



# THE REFORM OF DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANIZATION: CONTRIBUTION AND PERSPECTIVES FROM INDONESIA

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## ABSTRACT

The WTO dispute settlement system is currently in crisis as the Appellate Body has been unable to perform its appellate review since December 11th, 2019. The US asserted that the AB has exceeded its authority. The crisis can be detrimental, especially for developing countries in international trade. The WTO Members have made efforts to reform the system. This paper uses qualitative and descriptive research to analyse the contribution of Indonesia to the system and its perspectives on the reform negotiations.

Indonesia has contributed to the system and the Organization by clarifying interpretations of WTO agreements. In the reform negotiations, Indonesia has actively participated by joining a proposal to commence the selection of new AB members, supporting the result of "Walker Process" negotiations as a basis for future negotiation, and making some proposals such as formal communication to the WTO on a process in an informal process to implement the mandate of MC12 Outcome Document. As a negotiation strategy, Indonesia should continue its active participation by prioritizing accessible aspects that are interests of developing and LDC members, emphasizing the need to limit negotiation scope and urging the fulfilment of the 2024 deadline, safeguarding a legalistic system, and conducting a comprehensive analysis on two-tier litigation.

**Keywords:** WTO Dispute Settlement System; Crisis; Contribution of Indonesia.

## I. INTRODUCTION

### 1.1 Background

The majority of economists agree that countries can benefit from international trade<sup>1</sup>. International trade between nations is a crucial factor in improving living standards, providing employment opportunities, and offering consumers a diverse range of goods<sup>2</sup>. In the modern economic era, we have witnessed for over 70 years how trade liberalization has significantly contributed to global economic growth<sup>3</sup>.

Not only for economies, but "free" trade also fosters world peace<sup>4</sup>. As quoted from the 19th-century French economist Frederic Bastiat, "when goods don't cross borders, soldiers will." History

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<sup>1</sup> Bossche, Peter Van den dan Werner Zdouc. 2017. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Fourth Edition. Cambridge University Press (Page 19).

<sup>2</sup> Pettinger, Tejvan. 2021. *The Importance of International Trade*: <https://www.economicshelp.org/blog/58802/trade/the-importance-of-international-trade/#:~:text=Specialisation%20and%20economies%20of%20scale,which%20outweigh%20most%20other%20factors,downloaded on 22 March 2023>.

<sup>3</sup> Ing, Lili Yan and Miaojie Yu (editor). 2019. *World Trade Evolution: Growth, Productivity and Employment*. First Edition. Routledge – ERIA studies in Development Economics (Page 1).

<sup>4</sup> Lester, Simon, Bryan Mercurio, and Arwel Davies. 2012. *World Trade Law: Text, Materials and Commentary*. Second Edition. Hart Publishing (Page 16).

has proven that post the Great Depression and World War II periods, economic cooperation has brought prosperity and peace<sup>5</sup>.

During the 1930s (the Great Depression era), the United States (US) and England, two major world economies, were prompted by the experience to prioritize economic cooperation over protectionist policies. During that time, the US implemented policies to address the Great Depression through high tariffs, currency devaluation, and discriminatory trade blocs, which disrupted international stability without improving economic conditions<sup>6</sup>.

This experience led to bilateral and multilateral financial and trade negotiations from early 1942 to 1944, resulting in the establishment of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), better known as the World Bank. Agreements on international trade proved more challenging to reach. A new agreement was only achieved in 1947 after negotiations in Geneva by 23 countries, signing a General Agreement on Tariffs and Trade (GATT) aimed at reducing tariffs and the concept of forming the International Trade Organization (ITO). Although ITO's establishment was supported by 53 countries in March 1948, the US couldn't proceed due to opposition from Congress<sup>7</sup>. Thus, during the period 1947–1994, GATT 1947 effectively operated as an organization conducting eight rounds of negotiations on global trade issues and international trade dispute resolution<sup>8</sup>.

GATT 1947, which was in effect for 47 years, was considered successful in reducing average tariffs, such as in the 1950s and 1960s, where it achieved an annual reduction of 8%<sup>9</sup>. However, during the 1970s and 1980s, GATT 1947 became increasingly irrelevant to the more complex conditions of global trade. It struggled to address issues like agricultural subsidies, the textile and apparel sector, and the globalization of the services sector. Furthermore, concerns arose regarding its institutional structure and dispute settlement system<sup>10</sup>.

In response to these factors, GATT 1947 Members sought to expand the multilateral trading system through the Uruguay Round of negotiations launched in 1986 in Punta del Este. Unlike previous GATT negotiation rounds, the Uruguay Round differed in many aspects, including the inclusion of new issues like agriculture and services that attracted many developing countries<sup>11</sup>. The conclusion of the Uruguay Round in 1994 resulted in various new multilateral agreements, including the General Agreement on Trade in Services, Trade-Related Aspects of Intellectual Property Rights, and the Understanding on Rules and Procedures Governing the Dispute Settlement or Dispute Settlement Understanding (DSU). Additionally, the Marrakesh Agreement was established, forming the World Trade Organization (WTO), which commenced operations on January 1, 1995<sup>12</sup>.

As the authority of the multilateral trading system organization, the WTO has made significant contributions to economic globalization and the healthy development of the world economy and

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<sup>5</sup> Zhou, Weihai. 2019. In Defense of the WTO: Why Do We Need a Multilateral Trading System? UNSW Law.

<sup>6</sup> See Office of the Historian AS, Bretton Woods-GATT, 1941-1947: <https://history.state.gov/milestones/1937-1945/bretton-woods>, downloaded on 22 March 2023.

<sup>7</sup> *Ibid.*

<sup>8</sup> Goodsoon, J. Michael. 2010. GATT/WTO. Law Library Duke University School of Law: Research Guides: <https://law.duke.edu/sites/default/files/lib/gatt.pdf>, downloaded on 22 March 2023.

<sup>9</sup> See Understanding the WTO: Basic: The GATT years: from Havana to Marrakesh: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm), downloaded on 22 March 2023.

<sup>10</sup> *Ibid.*

<sup>11</sup> Kumar, Pranav. 2008. Multilateral Trading System: Is it India's best option? CUTS Centre for International Trade, Economics & Environment (CUTS CITEE).

<sup>12</sup> See WTO in Brief. 2021: [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.pdf), downloaded on 22 March 2023.

trade<sup>13</sup>. From its establishment in 1995 to 2021, the average volume and value of world trade increased by 4% and 6%, respectively. Meanwhile, global trade volume from 1950 to 2021 has increased approximately 43 times<sup>14</sup>. Nevertheless, discussions on how to make the WTO mechanism more balanced and efficient continue to resonate<sup>15</sup>. Therefore, debates on WTO reform are not new, but the momentum for discussion has emerged recently<sup>16</sup>. The global economic downturn and the collapse of world trade due to the COVID-19 pandemic, sustained geo-economic tensions among world economic powers, and the deadlock in major trade dispute cases have created significant challenges for the world economy, making WTO reform increasingly necessary<sup>17</sup>.

The focus of WTO reform revolves around its three core functions: 1) negotiation function, 2) transparency function, and 3) dispute settlement function<sup>18</sup>. In the negotiation function, WTO members encounter challenges in initiating, negotiating, and concluding trade agreements, both ongoing ones (such as the Doha Development Agenda) and new issues (plurilateral through the Joint Statement Initiative). Effectiveness of special and differential treatment (SDT) provisions for emerging countries is also questioned within this scope. Meanwhile, in the transparency function, there is a need to strengthen notification and transparency disciplines. Lastly, overcoming the four-year deadlock in appointing new members to the WTO's AB and enhancing the dispute settlement system's functions are shared concerns<sup>19</sup>.

The imperative for WTO reform across these three functions is high to prevent power from superseding rules in global trade relations<sup>20</sup>. Full restoration of the dispute settlement function is a top priority<sup>21</sup>. Since its establishment in 1995, the WTO dispute settlement mechanism has resolved an impressive number of trade disputes and gained a reputation as the "crown jewel" of the world trading system<sup>22</sup>. The WTO dispute settlement system is a key element in ensuring the security and certainty of the multilateral trading system<sup>23</sup>.

The crisis in the WTO dispute settlement mechanism emerged on December 11, 2019, when the WTO's AB was left with only one member, below the minimum requirement of three members to examine a dispute case at the appellate level. Under these conditions, the AB became non-

<sup>13</sup>Quan, Chong. WTO Reform: Challenges and Solutions: <http://www.cpifa.org/en/cms/book/264>, downloaded on 22 March 2023.

<sup>14</sup>See [https://www.wto.org/english/res\\_e/statis\\_e/trade\\_evolution\\_e/evolution\\_trade\\_wto\\_e.htm#:~:text=World%20trade%20values%20today%20have,the%20WTO%20was%20first%20established](https://www.wto.org/english/res_e/statis_e/trade_evolution_e/evolution_trade_wto_e.htm#:~:text=World%20trade%20values%20today%20have,the%20WTO%20was%20first%20established), downloaded on 22 March 2023.

<sup>15</sup>Quan, Chong *Op.cit.*

<sup>16</sup>See MC12 Briefing Note: WTO Reform – an overview: [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/briefing\\_notes\\_e/bfwtoreform\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm), downloaded on 22 March 2023.

<sup>17</sup>Schneider-Petsinger, Marianne. 2020. Reforming the World Trade Organization: Prospects for Transatlantic Cooperation and the Global Trade System: <https://www.chathamhouse.org/2020/09/reforming-world-trade-organization>, downloaded on 22 March 2023.

