

PARALYZING THE WTO FROM THE INSIDE: THE DEADLOCK OF THE APPOINTMENT OF APPELLATE BODY JUDGES AND ITS REPERCUSSIONS

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Received: 2021-10-09; Reviewed: 2021-10-09; Accepted: 2022-04-23; Published: 2022-08-23

Abstract

The establishment of the dispute settlement procedure that consists of the Panel Report and the Appellate Body has been the most remarkable characteristic of the World Trade Organization. Aside from the most productive international dispute resolution process, it has consistently adopted a rule-oriented procedure in enforcing the commitments made during trade negotiations. Since the last five years, however, the dispute settlement process has confronted an existential crisis. While conflict resolution through consultations and panels continues, the process under the Appellate Body is forced to stop. The United States has impaired the appointment of additional judges to this body, preventing it from obtaining the quorum required to hear appeals. This paper aims to identify and analyze the deadlock of the appointment of the Appellate Body judges and its repercussions for international trade governance, including Indonesia. This deadlock could jeopardize the viability of the global trading system as there would be no proceeding to hear the dispute at the appellate level. Some cases that involved Indonesia would also be affected, particularly if the parties are willing to continue this process to the Appellate Body.

Keywords: *Deadlock; Dispute Settlement Mechanism; The Appellate Body; World Trade Organization*

1. INTRODUCTION

As poverty and inequality increase in some of its member states, the presence of the World Trade Organization (WTO) that liberalize international trade has been called into question.¹ According to the United Nations Development Program (UNDP), from 1990 to 2015, Extreme poverty fell from 47 to 13 percent globally, but only from 57 to 40 percent in Sub-Saharan Africa.² The World Bank then examined the poverty rates in Central Asia, Europe, and Africa.³ In Europe and Central Asia, less than 2 percent of the population (272.4 million) lives on less than USD 1.25 a day, despite a 0.7 percent increase in population.⁴ In Africa,

¹ I Gusti Ngurah Parikesit Widiatedja, 2021, *International Trade and Investment Law: The Case of Indonesia*, Udayana University Press, Denpasar, pg. 72.

² United Nations Development Programme, 2015, *Human Development Report 2015*, New York, pg 36.

³ World Bank, 2016, *The World Bank Group A to Z*, Washington D.C, pg 19.

⁴ *Ibid.*

46.8 percent of the population (936.3 million) lives on less than USD 1.25 a day, despite a 2.7 percent increase in population.⁵

The overriding spirit of national interest also jeopardized the WTO, resulting in the failure to approve trade agreements.⁶ Take, for example, the Doha Development Agenda (DDA) gridlock caused by unresolved differences between developing and developed countries on problems like agriculture and trade remedies.⁷ Domestic laws in several nations exacerbate this situation. For example, Anti-dumping mechanisms were implemented by Donald J. Trump to penalize any countries whose products were damaging local businesses in the United States (US).⁸ Indonesia also imposed export restrictions on nickel ore to encourage local extractors to refine the ore at home and export higher-value goods.⁹ Finally, some governments enacted trade measures to defend what they perceived to be local cultures, which may come under the category of “inefficient protectionism.”¹⁰

Despite the bleak outlook for the WTO’s future, the establishment of the Dispute Settlement Mechanism (DSM), which consists of the Panel Report and the Appellate Body (AB), has salvaged the WTO’s destiny. The WTO DSM has been the most productive international dispute resolution process,¹¹ and is one of the most noteworthy features of the WTO.¹² The existence of DSM plays an important role in enforcing the commitments made during trade negotiations.¹³ Without the DSM, no trade deals could have been reached.¹⁴

Since the last five years, however, the WTO DSM, also known as the “jewel in the crown,” is confronting an existential crisis. While conflict resolution through consultations and panels continues, the AB has ground to a halt, with 16 pending cases for appeal as of December 2020.¹⁵ For the past two years, the US has obstructed the appointment of additional judges to the AB, preventing the AB from obtaining the

⁵ *Ibid.*

⁶ I Gusti Ngurah Parikesit Widiatedja et al., *The Rise of the Spirit of National Interest and the Existence of World Trade Organization Agreement : A Case Study of Indonesia*, Hasanuddin Law Review vol. 73, no. 1 edition of April 2019, pg 261-262.

