Indonesia and the WTO Dispute Settlement System

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Abstract

This paper discusses several issues in relations with Indonesia and its utilization of the WTO Dispute Settlement System as a Complainant or a Third Party. It is shown that Indonesia has not yet active using the WTO Dispute Settlement System to secure its trading rights under the WTO. Therefore, optimism on the future of Indonesia and WTO Dispute Settlement System should be built since the government sees the importance of WTO litigations for our national interests and due to the WTO is a rule-based system and its major achievement is to have an effective dispute settlement mechanism.

Keywords: Indonesia, WTO Dispute Settlement System, RTA.

"The best international agreement is not worth very much if its obligations cannot be enforced when one of the signatories fails to comply with such obligations. An effective mechanism to settle disputes thus increases the practical value of the commitments the signatories undertake in an international agreement".[3]

Indonesia has been a member of the World Trade Organization (WTO) since its creation on April 15, 1994. Indonesia's membership can even be traced back to February 24, 1950, as one of the Contracting Parties to the General Agreement on Tariffs and Trade 1947 (GATT 1947). To date, Indonesia has been using the WTO Dispute Settlement System in five cases as Complainant[4], four cases as Respondent[5], and four cases as Third Party.[6] Although involvement in the WTO Dispute Settlement System is not new to Indonesia, however, these numbers are considerably low compared to other developing countries like India,[7]

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[3] World Trade Organization, *A Handbook of The WTO Dispute Settlement System*, p.1.

[4] As Complainant in *Argentina-Safeguard Measure on Imports of Footwear* (DS 213), *US-Continued Dumping and Subsidy Offset Act of 2000* (DS 217), *Korea-Anti Dumping Duties on Imports of Certain Paper From Indonesia* (DS 312), *South Africa- Anti Dumping Measures on Uncoated Woodfree Paper* (DS 374), and *US- Measure Affecting the Production and Sale of Clove Cigarettes* (DS 406).

[5] As Respondent in *Indonesia-Certain Measures Affecting the Automobile Industry* (DS 54, DS 55, DS 50, DS 64).

[6] As Third Party in *Brazil- Measure Affecting Desiccated Coconut* (DS 22), *Argentina-Safeguard Measure on Imports of Footwear* (DS 121 and DS 164), and *US-Continued Dumping and Subsidy Offset Act of 2000* (DS 234).

[7] India, as complainant in 19 cases, as respondent in 20 cases, as third party in 63 cases

Thailand,[8] Argentina,[9] Brazil,[10] or Mexico.[11]

Indonesia's low utilization of the WTO Dispute Settlement System as either a Complainant or a Third Party does not necessarily mean there have been no potential WTO inconsistent measures implemented against Indonesia. Indonesia has been facing many market access barriers in form of tariff or non-tariff measures, some of which are never brought to the WTO Dispute Settlement System. Our fish products were subject to testing requirements for every consignment due to the allegation of heavy metals and histamine contaminations.[12] Our national airline, Garuda Indonesia, was banned to fly into Europe.[13] Our Crude Palm Oil (CPO) has been boycotted in Europe due to environmental reasons.[14] Our paper products have been subjected to many trade remedies instruments, some of which were found to be WTO inconsistent.[15] The latest is, our cloves cigarette has been banned to be sold in the US because the US claims it attracts youngster to start smoking.[16]

This paper seeks to explore several issues in relations with Indonesia and its utilization of the WTO Dispute Settlement System as a Complainant or a Third Party. In Part I, it will analyze the possible reasons why Indonesia is not as active as other developing-country Members in utilizing the WTO Dispute Settlement System and propose potential solutions to the problems. While in Part II, this paper will explore the future of Indonesia's usage of the Dispute Settlement System amidst its increasing participation in various Regional Trade Agreements. Finally, Part III will be the conclusion.

A. Reasons of Indonesia's Inactivity in The WTO Dispute Settlement System

We identify at least four possible factors which prevent Indonesia from actively pursuing its market access right under WTO Agreements, namely 1) Human Resources; 2) Cost of Dispute; 3) Problematic Decision-Making Mechanisms; and 4) Enforcement Mechanism of the panel and Appellate Body Reports. Some of these factors are closely related one to another as elaborated in the following.

1. Human Resources

In order to be able to litigate a WTO-related dispute, developing countries need experts of WTO Law. Even before deciding to resort to litigation, we need these experts in identifying the potential breach of WTO law implemented by another WTO Members which nullify

8 Thailand, as complainant in 13 cases, as respondent in 3 cases, as third party in 45 cases

9 Argentina, as complainant in 15 cases, as respondent in 17 cases, as third party in 30 cases.

10 Brazil, as complainant in 25 cases, as respondent in 14 cases, as third party in 61 cases.

11 Mexico, as complainant in 21 cases, as respondent in 14 cases, as third party in 55 cases.

12 OJ L215, 12.8.2008, p 6-7 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:215:0006:0007:EN:PDF)

13 "List of 'blacklisted' airlines revised, Indonesia appeals," *New Europe*, December 1, 2007. http://www.neurope.eu/articles/80383.php (November 22, 2010).