<sup>18</sup>Hoda, Anwarul. 2021. WTO Reform: Issues on Special and Differential Treatment (S&DT). Working Paper No. 406 ICRIER (Page 1-2).

<sup>19</sup>See MC12 Briefing Note: WTO Reform – an overview, *Op. Cit.*

<sup>20</sup>See Statement of Deputy Director-General WTO, Anabel Gonzalez: "WTO reform is about promoting resilient, sustainable and inclusive trade": [https://www.wto.org/english/news\\_e/news23\\_e/ddgag\\_14feb23\\_e.htm](https://www.wto.org/english/news_e/news23_e/ddgag_14feb23_e.htm), downloaded on 22 March 2023.

<sup>21</sup>See Statement of Deputy Director-General WTO, Angela Ellard: "Benefits of multilateralism, risks of unilateralism, WTO reform": [https://www.wto.org/english/news\\_e/news23\\_e/ddgae\\_13feb23\\_e.htm](https://www.wto.org/english/news_e/news23_e/ddgae_13feb23_e.htm), downloaded on 22 March 2023.

<sup>22</sup>Payosova, Tetyana, Gary Clyde Hufbauer and Jeffrey J. Schott. 2018. Policy Brief: The Dispute Settlement Crisis in the World Trade Organization: Causes and Curses. Peterson Institute for International Economics.

<sup>23</sup>See Article 3.2 DSU: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system..."

operational<sup>24</sup>. The WTO AB, a standing body consisting of seven members, is tasked with examining appellate cases arising from panel decisions in trade disputes among WTO members<sup>25</sup>.

The non-operational status of the WTO AB stems from the United States' stance, starting in August 2017 during the Trump administration, rejecting the appointment of new AB members to replace those whose terms had expired<sup>26</sup>. The underlying issues driving the US position fundamentally revolve around the assertion that the AB has exceeded its authority and has not adhered to the provisions within the system<sup>27</sup>.

Various efforts have been made by WTO Members to address the challenges facing the WTO AB, including: 1) proposals to initiate the selection of AB members through regular meetings of the Dispute Settlement Body (DSB) of the WTO; 2) the "Walker Process"; and 3) the process to implement the mandate of the Ministerial following the 12th WTO Ministerial Conference. The first<sup>28</sup> and second<sup>29</sup> efforts have yet to yield positive results due to US opposition, while the third effort is still ongoing.

The non-operational of the AB and the lack of resolution to the issues raised by the US have led to a considerable number of trade disputes filed to the AB appellate stage, remaining unprocessed indefinitely ("appeal into the void"). As of December 2022, the WTO Secretariat has recorded at least 25 trade disputes at the appellate stage<sup>30</sup>. Indonesia's trade disputes in the appellate stage include DS484: Indonesia – Importation of Chicken (Compliance Panel stage, filed by Brazil)<sup>31</sup> and DS592: Indonesia – Raw Materials (filed by the European Union)<sup>32</sup>. Indonesia is also engaged in an ongoing trade dispute with the European Union in DS593: EU – Biofuels, where Indonesia is the complaining party and currently in the final stages of the panel process.

## 1.2 Research Problem

This paper will examine the following issues: What are Indonesia's perspectives, contribution, and strategies in the ongoing and/or upcoming negotiations for the reform of the WTO dispute settlement system?

## 1.3 Research Objectives

This paper will outline and provide an analysis of Indonesia's perspectives, contributions, and to recommend possible strategies for Indonesia used in the negotiations for the reform of the WTO dispute settlement system.

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<sup>24</sup>Danish and Aileen Kwa. 2019. Policy Brief: Lights Go Out at the WTO's Appellate Body Despite Concessions Offered to US. South Center.

<sup>25</sup>See Dispute Settlement: Appellate Body: [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm#:~:text=The%20Appellate%20Body%20was%20established,disputes%20brought%20by%20WTO%20Members](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#:~:text=The%20Appellate%20Body%20was%20established,disputes%20brought%20by%20WTO%20Members), downloaded on 22 March 2023.

<sup>26</sup>Ismail, Faizel. 2020. WTO Reform and the Crisis of Multilateralism: A Developing Country Perspective. South Center. Page 62.

<sup>27</sup>See 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program, Page 148: [https://ustr.gov/sites/default/files/2019\\_Trade\\_Policy\\_Agenda\\_and\\_2018\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf), downloaded on 22 March 2023.

<sup>28</sup>See Document WT/DSB/M/473. Page 7.

<sup>29</sup>See Document WT/GC/M/181. Page 22-24.

<sup>30</sup>See Dispute Settlement Body: Appellate Body: [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm), downloaded on 22 March 2023.

<sup>31</sup>See Document WT/DS484/26.

<sup>32</sup>See Document WT/DS592/6.

## II. RESEARCH METHODS

### 2.1 Significance of the Research

An analysis of Indonesia's perspectives, contribution and recommendations for strategies in the negotiations for the reform of the WTO dispute settlement system can serve as a reference for leaders, negotiators, or policymakers in formulating trade policies, especially Indonesia's national position in the negotiations for the reform of the WTO dispute settlement system.

### 2.2 Methodology

The paper adopts a qualitative research method and a descriptive research method. Qualitative research is descriptive in nature and tends to use analysis. Descriptive research illustrates the characteristics of a population or a phenomenon that is the object of research<sup>33</sup>.

The qualitative research method will utilize theoretical foundations to explain the analysis. The descriptive research method will involve a case study of Indonesia's negotiations and the author's direct involvement in the WTO dispute settlement system reform negotiations. In developing analysis, the author will also rely on secondary data sources from national legislations, books, journals, and articles.

### 2.3 Theory of Social Interest

Roscoe Pound introduced the doctrine of "Social Engineering" which aims at building an efficient structure of society which would result in the satisfaction of maximum of wants with the minimum of friction and waste. He tried to cover social life as a whole. He concentrated more on functional aspect of law. According to Pound, like engineers, the lawyer should apply law in a court room so that the desires of the people are fulfilled. Therefore, he calls law as Social Engineering and says that the aim of Social Engineering is to build as efficient a structure of society as possible which requires the satisfaction of wants with the minimum of friction and waste. It means Law should work for balancing of competing interest within the society for the greatest benefit.<sup>34</sup>

Pound has outlined an elaborate hierarchical system of interests which are to be recognized, or are pressing for recognition. The interests which the law should recognize and to which it should give effect are classified in three major groups. They are social interests, public interests, and individual interests.<sup>35</sup>

The first of Pound's social interests is the interest in the general security. This is a claim that social life be secure against forms of actions and courses of conduct which threaten its existence. In its simplest form, this interest is concerned with the general safety as the highest law, but it extends to such forms as interest in general morals, general health, peace, order, security of transactions and of acquisitions.<sup>36</sup>

Second is the social interest in the security of social institutions, i.e., the claim that fundamental institutions of social life be secure from courses of conduct that threaten their existence or impair their efficiency. This includes interest in the security of domestic institutions, religious institutions, political institutions, and, more recently, economic institutions. Pound's third social interest is in the general

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<sup>33</sup>Nandy. 5 jenis-Jenis Penelitian: Kuantitatif, Kualitatif sampai Campuran: <https://www.gramedia.com/literasi/jenis-jenis-penelitian>, downloaded on 23 March 2023.

<sup>34</sup>More, Adv Hemant. 2023. "Pound Theory of Social Engineering": <https://thelegalquotient.com/social-laws/law-and-society/pound-theory-of-social-engineering/1393/#:~:text=Roscoe%20Pound%20stated%20that%20the,this%20as%20%E2%80%9CSocial%20Engineering%E2%80%9D>, downloaded on 5 January 2024.

<sup>35</sup>McManaman, Linus J. 2016. "The Legal Philosophy of Roscoe Pound": <https://core.ac.uk/download/217000538.pdf>. The Catholic Lawyer Volume 13 Number 2, Spring 1967, downloaded on 5 January 2024.

<sup>36</sup>*Ibid*

morals, or the claim that social life in civilized society be secure against forms of action offensive to the moral sentiments of the general body of individuals therein for the time being. This includes policies against such misdemeanours as dishonesty, corruption, gambling and things of immoral tendency. Fourthly, there is the social interest in the conservation of social resources, or the claim that the goods of existence shall not be wasted; that courses of conduct which tend needlessly to destroy these goods be restrained. This refers chiefly to common property which is used but not owned by individuals, and is closely related to the interest in the protection and training of dependents and defectives. Fifth is the social interest in general progress, or the demand that the development of human powers and of human control over nature for the satisfaction of human wants go forward; the claim that social engineering be increasingly and continuously improved for the development of human powers. This includes interest in economic, political and cultural progress.<sup>37</sup>

Sixth, and last, is the social interest in the individual life. This is in many ways the most important. It is the claim that each individual be able to live a human life in civilized society according to the standards of that society.<sup>38</sup>

In the practical order, one of Pound's constant concerns has been to avoid any form of absolutism in government. To this end he insists that we must have absolute norms of values. Based as it is on a theory of social interests, his measure of values must necessarily be relative and also must necessarily be constantly changing and adjusting to the needs of the time and place.<sup>39</sup>

## 2.4 Principles of Indonesia's International Trade Cooperation

In international trade cooperation, Indonesia adheres to principles encompassed in the regulation of foreign relations, the formation of international agreements, and trade. The author identifies that these principles are embodied in various following national legislations:

1. Law No. 7 of 2014 concerning Trade;
2. Law No. 24 of 2000 concerning International Treaty; and
3. Law No. 37 of 1999 concerning Foreign Relation.

