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The WTO Dispute Settlement System and How It Incentivizes Imparity Between Indonesia's Executive and Parliament

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Abstract
The Indonesian zeitgeist to provide more checks toward the power of its executive organ to formulate and enter into international treaties and agreements during the infancy phase of the Reformasi era, which was spurred on by the international debt ballooning that they suffered under the leadership of President Soeharto, was somewhat undermined by the passing of the Law No. 24 of 2000, which effectively limits the involvement of the House in the formulation process of international treaties to which Indonesia would be a party to. This apparently voluntary weakening of the legislative's oversight function is caused by the understanding that the realities of contemporary international intercourse has resulted in the increasing need for the formulation and entrance into international treaties and agreements as expeditiously as possible. The WTO, as the manifestation of globalization and its byproduct, neoliberalism, plays a role in creating such a necessity, which in turn incentivizes the imparity between the legislative and executive branches of the Indonesian government. The focus of this article is its dispute settlement system, and how its strengths and its weaknesses, has created the incentive for negotiations and expeditious decision making outside of the system itself, which requires a considerable degree of latitude to be afforded to the party involved in such negotiations, the executive. The discussion in this paper delves upon works dealing with the theoretical implications of several aspects of the WTO dispute settlement system and a case study of the US-Clove Cigarettes Case, which perfectly demonstrates said implications toward Indonesia.
Keywords: WTO; Dispute Settlement System; Weakening; Legislative Oversight; Executive Powers.

Introduction

During the infancy phase of the era in Indonesian history known as the *Reformasi*[1] (1999-2002), in which the largely autocratic form of government

[1] From this point on, further references to this term shall be done under its English equivalent, "the Reformation era".

under President Soeharto was massively overhauled by a series of legislative and administrative reforms, one of the most prominent issues which occupied the collective minds of the country's citizens and its policymakers was the drastic ballooning of the country's national debt under Soeharto's administration, which owes in no small part to the dominance which the office of the President held in the making of international loan agreements. The most prominent discourses surrounding the amendments, therefore, are mostly predicated upon the question of how to best solve this issue of executive-heavy government.[2] To address said concerns, The Law No. 24 of 2000 on Foreign Treaties (*Undang-Undang Nomor 24 Tahun 2000 tentang Perjanjian Internasional*) was passed by the House and the President. This piece of legislation establishes the formal procedures in which the formulation and the ratification of international treaties by the Indonesian government (which in this context must be taken to mean both the executive and the legislative branches) must be conducted. However, this Law contains several interesting provisions, manifested in this case by its Articles 2, 9(2), and 10. Said articles, in essence, would limit the involvement of the House in the formulation process of international treaties and agreements to which Indonesia would be a party to.[3]

The aforementioned articles were drafted mainly with the understanding that, given the realities of international intercourse, which necessitate states to participate in the formulation of and enter into many international treaties and agreements as expeditiously as possible, ample discretion has to be afforded toward the executive branch so that the realization of the many needs of the country will not be impeded.[4] This line of reasoning- which was drawn from the Letter of the President to the Speaker of the House No. 2826/HK/60 of 22

[2] Merdiansa Paputungan and Zainal Arifin Hoesein, 'Pembatasan Kekuasaan Presiden Dalam Melakukan Perjanjian Pinjaman Luar Negeri Pasca Amandemen UUD 1945' (2020) 17 Jurnal Konstitusi.[388].

[3] The Indonesian Constitutional Court (Mahkamah Konstitusi Indonesia) Decision No. 13/PUU-XVI/2018 in The Case of the Judicial Review of Law No.24 2000.

[4] *ibid*.[117–118].

August 1960, which *unilaterally* declares that only treaties of a political nature are required to be brought before the House for its approval[5]- is quite obviously rather incongruent with the Reformation era zeitgeist to put more checks to the Executive's treaty and agreement-making powers, and at times has even resulted in instances of perfidious international treaty making by the government in the form of disguising the treaty in question's subject-matters or mislabeling them as mere MoUs so they do not seem to fall within the category of treaties requiring ratification by the House.[6]

And yet, such line of reasoning still persists to this day, from which we can only logically conclude that this apparent voluntary weakening of the legislative branch is somewhat of a necessary sacrifice. Seeing as many publications on this matter treat the line of reasoning offered by the lawmakers in this case as a given,[7] this paper would defer to them and assume their stance. This author would like to instead delve into the question of what factors, relating to the contemporary developments in international law, have caused such a state of affairs.