14 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Resources).

15 There were 2 cases in the WTO challenging the imposition of antidumping measures on Indonesia paper products by South Korea (DS 312) and South Africa (DS 374). The case against South Africa was settled in the consultation phase.

16 Jonathan Lynn, "Indonesia takes U.S. to WTO over clove cigarette ban," *Reuters,* April 12, 2010, http://www.reuters.com/article/idUSTRE63B42020100412 (November 22, 2010).

or impair Indonesia's trading rights as a WTO Member. This raises serious concern because apparently developing countries, including Indonesia, are lacking of specialized trade lawyers and experts. Undeniably, there are number of government officials from the Ministry of Foreign Affairs or the Ministry of Trade who deal with specific WTO related issues. However, the rotation system which often happens in government institutions results in the absence of experienced people in a particular issue particularly on dispute settlement. For many years, there has been no functional position for government officials to be specialized in international litigations including litigations at the WTO. Thus, the issue of human resources arises again.

Indonesia's condition is different from some of other developing country Members like Brazil, Mexico and India. In many occasions, those countries represent themselves by using in-house legal experts from their Ministry of Foreign Affairs, Ministry of Trade, or lawyers from their respective permanent missions. Those experts and lawyers have undergone rigorous trainings and have considerable amount of experience in WTO dispute settlement proceedings. In some cases, these countries also gave opportunity to local private lawyers to be involved in panels or Appellate Body proceedings. Some of those countries also open internship programs for non-governmental individuals in the countries' respective missions or trade-related Ministries to give them practical experience on WTO related issues including dispute settlement so when they go back to their law firms, universities, companies or other institutions they can use their knowledge and experience about the WTO System.

Compared to those countries, Indonesia has not had that many trade experts or trade lawyers, trained in such ways YET. For this reason, in its past participation in the WTO Dispute Settlement System, Indonesia predominantly has been represented by foreign trade lawyers. Moreover, this issue can be a major hurdle for Indonesia even at an earlier stage of deciding whether to file a complaint or even to participate as a third party in a dispute. Without enough experts with specific knowledge in WTO Law, there exists high uncertainty of both on the existence of violation and the potential outcome of pursuing a particular measure.

Those being said, the WTO actually realized about the human resource limitation issue in the Dispute Settlement System. Thus, through its Secretariat, the WTO provides technical assistance to developing-country Members in respect of dispute settlement when they so request. Article 27.2 of the DSU recognizes that there may be a need to provide additional legal advice and assistance to developing country Members. To meet this additional need, Article 27.2 requires the WTO Secretariat to provide a qualified legal expert. This assistance is being coordinated by the Institute for Training and Technical Cooperation (ITTC), a division in the WTO Secretariat. Currently, ITTC employs one full-time official and on a permanent part-time basis, two independent consultants as the experts available for the developing country Members. However, such assistance is limited because the expert can only assist in a manner ensuring the

continued impartiality of the Secretariat, and there can be no assistance for support in litigation proceedings.

The legal assistance provided by the WTO Secretariat may not serve as solution. Moreover, in a dispute between two WTO Members who are both requesting the Secretariat' assistance, the Secretariat can only provide legal advice that is very limited to discussion of general terms and information of each party's options.

Nevertheless, Article 27.3 of the DSU enables developing country Members to have their experts trained in special training courses concerning WTO dispute settlement procedures and practices. These trainings are regularly held by ITTC and the Legal Affairs Division of the Secretariat. The participants include government officials, academics, university professors and private sectors world-wide.

In practice, the assistance offered by the DSU might not be very helpful for short term to increase Indonesia's capacity to lodge complaints before the WTO Dispute Settlement System. Indonesia needs more than mere legal advice. Indonesia also needs trade lawyers or experts who can represent them in a dispute before a panel or the Appellate Body. However, this is not provided by the DSU.

There exists another more effective legal assistance for developing country Members, provided by the Advisory Centre on WTO Law (ACWL). ACWL, established in 2001, is a Geneva-based independent, intergovernmental organization (not attached to the WTO), which functions as a law office specializing in providing free legal advice and training exclusively to developing country and economy-in-transition members of ACWL and all least-developed countries. The legal advice and training are specifically on WTO Law and the WTO Dispute Settlement System.[17] Additionally, ACWL provides litigation support at all stages in WTO dispute settlement proceedings at very low rates compared to other private law firms. ACWL has gained considerable experience in litigating WTO disputes. In fact, Indonesia has twice used the legal support of ACWL, namely in the cases of *Korea-Anti Dumping Duties on Imports of Certain Paper* (DS 312) in 2004 and *South Africa-Anti-Dumping Measures on Uncoated Woodfree Paper* (DS374) in 2008.

