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The Recent Crisis of the WTO Appellate Body: Is the WTO's Reform a Solution?

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Abstract

At the end of 2019, the international society was surprised by the cessation of the Dispute Settlement Body of the World Trade Organization (WTO) since the United States (US) blocked the election of the new judge of the Appellate Body (AB). This study examined the superiority and drawbacks of the implementation and capacity of the WTO dispute settlement body (DSB) to maintain the trading system among the state members. This paper finds that the WTO DSB plays a crucial role in the panel report's acceptance. WTO also continues to develop and is characterized by a strict interpretation of the WTO treaties. Nevertheless, provisions were criticized, which made their implementation inefficient, such as retaliation, the lack of transparency, the restriction of amicus curiae briefs, the procedure of concession suspension, and the deficiency in the enforcement of the report by the injured party. The crisis that happened to the AB could trigger countries to revise the mistakes in the WTO whole system. This situation presents a chance to resolve issues about the output quality and institutional mandate observance of the WTO tribunals. Overall, the ideal option for member states is to continue incurring the costs of loss, develop a consensus, earn global benefits to keep the trading system running and support the WTO through active participation.

I. Introduction

In the end of 2019, the international society were surprised by the cessation of the Dispute Settlement Body of the World Trade Organization (WTO) because the United States (US) blocked the election of the new judge of the Appellate Body (AB). The crisis did not happen suddenly. Since 2011, the United States has rejected to participate in the appointment new judge of AB (Rathore & Bajpai, 2020), although

other WTO members disapprove the US approach in expressing discontent with the AB's operations. The WTO was established to facilitate commercial freedom at its most possible and to assist dispute settlements among member states. If the situation is not handled punctually, the organization's future will be threatened. The members will no longer be able to appeal the WTO panels' judgement, and rather they choose third-party settlement for any dispute. The member state that obtains an unfavorable panel judgement may prevent its implementation. Nevertheless, if member states use alternatives of dispute settlement mechanisms, the WTO's objective is challenged.

This study examined the advantages and disadvantages of the implementation and capacity of the WTO DSB to maintain the trading system among the state members. The first part discusses the advancement of the WTO's dispute settlement compares to General Agreement on Trade of Tariff (GATT) 1947. It also revealed the disadvantages of dispute settlement application, the cessation of AB function, and the possibility of reforming the WTO.

II. The Advantages of Dispute Settlement Body (DSB)

The most remarkable characteristic of the DSB WTO, first, is its effective procedure in case settlement. The dispute settlement aims to save time in the process (Merrills, 2011). Previously, the DSB is an improvement of dispute settlement of the GATT 1947. One of the causes that influenced the modification in the GATT dispute settlement is the tendency of member states to ignore the Panel's report. It led to a stalemate in several high-level trade disputes (Read, 2005). As a matter of fact, the GATT dispute resolution is founded on the idea of deliberation or consultation among parties to the GATT agreement (Srinivasan, 2007). Therefore, the dispute settlement mechanism in the GATT is inefficient and time-consuming because state may obstruct or postpone any phase of dispute settlement.

The International Court of Justice (ICJ) could reach approximately four years to solve a dispute. Then, the North American Free Trade Agreement (NAFTA), or now the United States Mexico Canada Agreement (UMSCA) (*United States-Mexico-Canada Agreement*, 2020), spend about three to five years. Thus, the WTO DSB is a platform for dispute settlement that is considerably quicker and more efficient (Van den Bossche & Prévost, 2021). The DSB also promotes regulation as a means of ensuring 'security and predictability' in international trade system (Reich, 2017). Thus, the WTO DSB offers excellence over other international dispute resolution systems in both time and mechanisms.

On the other hand, WTO set the time for each stage, even though the factual duration in court may take time twice or more. For instance, the consultation sets to be finished in 60 days but the average duration during 1995-2006 reached 210.2 days. The panel took time for 406.4 days, almost ten times of the initial target 45 days (B. M.

