



## **Implications of WTO DSB Panel Ruling on Imbalance of Power between WTO Member States**

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### **Abstract**

Economic liberalization, easy market access and free trade are some of the goals of the establishment of the WTO. However, international trade activities have the potential to give birth to disputes, especially when the dispute involves developing countries that tend to have a weak position in international relations. The imbalance of positions between developed and developing countries allows for non-compliance with decisions given by the Dispute Settlement Body. This research is juridical-normative research sourced from literary sources such as journals and books. This study found that there is no different treatment applied to developed and developing countries in the WTO; If the judgment given is not carried out on time, then there are retaliation efforts in the form of postponement of concessions and compensation.

**Keywords:** *DSB; DSU; developing countries; WTO*



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**Abstrak**

Liberalisasi ekonomi, akses masuk pasar yang mudah dan perdagangan bebas merupakan beberapa tujuan dari dibentuknya WTO. Akan tetapi aktivitas perdagangan internasional sangat berpotensi untuk melahirkan perselisihan, terlebih ketika sengketa tersebut melibatkan negara berkembang yang cenderung memiliki posisi lemah dalam hubungan internasional. Adanya ketidakseimbangan posisi antara negara maju dan negara berkembang memungkinkan munculnya ketidakpatuhan terhadap putusan yang diberikan oleh Dispute Settlement Body. Penelitian ini merupakan penelitian yuridis-normatif yang bersumber dari sumber kepustakaan seperti jurnal dan buku. Penelitian ini menemukan bahwa tidak ada perlakuan berbeda yang diterapkan terhadap negara maju dan negara berkembang dalam WTO serta jika putusan yang diberikan tidak dijalankan tepat waktu maka ada upaya retaliasi dalam bentuk penundaan konsesi dan kompensasi.

**Kata Kunci:** DSB; DSU; negara berkembang; WTO

**A. Introduction**

International trade has a significant role in meeting the national needs of a country considering international trade activities are one of the efforts to drive a country's national economy. However, international trade activities are prone to disputes between parties, in this case WTO member countries, who are involved in international trade practices. The World Trade Organization (WTO) which was formed in 1995 is a manifestation of the aspire of countries to have an

organization that becomes a forum and regulates the course of international trade. In addition, there is an urgency to replace the International Trade Organization (ITO) that was established through the Havana Charter in 1958 with a new international organization that can carry out trade agendas that are not resolved by the ITO and strengthen The General Agreement on Tariffs and Trade (GATT) 1948.<sup>1</sup>

The absence of international organizations that regulate and supervise trade flows between countries prompted the establishment of the WTO and is a significant step in establishing international trade rules. As a rule-based organization, the WTO carries out its duties and functions based on norms that have been agreed upon by its member countries.<sup>2</sup> The existence of the WTO stimulates peace between countries involved in international trade.<sup>3</sup> Even so, the high intensity of international trade practice is prone to conflict between

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<sup>1</sup> Koul, Autar Krishen. *Guide to the WTO and GATT: Economics, Law and Politics*. Germany: Springer Nature Singapore, 2018.hlm. 39

<sup>2</sup> Baldwin, Richard. "The World Trade Organization and the Future of Multilateralism." *The Journal of Economic Perspectives* 30, no. 1 (2016): 95-115. <http://www.jstor.org/stable/43710012>. hlm. 95

<sup>3</sup> Dr. Munir Fuady, S.H., M.H., LL.M. *International Commercial Law: Legal Aspects of the WTO*. Bandung: PT. The image of Aditya Bakti. 2023. p. 26

the parties involved. For this reason, the WTO also acts as a choice of forum in resolving trade disputes that occur between WTO member countries.

As a forum for international trade practices, the WTO has two main functions, namely the legislative function, where the WTO acts as a forum to reach agreements on trade agreements with all WTO member countries participating in the Ministerial Conference in order to determine and make rules or regulations,<sup>4</sup> and judicial functions, in which the WTO has a role in dispute resolution.<sup>5</sup> The mechanism for settling international trade disputes through the WTO begins with the WTO General Council authorizing the Dispute Settlement Body (DSB) to resolve disputes that occur between Contracting Parties. The terms of settlement of international trade disputes are regulated in the Dispute Settlement Understanding (DSU). In practice, the dispute settlement system adopted by the WTO uses negotiation as an initial mechanism in the sense that the parties are required to

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<sup>4</sup> Lee, Hyo Won, and Johann Park. "Free Trade and the Environment under the GATT/WTO: Negative or Compatible Relationship?" *Journal of International and Area Studies* 28, no. 1 (2021): 119–36. <https://www.jstor.org/stable/27210938>. hlm 120 - 121

