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The WTO Dispute Settlement System: Issues on Implementation

Yetty Komalasari Dewi¹

Lembaga Penyelesaian Sengketa pada World Trade Organization (WTO) adalah elemen yang penting bagi penegakan hak dan kewajiban para anggota WTO. Oleh karena itu, implementasi putusan Lembaga Penyelesaian Sengketa akan sangat mempengaruhi keberadaan WTO sebagai keseluruhan sistem. Terlepas dari keberhasilan Lembaga ini dalam memutuskan perkara di antara para anggotanya, ternyata kepastian pelaksanaan putusnya masih belum terlalu meyakinkan banyak pihak terutama the winning member(s). Tulisan ini akan membahas tentang berbagai alasan yang menyebabkan putusan Lembaga Penyelesaian Sengketa tidak dapat dilaksanakan. Disamping itu, tulisan ini juga akan menganalisis secara singkat posisi Indonesia terhadap Korea dalam perkara Korea-Anti Dumping Duties on Imports of Certain Paper from Indonesia.

I. Introduction

People had attempted to create an international trading system shortly after the World War II. Though, at that time, the establishment of the International Trade Organization (ITO) was not successful, many countries considered the General Agreement on Tariffs and Trade (GATT) as a principal institution for international trade². GATT itself was a multilateral agreement which was not intended to be an organization, but later in its development, it took a role as an international organization for example in conducting consultations and negotiations, applying

¹ Lecturer, Faculty of Law, University of Indonesia. The Paper was written for International Travel Program funded by EU-Indonesia Trade Support Program Ministry of Trade and was held on 5 – 16 May 2007 in Geneva and Brussels.

² John H. Jackson, *The World Trading System*, (Cambridge, MA: MIT Press, 2nd ed., 2000), 37.

rules in international trade as well as administering the implementation of trade agreements.

The World Trade Organization (WTO) was established in 1995 as a result of the Uruguay Round of multilateral trade negotiations (1986-1994)³. It is an international organization that sets global rules of trade between nations. The core of the WTO system, referred to as the multilateral trading system, is the WTO agreements which lay down the legal ground rules for international trade as well as the market-opening commitments taken up by its Members. These agreements are negotiated and signed by all Members of the WTO, and ratified in their parliaments.

Ever since its establishment in 1995, at the end of the Uruguay Round of global trade negotiations, the WTO has been important as a dispute settlement mechanism between and among its members. Dispute settlement is, unquestionably, fundamental for a multilateral trading system. As understood, the rule based-system would not be effective if there was no forum to settle disputes. When the WTO Agreement was signed in Marrakesh in 1994, its new procedures for implementing dispute settlement rulings were widely applauded as a significant improvement over the procedures codified and practiced under the General Agreement on Tariffs and Trade (GATT)⁴. The WTO Dispute Settlement Mechanism⁵ applies principles of fairness, open-dealing, and it results in mutual benefit

³ The Results of The Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, (Cambridge, UK: University Press, 1999), iii.

⁴ Ernst-Ulrich Petersmann, Future Challenges for the WTO Dispute Settlement Mechanism. From Y. Taniguchi *et alii* (eds), The WTO at Ten: Dispute Settlement, Multilateral Negotiations, Regional Integration (Cambridge: University Press, 2006), 1.

⁵ In this paper, the writer uses the word "Dispute Settlement Mechanism" and "Dispute Settlement System" interchangeably.

for Members in the trade relations⁶. Since the ultimate goal of the WTO is to improve global welfare by helping the citizens of Member countries to gain the most benefit from participation in the global economy, it is understood that the Dispute Settlement System preserves the same goal as well, i.e. by applying 'rules' rather than 'power' to balance the competing interests of Members countries. However, it should be borne in mind that the purpose of the WTO Dispute Settlement System is to help Members to find balance between serving firms and consumers in their own economies and ensuring that this 'service' does not hamper the trade to the economy as a whole or the global economy in the long run.

Basically, disputes in the WTO are about not keeping trade-commitments. When a Member country applies a trade policy measure that is considered by other Members to be violating the WTO agreement, a dispute then arises. It often begins with a Member's domestic regulation that intended to help its commercial interest but turns out to hurt the interests of other Members. In this respect, the Dispute Settlement System helps to restore the balance by interpreting and applying the rules of the trading system to that particular circumstance⁷.

