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Indonesia's Interests in the World Trade Organization and the Appellate Body Impasse: Questioning the Existence of Special and Differential Treatment

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Abstract
The World Trade Organization's role in resolving international trade disputes is crucial, particularly in multilateral trade, which continues to grow alongside information disclosure and technology advancements. Dispute settlement systems often depend on the existence of the World Trade Organization's Appellate Body. However, in 2019, the United States prevented new members from joining this body, resulting in dysfunction and instability. Moreover, in 2020, the term of the last sitting Appellate Body member expired. As members of the World Trade Organization, Indonesia and other developing nations receive preferential treatment, which frequently backfires when dealing with developed nations. The special and differential treatment provided to developing nations is supposed to minimize the distinctions between developed and developing nations. This study identified possible actions that Indonesia and other developing nations could take to put an end to the World Trade Organization's impasse. To do this, they could use non-alignment diplomacy and waive their special and differential treatment. Both a conceptual approach and a literature review were used in this study.
Keywords: Indonesia; Special and Differential Treatment; World Trade Organization; Appellate Body.

Introduction

The existence of multilateral trade is a consequence of unavoidable interactions between nations. The World Trade Organization (WTO) was founded to promote integrated dispute resolution in multilateral conflicts. Due to the Uruguay Round's provision of a dispute resolution tool through the Dispute Settlement Understanding (DSU) made by the Dispute Settlement Body (DSB),

the WTO is considered a revolutionary accomplishment.[1] However, developing nations are currently in a precarious position due to the WTO's existence. For example, nations such as China, India, Indonesia, Mexico, South Korea, and Thailand make contributions to global trade that must be considered due to their population size and economic growth.[2]

As explained, developing nations have a lot to offer and should be considered in global trade. According to world export data from both developing and developed nations between 2000 and 2017 (selected data), since 2000, the overall value of goods exported from developing nations has increased fourfold, from $2.239 billion to $8.477 billion.[3] Therefore, developing nations' contribution to global trade during this period is undeniable. This substantial growth has enabled developing nations to reach a level of prosperity previously thought impossible. It also extends the global network for developing nations to participate in international trade. How is this accomplished? The population's contribution to this success is substantial, as the middle class in the population drives the growth of the global economy through domestic demand and consumption.[4]

China continues to be the main driver of global export growth, accounting for 30% of developing nations' overall growth.[5] However, recognizing the contributions of other developing nations is also important, including those of South Africa, South Korea, Hong Kong, Mexico, Singapore, the United Arab Emirates, India, Thailand, Malaysia, Saudi Arabia, Brazil, Vietnam, Indonesia,

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[1] Koesrianti, 'WTO Dispute Settlement Mechanism: Indonesia's Prospective in International Trading System' (2015) 27 Mimbar Hukum 300; Chad P Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19 World Bank Economic Review.[287].

[2] James Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) 11 Review of International Political Economy.[542].

[3] Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22 Journal of International Economic Law.[297].

[4] *ibid*.

[5] Yi Che and others, 'China's Exports during the Global COVID-19 Pandemic' (2020) 15 Frontiers of Economics in China.[541].

and Turkey.[6] Despite the phenomenal growth and development those nations have experienced, the WTO's presence will continue to help resolve trade disputes that would otherwise result in further conflict. Indeed, heavy trade traffic—as reflected in the number of exports—may cause unavoidable frictions or conflicts in international trade relations.[7]

To provide stability and certainty in international trade, the WTO uses a set of legally binding, non-discriminatory commitments on trade access. The disputing nations use the DSU to carry out mandatory adjudication with third parties to enforce pre-agreed trade rules and concessions that are carried out within a certain period. Since its founding in 1995, the WTO has filed approximately 600 disputes with the DSB to help resolve both small and large bilateral trade disputes between nations. Between 1995 and 2011, this has resulted in the annual value of trade increasing from $55 billion to $60 billion.[8] Owing to DSB case law, the "shadow law" dispute settlement system now has access to hundreds of billions of dollars. However, this data does not provide a full account of the dispute settlement system. The advisory group that the WTO's legal entity established has helped developing countries resolve disputes and defend their interests (e.g. by filing grievances with other developing nations). With a cumulative total of 328 cases from 1995 to 2019, the 15 developing nations with the highest export values emerged as the parties that used participatory dispute settlement systems the most, followed by the United States (with 279 cases) and the European Union (with 187 cases).[9]

However, when considering the trade portfolios of the 15 biggest developing nations (which account for the majority of global trade), whether

[6] Antoine Bouët and David Laborde,'US Trade Wars in the Twenty-first Century with Emerging Countries: Make America and Its Partners Lose Again' (2018) 41 The World Economy. [2276].