<sup>5</sup> Iida, Keisuke. "Is WTO Dispute Settlement Effective?" *Global Governance* 10, no. 2 (2004): 207–25. <http://www.jstor.org/stable/27800522>. hlm. 207

reach an agreement that has been agreed in the negotiation process, before the dispute is brought and decided by the DSB.<sup>6</sup> International trade disputes usually start due to one party is alleged to have changed its policy to apply import protection policy beyond the limits agreed with the other party.<sup>7</sup>

Article 1 of the DSU states that the rules and procedures contained in the DSU apply to parties to disputes concerning the settlement of disputes that elaborates the rights and obligations of the parties contained in the Agreement Establishing the World Trade Organization (WTO Agreement) and other WTO instruments.<sup>8</sup> Meanwhile, Article 2 paragraph (1) of the DSU stipulates that DSB has the authority to form a panel, adopt or endorse the results of panel reports and reports

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<sup>6</sup> Brewster, Rachel. "Rule-Based Dispute Resolution in International Trade Law." *Virginia Law Review* 92, no. 2 (2006): 251–88. <http://www.jstor.org/stable/4144980>. hlm. 257

<sup>7</sup> Bown, Chad P., and Kara M. Reynolds. "Trade Agreements and Enforcement: Evidence from WTO Dispute Settlement." *American Economic Journal: Economic Policy* 9, no. 4 (2017): 64–100. <http://www.jstor.org/stable/26598347>. hlm. 64

<sup>8</sup> World Trade Organization. Pasal 1 DSU *"The rules and procedures of this Understanding shall also apply to consultations and settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization ("WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement"*.

from the Appellate Body, supervise the implementation of recommendations and decisions given by the panel and the Appellate Body, and authorize the termination of concessions and other obligations stipulated in other agreements.

Dispute resolution through DSB is carried out with the formation of a panel. After the panel gives a decision on the dispute, the parties can file objections or make appeals.<sup>9</sup> The adoption of the WTO Panel Report is quasi-automatic, meaning that the ruling is rendered automatically unless the losing party appeals or is determined by consensus.<sup>10</sup> Article 16 of the DSU further specifies that from twenty days after the recommendation is given and not more than sixty days, the DSB must adopt or endorse the recommendation, and the DSB is obliged to adopt the decision if there is no appeal from the parties involved.

As the implementation of dispute resolution through DSB regulated in such a way in the DSU, along with the procedure for adopting decisions from the panel, the question that arises is what if the parties involved in

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<sup>9</sup> World Trade Organization. Pasal 16 ayat (1) dan 4 DSU

<sup>10</sup> World Trade Organization Secretariat. *A Handbook on the WTO Dispute Settlement System*. 2nd ed. of WTO Internal Only. Cambridge: Cambridge University Press, 2017. hlm. 127

the dispute are developing countries versus developed countries? What if the panel declares a developing country as the winning party but nevertheless the more developed country as the losing party refuses to carry out its obligations in implementing the panel's rulings? The imbalance of power has the potential to disrupt the prospects for trade relations between disputed countries in the future.

Based on the description provided above, this article is titled "The Implications of WTO DSB Panel Ruling on Imbalance of Power between WTO Member States" and will discuss the effectiveness of the DSB Panel's decision and how the WTO responds to the imbalance of power that may occur to the disputing parties by using normative juridical research methods carried out based on secondary sources or literature sources<sup>11</sup> which focuses on reviewing journal articles and other scholarly papers, as well as panel opinions from past cases set a precedent. Furthermore, this research is also conducted by examining and understanding more deeply about WTO instruments such as the WTO Agreement, DSU, and other

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<sup>11</sup> Soekanto, Soerjono, dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Raja Grafindo Persada. 1994. hlm. 4

WTO documents related to the topic of discussion, as well as WTO Annexes.

## **B. Discussion**

### **1. Dispute Settlement at WTO**

Dispute can be interpreted as a failure to agree on a particular issue related to facts on the ground, law or policy in which the response or demand of one party is responded with rejection by the other party.<sup>12</sup> Based on this explanation, it can be said that international trade disputes refer to differences of opinion regarding the trade practices of a country in trade transactions with other countries.