Over the past ten years since 1995, more than 340 disputes were filed and settled under the WTO Dispute Settlement Understanding through a panel or the appellate body⁸. Despite its success in settling disputes, the question of ensuring the losing Member complies with the Dispute Settlement Body's rulings is a remaining

⁶ Kaarlo Carsten, Appellate Body Secretariat, interviewed held in Geneva, May 9, 2007 at WTO Building.

⁷ Peter Gallagher, *WTO: Guide to Dispute Settlement* (The Hague: Kluwer Law International, 2002), 3.

⁸ Ernst-Ulrich Petersmann, *supranote* 4. See also Kara Leitner and Simon Lester, *WTO Dispute Settlement 1995-2004: A Statistical Analysis*, *Journal of International Economic Law* 8(1), Oxford University Press: 2005, p.231-244.

problem. In addition, securing the winning Member's interest is still time-consuming, not to mention that there is no interim relief, compensation or reimbursement. Moreover, in the event of non-implementation, not all members have the same practical ability to resort to the suspension of obligation (or retaliation)⁹.

To date, disputes at the WTO are settled mainly on the basis of the rule of law. Each member country has equal rights within the system as well as an equal obligation to accept the results. Over ten years of dispute settlement experience in the WTO framework have revealed a phenomenon that developed and bigger member countries have by far been the most active users of the Dispute Settlement System namely the United States and the European Communities¹⁰. In this respect, 46% of the total complaints have involved either the United States or the European Communities as a complaining party and 43% of the total complaints as the responding party¹¹.

It is worth to note that up to date, developing countries have not yet fully reaped the benefits of the system, although there has been increasingly in number of cases brought before the Dispute Settlement Body by developing countries. During the period from 2000-2004, developing countries have filed request for consultations in 62% of the total requests filed¹². For example, Brazil has been particularly active by initiating 9 consultation requests¹³. It seems that developing countries have found the WTO

⁹ Johann Human, WTO-Rules Division, interviewed held in Geneva, May 9, 2007 at WTO Building.

¹⁰ As seen in Table 1 and 2, Annex 1 of this paper.

¹¹ *supranote*.

¹² Armin Steibach, The WTO Dispute Settlement Procedure under Review – How to Induce Better Compliance?, accessed on <http://proquest.umi.com> on 13 April 2007.

dispute settlement system to be a useful mechanism to deal with their trade disputes and use it not only against developed but also developing countries. Thus, using the dispute settlement mechanism is crucial to full participation in the WTO.

Realizing the wide-spread issues on dispute settlement within the WTO, this paper will only focus on the implementation aspect of the Dispute Settlement Body Rulings. It will first present a brief overview of the WTO dispute settlement system. It will then move on to discuss some obstacles in implementing the result of dispute settlement body faced by the winning member. The last part of this paper will discuss retaliation process within the Dispute Settlement Mechanism. The paper will also briefly discuss the possibility of Indonesia retaliating in the case against Korea in the imposition of Anti-Dumping Duties on Import on Certain Paper.

II. Brief Overview of the WTO Dispute Settlement Mechanism Basic Procedure¹⁴

An important feature of the WTO is the establishment of a dispute settlement mechanism which has functioned quite well over the years. The reason is perhaps because the dispute mechanism under the WTO is much better compared to that under the GATT regime¹⁵. Under the GATT regime, dispute resolution worked only if the member countries involved voluntarily accepted both the jurisdiction of the arbitral panel and its ultimate ruling¹⁶. Such ruling could take years to obtain not to mention that a Member could block the process from moving forward¹⁷. In the WTO

¹³ William T. Davey, *The WTO Dispute Settlement System: The First Ten Years*, *Journal of International Economic Law* Vol.8 No. 1, Oxford: University Press, 2005), p.17-50

¹⁴ Standard Procedure or Standard Mechanism.

¹⁵ Carsten and Human, *supranotes* 6 and 9.

¹⁶ <http://www.wto.org> , *Understanding the WTO: Settling Dispute*, accessed on 16 April 2007.

system, some improvements in this regard were contemplated. As the result, Members can no longer block the process at any point, Panels must render their decisions within established time-frames, and decision from the Appellate Body is final and binding¹⁸. The increasing involvement of Less Developed Countries in WTO dispute settlement system, the decreasing number of appeals from panel cases, as well as the relatively high records of the implementation of WTO dispute settlement rulings, are further evidence that the WTO dispute settlement mechanism function reasonably well¹⁹.