Hoekman & Kostecki, 2001). Based on the fact, the duration is inconsistent with the estimation. If the dispute settlement and implementation stages are added together, they spent almost four years, which are not in accordance with WTO rules to return to the proper procedures. However, compared to the GATT's, the WTO's dispute settlement is considered a progress. It makes two to five months faster settlement (Kim, 2017). Nevertheless, in company and industries perspectives, this duration is long and affects enterprises and activities.

Second, developing countries' involvement in WTO disputes has been much more robust. The developing countries involve as complainant, defendant, or third party. The dispute settlement is a significant institutional attempt to help developing nations with insufficient or inadequate resources in their dispute resolution efforts. Indeed, developing countries having increased their participation in WTO dispute resolution. On the other hand, the number of countries that report the most cases are developed countries. There are three indicators of causes for developing countries less likely to file lawsuits in the WTO's dispute settlement: (1) insufficient legal knowledge of WTO legislation, (2) limited budget resources for the appointment of external legal counsel, and (3) concerns about economic and political retribution (Shaffer, 2006). The involvement of developing nations reflects the WTO dispute resolution procedure as a means of expanding the inclusiveness of the multilateral trading framework.

In contrast, in the DSU, the WTO also prescribes special treatment for developing nations to safeguard economic progress and to establish a more equitable global economic order (*Developing Countries in WTO Dispute Settlement*, 2017). There is an important provision of the DSU. If there is a disagreement between developed and developing nations, the developing states may nominate at least one panelist from their nation (World Trade Organization, n.d.). Furthermore, the DSU mandates the WTO member nations to give particular attention to certain problems to include developing states in the consultation process (World Trade Organization, n.d.). Hence, the WTO state members continue to have gaps or inequities. This particular provision demonstrates that the WTO knows how to fill the gap.

Third, the panel report's acceptance is a crucial step and an essential improvement under the GATT processes. Negative consensus may be broken by parties who believe the report must be approved. Thus, the DSB has an obligation to approve the report of the first-level panel, unless the report is appealed or there is a consensus against adoption among the DSB members (John Howard Jackson et al., 2000). Based on the international law, the accepted report becomes an obligation for conflicting parties. In the new procedure, all members must vote against the report to prevent its implementation (negative consensus). In the GATT's prior dispute resolution mechanism, all members were required to approve a report before the adoption (positive consensus) (Varella, 2009). The disagreement seldom reached the point of commercial retaliation under the previous GATT because the injured

parties prevented it from being authorized. The harmed party cannot impede the report's execution based on the present system, unless the other parties join to block.

Fourth, the WTO continues to develop and is characterized by strict interpretation on the WTO treaties. Considering the legitimacy and the states' preference for the DSB over other alternatives, it is intriguing to observe that the states prefer the organization over others (Varella, 2009). Although there are international laws and some of them can be used in the case of trade, the WTO remains to exercise power over other law subsystems. To prevent conflicts with other international law, the WTO treaties are usually employed as legal sources. In all accounts, there is a considerable focus on the legal use of handling the dispute using both the DSU and the GATT as legal bases. The distinction resides in the WTO legal framework with other international law utilized to ensure that its judgments are implemented. Based on the international law point of view, it does not matter if the national regulation is inconformity with international principles if the final action adheres to international settlement. To validate its internal law, a state might simply disregard penalties or even withdraw from the organization without significant ramifications. The punishment can result in more significant reprisal only in severe circumstances (John H. Jackson, 2011). According to the WTO system, compliance depends on the dissatisfaction of the affected trade stakeholders that force a government to take action to alter the WTO decision into the national legislation, not the national court system (Varella, 2009). Thus, the WTO rules is higher in the hierarchy than the other trade treaties.