Where to Direct Our Attention? A *Prima Facie* Case Against the WTO, the Neoliberal Agenda it Diffuses, and the Inherent Power Imbalance Within, as Levied by Democracy and Developing Countries

In discussing the issue, it is inevitable that we will delve on discussions regarding the effects of globalization, since it has brought paradigmatic shifts in regards to how governments are run[8] and in regard to the firmament of international law; of particular relevance to the discussion on this paper is the precepts of international economic law. The promulgation of neoliberalism,

[5] Paputungan and Hoesein (n 2).

[6] Hikmahanto Juwana, "Kewajiban Negara dalam Proses Ratifikasi Perjanjian Internasional: Memastikan Keselarasan dengan Konstitusi dan Mentransformasikan ke Hukum Nasional" (2019) 2 Undang: Jurnal Hukum 1,[6–7]. <https://ujh.unja.ac.id/index.php/home/article/download/67/18>.

[7] Firman Hasan, *Kekuasaan Pembuatan Perjanjian Internasional Limitasi Menurut Undang-Undang Dasar Di Indonesia* (Andalas University Press 2016).

[8] Frank J Garcia, 'Introduction: Globalization, Power, States, And The Role Of Law' (2013) Rev. 36 BC Int'l & Comp. L. 903.

which is spurred on by the wave of globalization[9] through, *inter alia*, the World Trade Organization (WTO) and its legal system,[10] has been widely noted to have brought upon several adverse effects toward the healthiness of democracy in states, in effect eroding the role that the people play in the decision-making process of the state, especially in its foreign policy-making, both substantially and formally, in favor of the laws of the market.[11] In particular, it has been demonstrated how the neoliberal mode of governance has resulted in the accumulation of such powers from the hands of the legislative branch, traditionally regarded in democratic thought as the representative of the people, to the hands of the executive branch.[12]

Case in point is how the Italian constitutional arrangement has been moving from a parliament-dominated mode of governance in the 1980s toward a more executive-heavy one from 1992 onwards due to the burgeoning European market integration process, which is said to have required more executive role due to the complexity of the integration negotiations and the need to present a unitary stance in Europe.[13] It has been noted that, due to this phenomenon, the Italian national decision-making in matters of macroeconomic and financial measures has increasingly been done through decree laws and even emergency legislations, even in ordinary situations in which such legislative by-passing measures are not constitutionally warranted.[14]

The controversy surrounding the WTO Dispute Settlement System and how it was structured in such a way that it had provided impediments for developing

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[9] António José Avelãs Nunes, *Neoliberalism and Democracy" (2020) 2 69.* (2 edn, International Review of Contemporary Law 2020).[69].

[10] Sandrino Smeets, Alenka Jaschke dan Derek Beach, 'The Role of the EU Institutions in Establishing the European Stability Mechanism: Institutional Leadership under a Veil of Intergovernmentalism' (2019) 57 Journal of Common Market Studies.[675].

[11] Mohsen Al Attar, "Reframing the 'Universality' of International Law in a Globalizing World" (2013) 59 McGill Law Journal.[95] <https://id.erudit.org/iderudit/1018986ar>.

[12] Harry W Arthurs, "Law and Learning in an Era of Globalization" (2009) 10 German Law Journal.[629].

[13] Adriano Cozzolino, 'Reconfiguring the State: Executive Powers, Emergency Legislation, and Neoliberalization in Italy' (2019) 16 Globalizations.[388].