The WTO Dispute Settlement Mechanism is governed by the Dispute Settlement Understanding (DSU). It marks a major extension of the rule of law and a system of court. Apart from the GATT dispute settlement mechanism which applied a "consensus" rule, in the WTO, such rule was reversed by a "negative" rule²⁰. This means that rulings are automatically adopted unless there is a consensus to reject a ruling. In other words, any member wanting to block a ruling has to persuade all other WTO Members, including its adversary in the case, that the ruling should not be adopted. The mechanism also provides for appellate review and applies strict time-frames in resolving a dispute. The WTO Dispute Settlement System is considered as an integrated mechanism since it applies to the WTO Dispute Settlement Understanding²¹, the covered agreements²² and the special or additional or procedures²³. In

¹⁷ Susan Esserman and Robert Howse, *The WTO on Trial*, Journal of Foreign Affairs, Vol. 82 No.1, p.132.

¹⁸ Ernst-Ulrich Petersmann, *Supranote 4*.

¹⁹ Ernst-Ulrich Petersmann, *Supranote 4*.

²⁰ Negative rule means that in order to block any procedure, a member country will have to persuade all the member countries to agree with its view, including its opponent.

²¹ DSU, WTO Agreement, Annex 2.

²² DSU, Appendix 1.

addition to the Dispute Settlement Understanding as the main source of law in settling dispute, other sources of law is other relevant procedural provisions²⁴ as well as working procedures either for Panels²⁵ or for Appellate Review.

As the function of the dispute settlement mechanism is to maintain the balance of rights and obligations of Members,²⁶ it is mandatory for Members to bring any litigation relating to any 'covered agreement' to the dispute settlement mechanism. The system itself is based on rules, whereas the central concept is nullification or impairment of a benefit as a result of a violation or in the absence of a violation²⁷.

The Dispute Settlement Mechanism has a two-fold objective i.e. to provide predictability and security in international trade as well as to offer an efficient and effective resolution of trade disputes²⁸. In order to achieve such objectives, the dispute mechanism is designed to be mutually agreed (by disputing Members), flexible and binding²⁹.

The institution responsible for settling disputes is Dispute Settlement Body that consists of all WTO Members. The DSB has the sole authority to establish a panel of experts to consider the

²³ DSU, Appendix 2.

²⁴ They are contained in a number of other WTO Agreements.

²⁵ DSU, Appendix 3.

²⁶ DSU, Article 3.2.

²⁷ DSU, Article 3.3.

²⁸ *Supra* note 15.

²⁹ DSU, Article 3.6.

case, to accept or refuse the panel's findings or the results of an appeal³⁰. It also has the power to supervise the implementation of the rulings and recommendations, and has the power to authorize retaliation when a member country does not comply with a ruling. Besides the panel, there is also an Appellate Body to render its judgment on the case once it is appealed. It should be understood that a panel and the Appellate Body in this respect are not tribunals because they produce reports rather than binding judgments. Therefore, in order to have legal force, the Panel and Appellate Body Reports must be adopted by the DSB. It should be understood that these reports do not create binding precedents as they only apply to the disputing Members and the matter at issue³¹.

When a dispute arises, the DSU governs various methods that can be used for settling such dispute. A complaining member may seek recourse through consultations, adjudication, arbitration and good offices, conciliation and meditation³². The latter has never been used by Members, and now the use of it is being encouraged by Dispute Settlement Body. As of 31 July 2005, 279 requests for consultations have been made. The most active complainant was the European Communities (38%) and the United States (23%), whereas developing countries came in the last (19%)³³.

Generally, if a member country thinks that its interest is violated by a certain trade measure from any other member country, it has the right to bring the measure at issue before the Dispute Settlement Body. The Dispute Settlement Understanding provides five stages mechanism to resort the dispute, i.e.³⁴:

³⁰ DSU, Article 2.1.

³¹ DSU, Article 3.9.

³² DSU, Article 5.

³³ <http://www.wto.org>, accessed on 16 April 2007.

1. consultations conducted by the disputing members;³⁵
2. resolution of the dispute by an independent body, i.e. panel proceedings aimed at resolving legal disputes;
3. appellate review of 'issues of law covered in the panel report and legal interpretations developed by the panel';³⁶
4. adoption of dispute settlement rulings and their implementation under the surveillance of the Dispute Settlement Body; and
5. authorization of countermeasures in case of non-compliance with the WTO dispute settlement rulings.