⁷ Julieta Zelicovich, *Are There Still Shared Values to Sustain Multilateralism? Discourse in World Trade Organization Reform Debates*, Third World Quarterly Vol. 43, no. 2 edition of December 2021, pg. 334, <https://doi.org/10.1080/01436597.2021.2008796>.

⁸ Kristen Hopewell, *Trump & Trade: The Crisis in the Multilateral Trading System*, New Political Economy vol. 26, no. 2 edition of January 2021, pg. 276, <https://doi.org/10.1080/13563467.2020.1841135>.

⁹ I Gusti Ngurah Parikesit Widiatedja, *Indonesia Export Ban on Nickel Ore Does It Violate the World Trade Organization (WTO) Rules*, Journal of World Trade, vol. 55, no. 4 edition of August 2021, pg. 669.

¹⁰ Quynh-Dan Nguyen, *Error: Essay Not Found: Comparing Censorship in China and South Korea*, Brawijaya Law Journal vol. 3, no. 1 edition of April 2016, pg. 27.

¹¹ Peter Van den Bossche and Werner Zdouc, 2017, *The Law and Policy of the World Trade Organization*, Cambridge University Press, 4th Edition, pg 221.

¹² Meaza Haddis Gebeyehu, *The Impact Of Political Decisions Within The WTO Dispute Settlement System: Political Negotiations Within Adjudication*, Indonesian Journal of International Law vol. 17, no. 1 edition of January 2019, pg. 26.

¹³ Kenneth Holland, *The Trump Administration’s Critique of the World Trade Organization and Its Implications for the International Trading System*, Indian Journal of International Economic Law 13 edition of December 2021, pg. 155.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

quorum required to hear appeals.¹⁶ The US claimed that the AB overstepped its scope and misread WTO accords in a number of disputes involving the US and other members.¹⁷ It also asserted that the AB violated WTO norms by extending its mandate after its term had expired.¹⁸

Impairment at the appellate level jeopardizes the multilateral trading system's viability. The ruling would be in limbo if there was no AB to hear the dispute. Hence, the goal of this study is to identify and analyze the deadlock of the appointment of AB judges and its repercussions for international trade governance, including Indonesia. This paper begins by outlining the supremacy the WTO DSM, which includes its legal character and its role to control the spirit of national interest. It then explains the appointment and reappointment of the WTO's AB Judges. Finally, this paper shows the deadlock over the appointment of AB Judges, analysing its repercussions on international trade governance.

This paper is primarily normative research which is focused on the study of the dispute settlement mechanism under the WTO, explaining the impact of the deadlock of the appointment of the judges of AB. The paper also takes a historical approach to examine the supremacy of the WTO's dispute resolution systems. The study takes a case study approach, discussing relevant WTO cases that are thought to show real-world examples of how current systems have reached a stalemate.

2. DISCUSSION

A Legal Character of the WTO DSM

Some academics characterized the DSM's character in trade agreements. Jo and Namgung classified the DSM's degree of legalism from "high", "medium" and "low."¹⁹ The term "low" reflects to a condition in which agreements prohibits the formation of a third party or when a non-binding third party decision has been made.²⁰ Following that, "medium" reflects to the binding character of the third-judgment. Finally, "high" legalism is practised in the DSM through the institution of permanent standing courts.²¹

The WTO DSM has a legal personality and a high degree of legalism. Islam looked at how the DSM used a rule-oriented procedure to reduce power disparities, protect members' legitimate interests, and prohibit the offensive exercise of rights by using "covered agreements" as the legal basis.²² Bown praised the WTO DSM for removing

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Research Blog, The WTO Appellate Body Deadlock and the Way Ahead, <https://research.jgu.edu.in/the-wto-appellate-body-deadlock-and-the-way-ahead/> accessed on 1 June 2022.