Generally, in establishing foreign relations, alignment with foreign policy, national legislation, and international law and customs is essential.<sup>40</sup> Indonesia's foreign policy follows the principle of active non-alignment dedicated to national interests<sup>41</sup>. In the creation of international agreements, the government adheres to national interests guided by principles of equality, mutual benefit, and consideration of both national and international laws<sup>42</sup>.

Furthermore, in collaborating on trade with other countries and/or international institutions/organizations, the government aims to enhance market access and safeguard national interests<sup>43</sup>.

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<sup>37</sup> *Ibid*

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

<sup>40</sup> See Article 5.1 of the Law No. 37 of 1999 concerning Foreign Relation (State Gazette of the Republic of Indonesia of 1999 Number 156 and Supplement to State Gazette of the Republic of Indonesia Number 3882).

<sup>41</sup> See Article 3 of the Law No. 37 of 1999 concerning Foreign Relation (State Gazette of the Republic of Indonesia of 1999 Number 156 and Supplement to State Gazette of the Republic of Indonesia Number 3882).

<sup>42</sup> See Article 4 Ayat (2) of the Law No. 24 of 2000 concerning International Treaty (State Gazette of the Republic of Indonesia of 2000 Number 185 and Supplement to State Gazette of the Republic of Indonesia Number 4012).

<sup>43</sup> See Article 82 Ayat (1) of the Law No. 7 of 2014 concerning Trade (State Gazette of the Republic of Indonesia of 2014 Number 45 and Supplement to State Gazette of the Republic of Indonesia Number 5512).

From the three laws mentioned above, the primary principle in pursuing international trade cooperation is the principle of national interest. Indonesia initiated trade regime liberalization in the mid-1980s, involving the first-ever tariff reduction. The second wave of trade liberalization in Indonesia began in the early 1990s when the country formally joined multilateral agreements (WTO), imposing a maximum binding tariff limit of 40% from the previous 95%<sup>44</sup>. Indonesia's participation in the WTO was motivated by efforts to boost economic growth and to utilize international trade as a means to secure foreign aid, attract investments, and promote exports<sup>45</sup>.

### III. DISCUSSION AND RESULT

#### 3.1. WTO Dispute Settlement System

##### 3.1.1. GATT 1947 Era

The GATT 1947 contained only two brief provisions on dispute resolution, namely Articles XXII and XXIII, both of which did not explicitly refer to "dispute settlement"<sup>46</sup>. This occurred because dispute settlement provisions were supposed to be separately regulated with the establishment of the International Trade Organization (ITO). With the failure of the ITO to materialize, only the two provisions of Article XXII and XXIII of GATT 1947 remained applicable, providing no clear procedures<sup>47</sup>.

Article XXII of GATT 1947, titled "Consultation," allowed consultations regarding matters affecting the implementation of agreements. Article XXIII of GATT 1947, titled "Nullification or Impairment," granted GATT members the authority to submit written proposals to other members when their benefits were directly or indirectly affected. These proposals needed positive consideration from the affected GATT member. If resolution was not achieved through consultations within a reasonable timeframe, according to Article XXIII:2 of GATT 1947, GATT members could investigate and make specific recommendations or decisions<sup>48</sup>.

Despite procedural developments, including the establishment of working parties and ad hoc panels, the dispute settlement within GATT 1947 had limited characteristics. It operated as a power-based system, settling disputes through diplomatic negotiations<sup>49</sup>. The GATT 1947 dispute settlement system reflected a contradiction between realism and free trade, employing diplomacy rather than a judicial system to resolve disputes. Consequently, it had a realist character, as GATT 1947 members could use the "veto" right during the panel decision approval by the GATT Council<sup>50</sup>. In the 1980s, with an increasing number of issues in the GATT 1947 dispute settlement system, there was a growing demand for its development and reinforcement.

##### 3.1.2. WTO Era

In the 1980s, the GATT 1947 dispute settlement system faced serious challenges, primarily due to the fact that panel decisions only became legally binding if approved by the GATT Council,

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<sup>44</sup>Kis-Katos, Krisztina dan Robert Sparrow. 2015. Poverty, Labor Markets and Trade Liberalization in Indonesia. *Journal of Development Economics* Volume 117. Page 94-106.

<sup>45</sup>Kartadjuma. 1996. *GATT dan WTO: Sistem Forum dan Lembaga Internasional di Bidang Perdagangan*, Cetakan Pertama. Jakarta: UI Press. Page 230.

<sup>46</sup>Bossche, Peter Van den dan Werner Zdouc. *Op. Cit.*

<sup>47</sup>Lester, Simon, Bryan Mercurio, and Arwel Davies. *Op. Cit.* Page 150

<sup>48</sup>*Ibid.* Page 150-151.

<sup>49</sup>Bossche, Peter Van den dan Werner Zdouc. *Op. Cit.*

<sup>50</sup>Shell, G. Richard. 1995. *Op. Cit.* Page 830-831.

allowing the respondent to prevent it<sup>51</sup>. Hence, the calls for reform intensified<sup>52</sup>. The Uruguay Round negotiations (1986 – 1994) resulted in the Trade in Services Agreement (GATS), Trade-Related Aspects of Intellectual Property Rights (TRIPs), and notably, the Dispute Settlement Understanding (DSU). The success of the DSU, serving as the legal basis for dispute resolution procedures, received widespread appreciation from WTO members, trade law practitioners, and academics. Despite occasional criticisms, the DSU has been regarded as an effective and reliable system, marking a significant improvement compared to the dispute settlement system of the GATT 1947 era<sup>53</sup>.

The two most crucial changes from the GATT 1947 era were 1) the establishment of the AB by the WTO to review panel legal decisions, and 2) the automatic adoption of panel and AB reports by the Dispute Settlement Body (DSB) with legal implications through reverse consensus decision-making<sup>54</sup>. Reverse consensus, or negative consensus, implies that all countries must agree to reject the adoption of panel or AB decisions. The DSU also provides clearer procedures with a specific timeframe, making all dispute settlement information transparent.

Dispute resolution is a cornerstone of the multilateral trading system, contributing uniquely to global economic stability. Without dispute resolution, a rules-based system would be less effective, as trade rules cannot be enforced<sup>55</sup>. The fundamental change from the GATT 1947 era to the WTO in dispute settlement supports this, as the WTO dispute settlement system is more detailed and operates as a rules-based system in resolving disputes through adjudication<sup>56</sup>. The WTO dispute settlement mechanism consists of a two-stage litigation process, including the panel stage conducted by an ad hoc panel and the appellate mechanism by the AB<sup>57</sup>.

The WTO dispute settlement system has been in operation for over two decades. During this period, it has become the most widely used State-to-State international dispute settlement system. From January 1<sup>st</sup>, 1995, to December 31<sup>st</sup>, 2022, a total of 615 trade disputes were registered by WTO members with the DSB<sup>58</sup>. Out of these, 367 disputes proceeded to the litigation stage, while over 277 were resolved or withdrawn. Meanwhile, disputes taken to the appellate stage reached 189 cases<sup>59</sup>. A total of 111 WTO members participated in disputes as complainants, respondents, or third parties, representing about 67 percent of the entire WTO membership<sup>60</sup>.

### 3.2. Indonesia's Contribution to the WTO Dispute Settlement System

Indonesia is one of the developing countries actively utilizing the WTO dispute settlement system. From 1995 to the present, Indonesia has been involved in a total of 78 trade dispute cases,

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<sup>51</sup> Bossche, Peter Van den dan Werner Zdouc. *Op. Cit.* Page 166.

<sup>52</sup> Chaisse, Julien. 2020. *The Dispute Settlement Crisis in the World Trade Organization: Issues, Challenges and Directions*. Research Outreach.

<sup>53</sup> Hughes, Valerie. 2018. *Canada: A Key Player in WTO Dispute Settlement*. Centre for International Governance Innovation. Paper No. 11 – February 2018. Page 1.

<sup>54</sup> Lester, Simon, Bryan Mercurio, and Arwel Davies. *Op. Cit.* Page 153.

<sup>55</sup> See Understanding the WTO: Settling Disputes: A Unique Contribution: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm), downloaded on 23 March 2023.

<sup>56</sup> Bossche, Peter Van den dan Werner Zdouc. *Op. Cit.*

<sup>57</sup> Chaisse, Julien. 2020. *Op. Cit.*

<sup>58</sup> See Dispute Settlement Activity – some figures: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispustats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm), downloaded on 23 March 2023.

<sup>59</sup> *Ibid.*

<sup>60</sup> See Briefing Note: Dispute settlement: [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_disputes\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_disputes_e.htm), downloaded on 23 March 2023.

comprising 14 cases as a complaining party, 15 as a responding party, and 49 as a third party<sup>61</sup>. The number of cases is counted based on the case numbers as per consultation requests within the DSU framework recorded by the WTO Secretariat as DS. Currently, Indonesia is facing at least four trade disputes as both a complainant and respondent with the European Union in DS592: Indonesia – Raw Materials, DS593: EU – Biofuels, DS616: EU – CVD/AD on Stainless Steel, and DS618: EU – CVD on Biodiesel.