III. The Disadvantages of Dispute Settlement Body (DSB)

First, the disadvantage of DSB is the implementation of Retaliation. The Uruguay round of trade negotiations in 1994 was notable for the formalization of a dispute settlement or enforcement system. The idea of retaliation is also called "negative reciprocity". It is a development of enforcement method. Most academicians consider retaliation as an economically counterproductive tactic to implement free-trade standards. There are also other beliefs that there are other advantages of the mechanism. One of them is that retaliation mechanism maintains the WTO's dispute settlement process's credibility. The idea is to enhance compliance by rallying strong interest groups of violator countries to oppose the protectionist laws and to give protectionist organizations of the violator countries an enhancement on the legitimacy of enforcement threats (Nzelibe, 2005). However, Nzelibe provides argument that retaliation may causes low incentives to follow the rules and high costs to enforce them (Nzelibe, 2005).

Only the victorious parties of a same-sector dispute engage in retaliation. The possibility of retaliation has an immediate effect on contracts and causes losses for the party subjected to retaliation because the goods (Varella, 2009), as dispute-objected, subsequently grow so costly. Then, sales are hindered and the domestic markets are

lost. Retaliation is not an efficient and fair method of conflict resolutions, particularly for poor nations. In terms of goods from rich nations, developing countries may have fewer possibilities. These possibilities may not even represent politically significant industry in the developed countries. Consequently, it is very improbable that developing state will have the necessary internal political audience to bear retaliation (Nzelibe, 2005). If the size and power of the contesting states are grossly disproportionate, it becomes impossible to do retaliation through commodities. If the poor state puts too much tax on a commodity from the big exporter, it probably insufficient to alter the laws of wealth state based on the sum of money that it lost. Therefore, retaliation against a larger state would be insignificant.

One of the unsuccessful retaliations is in the case of the US and Brazil cotton dispute (*United States - Subsidies on Upland Cotton DS267*, n.d.). Brazil stated that putting a tax on cotton imported from the US would be ineffective since the country is a net exporter of the commodity. Brazil thought that putting a tax on cotton imported from the US would not be efficient because Brazil exports cotton and imports very little of it. The practice of retaliation by the US against Brazil in another sector, namely agricultural, is also ineffective in the same manner as the cotton case (*United States - Subsidies on Upland Cotton DS267*, n.d.).

Second, compliance is the conformity of a member's actions to the requirements of certain institutional agreements. Compliance refers to the step of implementation of the WTO dispute settlement procedure such as identifying the panel and the implementation of panel report (Young, 2013). Compliance with the execution of Panel or the findings of the Appellate Body is surprisingly high. There was an 83 percent of compliance rate on the execution of recommendations in Panel or Appellate Body reports (Davey, 2007). The Implementation of the DSB result must be completed within 15 months following the DSB's acceptance of the dispute panel or Appellate Body report by the respondent (World Trade Organization, 1994). There are three stages to work on. First, the respondent submits a proposal through agreement by the DSB. Second, the Complainant and respondent reach a consensus. Third, parties have an arbitration. If the complainant does not question the respondent's report of compliance to the DSB, compliance is deemed to have been accomplished. Vice versa, if it is questioned, it continues to the next stage as the respondent's expense of damages to the complainant.

However, compliance has historically been poor and tardive (World Trade Organization, 2020). It is caused by the neglection of several members, the injured parties, to be informed according to the required time on their business partners. The noncompliance can harm state-reliance in the global trade system based on regulations, as it would be harder states to agree on new rules and punishments when the old ones are not being complied. Furthermore, it emerges the difficulties for the institution to impedes the effective operation of the WTO, without thorough information on current WTO agreements, it is impossible to examine, analyze,

and generate ideas for negotiation. The failure to notify the information on trade provisions may causes member states harder to discover and correct inconsistencies and to utilize the dispute resolution process. Non-compliance with transparency and notice requirements have a direct influence on the WTO's dispute resolution function (World Trade Organization, 2018).