¹⁹ Hyeran J and Hyun Namgung, Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime, *Journal of Conflict Resolution* vol. 56, no. 6 edition of December 2012, pg. 1041.

²⁰ *Ibid*

²¹ *Ibid.*

²² M. Rafiqul Islam, 2006, *International Trade Law of the WTO*, Oxford University Press, pg.81.

the blocking procedure that enabled members to avoid a dispute, the formation of a panel, and the adoption of the panel report.²³ The next argument for the WTO DSM is the existence of “inherent powers,”²⁴ which include the ability to run the proceedings to the extent required to fulfil their adjudicative duty.²⁵ With this authority, tribunals may freely decide what evidence to acknowledge and how to weigh that evidence.²⁶

The legal nature of the WTO DSM has equally treated all of its member nations, particularly in WTO disputes complaints.²⁷ Surprisingly, poorer economies outperformed economic superpowers in some WTO disputes. For example, Costa Rica filed a complaint about underwear in the United States – Underwear; Indonesia filed a complaint about clove cigarettes in the United States – Clove Cigarettes; and Antigua, which has a population of only 67,000 people, filed a complaint about gambling in the United States – Gambling. As of 2019, 580 disputes had been filed for settlement. Furthermore, the Dispute Settlement Body (DSB) has adopted 222 panel reports and 138 AB reports.²⁸ In comparison, the International Court of Justice (ICJ) published 70 judgements and seven advisory opinions during the same period, while the International Tribunal for the Law of the Sea (ITLOS) released 23 judgments and two advisory opinions.²⁹

The WTO DSM and the Spirit of National Interest

As stated, before in the introduction, the overriding tone of national interest has created the WTO in jeopardy. The fierce disputation between developed and developing countries has resulted in the Doha Round's impasse. Some WTO member countries also disregard non-discrimination principles in the name of promoting what they consider to be a national interest. Historically, numerous states used discriminatory trade practices during the 1930s Great Depression, resulting in economic and political disasters. This was one of the leading factors to World War II.³⁰

The basic objective of the multilateral trading system, according to the WTO's preamble, is “the elimination of discriminatory treatment in international economic relations.” To expound on this purpose, the Appellate Body in *EC – Banana III* determined that the character of the non-discrimination duty is that “similar products should be

²³ Chad P. Bown, Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders, *The World Bank Economic Review* vol. 19, no. 2 edition of August 2005, pg. 293.

²⁴ Andrew Mitchell and David Heaton, The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function, *Michigan Journal of International Law* vol. 31 edition of September 2011, pg. 561.

²⁵ Tania Voon, Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law, *Journal of International Economic Law* vol. 18 edition of December 2015, pg. 800.

²⁶ Ma'en Juwaihian, Settlement of Commercial Disputes in the World Trade Organization (WTO), *Journal of Law, Policy and Globalization* vol. 91 edition of November 2019, pg. 88.

²⁷ Map of Disputes Between WTO Members, https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm. Accessed on 31 May 2022.

²⁸ World Trade Organization, Chronological List of Disputes Cases, <https://www.wto.org/english/tratopeldispuldspustatuse.htm>, accessed on 30 May 2022.

²⁹ ITLOS, Chronological List of Disputes Cases, <https://www.itlos.org/en/cases/list-of-cases/> accessed on 21 May 2022.

³⁰ Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 71.

treated equally, regardless of their origin.”³¹ However, in practice, many WTO member states have imposed discriminatory measures. For example, because of its ambiguous nature, the application of the public morals exemption might be used as a rationale to apply discriminatory policies through trade obstruction that they assumed were in the interest of public morality.³² For instance, Canada demonstrated its prohibition on child pornography and things deemed indecent, traitorous, or seditious.³³ Colombia has banned the use of minors in pornographic material.³⁴

The following disputes, on the other hand, demonstrate how the Panel’s and Appellate Body’s decisions successfully regulated WTO member states’ discriminatory measures by utilizing the public morality exception. Following Article XX GATT 1994, all of these measures were finally defined as “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade.”