An issue might still arise to obtain support when an issue arises between Indonesia and another member of ACWL. According to the Agreement establishing the Advisory Centre on WTO Law (ACWL Agreement), the issue might be resolved by giving priority in the following order, least developed countries, Members that have accepted ACWL Agreement, and Members that acceded to ACWL Agreement.[18] After all, to serve 30 countries (ACWL Members) which have been involved in thirty four WTO cases (either as complainant, respondent or third parties) at the moment ACWL has only seven permanent lawyers and three junior lawyers.

In practice, ACWL tries to accommodate the need of both Members requesting the litigation support. In order to prevent conflict of interest, the first party requesting the support will be assisted by ACWL's staff. Meanwhile the other party will be assisted by external counsel. The external counsel is law firms and individuals who have agreed to provide

[17] The Training conducted by ACWL mostly for Geneva-based government officials from ACWL Member countries.

[18] Article 8 of the ACWL Agreement.

their services as external counsel according to certain terms and conditions.

Although ACWL can be a temporary solution to the shortage of human resources in Indonesia, Indonesia should endeavour to increase the number of Indonesian trade lawyers and experts, and to further increase the experience of the existing ones. Some of the ways are to benefit from the previously mentioned trainings provided both by the WTO and ACWL, as well as providing exposure to the existing lawyers and experts by participating in a WTO dispute as a third party.

Most developing countries which are actively participating in the WTO Dispute Settlement System started by becoming third parties to various WTO disputes. Pursuant to Article 10 of the DSU, any Member having substantial interest in a matter before a panel and having notified its interest to the DSB shall have the opportunity to be heard and to make written submissions to the panel as well as receive the submissions of the parties to the dispute in the first meeting of the panel. Third party right can also be exercised at the Appellate Body stage. The third party submissions shall also be reflected in the reports.

There are many advantages in becoming a third party to a WTO dispute. First is to learn about WTO dispute settlement proceedings. Once a Member's flag is raised when the chair of Dispute Settlement Body (DSB) asks to all Members during the DSB meeting establishing a panel whether any Member would like to be third party in the dispute or a formal written request submitted to DSB within timeframe set by the DSB, all third party rights shall be granted to the Member.

As third party, the Member has the right to obtain the first submissions by the Complainant(s) and Respondent. Third party has also the opportunity to submit written submission within the timeframe set in the timetable of the panel usually around one or two weeks after the deadline of submission of the Respondent. Written submissions by third party will be reflected in the panel reports although there is no strict obligations that the panel must evaluate or take into account every arguments and issues raised by the third party.

In the first substantive meeting, opportunity for third party to submit its oral submission is provided. Usually it is after the first statement of the Complainant(s) and the Respondent. The Complainant(s) and the Respondent of the dispute have the right to be present during the oral submissions of third party but it is not applicable vice versa. Third party which does not submit written submission could still present its view in the oral hearing. However, submissions by third party are not mandatory meaning a third party can be very passive without giving any submission while still has the right to receive submissions and to attend the first substantive meeting allocated for third party.

This opportunity usually is used by many Members particularly developing-country Members to learn about WTO dispute settlement proceedings and to train their in-house lawyers and to give them experiences about procedural issues on the WTO Dispute Settlement System. So by the time they are becoming either Complainant or Respondent to a dispute, they already has the knowledge, skills and experiences.

Second is learning about the substance of the dispute itself. Many of the measure at issues to a dispute are about trade policies. Similar trade policies might also be implemented by other Members or different Member has been applying similar trade policy to other Members. So, as a third party, it can learn why a measure implemented by other Members is challenged to be WTO inconsistent or it can learn how to defend or justify such challenge and what would be the decision of the panel or Appellate Body on the matter. A third party can also submit its view on why such measure should be considered WTO consistent or WTO inconsistent with different basis than what has been submitted by either the Complainant(s) or Respondent or other third party as a systemic interest because, although it is not strictly binding jurisprudence, the panel report will be taken into account for similar disputes.

For example at the moment it begins to rise to the surface cases relating to export restrictions particularly to commodities of which production is dominated by certain member. In the past, most WTO cases are about import restrictions or restrictions to market access into another Member territory. What panels think about this issue will be interesting to many developing countries which may impose similar trade policy which at the moment has not been challenged.

It is undeniable that there is also disadvantage of becoming third parties. One of which is provided in Article 8.3 of the DSU stating panellist to a dispute cannot be from party to the dispute including third party (unless agreed otherwise by parties to the dispute). That is why there has been limited number of panellists from United States, EU and now China since they are mostly becoming third party to any dispute in the WTO due to their systemic interest or other considerations.