Differences of opinion in trade transactions can be motivated by various factors such as policy changes that initially support the interests of both parties in trading activities, but later bring losses to the other parties. As for other conditions, such the passing of new laws and regulations that are more favourable to domestic trade actors in an effort to increase and stimulate consumption of domestically made

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<sup>12</sup> Merrills, John, and Eric De Brabandere. *Merrills' International Dispute Settlement*. 7th ed. Cambridge: Cambridge University Press, 2022. hlm. 1



products. Other examples related to differences of opinion on a country's attitude in the environmental context, for example, when exporting countries make policies to limit the export of a product in an effort to conserve the resources of that product, as well as other factors that are considered to be detrimental to other parties or inconsistencies with the rules in WTO treaty instruments.

Simply put, disputes can also be present due to non-fulfilment of obligations of one party to the other. These things can certainly be a trigger for disputes between the two countries involved in an international trade relationship. As explained in the introduction, the WTO also acts as the choice of forum for settling international trade disputes between its member states. There are several conditions that cause the WTO to be chosen as the choice of forum by the parties to the dispute, namely when:

- a) the existence of an action that is inconsistent with the existing agreements in the WTO;
- b) such actions have significant repercussions on trade, both export and domestic;
- c) there are trade organizers affected by such actions; and

d) a claim made by a member state is rejected by the Member State issuing the policy or action.<sup>13</sup>

With an agreement between the two disputing countries to use the DSB mechanism as a choice of forum for dispute resolution, then these countries must comply with the rules set out in the DSU. Briefly, dispute resolution through the WTO includes three stages, namely formal consultation between the disputing parties, the adjudication process carried out by the Appellate Body, and the last is the execution of recommendations or decisions given by the panel.

Consultation is the initial stage of dispute resolution through the WTO in the form of consideration for countries in addressing existing trade problems before bringing the dispute to a further stage of dispute resolution.<sup>14</sup> Once a request for formal consultation by a member state is granted, a reply to the request for consultation must be provided by another member state involved in the dispute within 10 days.

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<sup>13</sup> Marco Tulio Molina Tejada. *Practical Aspects of WTO Litigation*. Netherlands: Wolters Kluwer. 2020. hal. 10

<sup>14</sup> World Trade Organization. Pasal 4 ayat (1) dan (2) DSU

Dispute settlement through the WTO has the characteristic of allowing other member states other than the disputing parties to participate in the consultation process. This is regulated by Article 4 paragraph (11) DSU which states that joint consultations can be carried out when other countries have substantial trade interests in the case. This can be done by giving notice to consulting members and DSB that the country wants to participate in formal consultations involving consulting members.

The consultation process takes about 60 days. If within 60 days the consultation process does not result in an agreement among the parties, the complaining party may submit a request for the formation of a panel as stipulated by Article 4 paragraph (7) DSU. The request for the formation of a panel by the parties must be made in writing and contain matters, including an explanation that consultations have been carried out but did not produce satisfactory results, identifying and explaining the efforts, actions, and facts that are the problem of the dispute, as well as a brief summary of the legal basis on which the dispute complaint

refers,<sup>15</sup> the Terms of Reference may also be included in the request if the parties do not agree to the Terms of Reference mandated in the DSU. The composition of the panel consists of experts who are qualified in the field of international trade. Quoted from Article 8 paragraph (1) of DSU which states that,

*“Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as the representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member”.*

The formation and appointment of the panel lasts for approximately 45 days. Panel selection should reflect the independence and non-partial nature of the panellists on the issue. Therefore, panel members must not be from countries that are parties to the dispute, unless this has been first agreed or waived by the disputing party.

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<sup>15</sup> World Trade Organization. Pasal 6 DSU

Similar to the consultation, the adjudication stage by the panel or also known as panel procedures, is also allowing the third party that has substantial interest in the case. The WTO distinguishes between substantial trade interests that must be owned by third parties or other parties at the consultation stage and the panel procedures stage.

At the consultation stage, other countries with substantial trade interest may request to participate in the consultation provided that the request is accepted by the consulting members. However, DSU does not provide definition of substantial trade interest which lead to broad interpretation of substantial trade interest.<sup>16</sup> On the other hand, if another member state feels that there is a systemic interest affected by a case, the procedures panel may allow the said state to participate in the procedure even if the systemic interest is not necessarily "substantial".<sup>17</sup>

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<sup>16</sup> Patrick F.J. Macrory, Arthur E. Appleton dan Michael G. Plummer. *The World Trade Organization: Legal, Economic and Political Analysis*. United States of America: Springer. 2007. hal. 1215

<sup>17</sup> World Trade Organization. The Process – Stages in a Typical WTO Dispute Settlement Case. [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm). diakses 9 Agustus 2023

Substantial interest is interpreted elastically based on previous panel reports, where some form of 'interest' as a minimum standard is considered important, but some consider that interest here refers to something prospective, abstract, but still intersecting with international trade.<sup>18</sup> Thus, it can be concluded that as long as there is a trade interest in the case, other countries can participate both in the consultation process and in the panel procedures process.