In order for WTO to function effectively, prompt dispute settlement is essential. Within the WTO timetable, if a case runs its full course to a first ruling, normally it should take less than one year up to 15 months if the case is appealed³⁷. However, if the case involves perishable goods, it is accelerated as much as possible³⁸. Even though dispute settlement process in WTO resembles a court or tribunal process, the preferred solution is to enable the disputing parties resort the problem by themselves. Therefore, the first step is consultations between the members concerned and trying to settle their differences. If it does not work, the members can still ask the involvement of the Director-General to assist them in settling their dispute. Consultation and mediation are still possible during the whole process of dispute settlement.

If consultation fails, the complaining member can ask for the establishment of Panel. In this step, the responding member may block such establishment once, however in the second meeting of

³⁴ Ernst-Ulrich Petersmann, *Supranote* 4. Confirmed also by Carsten & Human.

³⁵ Sometime also political settlement.

³⁶ DSU Article 17.6.

³⁷ Niall Meagher, Senior Counsel of Advisory Center for WTO Law (ACWL), interviewed held in Geneva, May 10, 2007 at ACWL Building.

³⁸ DSU Article 4.9.

the Dispute Settlement Body, the establishment of such panel can no longer be blocked unless there is a consensus against establishing the panel. Formally, the panel is assisting the Dispute Settlement Body make rulings or recommendations. However, its decision is difficult to overturn since the panel's report can only be rejected or refused by consensus in the Dispute Settlement Body. The panel's findings have to be based on the agreements cited. The panel's final report should be furnished to the disputing parties within 6 months. But in case of urgency in terms of perishable goods, the deadline is shortened to three months.

B. Appeal Procedure

One of the most important aspects of the WTO Dispute Settlement Mechanism is the opportunity for appellate review, a possibility that did not exist under the GATT 1947³⁹. An appeal is commenced by giving notice in writing to the Dispute Settlement Body and filing a Notice of Appeal with the Appellate Body Secretariat⁴⁰. Parties other than the original appellant may join the appeal by filing a Notice of Other Appeal⁴¹. In this regard an appeal of panel's ruling to the Appellate Body has to be based on issues of law and legal interpretation and not issues of facts⁴². Thus, the Appellate Body does not reexamine existing evidence or examine new issues. Each appeal is decided by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body⁴³. The outcome of the Appellate Body upholds,

³⁹ Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2004: A Statistical Analysis*, *Journal of International Economic Law*, Vol.8 No. 1 (Oxford: University Press, 2005), p.231-244.

⁴⁰ Rule 21(1) of the Working Procedures.

⁴¹ Rule 23(1) of the Working Procedures.

⁴² DSU Article 17.6.

⁴³ DSU Article 17.1.

modifies or reverses the panel's legal findings and conclusions⁴⁴. With respect to timetable, an appeal should not last more than 60 days and maximum of 90 days. One of the issues regarding the Appellate Body is that it has too often made it difficult for domestic agencies to administer trade remedies in an expeditious and cost-effective fashion⁴⁵. As of 25 January 2005, the total number of circulated reports that were appealed is 67 constituted the percentage of panel reports appealed to date is 73%⁴⁶.

III. Implementation of Dispute Settlement Rulings

A. Compliance Issue

The pivotal objective of the Disputes Settlement System is the resolution of trade-related disputes between WTO members. As the Dispute Settlement Understanding makes clear, in cases where a violation of the law is found, removal of the inconsistent measure is the goal. In other words, the purpose of settling dispute is to induce compliance from the losing member to withdraw its trade measures that are inconsistent with WTO law⁴⁷.

The DSU rules governing the implementation on WTO rulings were intended to correct the most common criticism of the prior, ineffective GATT procedures, that the losing GATT party could permanently evade compliance without fear of adverse consequences⁴⁸.

⁴⁴ DSU Article 17.13.

⁴⁵ *Supranote 4*, p.136.

⁴⁶ *supranote 39*.

⁴⁷ DSU, Article 22.1. This has also been ruled and confirmed by arbitration panels stating that "the purpose of (DSE) countermeasures is to induce compliance". WT/DS27/ARB, EC-Bananas, 9 April 1999, para 6.3.

⁴⁸ See, e.g. EC Failure to Comply with WTO Rulings on EC Banana Regime: US Position (Tan.1999), p.2.

Hence, it has to be admitted that although the WTO system makes it easy to litigate a dispute and secure a legal ruling, it unfortunately does not provide a structured way to achieve negotiated settlement.