The panel examined the scope of the Interstate Horseracing Act in *US-Gambling*. With the agreement of specific organizations, this Act stated that “an interstate off-track wager may be accepted by an off-track betting system.”³⁵ Simply put, the panel and the AB contended that the Act permitted local service providers to provide remote betting services for specific horse events but not foreign service providers. As a result, the U.S was unable to demonstrate that its policies were not “arbitrary and unjustified discrimination.”³⁶

In *China – Audiovisual*, China screens publications of books, newspapers, and video products, such as DVDs, CDs, games and music transferring services, through state-owned corporations.³⁷ China claimed that its system was necessary as a preventive policy to assure that products did not carry any pornographic or violent materials that were contradictory with China’s traditional values. Both the Panel and the AB invalidated this policy because it caused to discriminatory practices in which China required the trade of importing publications to be organized wholly by State-owned firms and banned international firms from being permitted as publication importers, so that this policy did not fall within the range of the general exception under GATT Article XX.³⁸

Both the Panel and the AB examined the TBT agreement in *EC- Seal Products*, concluding that the European Communities (EC) Seal Regime was an unjust treatment

³¹ Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 25 September 1997.

³² I Gusti Ngurah Parikesit Widiatedja, Can Indonesia Invoke Public Morals Exception under the World Trade Organization (WTO) for Prohibiting Cross-Border Gambling?, Yustisia vol.7 no. 2 edition of May 2018, pg 262.

³³ WTO Secretariat, Report of the WTO Secretariat on the Trade Policy Review of Canada, WT/TPR/S/53, 19 November 1998.

³⁴ WTO Secretariat, Report of the WTO Secretariat on the Trade Policy Review of Colombia, WT/TPR/S/172/Rev.1, 3 April 2007.

³⁵ Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005.

³⁶ *Ibid.*

³⁷ Panel Report, China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, 12 August 2009

³⁸ *Ibid.*

because it was designed to give Greenland's Inuit groups an advantage over Canadian Inuit groups through the means this measure was applied.³⁹ As a result, when compared to Greenlandic seal products, the EC Seal Regime had a negative impact on the conditions of competition for Norwegian and Canadian seal products.⁴⁰

The Procedure of WTO DSM and the Appointment and Reappointment of the AB Judges

The fundamental purpose of the WTO DSM is to quickly overcome WTO member disputes concerning their specific rights and obligations.⁴¹ Following Article 3.3 of the Dispute Settlement Understanding (DSU), the timely and efficient resolution of such disputes is critical to the successful operation of the WTO and the balance of the member's rights and obligations.⁴² The current WTO DSM includes four stages: consultations, panel reports, AB reports, and the Dispute Settlement Body (DSB) acceptance.

If a member offers consultations with the other members, the WTO DSM is launched.⁴³ According to Article 4.3 of the DSU, the responding member must reply to this proposal within ten days, and then conducts good faith consultations within 30 days of acquiring the proposal. If the consultation fails within 60 days, a panel is formed. Following Article 8.4 and 8.5 of the DSU, unless the members of a dispute agree otherwise, the panel consists of five or three panellists (who are not primarily jurists) chosen from the Secretariat's list. Although the panellists act on their own behalf, the fact that the quarrelling members must agree on the panellists can have an impact on their position.⁴⁴ The disputing members then explain their proposal to the panel, and the panel then adopts the final report, which includes recommendations following Article 16.4 of the DSU. Unless there is a consent against adoption, the DSB accepts this report within 60 days.