Indonesia's participation in the dispute settlement system, through trade dispute cases, has made a significant contribution to the WTO dispute settlement system and the multilateral trading system by clarifying interpretations of WTO agreements. Some Indonesia's contributions to trade disputes include:

### **3.2.1. Dispute DS54, DS55, DS59, DS64: Indonesia – Autos**

In this dispute case, Indonesia, as the Respondent, faced three WTO Member countries: the European Union (DS54), Japan (DS55, DS64), and the United States (DS59) as the Complainants. This marked the first instance where Indonesia's policies were contested by other WTO Member countries.

Initially, the European Union initiated the dispute by requesting consultations under the DSU on October 3, 1996, followed by Japan on October 4, 1996, the United States on October 8, 1996, and Japan again on November 29, 1996<sup>62</sup>. Consultations were held with each Complainant country, but no mutually beneficial resolution was reached. Consequently, the dispute proceeded to the litigation stage with requests for the establishment of a Panel submitted by the European Union (May 12, 1997), Japan (April 17, 1997), and the United States (June 12, 2017). The contested policies (measures) included<sup>63</sup>:

- a) 1993 Incentive Program (Program 1993): In 1993, Indonesia introduced a policy known as the 1993 Incentive System, comprising: (1) reduction or exemption of import duties on automotive parts and accessories based on the percentage of domestic content in the finished motor vehicles and certain types of vehicles using parts with domestic content; (2) tariff relief on sub-parts used to produce parts and accessories based on the percentage of domestic content in the part or complete accessory; and types of motor vehicles using those parts or accessories; (3) exemption or reduction of luxury goods sales tax for certain categories of motor vehicles.
- b) National Car Program (“Program Mobil Nasional or Mobnas”): The Mobnas Program stipulates exemptions from luxury goods sales tax for Mobnas and import duty exemptions for parts and components of Mobnas for national car companies referred to as pioneers. Another contested policy in the Mobnas Program is that national cars manufactured in other countries by Indonesian companies and meeting domestic content requirements are treated as domestically produced cars, thus exempt from luxury goods tax and import duties.
- c) \$690 million loan to PT. Timor Putra Nasional (TPN): This policy, specifically contested by the United States, was essentially part of the Mobnas Program. The loan was granted on August 11, 1997, by a consortium consisting of four government banks and 12 private banks at the behest of the Indonesian government. The loan carried an annual interest rate of 3% with a 3–6-month deposit interest rate, a maturity period of 10 years, a grace period of 3 years, and the four government banks would provide a loan of \$650 million.

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<sup>61</sup> See Disputes by member: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm), downloaded on 23 March 2023.

<sup>62</sup> See Documents WT/DS54/1; WT/DS55/1; WT/DS59/1; dan WT/DS64/1.

<sup>63</sup> See Documents WT/DS54/6; WT/DS55/6; WT/DS59/6; dan WT/DS64/4.

The Complainants argue that Indonesia's national policies violate the WTO Agreements, namely the GATT 1994 (Article I:1 (Most Favoured Nations), Article III:2 (first and second sentence), and Article III:4 (National Treatment – taxes and charges), Article X:1 and X:3(a)); the Trade-Related Investment Measures Agreement or TRIMs Agreement (Article 2.1 (local content requirement)); the Agreement on Subsidies and Countervailing Measures or ASCM (Article 5(c), Article 6, and Article 27 – (serious prejudice), Article 28.2); and the Trade-Related Aspects of Intellectual Property Rights Agreement or TRIPs Agreement (Article 3, Article 20, and Article 65 (discrimination of trademarks)).

In the Panel Report circulated to all WTO Members on July 2, 1998, the Panel concluded that Indonesia had violated Article I and III:2 of GATT 1994, Article 2 of the TRIMs Agreement, and Article 5(c) of the ASCM, but not Article 28.2 of the ASCM. The Panel also determined that the Complainants failed to prove Indonesia's violations of Article 3 and 65.5 of the TRIPs Agreement<sup>64</sup>. This Panel Report was adopted by the WTO DSB on July 23, 1998<sup>65</sup>.

In this case, Indonesia chose not to appeal and expressed its intention to comply with the WTO DSB's decision within a reasonable period of time, as stipulated in Article 21 of the DSU<sup>66</sup>. The implementation timeline for Indonesia was decided through arbitration with a binding decision (Arbitration Report circulated on December 7, 1998), granting Indonesia 12 months or until July 23, 1999<sup>67</sup>. On July 15, 1999, Indonesia announced to the WTO DSB that it had issued a new automotive industry policy on June 24, 1999, deemed to effectively implement the recommendations and decisions of the DSB<sup>68</sup>.

This case is noteworthy for Indonesia's contribution to the WTO Dispute Settlement System. For the first time in this dispute, a WTO Member was accompanied or represented by private lawyers during the Panel proceedings. Previously, in the EC – Banana case, Saint Lucia had private lawyers present during the AB stage.

The composition of Indonesia's delegation, including two private lawyers, was contested by the United States and Japan. They argued that the intergovernmental nature of the WTO Dispute Settlement System was inconsistent with the presence of private lawyers. They expressed concerns that involving non-government individuals could jeopardize the confidentiality of the dispute resolution process and its substance. The US also raised concerns that the engagement of private lawyers might hinder developing countries' effective participation due to the exorbitant costs associated with hiring private lawyers<sup>69</sup>.

Indonesia disagreed with the US and Japan, contending that sovereign rights, based on international law, allow a country to determine the composition of its delegation in a hearing. Indonesia argued that there are no provisions in the DSU and its Working Procedures, as well as other WTO Agreements, prohibiting private lawyers from assisting a WTO Member country. They emphasized the limitations faced by developing countries, particularly in WTO legal expertise within the government. Involving private lawyers, according to Indonesia, could enhance the effectiveness of developing countries' participation in the Dispute Settlement System. Regarding legal expenses, Indonesia asserted its sovereign right to budget for such financing<sup>70</sup>.

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<sup>64</sup> See Documents WT/DS54/R; WT/DS55/R; WT/DS59/R; dan WT/DS64/R.

<sup>65</sup> See Documents WT/DS54/10; WT/DS55/10; WT/DS59/9; dan WT/DS64/8.

<sup>66</sup> See Documents WT/DS54/11; WT/DS55/11; WT/DS59/10; dan WT/DS64/9.

<sup>67</sup> See Documents WT/DS54/15; WT/DS55/14; WT/DS59/13; dan WT/DS64/12.

<sup>68</sup> See Documents WT/DS54/17/Add.1; WT/DS55/16/Add.1; WT/DS59/15/Add.1; dan WT/DS64/14/Add.1.

<sup>69</sup> See Documents WT/DS54/R; WT/DS55/R; WT/DS59/R; dan WT/DS64/R. Page 19-25.

<sup>70</sup> *Ibid.*

### 3.2.2. Dispute DS406: US – Clove Cigarette

The DS406 dispute originated from the United States' enactment of legal measures, specifically Section 907(a)(1)(A) of the Family Smoking Prevention and Tobacco Control Act (hereafter referred to as Section 907), on June 22, 2009, becoming effective three months later on September 22, 2009. Section 907 prohibited the production or sale in the US of flavoured cigarettes, including kretek, while allowing the production and sale of other types of cigarettes, including those containing menthol.

Indonesia initiated a request for consultations under the DSU framework with the US on April 7, 2010. In its consultation request, Indonesia accused the US of violating Article III:4 of GATT 1994, Article 2 of the Technical Barriers to Trade Agreement (TBT Agreement) for discriminatory actions against imported products compared to similar domestic products, and several provisions of the Sanitary and Phytosanitary Agreement (SPS Agreement)<sup>71</sup>. As consultations between the parties did not lead to a mutual resolution, Indonesia proceeded to the dispute resolution process, requesting the establishment of a panel on June 9, 2010<sup>72</sup>. The WTO DSB approved the formation of the panel at its second meeting on July 20, 2010. Brazil, the European Union, Guatemala, Norway, Turkey, Colombia, the Dominican Republic, and Mexico participated as Third Parties in this case.

The Panel delivered its decision in the Final Panel Report on September 2, 2011, circulated to all WTO Members<sup>73</sup>. The Panel first analysed whether Section 907 constituted a technical regulation under the TBT Agreement. The Panel considered this policy a technical regulation covered by the TBT Agreement.

Regarding Indonesia's main claim under Article 2.1 of the TBT Agreement, the Panel concluded that the ban on kretek cigarettes was inconsistent with the national treatment obligations outlined in Article 2.1 of the TBT Agreement because it treated kretek cigarettes less favourably than menthol cigarettes. The Panel deemed kretek and menthol cigarettes as like products under Article 2.1 of the TBT Agreement. With a violation of Article 2.1 of the TBT Agreement, the Panel did not need to examine the consistency of Section 907 with Article III:4 of GATT 1994, as claimed by Indonesia. This also led to the Panel not analysing the defence argument that Section 907 could be justified under Article XX(b) of GATT 1994 (protection of human health).

Although the ban on kretek cigarettes was considered discriminatory, the Panel rejected Indonesia's claim that this prohibition was unnecessary. The Panel determined that Indonesia failed to prove that the policy was more trade-restrictive than necessary to achieve the legitimate policy objective (in this case, reducing the number of young smokers) under Article 2.2 of the TBT Agreement. The Panel found scientific evidence presented by the US supporting the claim that the ban could reduce the number of young smokers.