[14] *ibid*.[340].

countries in enforcing their rights[15] has led this paper to focus its inquiries on how the introduction of and developments within the WTO dispute settlement system has affected the dynamics of international intercourse. The hypothesis which underlies the discussions contained in this paper is that the strengthening of the international trade dispute settlement system in the WTO legal system has created the incentive for states to formulate and enter into international treaties and agreements in higher volumes and frequency, and that its design weaknesses, which have left room for developing countries to be trampled over by stronger ones, create an additional, but equally as important, need for flexibility in international treaty and agreement-making for such developing countries, including Indonesia.

Such a choice of inquiry is deemed necessary by virtue of the fact that most of the existing literature on the subject of WTO *vis-à-vis* the Indonesian governance experience, so far, have adopted a more general approach, whereby the focus is directed toward, *inter alia*, the topic of how the effects of the neoliberalist mode of governance promulgated by the WTO system has caused the infiltration of the government (the executive branch in particular) by actors not acting in the interest of the general public, such as Multi-National Corporations (MNCs);[16] and how neoliberalism (as diffused by, among other international economic institutions, the WTO) impacts adversely the observance of the state toward the human rights of their citizens in favor of the interests of the global market.[17] This paper attempts to present a contribution of a more technical nature to the extant body of literature on the relationship between the WTO and Indonesian governance experience by discussing the WTO dispute settlement system in connection with Indonesia's status as a country belonging to the developing countries denomination, and how the nuances present in said system, most notably the power imbalance between

[15] James Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) 11 Review of International Political Economy.[546-549].

[16] Budi Winarno, 'Globalisasi Dan Rezim Demokrasi Poliarki: Kebijakan Intergrasi Ekonomi Indonesia' [2014] Jurnal Hubungan Internasional.[4-5].

[17] Herlambang Perdana Wiratraman, *Neoliberalisme, Good Governance, dan Hak Asasi Manusia* (Jentera 2006).[25-26].

the developed and developing countries, have resulted in the aforementioned Indonesian policy of deference toward the executive in international treaty-making (much akin to the Italian situation), and the miniscule prospect for changes to such state of affairs in the future.[18]

The Strengthening of the International Trade Dispute Settlement System Through the WTO Dispute Settlement Understanding

In response to the many states' complaint that the diplomacy and consensus-based dispute settlement system espoused by the GATT system, which was the predominant international economic framework from the end of the Second World War up to 1995, has resulted in the inability of the victorious (or otherwise righteous) states to enforce their rights against their adversaries due to the system's lack of enforcement power; the Dispute Settlement Body (DSB) was introduced to the new WTO system during the Uruguay Rounds of negotiations in 1995.[19] The new system, whose rules of procedures were enshrined in the Dispute Settlement Understanding (DSU) document, was created with a considerably higher degree of robustness, in order to provide a firmer guarantee that the results of the dispute settlement process would be enforceable by the winning claimant, but at the same time ensure that any kind of countermeasures that would potentially affect another state's economy would not be done with impunity; that such actions may only be done through a sanctioned process based on the rule of law.[20]

Some of the most prominent changes that the dispute settlement system reforms brought are: the introduction of strict timelines for settlement proceedings and the reverse-consensus system, which ensures the ease for a report made by the adjudicating panel of a dispute to be adopted by the Dispute Settlement Body

[18] Sihnomo, 'Legal Consequences Dispute Settlement Body Decision 477-478 Concerning Protection and Empowerment of The Farmers' (2020) 3 Substantive Justice International Journal of Law.[59].

[19] David Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization* (Practice a, Cambridge University Press 2004).[6–11].

[20] Understanding on rules and procedures governing the settlement of disputes 1994.

(DSB);[21] the introduction of an explicit remedy regime, which means that, if the respondent fails to rectify their non-compliance, the complainant may be authorized by the DSB to sanction the respondent state;[22] the stipulation that a respondent may no longer block the formation of a panel to settle a claim brought against them;[23] the endowment of right to the aggrieved complainant to demand for compensation for the damages incurred during the period of noncompliance by the respondent, although this is subject to an agreement between the parties.[24] And lastly, the introduction of an Appellate Body (AB), which holds the authority to review the findings of the panels, has resulted in the strengthening of the rule of law and a more coherent body of jurisprudence in the WTO.[25]