The US and four other members made a proposal to the WTO on improvement of transparency and contraction on the notification provision in November 2018 (Reinsch et al., 2020). The WTO was requested to provide technical help and capacity-building support for members who were having trouble to fulfill notification. Recently, the continuing debates over additional restrictions on damaging fisheries subsidies highlights the necessity for transparency and adherence to notification requirements (U.S. Mission to International Organizations in Geneva, 2019). In this scheme, transparency may help to guarantee that individuals receive subsidies, such as subsistence fishermen or minorities who need aid to complete. In 2019, Cuba, India, and the African Group also submitted a proposal that underlines the difficulties experienced by poor and least-developed nations in terms of openness and notification duties. In addition to requesting transparency in decision making, they also implied critique of the WTO's practice to employ "green rooms" comprised of chosen and high-income nations to bargain on behalf of the whole membership (World Trade Organization, 2019a).

Third, the third-party involvement might be constrained by the principle of *amicus curiae briefs* since it is not suitable to invite people, corporations, trade unions, international organizations, and NGOs to participate in the dispute settlement (Van den Bossche & Zdouc, 2017). Several cases were proposed to have third parties in the proceeding. They were rejected due to the panel having the discretion to decide not to seek out such information or counsel in the first place based on the panel's authority to act under the DSU (World Trade Organization, 1994). For instance, it can be found in the cases of US-Shrimp, US-Lead and Bismuth II, E-C-Sardines, etc. (*Amicus Curiae Briefs*, n.d.). The acceptability of the function and the involvement of *amicus curiae brief* is necessary to enhance transparency and acceptance of third-party participation in the DSB. For instance, the participation of NGOs will enhance the WTO decision-making since NGOs provide specialized expertise, resources, and analytical skills that governments do not possess (Van den Bossche & Zdouc, 2017). Thus, the implementation of *amicus curiae briefs* can make the WTO's DSM procedure to be more efficient and minimize the possibility of new problem.

Fourth, the procedure suspension of concessions or other obligations is also performed as a drawback in the DSM. It is a temporary solution if the losing nation does not complete the report and decisions within a fair amount of time (World Trade Organization, n.d.). The DSU stipulates that the degree of concessions or other obligations suspension shall correspond the number of cancellations or detriment that generated the loss (World Trade Organization, n.d.). Because there is no explicit

definition or guideline for the equivalent under the DSU, this clause is practically challenging. Therefore, the WTO should specify the notion of equality, the calculation indicators, and the procedure for executing the suspension of concessions. By doing so, they are proportional to the number of cancellations or breakdowns that result in losses.

Fifth, the dispute resolution situation presents a chance to resolve issues about the output quality and institutional mandate observance of the WTO tribunals. The efficacy of the WTO dispute settlement procedure is determined based on its ability to enforce the WTO regulations. Fiorini and other scholars conducted survey involving several WTO member-states and stakeholders. They asked their opinions on the functioning of the dispute settlement mechanism. Based on the survey, most developing nations do not participate in dispute settlement and are concerned with the AB's use of prudence in its mission (Fiorini et al., 2019). Some respondents still affirm that the function of dispute settlement body is useful for trading community. They agree on the basic concept of the DSU as it was made in the Uruguay Round (Fiorini et al., 2019). Openly, most of the WTO member-states have less enthusiasm to the DSU as the entity that is advantageous for them (Saluste et al., 2020).

Enforcement is a significant factor to evaluate the judicial body's function as it associated with the compliance of member-states. In the setting of the WTO's DSB, it is to influence national government decisions to adjust with the WTO principles and prevent the states intentions to revoke the negotiated agreements. Although 83 percent of compliance rate have been successfully implemented in dispute settlement from 2002 to 2005 reports (Davey, 2007), Hoekman proposes the probability of political economic factors that may tip the scales in favor of weaker interpretations of contractual duties commitments. It can invoke retaliation from other parties and cause the disintegration of cooperation (B. Hoekman & Mavroidis, 2020). Therefore, the WTO's self-enforcing and member orientation is reflected in the dispute resolution mechanism (Clifford Chance, 2019).