On another claim, the Panel ruled that the US violated Article 2.9.2 of the TBT Agreement by not notifying its technical regulations to the WTO Secretariat and Article 2.12 of the WTO Agreement on the publication and enforcement pause for technical regulations. In response to this Panel decision, the US appealed to the AB on January 5, 2012<sup>74</sup>. The AB issued its decision in the AB Report on April 4, 2012<sup>75</sup>.

The AB upheld the Panel's decision that Section 907 had violated Article 2.1 of the TBT Agreement and consequently also violated Article 2.12 of the TBT Agreement. In other words, the

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<sup>71</sup> See Document WT/DS406/1.

<sup>72</sup> See Document WT/DS406/2.

<sup>73</sup> See Document WT/DS406/R.

<sup>74</sup> See Document WT/DS406/6.

<sup>75</sup> See Document WT/DS406/AB/R.

AB agreed that kretek and menthol cigarettes were like products. However, notably, the AB presented different arguments than the Panel regarding the analysis used to determine like products and less-favourable treatment under Article 2.1 of the TBT Agreement.

The AB's examination of like products, contrary to the Panel's regulatory objective approach, relies on a competitive relationship analysis, employing the traditional "likeness" criteria. This involves comparing physical characteristics, end-uses, consumer preferences and habits, as well as tariff classifications. Nonetheless, the AB asserts that regulatory objectives can be used to analyse "likeness" as long as they impact the competitive relationship among products.

Regarding the analysis of less-favourable treatment, the AB interprets the obligation of less-favourable treatment under Article 2.1 of the TBT Agreement as not prohibiting adverse effects on imports that specifically stem from a different policy justification. Based on this interpretation, the AB concludes that the pattern, architecture, structure, implementation, and application of Section 907 significantly negatively impact the competitive opportunities of clove cigarettes, demonstrating discrimination against the imported like-products from Indonesia. The decisions of both the AB and the Panel were adopted by the WTO DSB on April 24, 2012.

Through this adoption, the US is obligated to implement the decisions of the Panel and the AB by amending or withdrawing its policy. To effectuate this, the US requested a reasonable period of time, agreed upon by Indonesia and the US for 15 months, ending on July 24, 2013<sup>76</sup>. Despite several progress reports submitted by the US to the DSB, the ban on clove cigarettes has not been lifted. In light of this, Indonesia submitted a request for retaliatory authority to the DSB under Article 22.2 of the DSU, covering retaliation against sectors governed by GATT 1994, the TBT Agreement, and the Import Licensing Agreement (ILA)<sup>77</sup>. The US opposed this request due to the lack of agreement on the level of compensation<sup>78</sup>. Additionally, the European Union, as a Third Party in this case, raised the issue that Indonesia's request for retaliatory authority should go through the compliance panel process first to settle agreements on the level of compliance or implementation by the US<sup>79</sup>.

Over time, Indonesia and the US engaged in bilateral diplomacy to find a resolution. An agreement was reached through a memorandum of understanding between the two nations, declaring the dispute case resolved due to mutual agreement<sup>80</sup>. In an online media source, *policio.com*, it was highlighted that, for the U.S., the Section 907 policy remained in place, but the dispute case had concluded. It was further explained that the agreement was reached considering the long-term relationship between the two countries with a focus on cooperation in other areas to enhance US-Indonesia trade in the future.

The significance of this case lies in the jurisprudence related to Article 2.12 of the TBT Agreement. The AB interpreted Article 2.12 of the TBT Agreement only once in the DS406 case. As Section 907 was issued on June 22, 2009, and became effective on September 22, 2009, with a 3-month or 90-day interval from publication, the AB concluded that a reasonable interval for publication and enforcement is at least 6 months. This determination was based on the interpretation of "reasonable interval" according to Paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns. The argument presented by the US that it needed to be immediately enforced

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<sup>76</sup> See Document WT/DS406/10.

<sup>77</sup> See Document WT/DS406/12.

<sup>78</sup> See Document WT/DS406/16.

<sup>79</sup> See Document WT/DS406/15.

<sup>80</sup> See Document WT/DS406/17.

within 3 months due to its "urgent" nature to protect public health was not accepted by the AB, as clove cigarettes had long been present in the market.

### 3.2.3. Dispute DS490/496: Indonesia – Certain Iron or Steel Products

This case significantly contributes to clarifying the definition of safeguard measures and the imposition of safeguard measures for products classified as not bound by tariff concessions in the WTO (unbound). The panel and AB analyses indicate that additional duties, as safeguard measures, must be able to suspend the obligations or concessions of WTO Members when applied. Products with unbound status cannot be subjected to safeguard measures in the form of additional duties. However, such products can still be subject to safeguard measures in the form of quotas, following the procedures and rules outlined in the WTO Agreement on Safeguards (AOS). Another notable contribution of this case is the clarification that Article 9.1 of the AOS does not result in the suspension of Article I:1 of the General Agreement on Tariffs and Trade (GATT) because it constitutes a provision of special and differential treatment for developing and least-developed countries<sup>81</sup>.

The WTO dispute settlement system, grounded in legal principles and rules, has provided a platform for all WTO Members (both developed and developing nations) to uphold WTO rules and agreements. While the dispute settlement system with its rules-based character aligns more with regime theory than realism, WTO Members' awareness of adhering to the provisions and procedures of the Dispute Settlement Understanding (DSU) and implementing its outcomes is crucial. Indonesia's participation in the dispute settlement system underscores the system's vital role in ensuring that national interests can be advocated and safeguarded. Although foreign relations are based on national interests, this does not imply that Indonesia strictly applies only realist theory in practice. Various principles underlying Indonesia's international trade cooperation tend to indicate a more plural and comprehensive approach aligned with pluralism theory.

## 3.3. Negotiations for Reforming the WTO Dispute Settlement System

### 3.3.1. Challenges of the WTO Appellate Body and Its Implications

In August 2017, during a regular meeting of the Dispute Settlement Body (DSB), the United States (US) expressed its rejection of the proposal to initiate the selection process to fill vacant positions within the AB until systemic concerns regarding the dispute settlement system were addressed<sup>82</sup>. From that moment until the DSB meeting on November 28, 2022, the US consistently rejected the proposal<sup>83</sup>, despite it being revised 23<sup>84</sup> times and supported by over 120 WTO Members, including Indonesia.

The comprehensive concerns raised by the US are detailed in the US Trade Representative's (USTR) Report on the AB of the World Trade Organization, issued on February 12, 2020. In the 124-page report, the US staunchly maintained the following key points<sup>85</sup>:

1. The AB consistently disregards the obligation to meet the 90-day deadline for deciding appellate cases.

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<sup>81</sup> Putra, Angga Handian. 2019. *Implikasi Keputusan Dispute Settlement Body WTO pada Kasus Sengketa Dagang antara Indonesia dengan Taiwan dan Vietnam (Kasus DS490/DS496: Indonesia -Safeguard on Certain Iron or Steel Products*: [https://www.researchgate.net/publication/337706335\\_Implikasi\\_Keputusan\\_Dispute\\_Settlement\\_Body\\_WTO\\_pada\\_Kasus\\_Sengketa\\_Dagang\\_antara\\_Indonesia\\_dengan\\_Taiwan\\_dan\\_Vietnam\\_Kasus\\_DS490DS496\\_Indonesia\\_-\\_Safeguard\\_on\\_Certain\\_Iron\\_or\\_Steel\\_Products](https://www.researchgate.net/publication/337706335_Implikasi_Keputusan_Dispute_Settlement_Body_WTO_pada_Kasus_Sengketa_Dagang_antara_Indonesia_dengan_Taiwan_dan_Vietnam_Kasus_DS490DS496_Indonesia_-_Safeguard_on_Certain_Iron_or_Steel_Products), downloaded on 24 March 2023.

<sup>82</sup> See MC12 Briefing Note: WTO Reform – an overview. *Op. Cit.*

<sup>83</sup> See Document WT/DSB/M/473. *Op. Cit.*

<sup>84</sup> See Document WT/DSB/W/609/Rev.23.

<sup>85</sup> See Document USTR: Report on the Appellate Body of the World Trade Organization.

2. The AB allows individuals whose terms as AB members have ended to decide appellate cases, creating a perception as if their terms have been extended by WTO Members in the DSB.
3. The AB has exceeded its authority by making findings on factual issues, including factual issues related to the domestic laws of WTO Members, despite its authority being limited to legal issues.
4. The AB has issued advisory opinions.
5. The AB insists that its previous reports and interpretations serve as binding precedents to be followed by panels.
6. The AB neglects the obligation to make necessary recommendations when a measure has expired after the formation of a panel.
7. The AB has acted beyond its authority, expressing views on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and DSB.

The USTR report also states that the AB has overstepped its authority by assuming new rights and imposing new obligations through incorrect interpretations of WTO agreements. The AB has attempted to fill "gaps" in the WTO agreement, turning them into rights or obligations that neither the US nor other WTO members have agreed upon. This has favoured non-market economies (NMEs), rendering trade remedy laws ineffective and limiting the policy space of legitimate WTO Members. Examples of erroneous interpretations include those related to the "public body" concept, the prohibition of using zeroing in anti-dumping measures, the tightening and use of unrealistic tests in out-of-country benchmarking, the making of flawed analyses concerning unforeseen developments in safeguard investigations, and restricting WTO Members from imposing anti-subsidy and anti-dumping duties using methodologies from NMEs such as China.