[7] *ibid*.

[8] Chad P Bown and Kara M Reynolds, *Trade Flows and Trade Disputes*, Policy Research Working Papers (The World Bank 2014).

[9] Anabel González and Euijin Jung, '20-1 Developing Countries Can Help Restore the WTO's Dispute Settlement System'.

these advantages can shape the dispute settlement system through the WTO becomes questionable. This is especially true given the refusal of the United States to rectify the destructive actions it carried out under Donald Trump's leadership. By refusing to fill the vacancies on the WTO's Appellate Body, the Trump administration crippled an essential part of the WTO's dispute settlement system.[10] Consequently, all disputes that have been appealed are currently postponed. This enables the party that lost the lawsuit to prevent the panel's decision from being implemented, damaging the dispute settlement system.[11] Several WTO members responded by looking into the interim appeals review mechanism. Although they do not seek to reinstate the Appellate Body, this is nevertheless a crucial step in maintaining the current system.[12]

Developing nations cannot be blamed for the problem the WTO's Appellate Body faces. However, because of their trade activity history (as summarized above), they might have the political clout to resolve it. Indeed, except for developing nations, no other parties or groups of nations rest their future on a legal dispute settlement system. One of the biggest benefits of this group of developing nations is that, under the WTO Agreement's substantive and procedural level of special and differential treatment (S&D) (see Annex 1 to the Marrakesh Agreement), those nations receive special treatment to make up for their underdevelopment. S&D represents the spirit of the group, ensuring developing nations participate in the WTO. Beneficiaries of S&D are also aware of the following: "(the) need for positive effort designated to ensure that emerging countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[13]

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[10] *ibid*.

[11] Dina Sunyowati and others, 'Can Big Data Achieve Environmental Justice?' (2022) 19 Indonesian Journal of International Law.[6].

[12] Rachel Brewster, 'WTO Dispute Settlement: Can We Go Back Again?' (2019) 113 AJIL Unbound.[61].

[13] WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh, 1998).

Based on the above, the following questions need to be addressed: Can developing nations with a history of economic strength in international trade bring about change and clear up the confusion surrounding the dispute settlement system caused by the United States government's refusal to fill the vacancies of the Appellate Body? To what extent is the dispute settlement system important to Indonesia? Can Indonesia end the WTO's impasse?.

Involvement of Indonesia and Developing Nations in the WTO's dispute Settlement System

The WTO's dispute settlement system ensures that all nations are treated in the same way and that they all have an equal chance of succeeding in trade disputes. Indeed, the DSB adopts a rules-based approach to dispute resolution, which seems to neutralize developed nations' power effectively. The S&D contains clauses under which developing nations can return to the General Agreement on Tariffs and Trade (GATT) decision of 1966, and it eliminates the distinction between developed and developing nations.[14] Consequently, both developed and developing nations play an active role in the WTO's dispute settlement system. Table 1 below lists the number of disputes that were settled through the DSU in the 15 largest developing nations:[15]

Table 1. Participation in dispute resolution of 15 developing nations[16]

Countries	Complainant	Respondent	Total	3rd Parties
China	21	44	65	177
South Korea	24	32	56	162
Hong Kong	33	16	49	145
Mexico	25	15	40	105
Singapore	21	18	39	12
United Arab Emirates	11	14	25	42
India	14	4	18	96
Thailand	5	12	17	95

[14] Dyan F D Sitanggang, 'Posisi, Tantangan, Dan Prospek Bagi Indonesia Dalam Sistem Penyelesaian Sengketa Wto' (2017) 3(1) Veritas et Justitia.[92].