By implementing the proposed solutions, namely increasing number of Indonesians trained in WTO Law and exposing the existing ones by being third party to a dispute, hopefully, in the future, Indonesia will have more trade lawyers and experts who in turn will increase Indonesia's capacity to identify potential complaints and to litigate them in the WTO Dispute Settlement System.

2. Cost to Litigate

The proceedings at the WTO Dispute Settlement Body itself are free of charge. No cost is imposed either on the complainant, respondent, or third parties in arbitration, Panels, or Appellate Body proceedings. In other words, there is no obligation for WTO Members to pay any extra cost to resort to the system, aside from its contribution to the WTO budget.[19] The fee of Panellists, Appellate Body Members, arbiters or even experts is borne by the organization itself.

Nonetheless, many people think that WTO litigation is very costly. WTO litigation takes place at the WTO headquarter in Geneva, one of the most expensive cities in the world. However, this is not the

19 Pursuant to Article VII:4 of the WTO Agreement, each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council. The Contributions of Members to the WTO budget are established according to a formula based on their share of international trade in goods and services for the last three years for which data are available. In 2007, Indonesia contribution amounts to 0.8 per cent of the WTO total budget. The actual contribution of each member to the budget can be found at www.wto.org/english/thewto_e/secre_e/contrib07_e.htm.

most contributing factor of such high cost. In particular, the cost to litigate can be significantly high for developing countries to afford if the developing countries lack of its own legal resources, specifically trade experts or lawyers with capacity and experience in WTO dispute settlement, as explained in Part I: A of this paper. In such circumstance, the only viable option for them to litigate is to hire overseas counsel or law firms, such as those who are based in Geneva, Brussels or Washington, or ACWL as the cheaper option. However, hiring those overseas counsel or law firms might still incur very high cost which possibly reaches to the point beyond the expected benefits that can be achieved from the dispute. To illustrate the high litigation cost, below is the table of maximum fee charged by ACWL for each stage of WTO dispute settlement proceedings as of 19 November 2007. The fee is charged differently based on the category of the member. Indonesia is classified as a Category B Member. It should be noted that the fee is much cheaper than the fee charged by private law firms.

High litigation cost might be beyond the expected benefits to be achieved from a dispute when the measure to be challenged is only related to a certain sector which does not contribute significantly to the aggregate export of the country. In other words, due to the small export, they do not benefit largely from the economies of scale of the export. Meanwhile, the government still has many other priorities which require such big amount of money.

The solution to this problem is not straight forward; rather it depends on case by case basis. The decision lays much on the trade policy makers. Having said that the solution lies in the decision makers, the private sector can actually become a part of the solution to this problem. The relevant private sector may finance the expense of hiring legal services to lodge a complaint or to participate as a third party in a WTO dispute proceeding. Alternatively, the private sector, namely industry associations, private sector attorneys and consultants can engage in the pre-litigation which are to be litigated in Geneva. The US

Table 1:
Maximum charges for a complainant or respondent (in Swiss francs)

	Consultations	Panel Proceedings	Appellate Body Proceedings	TOTAL
Category B	35,721	107,892	63,909	207,522

Source: Decision 2007/7 Adopted by the Management Board on 19 November 2007

Table 2:
Maximum charges for a third party (in Swiss francs)

	Panel Proceedings	Appellate Body Proceedings	TOTAL
Category B	15,552	21,627	37,179

Source: Decision 2007/7 Adopted by the Management Board on 19 November 2007

and European Union have been practicing the second approach.[20] Of course, this very much depends on the interest of the relevant private sector, and might not always be a solution.

3. Problematic Decision-Making Mechanism

Decision-making mechanism posits formidable challenge for developing country Members, including Indonesia. The decision-making mechanism in this discussion refers to the process of deciding whether to lodge a complaint or to be a third party in a WTO dispute. This important process involves the stages of dispute resolution, namely, "naming, blaming and claiming."[21] Naming stage injuries refers to perceiving injuries. Blaming identifies the responsible actor of injuries suffered, and finally claiming refers to mobilization of resources to bring a legal claim or negotiate a favourable settlement.[22]

The problem in Indonesia, as in many other developing countries, is the absence of effective mechanisms to perform those stages until reaching a final decision whether to litigate. The effective mechanisms must be able to identify promptly and prioritize claims. These mechanisms become more complicated because being able to identify a possible claim of violation will not necessarily make a country to lodge a complaint if there is not enough confidence that such claim is worth pursuing.[23]

In the decision-making mechanisms, many considerations are involved, such as high cost to litigate, expected remedies, trade relations, economic/investment consequences and political risks. In some cases, expected remedies can be the determining factor to lodge a complaint. For instance, Indonesian government lodged a complaint against the United States US measure banning the sales and distributions of clove cigarette which predominantly (if not all) is imported from Indonesia. It is reasonable to believe that the government took such decision because of the expected remedies of the ban removal. Prolonging the ban might cause Indonesia to suffer more economic disadvantages considering that the clove cigarette industry employs millions of workers and tobacco farmers.