The issues with the AB have directly impacted its non-operational status in conducting dispute settlement functions at the appellate stage among WTO Members. As mentioned earlier in Chapter 1, at least 24 trade disputes in the appellate stage remain unprocessed for an undetermined period (void).

The non-operational status of the AB not only weakens the dispute settlement system but also the multilateral trading system in general. The establishment of the WTO dispute settlement system has made a significant contribution to achieving WTO objectives. The system has been considered successful and beneficial to all WTO Members, providing security to developing countries that lacked the political or economic strength to enforce their rights and protect their interests in the past<sup>86</sup>. Without an effective legal enforcement tool, developing countries may find themselves in an unfavourable position, especially concerning the proliferation of trade and environmental policy implementations by developed countries.

Without a fully functioning dispute settlement system, protective policies of WTO Members are on the rise. For example, in March 2018, the US implemented policies to increase import tariffs on steel and aluminium products by 25% and 10%, respectively. These tariff levels exceeded the US tariff concessions in the WTO. A UNCTAD study on this matter has been conducted. In summary, the application of these tariffs by the US could raise the export tariffs of developing countries from 3% to 37%. This situation undoubtedly hinders the participation of developing countries in global trade. For this reason, resolving AB issues is a crucial element in preventing trade wars, as acknowledged by the

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<sup>86</sup> Bossche, Peter Van den dan Werner Zdouc. 2021. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Fifth Edition. Cambridge University Press (E-Book edition).

Director-General of the WTO, as quoted by the Washington Trade Daily (Volume 30, Number 238)<sup>87</sup>.

### 3.3.2. WTO Dispute Settlement Reform Negotiations and Indonesia's Contribution

#### a. Negotiations at the Regular Dispute Settlement Body Meeting

The issues raised by the United States (US) have undergone a shift. In early 2017, there were two vacant positions in the AB. Under these circumstances, the AB proposed a method for selecting new AB members during a regular Dispute Settlement Body (DSB) meeting, but WTO Members could not reach a decision. At that time, the US did not express any objections. It was only during the regular DSB meeting on May 22, 2017, that the US voiced its rejection of the selection process for new AB members, citing the primary reason of the transition period for a new government<sup>88</sup>. There were two identical proposals, one from the European Union<sup>89</sup> and another from the South American coalition (Argentina, Brazil, Colombia, Chile, Guatemala, Mexico, and Peru).

From the issue of the transitional government, the US began to emphasize new reasons at the regular DSB meeting on August 31, 2017, specifically the matter of individuals whose terms as AB members had ended being assigned to decide appellate cases (Rule 15 Working Procedures for Appellate Review issue)<sup>90</sup>. The US also indicated the need for an informal DSB meeting to discuss this issue.

At the regular DSB meeting on November 22, 2017, the proposals from the European Union and the Latin American Group were combined (document series WT/DSB/W/609). With the selection process yet to begin, many WTO Members, both developed and developing countries, began to take notice. The combined proposal gained broad support. Indonesia did not immediately endorse either the mentioned proposal or the one from the European Union and the Latin American Group earlier. However, Indonesia, at the regular DSB meetings on June 19<sup>91</sup> and July 20, 2017<sup>92</sup>, encouraged the prompt initiation of the AB member selection process, emphasizing the crucial role of the AB in the WTO dispute settlement system. Indonesia did not align itself with any proposal at that time as it was still focused on determining the selection process method.

Indonesia joined as a co-sponsor of the 64th proposal (document series WT/DSB/W/609) during the regular DSB meeting on March 27, 2018. At this point, with no concrete proposals or ideas from the US, Indonesia reiterated the vital role of the AB in the multilateral trading system and requested the US to provide concrete proposals to resolve the Rule 15 issue. Indonesia explicitly called for the separation of discussions on the Rule 15 issue from the process of selecting new AB members,

<sup>87</sup>Putra, Angga Handian. 2022. Potential Contributions of the G-20 Presidency of Indonesia to WTO Reform on Dispute Settlement System: [https://www.researchgate.net/publication/359973163\\_Potential\\_Contributions\\_of\\_the\\_G-20\\_Presidency\\_of\\_Indonesia\\_to\\_WTO\\_Reform\\_on\\_Dispute\\_Settlement\\_System](https://www.researchgate.net/publication/359973163_Potential_Contributions_of_the_G-20_Presidency_of_Indonesia_to_WTO_Reform_on_Dispute_Settlement_System), downloaded on 24 March 2023.

<sup>88</sup>See Document WT/DSB/M/397. Page 24-25: "The representative of the United States said that, given the ongoing transition in the United States' political leadership and the very recent confirmation of a new US Trade Representative, the United States was not in a position to support the proposed decision to launch a process to fill a position on the Appellate Body that would only become vacant in December 2017. Nevertheless, the United States was willing to join a consensus for the DSB to take the decision proposed by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico, and Peru. That decision was focused on a process to fill a position that would become vacant in just over one month's time. As the United States had conveyed to several Members, despite the ongoing transition, it had received guidance that it would be acceptable to launch a process given the expiry of Mr. Ramirez's second term on 30 June 2017."

<sup>89</sup>See Document WT/DSB/W/597.

<sup>90</sup>See Document WT/DSB/M/400. Page 13: "as had been mentioned under Agenda item 5, the United States was not in a position to support the proposed decision. The United States considered that the first priority was for the DSB to discuss and decide how to deal with reports being issued by persons who were no longer members of the Appellate Body. Members should consider how the resolution of those issues might affect a selection process. An informal DSB meeting would be a good place to start".

<sup>91</sup>See Document WT/DSB/M/398. Page 17.

<sup>92</sup>See Document WT/DSB/M/399. Page 12.

following the applicable DSU provisions. Additionally, Indonesia expressed openness to further discussions on the existing problems<sup>93</sup>. Several WTO Members, such as the European Union, China, and India, also made strong statements, questioning the basis for the US raising the Rule 15 issue, including the rationale for bringing up the issue after two decades of DSU operation.

The scope of issues raised by the United States (US) began to widen, particularly during the regular Dispute Settlement Body (DSB) meeting on November 21, 2018<sup>94</sup>. Beyond the Rule 15 issue, the US started addressing concerns on: 1) overreaching issues, notably the AB's reports on subsidies, anti-dumping duties, countervailing duties, standards and trade barriers, and trade safeguards; 2) the AB issuing advisory opinions; and 3) the AB disregarding the 90-day deadline for the appellate process. The proponents of the proposal (document series WT/DSB/W/609), including Indonesia, highlighted potential violations by WTO Members of Article 17.2 of the Dispute Settlement Understanding (DSU), which mandates the selection process for AB members to be conducted when positions are vacant. WTO Members also expressed disappointment in the US for not initiating discussions.

The US later elaborated in more detail on its concerns in the USTR report on the WTO AB on February 12, 2020. These issues continued to be emphasized by the US when rejecting proposals to initiate the selection process for new AB members.

In August 2020, Ambassador Robert Lighthizer, the USTR, wrote in *The Wall Street Journal*<sup>95</sup>:

"The WTO's dispute-settlement system should be totally rethought. The current two-tier system should be replaced with a single-stage process akin to commercial arbitration, in which ad hoc tribunals are impanelled and resolve particular disputes in an expeditious manner."

While this idea was not formally presented in WTO formal meetings such as the DSB and General Council, the statement drew the attention of many countries. This US's views still require clarification, especially regarding a single-stage litigation system like commercial arbitration. Indonesia anticipated this statement as the US's motivation to continue negotiations on reforming the WTO dispute settlement system. Recognizing the importance of information in supporting negotiations, informal approaches with other WTO Member countries were undertaken as one of the negotiation strategies, alongside expressing national positions in formal WTO Committee meetings.

## **b. Negotiations on the "Walker Process"**

The informal process led by Ambassador David Walker, known as the "Walker Process," commenced in January 2019. The key outcomes of this process include (1) the facilitator's report and (2) the draft decision of the General Council (GC). It's crucial to note that the GC decision holds the highest authority in the WTO in the absence of a Ministerial Conference (MC) and is legally binding, requiring implementation.

The facilitator's report is based on discussions among WTO members in small group sessions (attended by a limited number of WTO members) and open-ended informal meetings (attended by all WTO members). Between January and December 2019, the facilitator conducted 11 small group sessions and 6 open-ended informal meetings, issuing 5 reports to the GC on February 28, May 7, July 23, October 15, and December 9, 2019<sup>96</sup>.

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<sup>93</sup> See Document WT/DSB/M/410. Page 16.

<sup>94</sup> See Document WT/DSB/M/421. Page 39-40.

<sup>95</sup> Lighthizer, Robert. 2020. How to Set World Trade Straight. *Wall Street Journal*: <https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341>, downloaded on 24 March 2023.

<sup>96</sup> See Document JOB/GC/225.