[15] *ibid*.

[16] WTO, 'World Trade Statistical Review 2020' (2020) 51 World Trade Organization.[51].

Saudi Arabia	0	5	5	21
Malaysia	5	0	5	33
Brazil	2	1	3	12
Vietnam	1	1	2	23
Indonesia	0	2	2	49
Turkey	1	0	1	22
South Africa	1	0	1	56
Total	164	164	328	1,165

From 1995 to October 2019, developed nations used the WTO dispute settlement system as complainants in 55% of cases and as respondents in 57% of cases. Meanwhile, developing nations used the same settlement system as complainants in 45% of cases and as respondents in 43% of cases. Based on their success rates, the 15 developing nations listed above had more success when they were complainants than when they were respondents.[17]

Indonesia uses the dispute settlement system to resolve various trade disputes. One example of this is the biodiesel conflict between Indonesia and the European Union. In 2006, Indonesia produced 65 million litres of biodiesel, and by 2012, it was producing 2.2 billion litres, which was more than the European Union. However, the European Union still produces more than 30% of the biodiesel consumed globally and more than 40% of global biodiesel production.[18] In other words, Indonesia needs to export its biodiesel production, and the European Union is one possible destination for that export. However, the European Union also wants to maintain its own production. To resolve the dispute, Indonesia suggested that the European Union's anti-dumping import duty be eliminated. In 2018, the WTO analysed the European Union's complaint about Indonesia's dumping policy. It subsequently concluded that the European Union's complaint was not in line with the WTO's anti-dumping policy. The WTO's decision essentially invalidated the anti-dumping import duty that

[17] González and Jung (n 9).

[18] Gabungan Pengusaha Kelapa Sawit Indonesia (GAPKI), 'Perkembangan Biodiesel Indonesia dan Keberatan Indonesia Atas Bea Masuk Anti Dumping Uni Eropa'.

the European Union had imposed on Indonesia.[19] This demonstrates that the WTO can help resolve bilateral and multilateral trade disputes, particularly for developing nations like Indonesia, provided the parties to the dispute act rationally and consider their bargaining positions.

Inequity of the WTO Dispute Settlement System Towards S&D Provisions

The WTO's dispute settlement system undoubtedly plays an important role in resolving international trade disputes. However, issues regarding how its resolutions are implemented must be addressed, particularly when it comes to the S&D provisions established for developing nations. Such issues include limiting access to developing nations' free markets, failing to safeguard their interests, limiting the national trade policies they can adopt, and enforcing excessive restrictions during the transition period.[20]

Implementing the S&D provisions is difficult because of the existence of cultural differences and trade restrictions that do not apply to developed nations. This becomes yet more apparent when the staples of developing nations' economies are considered: agriculture, textiles, and clothing. "Dirty tariffs," significant export subsidies, and the misuse of the 'blue box' and "green box" mechanisms are but a few examples of these barriers. Indonesia should be able to make the most of the S&D provisions, particularly when it comes to anti-dumping. However, developed nations hinder this process by abusing anti-dumping laws. One example of this is the US–Offset (Byrd Amendment) case, which gave rise to the S&D provisions. Once the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) was passed, Article 15 of the Anti-Dumping Agreement could no longer be put into effect. Consequently, the United States was prevented from allowing developing

[19] Anggi Mariatulkubtia, 'Peran WTO Dalam Menjembatani Benturan Kepentingan Antara Uni Eropa Dan Indonesia Dalam Perdagangan Biodiesel' (2020) 9 Andalas Journal of International Studies (AJIS).[16].