After the panel procedures have been carried out, within a period of 6 months, or within 3 months in certain situations, such as cases involving perishable goods, the panel is encouraged to provide the results of reports or recommendations to the parties. In the event where the panel does not have sufficient time within the 6 months or 3 months to provide the report, the panel is required to provide written notice to DSB regarding the estimated time for completion of the final report to be provided by the panel.

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<sup>18</sup> Chi Carmody. Of Substantial Interest: Third Parties Under GATT. Michigan Journal of International Law Vol. 8, Issue 4. 1997. hal. 655

In the panel procedure, there is an interim review stage process,<sup>19</sup> it is the process by which facts and arguments are spelled out which can then be refuted by one or both parties to the dispute. The results of the rebuttal and meeting in the interim review stage will then be included in the panel's final report after the panel procedures are declared complete.

The panel's final report is further disseminated to member states and within 60 days after the dissemination, the recommendation report will be endorsed through a DSB meeting. Attestation may not be made in the event that the disputing party appeals the results of the report. Appeals by parties will be heard and resolved by an Appellate Body consisting of seven experts in the field of international trade law and other subjects contained in WTO treaty instruments.<sup>20</sup> If at the consultation stage third parties or other countries could participate, the appeal stage in the Appellate Body can only involve the disputing parties to be heard. The Appellate Body will conduct an analysis of legal issues and interpretation of the panel report. Article 17 paragraph (13) of the DSU states that

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<sup>19</sup> World Trade Organization. Pasal 15 DSU

<sup>20</sup> World Trade Organization. Pasal 17 ayat (1) dan (3) DSU

the decision of the Appellate Body may corroborate, amend, or distort legal findings and interpretations in the report panel. Where the Appellate Body determines that the disputed measures and remedies are not in harmony with those set forth in WTO agreements, the Appellate Body will provide recommendations to the members involved to harmonize the actions they implement in accordance with those mandated by WTO agreements.

The results of the recommendations and rulings of the Appellate Body must be unconditionally ratified by the parties to the dispute. The ratification of the Appellate Body report is carried out through a DSB meeting within 30 days after the decision is disseminated to the WTO member countries. Thus, it can be said that the findings and analysis of the Appellate Body will provide recommendations as stipulated in Article 19 paragraph (1) of the DSU, namely if it turns out that the disputed action or steps prove to be inconsistent with WTO agreements, the panel and/or Appellate Body will recommend the disputing country to adjust the action in accordance with the WTO agreement. As well as how to implement the recommendation or decision.



## **2. Legal Force of WTO Decisions and the Imbalance of Power between WTO Member States in the Execution of International Trade Dispute Decisions**

After the issuance of a decision, whether it is from the panel if the dispute does not go through the appeal process, or the decision given by the Appellate Body, the next step is how the process of ratifying the decision and whether the decision has permanent legal force that binds the parties to the dispute.

Article 16 paragraph (4) of the DSU stipulates that within 60 days from the dissemination of the panel report and the absence of an appeal request from the disputing party, the panel report can be adopted and ratified through a DSB meeting. However, if one of the parties appeals and has obtained a decision from the Appellate Body, then the decision is accepted by the disputing parties and ratified through the DSB meeting starting after 30 days the decision is circulated. The recommendations of the panel and the Appellate Body

become a decision which is then endorsed by the DSB meeting.<sup>21</sup>

Although the WTO has clearly regulated the dispute settlement procedure through the panel mechanism and the Appellate Body, the DSU does not explain in detail how effective and binding force the rulings are. Especially if the parties to the dispute are developing countries and developed countries, where there are imbalance of power, economic levels, and other factors that put developing countries in a weaker position. With regard to the legal force of the recommendations of the panel and the Appellate Body, Article 17 paragraph (14) of DSU reads,

*“An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of the Members to express their views on an Appellate Body report”.*<sup>22</sup>

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<sup>21</sup> Mitsuo Matsushita *et al.* *The World Trade Organization: Law, Practice, and Policy*. Third Edition. United Kingdom: Oxford University Press. 2015. hal. 114

<sup>22</sup> World Trade Organization. Pasal 17 ayat (14) DSU

Based on the mentioned article, the recommendations of the Appellate Body are unconditionally accepted by the member states involved in the dispute, unless the DSB agrees not to adopt them. This makes the recommendation binding for the parties to the dispute.