The expected remedies might not necessarily be only from economic point of view. It can also be the remedies of bringing compliance of the violator state.[24] If the ban of clove cigarette is found to be in breach of WTO law, this can potentially bring reputational loss on the United States. Indonesia can expect that the potential reputational loss will make the US comply with WTO law in its future trade relations with Indonesia. A systemic consideration could also play a role in this case. Concern that the ban will be followed by other WTO Members if its WTO inconsistency is not proven is clearly eminent. Admittedly, these considerations might not come as a priority in the decision-making considerations.

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20 Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation*, Washington, DC: The Brookings Institution Press, 2003, 6.

21 William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 Law & Soc'Y Rev. 631 (1980-1981).

22 Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 World Trade Rev. 177, 2006 [Shaffer].

23 *Shaffer*, 178.

24 Andrew T. Guzman, *How International Law Works: A Rational Choice Theory,* New York: Oxford University Press, 2008, p. 139.

Indonesia is still faced with the underlying issue of the absence of effective mechanisms to identify such potential claims, to consider factors in order to prioritize, and to mobilize resources. In Indonesia, bureaucratic challenge can be a major hurdle due to the absence of efficient inter-ministries coordination.

All of Indonesia's acts within the WTO are in the realm of foreign policy, including lodging a trade complaint. According to Article 13 of Law No. 37 of 1999 on Foreign Relations, any policy and action of the Government of Indonesia which are taken in relations with another state, international organization, and other subjects of international law in facing an international issue to achieve national goals is considered as foreign policy. The power to perform Indonesia's foreign policy is on the President,[25] and he can mandate such power to the Ministry of Foreign Affairs.[26]

Although the Ministry of Foreign Affairs is also responsible to coordinate Indonesia's acts in international trade, it is important to realize that the Ministry does not necessarily have the required information to decide on what actions should be done.[27] Therefore, Article 5 of Law No. 24 of 2000 on International Agreement regulates that consultation and coordination of relevant state institutions or ministries with regards to negotiation of international agreements must occur. As such, any action with regards to the WTO will involve at least Ministry of Trade, Ministry of Foreign Affairs and Ministry of Finance. It will involve even more ministries depending on the products covered by a particular complaint.[28]

Unfortunately, Law No. 24 of 2000 does not specify the mechanism of consultation and coordination which shall be conducted for dispute settlements. It was only clarified few years later. Indonesian government realized about the importance of having in place an effective consultation and coordination mechanism with regards to international trade. Therefore, for practical implementation of Indonesia's foreign policy in dispute settlement, the government issued Decree of the President of the Republic of Indonesia No. 28 of 2005 on Establishment of National Team for International Trade Negotiations. The decree established a national team for international trade negotiations (*Tim Nasional PPI*).[29] The language of the decree suggests broad interpretation of establishing *Tim Nasional PPI*'s functions to include decision-making process to engage in the WTO Dispute Settlement System.[30]

The adoption of such mechanism is expected to resolve two very crucial issues which are never addressed by the old mechanism, namely issues of inter-ministries coordination and time.

Inter-ministries coordination is crucial to ensure that the decision made to lodge a complaint is based on an integrated and

[25] Article 6 (1) Law No. 37 of 1999.

[26] Article 6 (2) Law No. 37 of 1999.

[27] Interview with an official at the Permanent Mission of Indonesia in Geneva.

[28] For example, if there is a complaint about fisheries products, then the Ministry of Seas and Marine Affairs should be involved in the decision-making process. If the complaint is about forestry products, then the Ministry of Forestry should be involved in the decision-making process.

[29] Decree of the President of the Republic of Indonesia No. 28 of 2005 on Establishment of National Team for International Trade Negotiations.

[30] The decision-making capacity of *Timnas PPI* is confirmed by an official at the Permanent Mission of Indonesia in Geneva.

coordinated national interest, especially in increasing its access to international market and boosting domestic economic growth. It seems that the government realized that such coordination was not effective with the old mechanism because there might be possibility that not all relevant ministries were involved in the decision-making process. Thus, the decree provides a detailed list of people who must be involved in the decision-making process.

To coordinate all relevant ministries in decision-making process is time consuming. Not to mention the deep rooted bureaucratic challenges within those ministries, for example search of people in charge or correspondence formalities. Meanwhile, litigating at the WTO Dispute Settlement System is time sensitive. First, time lost mean losses to national industries because they suffer from the existence of the disadvantageous measures. Second, from procedural point of view, in order to participate as a third party in a dispute, a country must respect the timetable set by a panel for a particular case.