All these changes have generally resulted in the attainment of extensive authority on the part of the system, which means that states now pay more attention and deference toward the decisions on dispute proceedings in the WTO; in other words, they put more weight to it than before.[26] This extensive authority, especially the authority to grant authorization for sanctions by the complainant toward the noncompliant respondent, compounded with the provision of the right of the complainants to demand for the proper amount of compensation for the losses that they incurred due to the continuing noncompliance by the respondent, would in turn grant quite a significant advantage for the aggrieved complainants. The system is also somewhat empowered by the fear that states have that any noncompliance that they commit may result in reputational damages as a reliable treaty partner in

[21] 'Art. 16.4 of the DSU'

[22] 'Art. 22.4 of the DSU. An Interesting Caveat of This Second Feature Is That It Is of a Conditional Nature; That the Allowability of the Sanctions to Be Enacted by the Complainant State Is Contingent upon the Neglect by the Respondent State to Implement the changes that are incumbent upon them within the timeframe allotted by the Panel and/or the Appellate Body (in WTO's terms, the respondent's nullification or impairment). It is said that this provision is put in place due to the intention of the governments when crafting the institution that the WTO system should work on contract principles designed to permit breaches of the contract when the political gains from defection are greater than the political costs to the injured states'.

[23] Gregory Shaffer, Manfred Elsig and Sergio Puig, "The extensive (but fragile) authority of the wto appellate body" (2016) 79 Law and Contemporary Problems.[237].

[24] 'Art. 22.4 of the DSU' (n 22).

[25] *ibid*.

[26] Shaffer, Elsig dan Puig (n 23).

the eyes of the international community, and, for our purposes, with their trading partners.[27] We would be remiss not to mention that these features of the system are further strengthened, in the interests of creating a truly just international economic order, by the general *zeitgeist* within the WTO to conduct negotiations with the interests of developing countries in mind.[28]

The Shortcomings of the System, in General and for Developing States in Particular, and Their Ramifications for the Parties to a WTO Dispute

However, it is important to note that the DSU underscores the importance for the parties to reach an amicable settlement;[29] that the suspension of concessions (retaliatory measures) are supposed to be of a complementary nature to negotiated settlements, since it enhances the effectiveness of the WTO system due to the consensual nature of such settlements which would enhance the likelihood by the parties to carry out its provisions.[30] These provisions have somewhat undermined the DSU's authority and effectiveness as a judicial, rule-of-law based settlement mechanism. Another thing which may be a factor in the ineffectiveness of the WTO Dispute settlement system, this time in regard to developing countries, is the structural asymmetry in the bargaining power between the states involved in the dispute. It is hard to conceive that developing countries have the capacity to exert credible enforcement threats against developed countries to faithfully carry out the decisions of the DSB, since, as many economists note, raising tariff barriers against such major economies would not really impact them in a meaningful way and would, in most cases, only bring out problems toward the developing country imposing the tariff, rendering them more loss economically than if they just let their

[27] Rachel Brewster, "Pricing compliance: When formal remedies displace reputational sanctions" (2013) 54 Harvard International Law Journal.[259].

[28] Utkarsh K. Mishra and Abishek Negi, 'Should Trade Remedies Be Eliminated from the WTO: A Response to Tania Voon' (2021) 1 Journal of Human Rights, Culture, and Legal System.[199].

[29] *ibid*.[259].

[30] Jaime Tijmes, "Who wants what? - Final offer arbitration in the world trade organization" (2015) 26 European Journal of International Law.[587].

adversary commit noncompliance with the decision.[31] The lack of an enforcement organ on the part of the WTO only serves to accentuate this fact.[32]

These facts have resulted in the fact that, most of the time, WTO disputes end with negotiated settlements between the parties, meaning that the complainants would not get the full range of what was promised to them by the DSB's ruling.[33] These somewhat contradictory sides of the system (strong on one but weak on the other) have resulted in a predicament for the parties. It is not fully beneficial for the respondent state to act out in its totality the points of recommendation contained in the DSB ruling, but a total noncompliance may result in reputational damages as a reliable treaty partner in the eyes of the international community- and, for our purposes, with their trading partners. Meanwhile, for the complainant state, it is in vain to expect the respondent to comply with the DSB ruling in its totality, especially if such complainants are developing countries. Nevertheless, it is material for them to still, somehow, secure adequate reimbursements for their losses. This holds especially true for developing countries, since trade remedies, after all, constitute the main reason of their sustenance in international trade.[34]