Article 17.3 of the DSU governs the operation of the WTO's appeals procedure. Parties to a dispute may challenge legal interpretations made by a panel in its panel report. Only three judges are chosen for each appeal to hear and decide the matter. Judges are chosen at random and in an unpredictable manner, giving each justice the opportunity to serve regardless of national origin. The AB has the authority to affirm, alter, or reverse panel findings. The WTO appellate proceedings must be finished within 60 days (two months) of the appellant filing its notice of appeal. If the AB believes it will

³⁹ Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, 22 May 2014.

⁴⁰ *Ibid.*

⁴¹ Pei-kan Yang, *Reinforcing Dispute Settlement Mechanism under the Framework Convention on Tobacco Control as an Option to Solve Trade/Investment-Related Tobacco Disputes*, *Asian Journal of WTO and International Health Law and Policy* vol. 16, no. 2 edition of September 2021, pg. 369.

⁴² Dispute Settlement Rules, *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2*, 1994.

⁴³ Pervaiz Khan and Mohammad Asif Khan, *GATT (1947) and WTO Dispute Settlement Systems: A Comparative Analysis*, *Journal of Law and Society (University of Peshawar)* vol. 49, no. 73 edition of August 2018, pg. 21.

⁴⁴ Zachary Flowers, *The Role of Precedent and State Decisions in the World Trade Organization's Dispute Settlement Body*, *International Journal of Legal Information* vol. 47, no. 2 edition of September 2019, pg.92.

be unable to complete its work within the required time frame, it shall notify the DSB in writing of the ground for the postponement as well as the expected time frame for issuing its report. In any case, this term cannot be more than 90 days (three months).⁴⁵

Concerning its membership, the AB has a fixed membership of seven independent legal scholars. Each judge serves four-year terms by consensus voting.⁴⁶ They may be reappointed for a second four-year term. The term dates for each justice are staggered to ensure that no judge's tenure begins and ends at the same time. The WTO considers granting a sitting AB judge a second term to be a conventional practice.⁴⁷ However, this practice no longer exists since the last five years. Both Seung Chang of South Korea and Shree Baboo Servansing of Mauritius were denied reappointment because the US vetoed their reappointments.⁴⁸ Moreover, the judicial terms of Ujal Singh Bhatia and Thomas R Graham terminated in December 2019. Because there have been no subsequent appointments, Hong Zhaho is the only judge on the WTO's AB. As a result, the AB is currently unable to render decisions until at least two vacancies are filled.⁴⁹

The Deadlock of the Appointment of Appellate Body Judges

Obstructing the appointment of AB Judges, the US has jeopardized an important function of the WTO DSM. Ironically, the US was the driving force behind the formation of the WTO's formidable dispute settlement system.⁵⁰ The following paragraphs will show how the US has refused appointment of AB judges in many occasions.

The Chair of the DSB declared on 16 December 2016, that the second terms of AB Members Ricardo Ramirez-Hernandez and Peter Van den Bossche would expire on 30 June 2017 and 11 December 2017, respectively.⁵¹ The chair advocated a simultaneous selection procedure for the two seats for the sake of efficiency and limited time in the second half of the year due to the upcoming Ministerial Conference.⁵² In August 2017, the chair of the DSB announced that one of the most recent AB judge, Hyun Chong Kim, had tendered his urgent resignation to the chair of the Appellate Court at the time. Kim had been named Trade Minister in his home country of South Korea, which barred him from continuing to serve as an AB Judge.⁵³

⁴⁵ World Trade Organization, Appellate Body Members, https://www.wto.org/english/tratope/dispute/ab/members_descrpe.htm, accessed on 17 May 2022.

⁴⁶ Appellate Body Secretariat, Annual Report for 2008, 2009, https://www.wto.org/english/tratop-e/dispu-e/ab-anrep_2008_e.pdf, accessed on 21 May 2022.

⁴⁷ *Ibid.*

⁴⁸ World Trade Organization, Members Urge Continued Engagement on Resolving Appellate Body Issues, https://www.wto.org/english/newse/news19_e/dsb_18dec19_e.htm, accessed on 30 May 2022.