To some extent, the decree might have addressed both issues. However, the practical reality is more complicated than what appears on paper. Even after the establishment of *Tim Nasional PPI*, those issues still arise. Coordinating a meeting and coordinating substantial concerns of each ministry are simple examples. When coordination issues arise, in turn it will make the decision-making process longer.

Improvement remains pertinent to accommodate swift coordination amongst the relevant ministries to expedite the decision making process. One of the ways is to adapt the successful mechanisms implemented by other countries and adjust in accordance with its own condition and needs. For example, Brazil is a developing country which has developed a successful mechanism, well-known as the "three pillar" structure.[31] The structure consists of a special WTO dispute settlement division in its capital, coordination on WTO legal matters between its Geneva mission and the dispute settlement division, and organized relations with private sector. With regard to the third pillar, the Brazilian government actively helped in facilitating the training young attorneys in Brazilian law firms in WTO dispute settlement. At the same time, this will help to solve the lack of legal resources in the government.

Apparently, Indonesia has started to adapt such structure, although it might work differently in practice. Regulation of Minister of Trade No. 31 of 2010 on Organization and Working Mechanism of Ministry of Trade created a special division to address WTO issues called Advocacy Service Centre for International Trade (ASCIT).[32] ASCIT is a supporting element of the Ministry of Trade and is directly responsible to the Minister of Trade.

The Centre's main functions, which are relevant to international trade, are quite broad, namely:

a) analyzing, conducting legal review, and advocating in negotiation and/ or conclusion of international trade agreements;
b) analyzing, conducting legal review, and advocating implementation of agreements and handling of international trade disputes;
c) Providing legal opinion on the draft of laws and regulations related to commitments in international trade agreements; and
d) Preparing and analyzing compliance of national trade policy and trade partners

[31] *Shaffer,* 181.

[32] Article 945 of Regulation of Ministry of Trade No. 31 of 2010.

with commitments in international trade agreements.

The establishment of this centre can be a good start for Indonesia in creating more effective decision-making mechanisms process in dispute settlement and creating a career path for experienced WTO litigators. This is because ASCIT can be the forum where Indonesia can identify trade complaints and assess the possibility of successful complaints. With such identification and claims, as the preparatory work, it could be brought to consultation and coordination with the relevant ministries to set the priority of complaints, and finally to decide on mobilizing the sources to lodge such complaints.

This mechanism is both more effective and efficient compared to the previous mechanism. In the past, when there was a potential claim arising and identified by the Indonesian Permanent Mission in Geneva, the Permanent Mission will consult with the Directorate General of Law and International Agreement of the Ministry of Foreign Affairs and Directorate of International Trade Cooperation or the Legal Bureau of the Ministry of Trade. Notably, the old mechanism appears to be sporadic in trying to address a potential claim. There is no specialized agency to identify and make legal review of potential complaints.

The newly established ASCIT[33] will be integrated into *Tim Nasional PPI*.[34] This might create even more efficient and effective decision-making mechanisms for Indonesia's engagement with the WTO Dispute Settlement System. However, consistent improvement is still required to address the coordination issue and to maintain effective decision-making mechanisms.

4. Enforcement Mechanism of the panel and Appellate Body Reports

Another significant problem for developing country Members is the enforcement of panel and Appellate Body reports. There is no much use if a developing country Member won a case in the WTO Dispute Settlement System, but the decision is not implemented or cannot be enforced to remedy the nullification or impairment.

WTO Members are very much aware of this problem because they learn from the past experiences during the regime of GATT 1947. During GATT 1947 era, every panel report must be adopted by consensus, including by the losing party.[35] The adoption itself does not necessarily mean the adopted report will be implemented by the losing party.

Furthermore, under GATT 1947, there was no mechanism available to address the winning party's claim if the losing party does not implement the ruling and recommendation as stated in the panel report. Therefore, under the WTO Dispute Settlement System, this matter is regulated in Article 21.5 of the DSU. Under Article 21.5 of the DSU, a Member could resort to the original panel if there is disagreement to the implementation of the recommendation and rulings of such dispute. The panel will then resolve the issue in an

[33] Established on 5 August 2010.

[34] Interview with an official at the Permanent Mission of Indonesia in Geneva.

[35] Article XXIII of the General Agreement on Tariffs and Trade 1947.

expedite manner. Although statistically there are only around 10% of all WTO cases that have implementation problem,[36] however, this unimplemented ruling and recommendation could discourage counties from resorting to the WTO Dispute Settlement System.