Simultaneously, the Walker Process produced a draft decision of the GC (WT/GC/W/791) containing substantive elements aimed at resolving the issues raised by the US regarding the AB (AB). This draft decision was formally discussed at the General Council meeting on December 9, 2019. The proposal includes the following suggestions<sup>97</sup>:

1. AB members continue to hear an appeal even after their term has expired and without the approval of the Dispute Settlement Body (DSB) (transitional rules for outgoing AB members). On this issue, it is proposed to agree that: (a) only WTO members are authorized to appoint AB members; (b) the Dispute Settlement Body (DSB) has explicit authority and responsibility for determining AB membership and is obligated to fill vacant positions when they occur; (c) to assist members in fulfilling their responsibilities, the selection process to replace AB members who have left their positions must commence automatically 180 days before the end of an AB member's term. The selection process should follow previous practices; (d) if a vacancy occurs before the end of an AB member's term due to other circumstances, the DSB Chair must promptly initiate the selection process with the view to filling the vacant position as soon as possible; (e) AB members approaching the end of their term can be assigned to a new appellate division up to 60 days before the end of their term; (f) the assigned AB member can complete the appellate process if the oral hearing is held before the end of their term.
2. AB members do not adhere to the 90-day deadline for concluding an appeal without consulting the DSB (90-day). It is proposed that: (a) The AB is required to issue its report no later than 90 days from the date either party files its notice of appeal (consistent with Article 17.5 DSU); (b) In cases of unusual complexity or an unusually large number of appeals, parties may agree with the AB to extend the deadline for issuing the AB report beyond 90 days (such agreements may also be made under force majeure conditions). Each agreement will be notified to the DSB by the parties and the Chair of the AB.
3. In an appeal, the AB re-examines facts at the panel stage, including domestic law, even though the AB should only review legal issues and legal interpretations made by the panel in its final report (scope of appeal). For this issues, it is proposed that (a) Article 17.6 DSU limits the issues that can be raised on appeal to legal issues covered in the panel report and the legal interpretations made by the panel; (b) The "meaning of municipal law" is treated as a factual issue and, therefore, not subject to appeal; (c) The DSU does not allow the AB to engage in a "de novo" review or "completing the analysis" of the facts of a dispute; (d) Consistent with Article 17.6 DSU, participating members in the appellate process must refrain from presenting overly broad and unnecessary arguments in their efforts to have factual findings overturned on appeal, according to Article 11 DSU, in a de facto "de novo review".
4. The AB examines and provides recommendations on various issues not contested by the disputing parties (advisory opinions). In this section, it is proposed that (a) issues not raised by both parties cannot be concluded or decided by the AB; (b) consistent with Article 3.4 of the DSU, the AB should address issues raised by the parties under Article 17.6 of the DSU alone for matters necessary to assist the Dispute Settlement Body (DSB) in making recommendations or rendering decisions provided in the WTO covered agreement to resolve disputes.
5. The AB makes decisions on previous cases as precedents for future cases, even though the WTO dispute settlement process does not create precedents. The proposal for this issue is that (a) precedents are not created through the WTO dispute settlement process; (b) consistency and

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<sup>97</sup>See Document WT/GC/W/791.

- predictability in interpreting rights and obligations under the WTO agreement are essential values for members; (c) panels and the AB should use previous panel/AB reports with consideration, only when the panel/AB deems it relevant to the dispute at hand.
6. Decisions and recommendations of the AB may diminish or augment the rights and obligations of WTO members, which should not be the case. Particularly regarding anti-dumping provisions, it should be interpreted in accordance with Article 17.6(ii) of the WTO Anti-Dumping Agreement (overreach). On this issue, the proposal includes (a) as stipulated in Articles 3.2 and 19.2 of the DSU, findings and recommendations of panels and the AB, as well as recommendations and decisions of the DSB, cannot augment or diminish the rights and obligations contained in the WTO agreement; (b) panels and the AB should interpret the provisions of the WTO Anti-Dumping Agreement in line with Article 17.6(ii) of that agreement.
  7. Regular dialogue between the DSB and the AB. Concerning this issue, it is proposed that (a) the DSB, in consultation with the AB, will establish a mechanism for regular dialogue between WTO members and the AB where members can express their views on issues, including those related to the implementation of these decisions, but not related to the endorsement of specific reports; (b) this mechanism will take the form of informal meetings, at least once a year, chaired by the DSB Chairman; (c) to maintain the independence and impartiality of the AB, clear basic rules will be established to ensure that there is no discussion of ongoing disputes or any AB member at any point.

The Walker Process encountered a deadlock after the US rejected it at the General Council meeting. Several WTO members, including Indonesia, expressed disappointment and regretted the US rejection due to its potential harm to the multilateral trading system. Indonesia specifically emphasized that the GC decision concept from the Walker Process could serve as a basis for future negotiations. The U.S.'s move is likely to have consequences, including eroding trust, good faith, and the integrity of rules within the rules-based system. The US is suspected of continuing a strategy that demonstrates its strength until other countries give in<sup>98</sup>.

Various proposals or papers have been presented by the African Group (since November 2018) attempting to address AB functionality issues; a joint communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, South Korea, Iceland, Singapore, Mexico, and Montenegro (December 10, 2019) expressing scepticism about the AB issue resolution process; a paper submitted jointly by Japan, Australia, and Chile (April 18, 2019); communication from Brazil, Paraguay, and Uruguay (April 25, 2019); Thailand (April 26, 2019); and Honduras (January 21 and 29 and February 4, 2019). The future Walker Process does not seem likely to reopen negotiation processes<sup>99</sup>.

### **c. Negotiations to Implement the Outcomes of the 12th WTO Ministerial Conference**

The 12th WTO Ministerial Conference took place from June 12 to 17, 2022, in Geneva. One of the outcomes of MC12 is the MC12 Outcome Document, which was adopted on June 17, 2022. Through this document, WTO members agreed for the first time to conduct a comprehensive review of WTO functions to ensure the organization can more effectively respond to challenges faced by the multilateral trading system. WTO members attempted to outline the way forward for WTO reform. Regarding dispute resolution, the ministers' mandate is encapsulated in Paragraph 4<sup>100</sup>.

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<sup>98</sup>Danish and Aileen Kwa. *Op. Cit.*

<sup>99</sup>Bossche, Peter Van den dan Werner Zdouc. 2021. *Op. Cit.*

<sup>100</sup> See Document WT/MIN (22)/24; WT/L/1135 on MC12 Outcome Document.

Paragraph 4 of the MC12 Outcome Document states that:

"We acknowledge the challenges and concerns with respect to the dispute settlement system, including those related to the AB, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."

Paragraph 4 of the MC12 Outcome Document includes the following elements:

- Recognition of the challenges and concerns regarding the dispute settlement system, including those related to the AB;
- Acknowledgment of the importance and necessity to address these challenges and concerns; and
- Commitment to conduct discussions with the aim of obtaining a fully functional and accessible dispute settlement system for all WTO members by 2024.

The 2024 deadline provides a "breath of fresh air," offering a clear milestone for issue resolution. However, Paragraph 4 of the MC12 Outcome Document indicates a broader scope than just the AB issue, particularly raised by the U.S., but encompasses the entire dispute settlement system accessible to all WTO members. Accessible would become key element in negotiating the reform. Accessible means capable of being entered or approached; easy of access; readily reached or got hold of. Also with to<sup>101</sup>. Accessible issue should pay attention the need of developing and LDC members, who are either tend to shy away from participating in disputes or are unable to access the system<sup>102</sup>. The reasons for this may include a lack of resources, a lack of institutional capacity, or a lack of political will<sup>103</sup>.

Therefore, negotiations on the reform of the dispute settlement system will bring up new issues for discussion mainly from developing or LDC members. Some issues could be about the access to fund, faster and more simple procedures, and provide effective special and differential treatment provisions within the DSU for developing and LDC members. However, it is crucial to ensure that negotiations do not broaden excessively as to meet the 2024 deadline.

Following the mandate in the MC12 outcome document, the US has shown an intention to initiate discussions on resolving issues with the WTO dispute settlement system. There is an informal process led by the US involving WTO members interested in participating. Generally, these WTO members are active users of the WTO dispute resolution mechanism, although some LDC members are also engaged in the process.

Despite positive developments regarding efforts to resolve WTO dispute settlement system issues, information on this informal process is still limited among WTO members and not widely known to the public regarding the issues discussed and the progress of the process provided the discussion is informal process in nature. From General Council documents<sup>104</sup>, the informal process is ongoing and targeted for completion by the end of 2022, as requested by the US The process is also rumoured to soon commence with text-based negotiations<sup>105</sup>. In the same meeting, Indonesia

<sup>101</sup> See Definition of Accessible in Oxford English Dictionary: <https://www.oed.com/search/dictionary/?scope=Entries&q=accessible>, downloaded on 8 January 2024.

<sup>102</sup> Bohl, Kristin. 2009. "Problems of Developing Country Access to WTO Dispute Settlement": <https://studentorgs.kentlaw.iit.edu/jicl/wp-content/uploads/sites/5/2014/01/BohlSubmissionWTOFinal.pdf>, downloaded on 8 January 2024.

<sup>103</sup> *Ibid.*

<sup>104</sup> See Document WT/GC/M/201. Page 6.

<sup>105</sup> *Ibid.* Page 91. Brazil statement: "Second, on the dispute settlement function, there is an active and informal process on the dispute settlement reform, up to December. A fully functioning dispute system is of fundamental importance for Brazil. We expect useful results from this process in order to transition to a text-based negotiation as quickly as possible".

advocated and supported the General Council Chair to promptly organize a special session on WTO reform<sup>106</sup>.

On September 19th, 2023, Indonesia issued a communication to all members of the World Trade Organization (WTO) regarding the "Dispute Settlement Reform Discussion: A Thought on The Process". This communication signifies Indonesia's active participation in the ongoing negotiation to achieve the goals of the MC12 mandate. Indonesia stresses the need to formalize the informal discussions on DS Reform that the Dispute Settlement Body or the General Council have been holding. Formalization of the process will ensure that developing and LDC Members with small delegations can actively participate in the reform discussions. Indonesia is urging for inclusive, transparent, and open discussions accessible to all members, and any Member should be able to propose new ideas or proposals at any stage, as the process should be member-driven in nature.