Article 16 paragraph (4) regulates that the panel report can be endorsed through a DSB meeting unless there is an appeal decision by the party that causes the panel report cannot be ratified. Therefore, WTO recommendations or rulings are binding for the parties to the dispute therein. Article 3 paragraph (12) of the DSU explains that if a complaint is filed by a developing country to a developed country, the developing country has the right to use the dispute resolution provisions as stipulated in Decisions of 5 April BISD 14S/18 (Procedure 1966) relating to the period of the settlement stages which tend to be shorter when compared to the period stipulated in Article 4, Article 5, Article 6, and Article 12 of DSU.

The shorter period is intended to provide convenience to developing countries during the Panel's procedural process until the decision is rendered by the Panel. The 1966 Procedure also

provided an opportunity to facilitate good office to developing countries in an effort to produce solutions to disputed problems. Paragraph 1 of the 1966 Procedure states that,

*“If consultations between a less-developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less-developed contracting party complaining of the measures may refer the matter which is the subject of consultations to the Director-General so that, acting in an ex officio capacity, he may use his good offices with a view to facilitate solution”.*

By cutting the duration of dispute resolution through the 1966 Procedure, it will certainly provide convenience for developing countries, especially if the dispute has an impact on the national business activities of the country concerned or if the dispute involves perishable goods, where the dispute resolution period is vital for developing countries.

One example of the WTO's commitment to resolve disputes in a short time to developing countries is in the case of "European Communities – the ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001 (the

Banana Tariffs Arbitration I)"<sup>23</sup>. The case began when European Communities wanted to change banana import tariffs because it was related to the case of European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas) which at that time was known as the banana regime.

The adjustment of banana imports tariffs in The Banana Tariffs Arbitration I was carried out by European Communities by changing the import duty on bananas to 230€/t. On the basis of the tariff adjustment on 30 March 2005, Colombia, Costa Rica, Ecuador, Guatemala, Honduras and Panama, followed by the Bolivarian Republic of Venezuela, Nicaragua and Brazil requested an arbitration procedure to be carried out regarding the attitude of *the* European Communities.<sup>24</sup>

On August 1, 2005, an arbitral award was rendered to the parties involved in The Banana Tariffs Arbitration. This arbitration process took a relatively short time, considering that the request for arbitration

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<sup>23</sup> Award of the Arbitrator. *European Communities – The ACP-EC Partnership Agreement – Recourse To Arbitration Pursuant To The Decision Of 14 November 2001*. WT/L/616. 1 August 2005

<sup>24</sup> *Ibid* ¶ 6

procedure was filed on 30 March 2005 and the awarding of an arbitral award on 1 August 2005.

The second arbitration proceedings in the same case, namely “European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001 (the Banana Tariffs II)”,<sup>25</sup> even faster than The Banana Tariffs I. At that time, a second request for arbitration procedure was filed on 26 September 2005 with the awarding of an arbitral award by the arbitrator on 27 October 2005. It can be seen that the WTO is committed to providing convenience to developing countries in terms of dispute resolution by facilitating settlement procedures that tend to be quite short.

After the ratification of recommendations or decisions from the panel or Appellate Body through the DSB meeting, the next step is to supervise how the implementation of the decision. Within 30 days after ratification of the judgment, the disputing state shall inform it of its availability to implement the decision.<sup>26</sup>

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<sup>25</sup> Award of the Arbitrator. *European Communities – The ACP-EC Partnership Agreement – Recourse To Arbitration Pursuant To The Decision Of 14 November 2001*. WT/L/625. 27 October 2005

<sup>26</sup> World Trade Organization. Pasal 21 DSU

If the country cannot directly implement the decision, the time period for implementing the decision is determined through:

- a) The time period is determined between the disputed countries and accepted by the DSB, if not agreed, then;
- b) The period agreed by the parties is 45 days after ratification of the judgment, but if there is no agreement between the parties, then;
- c) The period of implementation is approved through arbitration proceedings within 90 days after the ratification of the recommendation or decision of the panel or Appellate Body.

With regard to supervising the implementation of the ruling, the WTO pays special attention to the developing countries that are parties to the dispute, where DSB must pay attention to the scope of trade in the issue or action complained of and how it impacts the economy of the developing country.<sup>27</sup> Compliance with the decision must be implemented as soon as possible in order to ensure an effective outcome for the parties, especially if the developing country is a party

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<sup>27</sup> *Ibid*

to the dispute. Therefore, DSB will continue to monitor how the implementation of the decision that has been given.