An example can be seen in the Korea-Paper case. The Panel found that Korea was acting inconsistently with the Anti-Dumping Agreement.[37] In the implementation stage of the Panel Report, Indonesia claimed that Korea has not brought the inconsistent measure into conformity with the Panel's recommendation and ruling. Indonesia resorted to Article 21.5 proceeding and again won the case.[38] However, even after the Panel ruling was issued, Indonesia consistently protested Korea's reluctance in applying the Panel ruling. It was only in 2010 when Korea anti-dumping authority finally revoked the anti-dumping measure on Indonesian paper based on its sunset review.

Although the WTO has no executive body to enforce the panel/AB report, under the DSU there is a tool called suspension of concession or retaliation measure to give pressure to the losing party to bring the inconsistent measure in conformity according to the panel ruling and recommendation. Under Article 22.6 of the DSU, retaliation shall be granted by reversed consensus. Retaliation, however, is not as simple as it might sound. Out of the 33 retaliation requests ever made in the WTO, most of them were done by developed countries. Only Antigua, India, Brazil, Chile and Ecuador are developing countries which dare to retaliate against the giants (United States, European Community, and Canada).

The relatively low number of retaliation requests by developing country against a developed country can be analyzed. In particular, political and economical considerations play major role because developed countries normally have higher leverage in these areas. Politically, developing country seeks to maintain good relationship with developed countries because there are many potential benefits, i.e. assistance in various development sectors. Retaliating against a developed country will likely taint the good relationship. Economically, the developing countries are sometimes economically dependent on developed countries. Along with the current globalization, many developing countries are relying heavily on its export to maintain national economic growth. Retaliating against a developed country might trigger the imposition of some export restrictive measures against the developing country, which in turn potentially bring more severe economic consequences. Additionally, developed countries invest in very large amount in developing countries. Retaliatory action might cause the developed country to discourage further investment in the developing country. Not to mention that the retaliatory action of developing country might not affect the developed country because for the developed country, the trade with the developing country contributes insignificant amount to its economy. For those reasons, a developing country will be reluctant in taking retaliatory action

[36] To date there are 418 standard DSU complaints, but there are only 41 Complaints based on Article 21.5 of the DSU.

[37] *Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia,* Report of the Panel, WT/DS312, 28 October 2005, para. 8.1.

[38] *Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia: Recourse to Article 21.5 of the DSU by Indonesia,* Report of the Panel, WT/DS312, 28 September 2007, para. 7.1.

against the relevant developed country.

Those considerations might affect Indonesian government's decision not to request for retaliatory authorization against South Korea in the *Korea-Paper* case. Notably, South Korea is one Indonesia's major trading partner/investors and Indonesia had enjoyed quite significant trade balance surplus from the trade between the two countries.[39] Retaliating against South Korea would potentially hurt the trade relations or affect both the existing and potential investment of South Korea in Indonesia.

As demonstrated above, the WTO Dispute Settlement System still cannot address the issue of effective enforcement of panel or AB reports. The ineffective enforcement mechanism poses as hurdle to developing countries like Indonesia to pursue its rights even if it won the case before panels or AB. In effect, this arise doubts on Indonesia whether to pursue such recourse which potentially become waste of resources.

Apparently, WTO members realize about this concern. In November 2001, ministers agreed to begin negotiations to improve and clarify the DSU. Specifically, the current retaliation system has been scrutinized by many members.[40] This system should be carefully re-engineered so that it can balance the interests of the developing country Members. Further discussion on the ideal system is beyond the scope of this paper.

B. Future of Indonesia and the WTO Dispute Settlement System in the Proliferating RTA Regime

Regional Trade Agreements (RTA)'s development, including Free Trade Agreements, can be traced back to 1958 when the European Economic Community was created as one of the early RTAs. Since then, there have been waves of regionalism which significantly increase the number of RTAs. One lesson that can be learned from the history of regionalism is, "growth in regionalism appears to go hand in hand with developments in multilateralism."[41] In fact this can be witnessed nowadays. The negotiation of Doha Development Agenda has been ongoing for 9 years since the Round's commencement in the Fourth Ministerial Conference in November 2001 in Doha, Qatar. However, the multilateral negotiations ended up in deadlock, and WTO members simply cannot expect any significant improvement to the situation. Consequently, the deadlock serves as one of the triggers of RTAs proliferation amongst WTO Members. Now, there are over 350 regional trade agreements in existence, each with different content and different signatories.[42]

Indonesia have also been engaging into numerous bilateral and RTAs. Currently, Indonesia has concluded at least

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[39] Data obtained from the statistic of 2005-2009 Trade Balance between Indonesia and South Korea provided by the Ministry of Trade of the Republic of Indonesia, http://www.depdag.go.id/statistik_neraca_perdagangan_dengan_negara_mitra_dagang/ (November 24, 2010).

[40] Peter Van den Bossche, "The Doha Development Round Negotiations on the Dispute Settlement Understanding, presented at WTO Conference New Agendas in the 21st Century, Taipei, 28-29 November 2003.