Political influence continues to play a crucial role in the WTO discussions. In contrast to the legal systems of sovereign nations, the WTO has neither a police force nor a prison to apprehend and punish states that violate the agreements. The imbalance of power among the WTO members raises potential problems for the WTO since such conditions may deny poor states market access and economic development possibilities (Jones, 2011). However, even a few developing nations still receive the WTO participation via MFN and the system despite they do not initiate the DSU's disputes.

IV. The Appellate Body Cessation

After the US government blocked the new appointment of AB members, on 11 December, the AB was deficient in three members to consider fresh appeals. It has

effectively brought the functioning of the AB to a halt. The US government under Trump's administration reveals several objections to focusing on the AB practices (Office of the United States Trade Representative, 2020). Perhaps the most severe accusation levelled against the AB is that of excessive judicial power. The complaint encompasses a variety of systemic concerns, including the claimed tendency of members to express opinions on uncontested matters.

First, the US released the AB's practice to make official interpretations of WTO regulations that are not limited to the situation of the dispute at hand. Consequently, it grants the AB authority to bind the WTO member states prior to the occurrence of a dispute, which is not considered under the DSU, including the interpretation of the domestic legislation of a WTO member and the production of advisory opinions on subjects unrelated to the appealed subject.

Second, since there is no process to contest an AB decision, the US is worried that a strict commitment to precedent may establish any incorrect legal interpretations, which is inconsistent with the DSU.

Third, since the DSU regulates that the process of AB is solely limited to legal problems (World Trade Organization, 1994), the US has often argued that the AB has an unduly expansive view of examined issues. In addition, Hillman asserts that appeals repeatedly only re-investigate facts rather than resolve exact legal concerns and emphasize previous decisions (Hillman, 2020).

Fourth, although the specific deadlines are outlined in the DSU, the AB procedure often surpasses five months to finish. The US has noted that a stronger emphasis on contentious topics can minimize the amount of time necessary to publish a report. In practice, the AB repeated the inability to complete cases within the mandated 90-day period (World Trade Organization, 1994).

Fifth, the AB lacks the jurisdiction to prolong the tenure of members without the DSB approval (World Trade Organization, 1994).

Sixth, the DSB has not officially endorsed the regulation, which aims to assure that new member's election does not cause delays in ongoing procedures. Since the DSB has the ability and obligation to nominate members of the AB, the US is of the position to view that it violates the WTO Agreement (Office of the United States Trade Representative, 2020). The US has concluded that the WTO's AB has exceeded its authority as a result of the concerns. These complaints have some justification and are commonly held, both in the United States and in international settings.

Every state tends to settle its dispute through the WTO mechanism and must go through a consultation with a panel to get a consensus before one of the parties raise objection and report to the AB or arbitration to uphold the decision (*The Process - Stages in a Typical WTO Dispute Settlement Case*, 2021). Even though the crisis caused AB to function inactive, member states still have access to engage in the consultation and panel process. Thus, the ultimate judgement will be based on panel findings.

It signals a return to the GATT era (World Trade Organization, 2004), despite the unfavorable consensus. Furthermore, the DSU precludes the ability of defendants to obstruct the adoption of reports. Based on the current situation, the respondent does not have the power to appeal (World Trade Organization, 1994). The AB's grasp has the potential to block the panel phase also because panel reports that have been appealed in void cannot be adopted by the DSB or eventually resolved at the appellate level (Muhamad Adystia Sunggara, 2022). Currently, no authority can examine and penalize like the WTO's non-compliance actions.

Nonetheless, it is important to highlight that the cessation of the WTO's AB does not imply the demise of the WTO as an organization or the regulation of the international trade system. In fact, in the same year, a panel forum of disputing state parties reached an agreement to adjust state rules to the WTO norms. Indonesia and Vietnam negotiated an agreement that, in the absence of a functional AB, the panel report in dispute DS496 will be considered binding in 2019 (World Trade Organization, 2019b; *Indonesia - Safeguard on Certain Iron or Steel Products DS496*, 2018). However, the present crisis should serve as a catalyst to reorganize the WTO by confronting the facts that the global trade community avoids.