Because WTO rulings under the new WTO procedures have been implemented to the satisfaction of the winning member more often than before, some may insist that the implementation procedures function in an effective manner. Today, as the WTO concludes its 50 year of operation, its dispute settlement implementation procedure is still being debated⁴⁹. There is extensive debate as to the effectiveness of the dispute settlement mechanism and its capability to provide accurate incentives in order to satisfy the ultimate goal of the Dispute Settlement Understanding, i.e. preserving rights and obligations of the member countries. In other words, it has to be admitted that there is a problem of ensuring the dispute settlement body's decision is enforced on the losing party.

Under the DS Mechanism, once the DSB adopts the rulings and recommendations from a Panel or an Appellate Body, it does not automatically implementable by the losing member since the DSU stated that 'decision should be implemented immediately'⁵⁰. The provision does not explicitly elaborate or set up certain criteria as to what is meant by 'immediately'. As a result, the losing member under the DSU may be entitled to an extended implementation grace period, even if it is virtually certain from the beginning of that period that the losing member does not intend to comply. Moreover, Article 22 stipulates that suspension rights are only accorded on a prospective basis following the expiration of the reasonable period and the losing member has every incentive to seek the longest

⁴⁹ Carolyn B. Gleason and Pamela D. Wather, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, *Journal of Law and Policy in International Business*. Washington : Spring 2000. Vol.31.p.709.

⁵⁰ DSU, Article 11.

possible grace period permitted under the system. During that grace period, the winning member has no right to initiate a compliance review, even if it becomes obvious well before the expiration of the reasonable period that the losing member will be out of compliance its deadline. When the deadline arrives, and the losing member is subsequently found to be out of compliance, the Dispute Settlement Understanding applies no penalty for that losing member's bad faith application of the grace period, even though that period was intended to be used exclusively to ensure full implementation.

The disputes over non-compliance that have cast doubt on the system are essentially those that have led to formal non-compliance actions. WTO implementation procedures create an undesirably long timetable for the complaining member. From 1995 to 1999, the overall average time from panel establishment to report adoption was more than 15 months, as opposed to the 12 months' pursuant to the DSU for appealed cases⁵¹. Some cases even take much longer, for example the EC Bananas case. In this case, the report was adopted in 1997, a final settlement was reached only in 2001, and full compliance with WTO rules is not required by the settlement until 2006 whereas the retaliatory measures had been in effect for almost two years⁵². In this regard, there has been a notion to improve incentives or sanctions under the DSU in order to achieve the WTO's implementation objective of 'prompt compliance'⁵³.

On the other hand, in order to ensure a losing Member would not have to open-ended timetable to comply that they had under GATT, the WTO-DSU has established procedures for fixing the losing member's deadline for implementing dispute settlement rulings and recommendations. Article 21 of the DSU stated that prompt compliance on the part of the losing member is essential in

⁵¹ William T. Davey, *supranote* 13.

⁵² William T. Davey, *supranote* 13.

⁵³ DSU, Article 21.1.

order to ensure effective resolution of disputes to the benefit of all Members⁵⁴. Yet, the article also governs that in the case that immediate compliance is impossible, it permits Members to have a 'reasonable period of time' to implement the rulings⁵⁵. Under the terms of Article 21(3), the reasonable period of time can be set in one of three ways, i.e. firstly, the losing member can propose a period that the DSB would approve; secondly, the disputing members (winning and losing members) can agree on an implementation period within 45 days following adoption of the ruling; thirdly, if the first two methods fail, the period can be set by binding arbitration, to be completed within 90 days after the adoption of the ruling. The Article does not precisely define the meaning of 'reasonable period'. It only states that the reasonable period of time should not exceed 15 months from the date the ruling was adopted⁵⁶. Ultimately, this period of time for implementation may be determined by the Dispute Settlement Body according to the circumstance of a case, even though the DSU emphasizes that 'prompt' compliance action is essential⁵⁷. The Understanding recommends no longer than 15 months from the date of adoption of the Panel report and Arbitrators have tended to treat this as the maximum period.

The Dispute Settlement Understanding governs that once the Panel or Appellate Body reports were adopted by Dispute Settlement Body, the losing member is bound to comply with recommendations and rulings of the Dispute Settlement Body immediately. If complying with the recommendations immediately is impractical, the losing member will be given a 'reasonable period of time' to do so. If it fails to commence within this period, it has to enter into negotiations with the complaining member (or members) in order to determine mutually acceptable compensation.

⁵⁴ DSU, Article 21.1.

⁵⁵ DSU, Article 21.3.

⁵⁶ DSU, Article 21.1 and 21.3 c.