[20] Nandang Sutrisno, 'Efektifitas Ketentuan-Ketentuan World Trade Organization Tentang Perlakuan Khusus Dan Berbeda Bagi Negara Berkembang: Implementasi Dalam Praktek dan Dalam Penyelesaian Sengketa' (2009) 16 Jurnal Hukum.[2].

nations to enter the American market.[21]

Developed nations should refrain from carrying out actions or implementing policies that could harm developing nations' economies, which is also a problem that arises in dispute resolution. Various GATT clauses and WTO agreements contain this clause in its entirety, including the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Technical Barriers to Trade Agreement (TBT Agreement), the Agreement on Trade-Related Investment Measures (TRIMs Agreement), and the Anti-Dumping Agreement. However, developed nations routinely disregard these agreements. For example, developed nations often flout the policies of the SPS Agreement and the TBT Agreement; however, when developing nations do the same, they are often hindered by a lack of domestic resources.[22]

The AA Agreement, the TBT Agreement, the TRIMs Agreement, and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) do not give developing nations the flexibility they need to fix internal issues such as irregularities, article issues, external factors, and other problems.[23] Although developing nations intend to follow the clauses of those agreements, developed nations have taken legal action against them. For example, in the Indonesia Automobile case, Indonesia is accused of violating several WTO regulations, such as its attempt to build its own automotive industry while facing lawsuits from Japan, the United States, and the European Union.[24] However, under Article 4 of the TRIMs Agreement, Indonesia should be free to stray from Article 2 of the GATT in regards to its National Treatment Quantitative Restriction, allowing Indonesia to control its own domestic automotive industry.[25]

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[21] Asoke Mukerji, 'Developing Countries and the WTO: Issues of Implementation' (2000) 34 Journal of World Trade.[33].

[22] *ibid.*

[23] G Garrett and JM Smith, 'The Politics of WTO Dispute Settlement' (2002) Occasional Paper Series, UCLA.[1].

[24] Sulistyo Widayanto, 'WTO Melindungi Kepentingan Domestik Negara Anggotanya Secara Optimal' (2016) 35 Tinjauan Perdagangan Indonesia 1; Mariatulkubtia (19).

[25] Verdinand Robertua, 'Environmental Diplomacy: Case Study of the EU-Indonesia Palm Oil Dispute' (2019) 2 Mandala Jurnal Hubungan Internasional.[1].

In short, the United States government's refusal to fill the vacancies on the WTO's Appellate Body made its dispute settlement system less effective because it resulted in a minimum number of members operating. This action demonstrates that the United States wants to return to a dispute settlement system that is based on power, which will undoubtedly benefit developed nations that have substantial resources. On the contrary, the Appellate Body plays an important role in ensuring the WTO dispute settlement system continues to be based on rules, not power.[26]

WTO's dispute settlement system

A special mechanism based on a rules-based dispute settlement system is used for WTO dispute resolution. The DSU is a system for resolving disputes that falls under the purview of all WTO agreements and is intended to be integrated into the process of resolving multilateral trade disputes. This system discredits power-based approaches to dispute resolution, and it is considered the most effective. The dispute settlement system promotes the rule of law in multilateral trade, which prioritizes the peaceful resolution of trade disputes between nations.[27] As applied to date, the WTO dispute settlement system also helps nations adjust their actions so that they are in line with multilateral trade law.[28]

The WTO's dispute settlement system generally has three main stages: consultation, panel, and appellate body. Figure 1 below illustrates the WTO dispute settlement system. As explained, the steps listed above are an effort to settle business disputes through the legal system. When resolving trade disputes, the DSU acknowledges that its members' circumstances differ (e.g. differences between developing nations and underdeveloped nations). Several special provisions for developing nations are outlined in Articles 3.12, 4.10, 8.10, 12.10, and 12.11 of the DSU.

[26] Henrik Horn, Petros C Mavroidis and Hakan Nordstom, 'Is The Use of the WTO Dispute Settlement System Biased?' (1999).

[27] K Buysse and D Essers, 'Cheating Tiger, Tech-Savvy Dragon: Are Western Concerns about "Unfair Trade" and "Made in China 2025" Justified ?' (2019) NBB Economic Review.[1].

[28] J A Alonso and J A Ocampo, Global Governance and Rules for the Post-2015 Era: Addressing Emerging Issues in the Global Environment, The United Nations Series on Development (Bloomsbury Publishing 2015).[173].