[41] Richard Baldwin and Patrick Low, ed., *Multilateralizing Regionalism: Challenges for the Global Trading System*, (New York: Cambridge University Press, 2009), 27 [Baldwin and Low].

[42] *Ibid.*, 1.

eight RTAs, and more RTAs are still being proposed or under consideration.[43]

Similar to most RTAs, Indonesia's RTAs cover many trade areas which are regulated under WTO, with variations. Each RTA has its own dispute settlement provisions, and some of the RTAs' dispute settlement mechanisms are similar to that of the WTO Dispute Settlement System.

One might rightly question the possibility of overlaps of obligations contained in RTA and WTO Agreements, which in consequence might result into procedural overlap.[44] For instance, Indonesia challenges another country under ASEAN Free Trade Agreement (AFTA) and before the WTO for a violation of an obligation contained in both agreements. This issue has been addressed by the WTO in *Mexico-Soft Drinks*. In that case, the US brought a national treatment claim to the WTO. However, at the same time, US investors in Mexico brought a similar treatment claim before a NAFTA Tribunal. Finally, the Appellate Body [AB] did not find any issue for Panel to exercise its jurisdiction although there was another NAFTA Tribunal addressing the same issue. In fact, the AB stated that based on Article 3.2 and 19.2 of the DSU, Panel seemed not to be in a position to choose whether to exercise its jurisdiction on a complaint presented by a Member even when there is another tribunal assessing a similar issue.[45]

The clarification made by the AB in *Mexico-Soft Drinks* might indicate that procedural overlap is certainly not a very critical issue. Yet, it may potentially lead to forum shopping. Realizing about this potential, in some RTAs, there are 'forum exclusion clauses' which oblige the complainant to submit a dispute arising from the violation of the RTA's provisions to the WTO when similar obligation exists in WTO Agreements.[46] However, this does not exist in most of Indonesia's RTAs. Analyzing whether this is good or bad is beyond the scope of this paper. Instead, this paper will analyze the consequence of this option to Indonesia's participation in the WTO Dispute Settlement System.

In the event there is a violation against Indonesia by a particular obligation of a WTO member who is also a member of a RTA which Indonesia is a member to, Indonesia has options to lodge a complaint in either one of the dispute settlement systems or to lodge a complaint in both dispute settlement systems.

As to the choice which Indonesia will make, it depends on cost and benefit analysis on the strength of the case in the relevant agreement (either WTO or RTA) and effectiveness of enforcement mechanism. First, the strength of case which can be made depends on the provisions of each agreement. It should be noted as well that Article XXIV GATT 1994 provides possibility of raising exception defence towards obligations under the Agreement when there exists RTA. In the event such provision exists in the relevant WTO Agreement, Indonesia might not resort to the WTO Dispute Settlement System because most likely it will lose its case. Second, effectiveness of enforcement mechanism can be a determining factor. This will vary on a case by case basis because of the different dispute settlement mechanisms provided by each RTA. For example, ASEAN

43 The calculation is based on data gathered from the website of Asian Development Bank in November 2010, www.aric.adb.org.

44 *Baldwin and Low*, 379.

45 *Mexico – Tax Measures on Soft Drinks and Other Beverages,* The United States and Mexico, WT/DS308/AB/R, 6 March 2006, para. 53.

46 Article 189.4 (c) of the EC-Chile FTA, Article 8.4 and 10.7.2 of the Republic of Korea-US FTA.

has its own dispute settlement mechanism which is very similar to that of the WTO DSU. However, the little is known about the effectiveness of this mechanism because no case has been lodged. On the other hand, the WTO Dispute Settlement System also has weakness of enforcement in some particular circumstances as explained above. Therefore, in such circumstance, Indonesia might just have to choose the WTO.

In the future, if RTAs' dispute resolution systems are more reliable, there is possibility of Indonesia resorting to such system in the event of a violation of obligations contained in both an RTA and WTO Agreements. However, it is too early to predict this because some of Indonesia's RTAs are not even in force yet. It can be concluded that temporarily, Indonesia's participation in the WTO Dispute Settlement System will not be much affected by the proliferating RTAs.

C. Conclusion

Indonesia has much homework if it wants to be more active using the WTO Dispute Settlement System to secure its trading rights under the WTO. All issues set forth in this paper are not without any solution. Provided that the government sees the importance of WTO litigations for our national interests, optimism on the future of Indonesia and WTO Dispute Settlement System should be built. As stated in the beginning of this paper, that international agreements are not worth very much if it obligations cannot be enforced. Enforcement through litigations should not be considered as finding enemies: instead all WTO Members are aware that this is part of game. After all, the WTO is a rule-based system and its major achievement is to have an effective dispute settlement mechanism.

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