⁵⁷ DSU, Article 3.3 and 21.1

However, if no satisfactory compensation is agreed to after 20 days, the complaining member may request the Dispute Settlement Body for authorization to impose trade sanctions against the losing member. The Dispute Settlement Body must provide its consent within 30 days of the expiry of the 'reasonable period of time' unless there is a consensus against the request. Essentially, the sanctions should be imposed in the same sector as the dispute, but if it is considered to be ineffective, the sanctions can be imposed in a different sector of the same agreement. If it is still impossible to implement and the circumstances are serious enough, such action can be applied under another agreement. The objective of this very careful step is to minimize the chances that the actions spilling over into unrelated sectors while at the same time allowing the actions to be effective. The whole process should not exceed 15 months⁵⁸. The Dispute Settlement Body supervises how adopted rulings are implemented.

B. Surveillance Issue

Article 21 of the DSU states that the losing member is required to submit few interim requirements between the time the losing member must inform the DSB of its intentions in respect of implementation of the rulings and recommendation of the DSB and the time the member reasonable period expires months later⁵⁹. However, the losing member is not required to identify the measure it will seek to remove or implement, nor is it required to specify any sort of implementation schedule. It needs not even consult with the winning member who may be concerned about whether the implementation period is being used in good faith.

Apart from the ultimate requirement that the member come into full compliance at the conclusion of the reasonable period, the only intervening obligation on the losing member is that it provides a

⁵⁸ DSU, Article 21.3.c .

⁵⁹ DSU, Article 21.3.

'status report' at regular intervals, beginning six months into the reasonable period. That report is all the DSB can insist upon for purposes of fulfilling its obligation to 'keep under surveillance the implementation of adopted recommendations or rulings'⁶⁰. Despite the minimum requirements imposed upon the losing member during the reasonable period, nothing in the DSU prevents the losing member from consulting closely with the winning member during that period.

Once the reasonable period is underway, the DSB is required to keep the losing member 'under surveillance'⁶¹. To assist the DSB fulfill that responsibility, six months into the losing member's implementation period, that member must begin providing 'status reports' at all scheduled DSB meetings on a regular basis. Only these reports are required of the losing member during its compliance period.

According to Article 22 (8) of the DSU, the Dispute Settlement Body must continue to keep under surveillance the implementation of the recommendations or rulings it has adopted. This includes cases where compensation has been provided or concession or other obligations have been suspended-retaliation is applied-but the recommendations to bring a measure into conformity with WTO law have not been implemented.

IV. Retaliatory Measure: Is it effective?

The Dispute Settlement Mechanism recognizes what so called non-implementation. Non-implementation occurs when the losing member fails to bring its measure into conformity with its WTO obligations within the reasonable period of time. In such circumstance, the complaining (winning) member is entitled to resort to temporary measures, which can be either compensation or

⁶⁰ DSU, Article 21.6.

⁶¹ DSU, supranote 24.

the suspension of WTO obligations⁶². All of these temporary measures are not preferred to full implementation of Dispute Settlement Body recommendations and rulings⁶³. When a Panel does render decisions, its standard remedy is to recommend that the losing member change its laws or practices. A losing member, understandably, might have domestic political difficulties in doing so. Another distinctive feature of the World Trade Organization's system is that if the losing member fails to comply with a ruling, an arbitral panel may award the winning member the right to retaliate through trade restriction⁶⁴. The question is then lies on whether such measure (retaliation) will be effective in ensuring the compliance of the losing member. There are many proposals to address this issue yet the solution is still unreachable.

Addressing non-compliance through retaliatory measure can be ineffective⁶⁵. One of the reasons is because such trade restriction may not be enough to encourage powerful WTO members such as the United States or the European Communities (EC) to bring their laws or regulations in conformity with the result. For big countries, being less vulnerable to potential retaliation is a matter of fact might be favored due to the size of their economy and their capability to exercise pressure in trade disputes to achieve a favorable economic resolution. Conversely, for developing or less developed countries, such sanctions can be devastating. When a developing country wins a dispute against a developed country which refuses to comply, the prevailing developing country can exert only scant pressure on the losing developed country⁶⁶. In other words, for developing

⁶² Retaliation refers to compensation or other suspension of WTO obligations.

⁶³ DSU, Article 3 .7 and 22 .1.

⁶⁴ DSU, Article 22 .1.

⁶⁵ Niall Meagher, *supranote* 37.