Thus, it can be seen how the strengths and shortcomings of the WTO dispute settlement system renders it beneficial for the parties to reach a bilateral agreement on how to resolve the issue at hand outside the ambits of the WTO, most of the time in an expeditious manner, especially if a prompt action of policy adjustment on the part of the respondent is quite simply unfeasible. Fortunately, such resolutions are facilitated by the aforementioned WTO system's openness and even preference toward negotiated settlements, which gives latitude to the parties to resolve the dispute between them through negotiated means and to

[31] Bernard M Hoekman and Petros C Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance* (23rd edn, The World Economy 2000).

[32] Triyana Yohanes *etal.*, 'Legally Binding of the World Trade Organziation Dispute Settlement Body's Decision' (2017) 3 Hasanuddin Law Review.[165].

[33] Rachel Brewster and Adam S Chilton, 'Supplying Compliance: Why and When the United States Complies with WTO Rulings' [2013] SSRN Electronic Journal.

[34] Tania Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements' (2010) 59 The International and Comparative Law Quarterly.[626].

set aside the results of the dispute which have been formally raised through the dispute settlement system.[35]

Case Study: The US-Clove Cigarettes Case

The perfect case involving Indonesia to demonstrate the foregoing points is the US-Clove Cigarettes Case, in which Indonesia acted as the complainant. In said case, Indonesia, a predominant exporter of clove cigarettes (*kretek*), alleged to the WTO that the 2009 Family Smoking Prevention Tobacco Control Act (FSPTCA), which put a ban the sale of flavored cigarettes within the US, has caused an unfair restriction toward the product of clove cigarettes, since the sale of menthol-flavored cigarettes is still allowed. At the end, both the panel handling the case and the AB held that the US law was inconsistent with Technical Barriers to Trade (TBT) Agreement Article 2.1; 2.9.2; and 2.12.[36] That decision was followed by the recommendation that the US either extend the ban to include menthol-flavored cigarettes as well, or that they revoke the Act entirely. The US refused to comply, and after going through Article 22.6 DSB arbitration process, Indonesia was authorized to impose retaliatory measures worth US$55 Million.[37] Indonesia did not go through with the sanction, however, and opted instead to negotiate with the US, which ended with the signing of an MoU between the two. The concessions granted by the US can be said to be quite substantially beneficial to Indonesia, involving several economic and political concessions such as the expansion of General System of Preference for Indonesian Products in the US; the moratorium on bans of Indonesian cigarettes and cigarillos; and the pledge by the US to not file a WTO claim against Indonesia for the ban of raw mineral exports.[38]

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[35] 'Article 3.6 of the DSU'.

[36] Appellate Body Report United-State, "Measures Affecting the Production and Sale of Clove Cigarettes, W T/DS406/AB/R" (2012) <https://www.wto.org/english/tratop_e/dispu_e/406abr_e.pdf>, para.298.

[37] Tania Voon, ' World Trade Organization: Appellate Body Report, United States–Measures Affecting the Production and Sale of Clove Cigarettes ' (2012) 51 International Legal Materials.[755].

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

The refusal by the US to comply with the Panel and AB's decision is a blatant demonstration of the power that they have as a major economy, which affords them the ability to disregard the hostile decision.[39] However, they still keep in mind the trade relationship that they have with Indonesia; they still desire to maintain their reputation as a reliable treaty partner in the eyes of Indonesia, especially seeing as Indonesia is a major trade partner of theirs, which would entice them to maintain good relations with the state.[40] Thus, it becomes beneficial for them to enter into a bilateral negotiated settlement in the form of an agreement (an MoU in this case) with Indonesia. It is also noteworthy that the US began pursuing negotiation talks with Indonesia (which entails also the suspension of the announcement of the arbitration award decision by the panel) after the latter was poised to be awarded the right to impose retaliatory measures worth US$55 Million by the DSB arbitration panel,[41] which indicates the US' willingness to avert themselves of the adverse reputational effects which the announcement of such adverse decisions would encumber upon them, and that the pursuit of a negotiated settlement was a way to prevent that from happening.