#### **d. Other Initiatives**

Another initiative refers to the efforts of a group of like-minded WTO members to address the situation where the appellate process cannot be conducted temporarily until a permanent solution is found. To tackle this issue with the understanding of preserving the right to appeal, 26 WTO members led by the European Union and Canada established the "Multi-Party Interim Appeal Arrangement" or MPIA. Participants in MPIA consist of both developing and developed countries, actively utilizing the WTO dispute settlement system, such as the European Union, Canada, Brazil, Australia, China, and Mexico (most recently, Japan joined MPIA on March 10, 2023<sup>107</sup>).

The arbitration appeal procedures within the MPIA framework essentially replicate the appellate procedures used by the AB, except that the composition of appellate judges is replaced by arbitrators<sup>108</sup>. The MPIA arbitration appeal procedures are temporary and used only until the AB can operate again.

MPIA renders panel decisions in a trade dispute involving MPIA participants, independently examined by arbitrators based on Article 25 of the Dispute Settlement Understanding (DSU). To date, there has been one arbitral award in the DS591 dispute: Colombia – Frozen Fries.

The list of pending appellate disputes at the AB is dominated by the United States (8 cases) and India (5 cases – potentially increasing as India indicates it will appeal to the AB for DS582/584/588). Meanwhile, trade disputes among MPIA participants during the non-operational AB period have not appealed into the void. Some have even been resolved without the need for further litigation processes, including:

1. In DS522, Brazil withdrew its complaint before the panel decision circulated to all WTO members.
2. In DS524, Costa Rica accepted the panel's result (even though "losing").
3. In DS537, the parties decided to settle the dispute with a mutual agreement (Canada committed to adjusting national legislation).

Some active users of the WTO dispute settlement system who have not joined MPIA include the United States, India, and Indonesia. The US is expected to be resistant to the MPIA initiative until a permanent solution is found for WTO dispute settlement system issues. India is involved in several disputes that are undergoing the appeals process. As for Indonesia, it remains open to MPIA but has

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<sup>106</sup>*Ibid.* Page 39.

<sup>107</sup> See Document JOB/DSB/1/Add.12/Suppl.9.

<sup>108</sup> See Documents JOB/DSB/1/Add.12 and JOB/DSB/1/Add.12/Suppl.5.

not made a decision to join yet. One reason for Indonesia's non-participation is the absence of practical case examples implementing the MPIA procedures.

## IV. CONCLUSIONS

### 4.1. Conclusion

The dispute settlement system in the WTO era has more detailed procedures, resolving trade disputes through litigation. In the GATT 1947 era, dispute resolution relied on diplomacy, favouring countries with greater political or economic strength.

The WTO dispute settlement system plays a crucial role in maintaining the security and certainty of the multilateral trading system. Indonesia has utilized the WTO dispute settlement system to defend national interests and contribute to the system.

The current WTO dispute settlement system is facing a crisis due to the non-operational of the AB. The non-operational AB condition stems from the United States' refusal to appoint new AB members since mid-2017. The US rejection is based on several reasons:

1. The AB consistently neglects the obligation to meet the 90-day deadline for deciding appellate cases.
2. The AB allows individuals whose terms as AB members have ended to decide appellate cases as if their terms have been extended by WTO members in the DSB.
3. The AB has exceeded its authority by making findings on factual issues, including factual issues concerning the national law of WTO members, even though its authority is only to handle legal issues.
4. The AB has issued an advisory opinion.
5. The AB insists that its previous reports and interpretations serve as binding precedents to be followed by the Panel.
6. The AB neglects the obligation to make necessary recommendations when measures have expired after the Panel's formation.
7. The AB has acted beyond its authority and expressed opinions on matters within the jurisdiction of WTO members acting through the Ministerial Conference, General Council, and DSB.

The crisis in the WTO dispute settlement system can be detrimental, especially for developing countries in enforcing WTO rules against developed countries and participating in international trade. WTO members have undertaken negotiations to address AB issues, including:

1. Negotiations at the Regular Dispute Settlement Body Meeting.
2. Negotiations on the Walker Process.
3. Negotiations to Implement the Outcomes of the 12th WTO Ministerial Conference.
4. Other initiatives, such as the Multi-Party Interim Appeal Arrangement (MPIA).

Indonesia has contributed to the system and the Organization by clarifying interpretations of WTO agreements through some trade dispute cases. In the reform negotiations, Indonesia has been also participating actively in the negotiations to restore fully function of the WTO dispute settlement system, by joining a proposal to commence the selection of new AB members which has been discussing at the Dispute Settlement Body, supporting the result of "Walker Process" negotiations as a basis for future negotiation, and making some proposals in an informal process to implement the mandate of MC12 Outcome Document, such as formal communication regarding the "Dispute Settlement Reform Discussion: A Thought on The Process".

Indonesia's interest in the negotiations to reform the WTO dispute settlement system is significant. The goal of trade liberalization by the WTO will face significant challenges without a legal

enforcement tool like the dispute settlement system. The non-operational AB has triggered the implementation of various protective policies applied by developed countries such as the US and the European Union.

Pound argued that values are not absolute and must be relative and adaptable to the needs of each time and place. A full function of the WTO dispute settlement system could contribute to avoid a trade war and ensure the security and predictability of the multilateral trading system. It also observed that a trade war would become a disincentive for developing countries to participate in international trade.

Many developing countries intend to enhance their export to improve their economic conditions from the COVID-19 Pandemic. Align with many developing countries interests, Indonesia's national interests boost exports<sup>109</sup>. Without full function of a dispute settlement system, the objective of the WTO to enhance participation of developing countries in the international trade would be far from reality.

#### 4.2. Recommendations

Indonesia should continue its active participation in the negotiations process as part of efforts to resolve the crisis of the dispute settlement system. Efforts to resolve issues within the WTO dispute settlement system through the Walker Process seem unlikely to reopen, given the divergent process and broader issues discussed. Indonesia needs to focus on negotiations in regular DSB meetings and negotiations to implement the outcomes of the 12th WTO Ministerial Conference. However, documents circulated during the Walker Process can serve as a reference for Indonesia to generate ideas for resolving WTO dispute settlement system issues.

In negotiations during regular DSB or General Council meetings, Indonesia can continue delivering statements, sharpening the substance conveyed, including highlighting significant impacts on the enforcement of WTO rules and the participation of developing countries in international trade. Indonesia can engage in expanding support for proposals for appointing AB members.

In negotiations to implement the outcomes of the 12th WTO Ministerial Conference, Indonesia can make it the primary forum for resolving WTO dispute settlement system issues. Indonesia needs to participate in informal discussions led by the US by proposing practical ideas, such as:

1. Prioritizing to restore the WTO dispute settlement system with necessary adjustment, mainly accessible aspects of the system that are interests of developing and LDC members;
2. Emphasizing to limit the scope of issues to avoid excessive expansion beyond the 2024 deadline. As known, negotiations to enhance WTO dispute settlement procedures through DSU review have been ongoing since 2001 and have yet to reach a clear outcome. The covered issues need to be limited to those raised by the U.S., contributing to the initiation of the selection process for new AB members. If there are other issues raised by other member countries that are not directly addressing the issues, their discussion can be deferred or separated.
3. Proposing documents or outcomes from negotiations not by amending the current DSU text to ensure the 2024 deadline is met, and implementation can be easily and promptly done without

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<sup>109</sup> See Kementerian Perdagangan RI: Resolusi 2023, Zulhas: Ekspor Non migas RI Capai Rp 4.500 T: <https://www.kemendag.go.id/berita/pojok-media/resolusi-2023-zulhas-ekspor-non-migas-ri-capai-rp-4500-t#:~:text=00%20WIB%20534-Jakarta%20%2D%20Menteri%20Perdagangan%20Zulkifli%20Hasan%20alias%20Zulhas%20menargetkan%20ekspor%20non,US%24%20253%2C61%20miliar>, downloaded on 24 March 2023.

the domestic processes of WTO members. Possible forms of outcomes to be considered include working procedures, guidelines, General Council decisions.

4. Safeguarding a legalistic WTO dispute settlement system, ensuring the process is not determined by the political or economic power of a country.
5. Making a comprehensive analysis on its cost and benefits of a two-tier litigation process.

In terms of the process, Indonesia can hold informal meetings with other countries to understand various issues discussed and other countries' positions. Gathering as much information as possible will be crucial in the negotiation process. At the national level, Indonesia can form a team given the multitude of issues discussed. Indonesia can form coalitions with like-minded countries. Additionally, Indonesia can leverage bilateral and regional cooperation forums to enhance its contributions. As explained earlier, the issues raised by the US are likely more political, so Indonesia may explore discussing these issues with the US bilaterally. In regional forums, Indonesia can leverage its leadership in ASEAN region to garner political will to resolve them.

In other efforts, especially regarding the Multi-Party Interim Appeal Arrangement (MPIA), Indonesia can further study the effectiveness and benefits of MPIA. For the time being, Indonesia needs to remain open to the possibility of joining MPIA, considering that the disputing parties with Indonesia are MPIA participants, while keeping an eye on the developments in the reform of the WTO dispute settlement system while safeguarding Indonesia's national interests. As an alternative, Indonesia may also consider ad hoc arbitration appellate procedures with case-by-case basis.

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