If the losing party in the dispute fails to implement the award within the period specified in Article 21 of the DSU, compensation and suspension of concessions may be made as a temporary remedy by the winning party. The suspension of concessions and other obligations is also referred to as retaliation as a final remedy and consequence imposed by the WTO on countries that do not comply to the decision that has been rendered. The act of retaliation is approved by the DSB and regulated in Article 22 of DSU and Agreement on Subsidies and Countervailing Measures (SCM Agreement) in Article 4 paragraph (10) and Article 7 paragraph (9) which is deemed a form of WTO effort in rebalancing trade activities between countries.<sup>28</sup> The retaliation reflects that non-compliance with the decision given by the panel or Appellate Body is very likely. Although basically the decision that has been passed through the DSB is

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<sup>28</sup> Spamann, Holger, The Myth of ‘Rebalancing’ Retaliation in WTO Dispute Settlement Practice, *Journal of International Economic Law*, Volume 9, Issue 1, March 2006, Pages 31–79, <https://remote-lib.ui.ac.id:2075/10.1093/jiel/jgi054>. hlm. 33



binding for the parties to the dispute, with the option of compensation or suspension of concessions, the losing party may choose to provide compensation rather than comply with the results of the decision. Using efficient breach theory as an analogy, member states can choose compensation options rather than if they have to implement the results of the judgment that has been given.<sup>29</sup> Non-compliance can occur due to differences in opinion and the complexity of existing disputes.<sup>30</sup> With regard to the issue of non-compliance, Judith Bello argues that,

*“The WTO rules are simply not ‘binding’ in the traditional sense. When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons, or gas. Rather, the WTO – essentially a*

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<sup>29</sup> Fukunaga, Yuka, Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations, *Journal of International Economic Law*, Volume 9, Issue 2, June 2006, Pages 383–426, <https://remote-lib.ui.ac.id:2075/10.1093/jiel/jgl007>. hlm. 396-397

<sup>30</sup> Lin, Tsai-Yu. “Compliance Proceedings under Article 21.5 of DSU and Doha Proposed Reform.” *The International Lawyer* 39, no. 4 (2005): 915–36. <http://www.jstor.org/stable/40708002>. hlm. 919

*confederation of sovereign national governments – relies upon voluntary compliance”.*<sup>31</sup>

Bello said that compliance from member states is voluntary, and if states do not want to comply, then there is no form of sanctions like if using other settlement mechanisms. Furthermore, Bello argues that when the verdict has been given, there are three scenarios that can be done by the losing side, namely:

- 1) the state may comply with the rendered judgment by withdrawing the disputed remedy or correcting it;
- 2) the state may still resort to the disputed action and choose to compensate for its non-compliance; and
- 3) does not change the disputed actions or policies and refuses to provide compensation and possible retaliation for his export activities.<sup>32</sup>

Moreover, the absence of any means to impose sanctions on member states that do not comply with the decisions of the panel or Appellate Body have given an advantage and allowed the developed countries to

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<sup>31</sup> Judith Hippler Bello. *The WTO Dispute Settlement Understanding: Less is More*. The American Journal of International Law. Vol. 90, No. 3. 1996. hal. 416-417

<sup>32</sup> *Ibid*

disobey the ruling.<sup>33</sup> If applied to one of the scenarios proposed by Bello to a case where the parties involved in the dispute are developed countries and developing countries. This can be detrimental to the developing countries, especially if the winning party to the dispute is the least developed country.

With the limitations of developing country economies, the implementation of concession deferral that will not harm developing countries itself is not possible. Retaliation carried out by developing countries is very unlikely to cause economic losses in developed countries. The unequal position in terms of economic or political power between the two disputing countries is certainly more pressing for developing countries that tend to be very dependent on developed countries.

This situation allows developed countries to choose compensation options, because the pressure exerted by developing countries is not strong enough to shake the position of developed countries. Hence, the one that might be harmed is the developing

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<sup>33</sup> Bechtel, Michael M., and Thomas Sattler. "What Is Litigation in the World Trade Organization Worth?" *International Organization* 69, no. 2 (2015): 375–403. <http://www.jstor.org/stable/24758119>. hlm. 379

country, even though the dispute is clearly won by the developing country.