On the other hand, Indonesia entered into the agreement with the understanding that, since the US is its third biggest partner, sanctions against them would cause unnecessary strains to their own economy, so it was best to find another way, outside of the adversarially obtained WTO damages, to recuperate their losses. This MoU is the perfect solution to that problem, seeing as it guarantees concessions to a broader range of Indonesian products, in effect recovering the losses caused by the ban on clove cigarettes,[42] while solving the issue in a non-adversarial manner.

Seeing as the opportunity that Indonesia may capitalize on from the case presents itself in a quite narrow window of time, *i.e.* after the threat of arbitration

[39] Dayu Nirma Amurwanti, Moch Faisal Karim and Nova Joanita, 'Settling Outside the WTO: The Case of the Indonesia-US Kretek Cigarette Trade Dispute, 2010–2014' (2021) 29 South East Asia Research.[92].

[40] *ibid.*

[41] *ibid.*

[42] *ibid.*

awards was encumbered upon the US, but before its scheduled announcement by the arbitrator,[43] it is understandable that oversight over the making of such international agreements would be unappealing, seeing as it was crucial for Indonesia to seize that very moment to make an agreement with the US to request for the suspension of the arbitration award announcement, and to subsequently negotiate for the most favorable concession arrangement which they are able to. Thus, this author is of the opinion that this aspect of the WTO, *i.e.* the strengths and weaknesses of its dispute settlement system, somewhat vindicates the weakening of the legislative's oversight of the executive in regards to international treaties and agreements-making, due to the fact that it incentivizes the expeditious making of bilateral settlement agreements, which indeed necessitates a considerable latitude of flexibility for the negotiators, *i.e.* the government.

Conclusion

The foregoing discussions have rendered us able to observe that there are several factors relating to the WTO dispute settlement system which may incentivize countries -especially developing ones- such as Indonesia to formulate and/or to enter into international treaties and agreements in high volumes and frequencies. The first factor is the system's strengths, the most prominent of which is its ability to afford the prejudiced complainant states with the authorization to bring upon retaliatory measures in the form of suspension of concessions toward the noncompliant respondent state. This aspect of the system empowers-in theory at least- the aggrieved countries to recuperate the losses which they suffer as a result of the respondent states' non-compliance, much more so than the previous diplomacy-based GATT dispute settlement system.

However, the system also has a number of shortcomings which somewhat undermine its strengths and its purposes in ensuring the rule-of-law based settlement of all international trade disputes. The first such factor is the system's inherent

[43] See note 29.

design; its drafters' original intent to use it as a means to encourage states embroiled in disputes to reach a negotiated settlement, which somewhat undermines its authority and effectiveness as a judicial, rule-of-law based settlement mechanism. Meanwhile, the second relates particularly to developing states and is grounded in *realpolitik*, *i.e.* the inherent imbalance between developing and developed states' ability to enforce their rights as declared by the DSB in their decisions, which prejudices the right of developing states.

This Janus-like nature of the system has rendered it beneficial for both sides of a dispute brought before the WTO to reach a settlement outside of the WTO system, and to do so in a manner that is as expeditious as possible. That, in turn, incentivizes states, especially developing ones, to purposefully weaken their legislative branch's oversight on their executive's international treaty and agreement making powers so that such processes will not be impeded. Drawing upon their past experience in the US-Clove Cigarettes Case, such an assertion is applicable as well for Indonesia; their first-hand experience in the case provides a firm basis for the assertion that it is beneficial for Indonesia that the *status quo* be maintained. This brings us to the conclusion that the strength and the weaknesses of the WTO dispute settlement system has incentivized -and, for the foreseeable future, will continuously incentivize- the current asymmetrical constitutional arrangement between the Indonesian government's executive and legislative branch in international treaty and agreement making to remain as such.

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