V. Is the WTO's Reform a Solution?

Hoekman and Mavrodis assume that the crisis in WTO cannot be figured out simply by restoring the AB function as it would not resolve the larger dilemma. Once the WTO's legislative role continues to stagnate, the amount of WTO disputes will decline (B. Hoekman & Mavroidis, 2020). Legislation also plays an important role in assessing the effectiveness of the WTO function to settle disputes and enforce regulations, not only focused on the judicial body.

The procedural and substantive concerns of the US must be addressed to find a durable solution to the WTO's AB and dispute-settlement mechanism dilemma. The WTO members must return to the negotiating table to handle dispute resolution. By discussing concerns with a small number of interested parties, plurilateral negotiation may provide faster results than the multilateral ones. Plurilateral agreements have the potential to extend the scope of multilateral regulations to WTO members who choose to do so (B. Hoekman & Mavroidis, 2020). It lessens the possibility of governments seizing hostages for the sake of their interests (Schneider-Petsinger, 2020). In terms of dispute settlement, Walker suggests several points to settle the conflict made by the US' block. Walker' proposal is quite attentive to the US concerns (World Trade Organization, 2019c). In other hand, Hillman has suggested that reforming the WTO AB may require three distinct approaches: (1) implementing the Walker principles, (2) creating a new oversight body to guarantee adherence to the WTO standards, and (3) limiting the term restrictions of the WTO Secretariat's legal personnel to foster fresh ideas and to improve the power balance between adjudicators and employees (Schneider-Petsinger, 2020).

If there is an opinion that proposes to return to the GATT era by eliminating the existence of the AB what is the difference between the WTO as a multilateral institution and the agreement system of other bilateral institutions? Many proposed reforms of the current DSB are expected to improve the system that accommodates all member states' interests. It should not only focus on the protests of the US, that represents developed country, but also considering the needs of developing countries. Giving up independent rule-based arbitration and returning to the GATT system, ad hoc panel findings that is short of a uniform jurisprudence and amounted to nothing more than advisory judgments or non-binding conciliation suggestions will be ineffective in multilateral system. Such approach will not be compatible with international commerce within a legally predictable framework, as evidenced by the present "trade wars" (Sacerdoti, 2020).

VI. Conclusion

There were many problems in the WTO system. However, the proposal of fair dispute settlement mechanism in the WTO was successful. The WTO member-states have been increasingly performed it. On the other hand, the success of the DSB overcome the previous system in the GATT 1947, including more efficient special provisions of dispute settlement for developing countries. It leads to increased participation in the WTO system, the AB as the answer of negative consensus, and the legitimacy of the WTO's legal foundation. The foundation has provided a substance of legal certainty to an area of law that is seriously affected by political conflicts that are fueled by economic conflicts. There are some disadvantages of the WTO dispute settlement system. Some provisions were criticized, which made their implementation inefficient, such as retaliation, the lack of transparency, the restriction of amicus curiae briefs, the procedure of concession suspension, and the deficiency in the enforcement of report by the injured party. The crisis that happened to the AB, so that it became inactive, could trigger countries to revise the mistakes that were in the WTO whole system. Some of the six reasons issued by the US government to block the AB are in line with the initial discussion on the success and fragility of the WTO dispute resolution system.

Nevertheless, if new trade rules are not developed, the reconstruction of the AB will make nothing to preserve the future relevance of the WTO. The difficulty for the WTO is to evolve into a platform in which plurilateral agreements can be negotiated and certain parts of the PTAs can be made more multilateral. The dispute settlement situation presents a chance to resolve issues about the output quality and institutional mandate observance of the WTO tribunals. Overall, the ideal option for member states is to continue incurring the costs of loss, develop a consensus, and earn global benefits to keep the trading system running, and support the WTO by active participation.

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