Retaliation itself is permitted by the WTO in order to engender member states' compliance with the decisions of the panel or Appellate Body.<sup>34</sup> Retaliation has become a common practice by member states as a first resort in case of non-compliance.<sup>35</sup> It was also mentioned by the arbitrator on the EC – Bananas III dispute who held that,

*“the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned... this temporary nature indicates that it is the purpose of countermeasures to induce compliance. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is equivalent to the level of nullification or impairment.”*<sup>36</sup>

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<sup>34</sup> Sherzod Shadikhodjaev. *Retaliation in the WTO Dispute Settlement System*. Netherlands: Kluwer Law International. 2009. hal. 46

<sup>35</sup> Charnovitz, Steve. “Rethinking WTO Trade Sanctions.” *The American Journal of International Law* 95, no. 4 (2001): 792–832. <https://doi.org/10.2307/2674626>. hlm. 808

<sup>36</sup> Award of the Arbitrator. *European Communities – Regimes for the Importation, Sale and Distribution of Bananas (Recourse to Arbitration by the European Communities Under the Article 22.6 of the DSU)*. WT/DS27/ARB. 9 April 1999 ¶6.3

One example of the use of retaliation in the case of European Communities – Measures Concerning Meat and Meat Products (EC – Hormones) is when the arbitrator decides that,

*“The arbitrators decide that the suspension by the United States of the application to the European Communities and its Member States of tariff concessions and other related obligations under GATT 1994 covering trade in a maximum amount of US\$ 116.8 million per year would be consistent with the Article 22.4 of the DSU”<sup>37</sup>.*

An example of the act of retaliation by developing countries can be seen in the case of the United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling) carried out by Antigua and Barbuda to the United States, where Antigua and Barbuda underlined their status as developing countries which reinforced that retaliation will be ineffective to the United States. Quoting an opinion from Antigua and Barbuda who said that,

*“Antigua and Barbuda is by far the smallest WTO Member to have made a request for the suspension of concessions under Article 22 of the DSU and*

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<sup>37</sup> Award of the Arbitrator. *European Communities – Measures Concerning Meat and Meat Products (Hormones)*. WT/DS26/ARB. 12 Juli 1999 ¶84

*realises the difficulty of providing effective counter measures against the world's dominant economy...- the imposition of additional import duties on product imported from the United States or restrictions imposed on the provision of services from the United States by Antigua and Barbuda will have a disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country. Given the vast difference between the economies of the United States and Antigua and Barbuda, additional duties or restrictions on imports of goods and services from the United States would have a much greater negative impact on Antigua and Barbuda than it would on the United States"<sup>38</sup>.*

The arguments made by Antigua and Barbuda prove that although retaliation can be carried out by developing countries, the means is not economically effective. How can Antigua and Barbuda suspend concessions on services and goods imported from the United States while 48.9% of imported goods come from the United States<sup>39</sup>. Plus, these items are household items needed by residents of Antigua and Barbuda. Raising tariffs on those goods will only hurt the economies of both countries more deeply. This

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<sup>38</sup> Recourse by Antigua and Barbuda to Article 22.2 of the DSU. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. WT/DS285/22. 22 Juni 2007

<sup>39</sup> *Ibid.*

further shows the imbalance of power between developing and developed countries in the dispute settlement mechanism through the WTO.

In GATT, the purpose of retaliation is to restore the balance of concessions between the defendant and the plaintiff. While the WTO sets that the first purpose for plaintiffs to apply for retaliation is to cause compliance with the obligations that must be carried out by the defendant,<sup>40</sup> the potential for retaliation to induce compliance as stated by the arbitrator in EC – Bananas III only has a relatively insignificant effect if carried out by developing countries due to the ratio of dependence between developing and developed countries and the level of economic and political power between them is not equal, and the volume of trade affected by such retaliation will not produce considerable political pressure for developed countries<sup>41</sup>.

Trade disputes in the WTO involving developing countries as the claimants as described above are often found in disputes resolved through the DSB. As of the

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<sup>40</sup> Brendan P. McGivern. *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*. The International Lawyer Vol. 36. No. 1. 2002. hal. 144

<sup>41</sup> Jan Bohanes dan Fernanda Garza. *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*. Trade, Law and Development. Vol. IV No. 1. 2012. hal. 93

period 2018-2024, there are 15 disputes involving developing countries as plaintiffs and developed countries as defendants.

Of the 15 disputes, 11 are still in the consultation and panel formation stage. One of the disputes, namely "DS564 US – Steel and Aluminium Products (Turkey)" is in the appeal stage against the Panel report, then 1 other dispute, namely "DS600 EU and Certain Member States – Palm Oil (Malaysia)" which has circulated the results of the Panel's decision. The dispute "DS595 EU – Safeguard Measures on Steel (Turkey)" is already at the stage of providing notification of the implementation of the Panel's decision, and "DS547 US – Steel and Aluminium Products (India)" is at the stage where the parties jointly agree on a solution to the Panel's decision. The dispute between US and Turkey that registered as "DS564 US – Steel and Aluminium Products (Turkey)" resulted in the United States rejected the decision rendered by the Panel because in the United States there was a misinterpretation made by the Panel. Implementation of the Panel report was



therefore improvable and the United States decided to appeal against the ruling.<sup>42</sup>

On the other hand, Turkey argues that the appeal notification attached by the United States is not in accordance with the mandate in the Working Procedures for Appellate Review, but nevertheless it remains committed to following the dispute resolution process to the final stage. In addition, when viewed in cases in the period 2018 to 2024 that have been resolved, the response from the defeated developed countries shows the willingness of developed countries to comply with the results of the panel report that has been given. This shows that, although from the point of view developed economies have a more advantageous position, they still respect the panel's decisions. Although there are also developed countries that refuse to implement the results of the report such as "US – Steel and Aluminium Products (Turkey)" case.