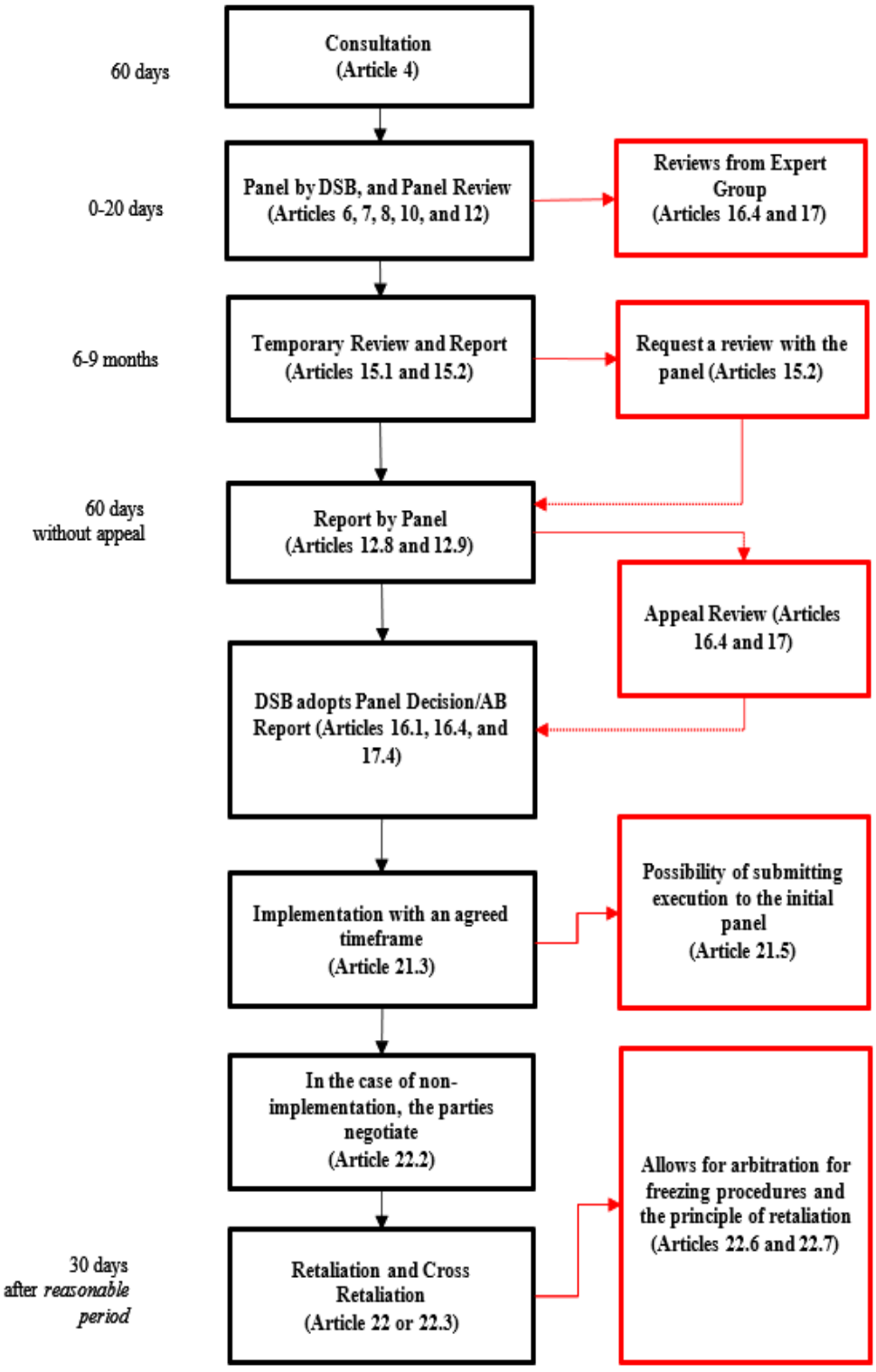

Figure 1. Dispute Settlement Mechanism WTO[29]

[29] WTO, 'Flow Chart of the Dispute Settlement Process' (2004).