⁶⁶ *Supra* note 3.

countries, retaliation is not an effective option. It is because they usually have much smaller markets, thus importing goods and services are much more important to their development⁶⁷. Moreover, retaliation has the preserve effect of crating further distortions of trade through re-imposition of import barriers and may actually do harm to the interest of the winning member. Implying that WTO members are retaliating against the losing member will only impose additional cost on society. Under the WTO system, DSU expresses a preference for compensation over suspension of concessions but notes that compensation is 'voluntary', and that either compensation or suspension of concessions are not preferred options to full implementation⁶⁸. If compliance is not achieved within the time period specified, the losing member can offer compensation until compliance occurs⁶⁹.

There have been at least two proposals to deal with this issue. The first proposal was brought up by Brazil and Uruguay. Their proposal is that the losing member, the one that has already been proven 'guilty' of illegal trade practices, should pay a fine equal to the value of damages assessed by the Panel⁷⁰. According to the proponents of this view, if the ultimate goal of the DSU is compliance, then monetary damages are able to be more of an incentive for the non-compliant member, given the fact of budgetary constraints⁷¹. This would provide developing countries a favorable alternative to the imposition of retaliation measures. However, objections were addressed to this proposal stating that it

⁶⁷ Supra note 3.

⁶⁸ DSU, Article 22.1.

⁶⁹ DSU, Article 22.2.

⁷⁰ International Financial Institution Advisory Commission (Meltzer Commission), Report March 2000, *supranote* 3.

⁷¹ *Supranote* 3.

was inconceivable that national legislatures would be willing to vote budgetary provisions for this purpose⁷².

The second proposal is to make compensation compulsory, meaning that the losing member will offer additional trade concessions in another products category. Thus, the losing member will have to reduce its trade barrier. The obvious advantage of trade compensation is that it liberalizes trade as opposed to generating additional trade barriers. Moreover, compensation is to be offered not only to the winning member, but also to all WTO members in accordance with the most-favored-nation rule⁷³.

To this end, alternatives to retaliatory measure should be available in cases where the losing member does not comply with a panel rulings. Although rules governing dispute settlements works relatively well as a mechanism that exercises discipline, there are considerable flaws that need to be addressed in the framework of the DSU in order to ensure certainty of incentives to abide by WTO rules and equality between big and small member states. The significant increase in participation of small counties in WTO dispute settlement in recent years indicates a reduction of barriers to the initiation of disputes. It is hoped that once the merits of trading rules have become less disputable, it will be increasingly difficult to justify the refusal of more effective enforcement resolutions.

V. Possibility of Retaliatory Measure: Indonesia-Korea Certain Paper Case

This is a case brought by Indonesia with Canada, China, the European Communities, Japan and the United States as third-party against Korea. On 28 November 2005, the DSB adopted the Panel Report. The official title is "Korea – Anti-Dumping Duties on

⁷² Report of the Ad Hoc Group on Legal Amendments to the General Agreement.

⁷³ DSU, Article 22.1, WT/DS10/19, Japan-Taxes on Alcoholic Beverages, Japan offered compensation on an MFN basis.

Imports of Certain Paper from Indonesia', the official WTO case number is 312.

The Issue:

The case was originated by Korea's imposition of definitive anti-dumping duties on imports of business information paper and uncoated wood-free printing paper from four Indonesian companies and China.

Indonesia considers Korea violated its obligations with respect to Korea's initiation of investigation, in spite of its failure to provide sufficient evidence of dumping, injury and causal link. Indonesia also alleged that Korea failed to provide a legal basis of its allegation of injury. Indonesia claimed that Korea acted improperly by disregarding and rejecting domestic sales data submitted by two Indonesian companies without outlining its reason. Indonesia also alleged that Korea violated its obligation with respect to its preliminary⁷⁴ and final determination⁷⁵.

The rulings:

In its Report, the Panel found that the Korean Trade Commission acted inconsistently with certain provisions of the Anti-Dumping Agreement in determining the margin of dumping for one Indonesian company, in failing to provide a proper disclosure of the verification results and details of the calculations of the constructed normal values for two Indonesian companies, as well as in failing to exercise special circumspection in the use of information from secondary sources instead of domestic sales data

⁷⁴ In regard to: like products, constructed value, best information available, denial of access to information, and the refusal to provide an opportunity to the exporters to present their views. WT/DS312/R.

⁷⁵ In regard to: like products, individual dumping margins, constructed value, treating a certain firm and other firms as a single economic unit; the impact and effect of the dumped imports on the domestic industry and prices in the domestic market, failure to evaluate all relevant economic factors and indices, and denial of access to information. WT/DS312/R.

provided by these two Indonesian companies. The Panel also found that in determination of the injury, the Korean Trade Commission erred by not requiring the applicants show good cause for treating the confidential information as confidential.