Regarding non-compliance with the recommendations of the panel report that has been given, something similar has happened in the case of

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<sup>42</sup> Notification of an Appeal by the United States. *United States – Certain Measures on Steel and Aluminium Products*. WT/DS564/21. 30 Januari 2023

"US – Gambling" as mentioned earlier. In 2013, the WTO granted permission to Antigua and Barbuda to take retaliatory action against the United States in the form of suspension of Antigua and Barbuda's concessions and obligations to the United States relating to Intellectual Property Rights as stipulated in The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>43</sup> The same thing previously also experienced by the "EC – Bananas III" case, where Ecuador has the right to retaliate in the form of suspension of concessions and other obligations as long as they do not exceed the limits mandated by the panel and also the suspension of obligations related to matters stipulated in the TRIPS Agreement can also be requested by Ecuador.<sup>44</sup>

Based on the elaboration of the cases provided, it can be seen that in terms of dispute settlement

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<sup>43</sup> Award of the Arbitrator. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Recourse to Arbitration by the United States under Article 22.6 of the DSU)*. WT/DS285/ARB. 21 Desember 2007. Izin untuk melakukan retaliasi telah direkomendasikan oleh Panel dalam *awardnya* pada tahun 2007, kendati demikian otorisasi dalam melaksanakan retaliasi baru diberikan pada 28 Januari 2013

<sup>44</sup> Decision by the Arbitrators. *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*. WT/DS27.ARB/ECU. 24 Maret 2000

involving developing countries as claimants, the WTO provides relief in the process of the settlement stage. Furthermore, the WTO is also committed to ensuring the creation of a fair and equitable dispute settlement process. This is reflected in the permitting of retaliation efforts stipulated in WTO agreements.

### **C. Conclusion**

The rulings rendered by the WTO are binding on the parties involved in the case and are endorsed through the DSB. WTO rulings are not *stare decisis* in international law, as WTO rulings apply only to the countries involved and there is no obligation of the panel to use previous WTO rulings as the precedent in the dispute settlement process. Nevertheless, the ruling remains binding on the parties therein. Developed countries and developing countries have equal opportunities in resolving disputes through the mechanisms provided by the WTO. Although there is an imbalance of power between Member States, in terms of dispute resolution procedures, they still follow the procedural rules in accordance with what has been mandated by the WTO and the WTO, on the other hand, is committed to providing convenience for developing countries, which is not only limited to providing a short

time but also in supervising the implementation of decisions involving developing countries in disputes.

WTO is an international organization that has member countries with different economic strengths that leads to trade disputes between member countries. Through DSU, the WTO provides ease of dispute resolution with a short time for developing countries as participating countries in a dispute followed by the WTO's commitment to provide convenience for developing countries not only limited to providing a short time but also in supervising the implementation of decisions involving developing countries in disputes. The verdict that has been given by the panel or *the Appellate Body* may not be carried out by the losing state. In this case, the WTO provides compensation and suspension of concessions or retaliation that can be submitted by the winning party to the losing country in a dispute. The existence of compensation options and suspension of concessions seems to provide space for a country not to implement the decision given.

Although WTO rulings are binding on the parties involved as stipulated in Articles 16 and 19 of the DSU, non-compliance with the rulings may occur which may result in compensation and retaliation efforts being

implemented. However, if developing countries as the winning party want to submit retaliation to developed countries, the inequality of power between countries makes retaliation efforts not so effective. Given that developing countries depend on their national fulfillment through trade relations with developed countries, retaliation efforts, for example, carried out by raising tariffs do not bring economic benefits to developing countries.

The imbalance of position can be one of the causes of the state becoming non-compliant in implementing the decision. Therefore, although the WTO has guaranteed equality for its Member States in dispute settlement procedures, there is a need for other rules that more comprehensively regulate the implementation of judgments and compensation and concession suspension efforts. This is expected to ensure the legal certainty of Member States and increase the effectiveness of the implementation of the decision.

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