Table 2. Exports of 15 Developing and Developed Countries (Selected Data)[30]

Countries	Export (%)	
	2000	2017
15 biggest developing nations	**22.6**	**35.6**
China	3.9	12.8
South Korea	2.7	3.2
Hong Kong	3.1	3.1
Mexico	2.6	2.3
Singapore	2.1	2.1
United Arab Emirates	0.8	1.8
India	0.7	1.7
Thailand	1.1	1.3
Saudi Arabia	1.2	1.3
Malaysia	1.5	1.2
Brazil	0.9	1.2
Vietnam	0.2	1.2
Indonesia	1.0	1.0
Turkey	0.4	0.9
South Africa	0.5	0.5
Total developing nations	**34.7**	**47.8**
European Union	38.1	33.3
Japan	7.4	3.9
United States of America	12.1	8.7
Total developed nations	**65.3**	**52.2**
Total	**100**	**100**

Table 2 above demonstrates that while developed nations experienced a decline in their exported goods, developing nations (as a whole) experienced growth. Specifically, exports from developing nations increased from 34.7% in 2000 to 47.8% in 2017, while those from developed nations decreased from 65.3% in 2000 to 52.2% in 2017. In other words, although much controversy and complexity surrounds the way in which the S&D is implemented, it nevertheless helps developing nations grow economically.[31] The S&D's provisions enable developing nations to access free trade. Part IV of the Enabling Clause of the GATT of 1994, the Agreement on Agriculture (the AA), the General Agreement

[30] González and Jung (n 9).

[31] I Gusti Ngurah Parikesit Widiatedja, 'The Evolution of the Dispute Settlement Mechanism in Preferential Trade Agreements (PTAs): The Case of Indonesia' (2020) 10 Asian Journal of International Law.[346].

on Trade in Services (GATS), and the Agreement on Textiles and Clothing (ATC), are all but some of the GATT provisions and WTO agreements that contain S&D provisions (ATC).[32]

The first S&D clause is found in the general principles outlined in Article 3.12 of the DSU, and it states that if a developing country member files a complaint against a developed country member under one of the covered treaties, they may do so by employing the previous procedure decision from 1966, as established in Article XXIII of the GATT Contracting Parties (the 1966 decision). This is viewed as a substitute for certain DSU provisions found in Articles 4 (consultation), 5 (good offices, conciliation, and mediation), and 12 (dispute resolution) (Panel Procedures). It should be noted that there is a conflict between the guidelines in Articles 4, 5, 6, and 12 of the DSU and those in the 1966 decision. Consequently, the final rule applies.[33]

As a founding member of the WTO, Indonesia has ratified the WTO agreement into Indonesian law through Law No. 7 of 1994, Concerning Ratification of the Agreement Establishing the World Trade Organization.[34] With this ratification, Indonesia is demonstrating its right to exercise its state's power in full and to benefit from the global economy. Indonesia adopted this agreement for two reasons: to assert claims over global trade so that it can bring about social wellbeing in the country, and to be involved in controlling global trade. These considerations all relate to Indonesia's interest in safeguarding the national interest toward a just and prosperous society through using foreign resources. All of these factors are considered in points a, b, and c of the consideration section of Law No. 7 of 1994.[35]

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[32] Mary E Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) 35 Journal of World Trade.[55].

[33] *ibid*.

[34] Farahdiba Rahma Bachtiar, 'Peran WTO Dalam Membangun Penegakan Hukum Internasional Terhadap Proteksionisme (Studi Kasus: Sengketa Dagang Rokok Kretek Indonesia)' (2020) 2 Review of International Relations.[40].

[35] F. D. Sitanggang (n 14).the effectiveness of this system hinges on compliance of states to decisions reached. Compliance in its turn are influenced by how parties to a dispute value the justness or equity of the final settlement. This paper discusses WTO Dispute Settlement Understanding (DSU

In an effort to advance and secure Indonesia's interests in free, fair, amicable, orderly, and peaceful global trade, the country has an interest in applying the principles of the WTO Agreement and its subsequent agreements. These principles include the notions of most favoured nation, national treatment, and transparency. Most favoured nation is the idea that all trading partners should be treated equally and without discrimination.[36]

In theory, global trade puts all of its participants on an equal footing, and S&D is a way of making up for differences that result from the divide between developed and developing nations. As Indonesia is not represented by any other country in the WTO, it is in a position to make national trade regulations so that the WTO Agreement does not diminish (or even abolish entirely) the essence of the existence, sovereignty, role, and function of the state.[37] At the international level, Indonesia has the same rights as those of other trading participants, but it also benefits from S&D treatment.