However, the Panel concluded that the Korean Trade Commission did act consistently with the certain articles of the Anti-Dumping Agreement in resorting to facts available with respect to two Indonesian companies, in rejecting the domestic sales data submitted by these two companies, in using constructed normal values for them, in treating three Indonesian companies belonging to the same group as a single exporter and assigning a single margin of dumping to them. The Panel also concluded that the Korean Trade Commission did act consistently in its price analysis, in its treatment of dumped imports made by the Korean producers from the subject countries and in disclosing its determination concerning the effect of the price of dumped imports on the Korean industry.

The Panel rejected Indonesia's request that the Panel suggest that Korea bring its measures into conformity with its WTO obligations by revoking the anti-dumping measure at issue.

The Panel also stated that under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent Korea acted inconsistently with the provisions of the Anti-Dumping Agreement, Korea nullified or impaired benefits accruing to Indonesia under that agreement. Therefore the Panel recommended that the Dispute Settlement Body request Korea to bring its measures proven to be inconsistent into conformity with its obligations under the WTO Agreement.

Lesson for others:

Although Indonesia and Korea had agreed that the reasonable period of time shall be eight months, expiring on 28 July 2006 and

informed such agreement to the DSB. There is no indication of compliance from the Korea. On 22 December 2006, Indonesia requested the establishment of a compliance panel under the Article 21(5) DSU. Up to date, since the adoption of the Panel Reports by the DSB, there is no indication that Korea will implement the DSB ruling. It should be considered that the DSB is aware of this situation, but there is no step taken to compel Korea brings the measure at issue into conformity with its rulings. In this circumstance, Indonesia has to demand other option to ensure Korea complies with its obligation. At the moment, Indonesia is in the middle of preparing request for the establishment of compliance panel⁷⁶.

With respect to the WTO Dispute Settlement System, it has to start considering the establishment of a measure that can effectively induce its member countries to enforce its ruling. If not, member countries that consider its rights or benefits have not been upheld and protected by the WTO system, will perhaps reconsidered its membership. Accordingly, even the best international organization is not worth very much if the members' rights or obligations cannot be enforced when one of the members fails to comply with such obligations.

VI. Conclusion

The Dispute Settlement Body comprised of Panels and Appellate Body has shown that international tribunals can indeed function independently, with judges basing their rulings on the rule of law rather than on their national affiliation. Since the WTO rulings are unarguably directly affected the interests of citizens, the system as a whole and the legitimacy of the rulings depend on the transparency of the judicial process. Thus, the system in the WTO will only be as good as the procedures established to enforce them. In light of implementation and compliance issues, efforts to provide

⁷⁶ Indonesia Resource Persons in Indonesian Embassy for WTO: Mr. Gusmardi Bustami, Mr. Agus Saptono and Mrs. Nurlaila. It is also confirmed by Nail Meagher from ACWL who supported Indonesia in the implementation phase in Korea-Anti Dumping Duties on Imports of Certain Paper From Indonesia.

alternative options for compliance have to be considered. In regard to retaliatory measures, the WTO system must consider providing other effective measure to oblige the losing member change its laws and regulations so as to correspond with the laws and regulations under the WTO.

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Annex 1:

Table 1. Complaining Parties in WTO Disputes since 1995-2004

Countries	Total Dispute
Brazil	22
Canada	26
Chile	9
European Communities	68
India	16
Japan	12
Korea	12
Mexico	13
United States	80
Other-Developed	18
Other-Developing	75
Other-Least Developed	1
Total Dispute	352

Table 2. Responding Parties in WTO Disputes since 1995-2004

Countries	Total Dispute
Brazil	12
Canada	13
Chile	10
European Communities	51
India	17
Japan	14
Korea	13
Mexico	12
United States	88
Other-Developed	24
Other-Developing	70
Other-Least Developed	0
Total Dispute	324

Source:

- The figures in the tables are based on Kara Leitner and Simon Lester, WTO Dispute Settlement 1995-2004: A Statistical Analysis, Journal of International Economic Law, Vol. 8 No, 1, Oxford: University Press, 2005, page 234.
- The classification of developed, developing or least developed countries is based on the Agreement Establishing The Advisory Center on WTO Law, can be accessed on <http://www.acwl>

Annex 2:

RESOURCE PERSONS

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