australian law on restrictive tobacco packaging. Those rules that banned logos and distinctive-colored cigarette packaging with brand names printed in small standardized fonts were also upheld. The WTO refused to accept that new rules constituted an illegal barrier to tobacco trade.

3. DISCUSSION

The two cases included in this paper are symptomatic and symbolic of the WTO's dispute settlement mechanism that replaced the GATT, 1994 mechanisms about two decades ago. These cases highlight the implementation of the WTO's two-tier dispute settlement

system comprising panels and appeals process (Hoekman & Bown, 2005). There are several councils and committees, parties and groups that work under the Dispute Settlement Body (DSB). It was also learned during this study that the primary objective of DSB under the WTO was to create an environment of recognition and acceptance of rulings of an international court and to adopt such practices that would enable the enforcement and compliance of such rulings (Alter, 2016; Liu, Zhu, Bian & Chen, 2018). This brief study thus attempted to understand the inside story of WTO dispute settlement procedures as well as its appellate mechanism. The study adopted a survey methodology of research, investigating the pros and cons of various cases as found in original documents, blogs and media reports.

The data suggests that WTO's dispute settlement mechanism may be the most authoritative judicial institution in the whole world but it is badly affected by the multilateral levels of world politics. Hoekman (2011) found out that WTO disputes reflected a political element as most cases are tit-for-tat suits, which means that anyone case filed in WTO will spur the respondent to look for a complaint against the complainant as a countersuit. Not only the respective judiciaries of the two or more countries have their images at stake, but the government officials in either country also play politics and pretend nationalistic affiliations before their domestic political audience to show how they are defending the interest of the country against foreign trading partners. This enables them to put the political and bureaucratic machinery in a position to gamble political costs and manipulate events at both domestic and foreign fronts. Examples of tit-for-tat suits include several cases between Canada and Brazil and the

United States and the European Union (Elsig et al., 2014). As a consequence of these cases, a legal war has started to shield the trade wars and business rivalries. The countries under the influence of such legal wars have created new legal infrastructure in order to consolidate their positions. As a result, till date, WTO has dealt with cases filed by as many as sixty-six of its members who have been either a complainant or a respondent and with cases with another thirty-five members who were a third party.

There are also a few examples of vested interests and manipulation when private parties, trade firms and enterprises, who have complementary interests on behalf of their governments, and who bring cases in order to share the benefits with their government. Since only governments can have formal access to WTO dispute settlement system, and small developing countries lack the resources to bring a case on their own as well as the legal capacity to recognize violations, such private vendors prove helpful as most of them have a network with multinational companies that make heavy investments in multiple countries. This phenomenon is exemplified in several cases brought by Cuba, Dominican Republic, Honduras, Indonesia, and Ukraine against Australia. In the labeling law on cigarette packages, for instance, media reports and independent agencies have found out that large U.S. and European tobacco companies had funded law firms to support these lawsuits as these countries have real economic stakes in tobacco industries and exports. The funds provided by these western tobacco companies enabled the smaller countries to manipulate the DSB and its appellate system in their own way.

A good example of outsourcing and enabling developing countries to wage legal battles against the developed ones is setting up

of an Advisory Center on WTO Law (ACWL) by a group of senior WTO Members who funded the creation of this Center. The objective behind the creation of this Center was to help the developing countries fight their legal battles. This Center offers free legal advice and subsidized assistance in dispute settlement proceedings. It also often acts on behalf of developing countries. Since its inception in 2001, the Center has brought nearly 50% of WTO cases. The role of the Appellate Body (AB) in the WTO dispute settlement mechanism has also remained dubious and controversial. Gregory et al. (2016) call it “fragile and at risk of decline” (Gregory et al., 2016: 257). The author affirms that the AB had never been a powerful body since the founders of the WTO did not design it to function as a court and constrained its authority. Currently, the AB, which consists of seven members appointed by the DSB, appears to be the apex of the WTO dispute settlement system. Its members are though not formally called judges, it operates as an international appellate trade court created to enforce trade rules (Ahmed, Umrani, Qureshi & Sarmad, 2018; Ali & Haseeb, 2019; Haseeb, Abidin, Hye, & Hartani, 2018; Haseeb., 2019; Suryanto, Haseeb, & Hartani, 2018). The controversy begins when the AB members wish to serve their own interest without consolidating the AB’s authority. In the context of the WTO dispute settlement system and its political and bureaucratic affiliations, the AB also is obliged to protect the institutional interests. The politicization had also penetrated into the selection process of new AB members (AlAli, 2016). It has threatened the AB’s authority and questioned its judicial authorities. AB Member David Unterhalter, for instance, expressed these concerns in his farewell speech Irshad, et al. (2018) cautioning WTO members

that the politicization is a big threat even to the independence of AB members and a challenge to the legitimacy and authority of the WTO dispute settlement system.

This increased politicization also becomes manifest when it is learned that the AB members are recruited based on their sensitivity to political and diplomatic concerns rather than legal expertise. This has greatly contributed to the decline of the AB's reputation and its authority. It could also result in making AB rulings less convincing and less consistent in its future dispute settlements, thus also reducing its authority on legal matters. Gregory et al. (2016) observe that the AB faces the real challenge of winning the trust and confidence of the civil society more than that of WTO members. Finally, it is also true that WTO law or its legal dispute settlement body (DSB) is not imposed on any country. DSB is actually a set of agreements, negotiated and signed by its WTO member governments. A consensus is needed of all its members whenever a deal has been concluded. Most of these deals are compromises as a result of arbitrator's role played by WTO through its members, most of these deals or rulings although aim for settling trade-related disputes, but they also show flexibility and exemptions by recognizing a wide range of other priorities, like health, social justice, advertising ethics and like. Moreover, the ruling given in a particular case is not necessarily final; it can be appealed by either side. Either party can challenge a ruling for its interpretation of the agreements to avoid creating a legal precedent in case its interpretation is wrong.

4. CONCLUSION

To sum up, the WTO in general and DSB, in particular, have acted as a custodian of trade rights in most of the developing countries like Indonesia. These agencies have created an environment of justice in trade and overall control in trade practices by giving them a legal shape. There are although controversies and doubts that have been raised on the role of WTO and DSB, on their integrity owing to their political and bureaucratic style of functioning. It is also seen in this study that many developed nations like the United States and European Union have hired private agencies and vendors to find cases for the DSB from the developing nations. This may suggest that the United States and other developed governments have decided to turn away from the WTO at least for purposes of trade negotiations, for they have signed numerous other trade agreements such as the Transpacific Partnership and the Transatlantic Trade and Investment Partnership, which have their own dispute settlement mechanisms.

However, this study also found a few strengths in the WTO and its dispute settlement systems. Even if the developed nations like the United States adopt new treaties with new dispute settlement mechanisms, the WTO dispute settlement system will always remain dominant because of the multilateral presence, in almost all sections of trade, society and business. Evidence of this study found out that WTO has succeeded primarily by the output of its rulings and participation by the private sector in both findings and promoting DSB activities.

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