S&D: A Strength and a Weakness for Indonesia

As explained, S&D treatment is governed by several WTO decisions and agreements, and it is intended to close the gap between developing and developed nations. Consequently, developing nations are granted privileges to carry out initiatives or implement policies that are primarily focused on putting the interests of the state as the highest priority. Additionally, developed nations have a duty to aid these initiatives by following the procedures outlined in the AA, the GATS, and the ATC, as well as Part IV of the Enabling Clause of the GATT 1994.[38]

In practice, obtaining S&D treatment does not automatically put developing nations—in particular, Indonesia—in a better situation. Developed nations invariably decide to ignore the rules dictating how S&D should be treated. For example, when Indonesia uses subsidy policies that include local content requirements during the

[36] *ibid*.
[37] Footer (n 32).
[38] *ibid*.

transition period, developed nations may take legal action on the grounds that Indonesia failed to notify the WTO within 90 days from the date the WTO Agreement became effective, even though Indonesia should have been entitled to the transition period under the TRIMs Agreement. Similar obstacles arose when Indonesia attempted to use the transitional period established in the SCM Agreement, as the standards established in the agreement were impossible to meet.[39]

The S&D rules are included in almost all instances between developed and emerging countries, and they serve as the foundation for WTO dispute resolution. However, under the current procedural requirements, developing nations are required to notify the General Council and substantively verify the reality of the challenges they encounter. Such requirements do not guarantee that the S&D regulations will be enforced successfully. This challenge is exacerbated by the Panel's and the Appellate Body's literal and rigid reading of the Note Ad Article XVII:11's causal relationship between the deviation of specific limits and conditions.[40]

The Indonesia Automobile case shows that even when the S&D provisions of the TRIMs Agreement and the DSU are applied effectively, this does not guarantee that domestic affairs will improve as a result. Although the arbitrator only granted a 12-month transition period, Indonesia fought for the right to a 15-month transition period, as specified in Article 21.3.c) of the DSU. In the same case, Indonesia attempted to invoke Article 27.3 of the SCM Agreement in support of its authority to grant subsidies to the National Car program for five years, but it was unsuccessful. Indonesia is struggling to obtain the transition period it wants because it has trouble complying with Article 27.8 of the SCM Agreement. Under this article, national subsidies cannot cause injustice, which is when the subsidies provided exceed the amounts allowed under Annex IV. If this happens, Indonesia is required to revoke the subsidy and make adjustments to comply with the WTO Agreement. Therefore, Indonesia did not benefit from securing the transition provisions established in the S&D requirements.[41]

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[39] Sutrisno (n 20).
[40] *ibid*.
[41] *ibid*.

Despite the challenges Indonesia and other developing nations face, the S&D clauses could give them a powerful negotiating position with developed nations. Alternatively, Indonesia could use other opportunities that might arise from cross-retaliation or other advantages that Indonesia has at hand. The provisions of the S&D and the refusal of the United States to fill the Appellate Body vacancies will make resolving disputes through the WTO dispute settlement system more difficult in the future, disrupting the WTO dispute settlement system. Therefore, significant efforts must be taken to elevate the national interest above the challenges that the WTO currently faces.

Alternative: Indonesia and Other Developing Nations Could Consider Waiving S&D Treatment

After the Appellate Body could no longer function as intended, the potential of altering the WTO dispute settlement system reached a significant turning point in 2019. When all Appellate Body members are considered inactive, the Appellate Body—as a whole—becomes inactive automatically. Under Article 16.4 of the DSU, an appeal filed without an Appellate Body will effectively halt the WTO dispute settlement system. The case will remain unresolved for as long as the Appellate Body has fewer than three member (the threshold at which the appeal must be decided), and the underlying panel report cannot be approved. One of the parties must (1) restore the Appellate Body so that the impasse can be ended, and (2) amass support from all WTO members (regardless of whether they have appealed) to invalidate Article 16.4 and then adopt the panel report to remove the current obstacle.

This last option will return us to a system akin to the GATT, in which the panel report can only be approved with agreement from all GATT members. In other words, even if the panel's decision is not favourable to one party, it must still accept it. This suggests that even though the WTO has suffered a structural crisis—limited to the Appellate Body until now—the system will continue to use the Appellate Body and the automatic approval or binding nature of panel reports

after 2019. In other words, WTO members can still submit consultation requests to the WTO, and the panel will continue to draft the final report. If the DSB approves the panel report, the losing party can ask the Appellate Body to veto the DSB's acceptance of the panel report (even though the Appellate Body is not currently functioning). Unless other members agree to the arbitration established in Article 25 of the DSU or NAPs, appealing to the vacant Appellate Body and blocking the panel's findings is the best option. The alternative requires prior positive action or member acceptance.[42]

Due to the refusal of the United States to stop blocking the appointments of Appellate Body Members (ABM), the WTO dispute settlement crisis could worsen. The main factors that will persuade the United States to lift its veto over the appointment of ABM are (1) finding a technical legal solution to the concerns of the United States regarding the Appellate Body's "overreach"; (2) negotiating political solutions for substantive trade, particularly those that can restore the balance of China–US relations; and (3) determining how the temporary dispute settlement system is implemented.[43] If this is accomplished in good faith, the United States may place a greater emphasis on talks rather than litigation in the field of conflict resolution, thereby altering its current stance. In turn, the General Council, the DSB, and the Appellate Body could attempt to preserve themselves by voting by majority or modifying the Appellate Body's work procedures, assuming this choice will not have a positive effect on legal and political grounds.[44]

Developing nations—including Indonesia—could reach an agreement by withdrawing their request for S&D in exchange for the United States agreeing to nominate a new Appellate Body member. This could be the first step in restoring

[42] *ibid*.
[43] *ibid*.
[44] Mochamad Kevin Romadhona, Bambang Sugeng Ariadi Subagyono and Dwi Agustin, 'Examining Sustainability Dimension in Corporate Social Responsibility of ExxonMobil Cepu: An Overview of Socio-Cultural and Economic Aspects' (2022) 3 Journal of Social Development Studies.[130].

the WTO dispute settlement system to its previous status.[45] However, this does not necessarily imply that Indonesia and developing nations will lose their flexibility in carrying out ongoing and future negotiations; rather, they must incorporate this flexibility into discussions. Considering the inadequate implementation of the S&D to date—resulting in Indonesia not being able to reap its benefits directly—removing or adding S&D provisions is not necessarily a bad thing (e.g. in the Indonesia Automobile case).[46] Therefore, to restore the proper functioning of the WTO dispute settlement system, developing nations like Indonesia should consider waiving S&D.

Indonesia is one of the developing nations that possesses the most abundant natural resources and that has achieved the highest levels of economic growth. This gives it substantial bargaining power. In addition, Indonesia, which adheres to a non-alignment policy, ought to be able to view the current impasse at the WTO as a chance to demonstrate its global identity. Obviously, if Indonesia were to waive the privileges it enjoys through the S&D treatment, its reason for doing so must be in the best interests of the nation and for the social wellbeing of its people.

Conclusion

The United States has refused to designate members of the Appellate Body. This has caused systemic problems for the WTO and has destabilized its dispute settlement system. Fifteen developing nations—especially Indonesia—can put an end to the current impasse by waiving the special treatment they receive from S&D in exchange for the United States appointing members of the Appellate Body. S&D was designed to help developing nations, but it has not worked as hoped. Therefore, when weighing up its legal and economic benefits, waiving the privileges it provides with the aim of restoring the WTO's proper functioning does not seem to be a major sacrifice. Indonesia has a vested interest in fighting for its future by

[45] Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2016) 79 Law and Contemporary Problems.[237].

[46] Koesrianti (n 1).

resolving conflicts through the WTO, and this cannot be achieved if the WTO is unable to function properly. Therefore, meaningful steps must be taken to safeguard the nation's interests and—above all—to improve the social wellbeing of its people.

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