⁴⁹ *Ibid.*

⁵⁰ Chen Fengying and Sun Lipeng, The United States' Role in WTO Reform, China International Studies Vol. 76 edition of May 2019, pg. 84.

⁵¹ Sun Zhenyu, Some Thoughts on Reform of the WTO, Journal of WTO and China vol. 9, no. 1 edition of January 2019, pg. 4.

⁵² Kholofelo Kugler, The World Trade Organization's Appellate Body Melee: How Did We Get Here, International Business Law Journal vol. 3, no. 1 edition of May 2019, pg. 270.

⁵³ DSB, *Minutes of DSB Meeting of 31 August 2017*, WT/DSB/M/400.

While the selection process of the AB judges was commenced, the US stopped this process. The reason was Hyun Chong Kim and Ramirez-Hernandez were presiding over *EU-Fatty Alcohols (Indonesia)*, the report of which was due on 5 September 2017. They would no longer be AB Members on the day the report was spread. As a result, the US questioned whether the report would be valid with only one signature.⁵⁴

The US again stopped the AB selection process at the DSB sessions in 7 November 2017 on the grounds that it could not participate in initiating a selection process for Van den Bosshe, who continued to serve on the AB.⁵⁵ In June 2018, the member of AB Judges, Shree Servansing expressed his desire to be considered for reappointment. His first four-year term would end on September 30, 2018.⁵⁶ However, the US refused to renew Servansing's tenure. When it expired, the AB was reduced to three members, the bare minimum for forming a division. As of the end of April 2019, the situation remained the same.⁵⁷

The US express its main concerns by stating that the selection process could not forward unless systemic concerns were addressed, some of which it had been highlighting for some time.⁵⁸ They included the AB neglect for the 90-day deadline for appeals; continued work by AB judges beyond their limited terms; the AB has issued advisory opinions on matters that are not necessary to resolve a dispute; and the AB claims that its reports are precedent-setting.⁵⁹

The US' move to prevent AB Judges' reappointment sparked heated debate among WTO members. South Korea chastised the US in unusually harsh terms: To put it clearly, this resistance is an effort to utilize reappointment as a media to hold AB members accountable for choices they may make on the bench. "If AB members create judgments that do not accord to US view, they will not be reappointed."⁶⁰ Brazil, China and India also expressed their concerns by saying that the deadlock would jeopardize the AB's integrity and impartiality, notably by exerting pressure on justices to decide in certain ways through the implicit threat of non-reappointment.⁶¹

The Repercussions of This Deadlock for International Trade Governance and Indonesia

Under the current scheme, the AB hears appeals from WTO dispute settlement panels' decisions, acting as a kind of "supreme court" for international trade disputes and thus an important component of the dispute settlement system.⁶² As informed earlier, the AB has seven seats, and a panel of at least three judges is required to hear a

⁵⁴ DSB, *Minutes of DSB Meeting of 29 September 2017*, WT/DSB/M/400, 2017.

⁵⁵ DSB, *Minutes of the DSB Meeting of 22 June 2018*, WT/DSB/M/414, 2018.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ DSB, *Minutes of DSB Meeting of 31 August 2017*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ World Trade Organization, Members Debate Appointment/Reappointment of Appellate Body Members, https://www.wto.org/english/news-e/news16_e/dsb_23may16e.htm accessed on 2 June 2022.

⁶² Hopewell, Trump & Trade, 273.

case. The impasse has made the AB unable to adjudicate claims since December 2019. This has had disastrous consequences accordingly. If an appeal is filed, the ruling of a dispute resolution panel is halted – and does not become legally binding – until the AB rules. As a result, in the absence of a functioning AB to hear the case, the country found to be against in a dispute may prevent adoption.⁶³ This has harmed the viability of the multilateral trading system. Members of the WTO are now at risk of other signatories breaching trade obligations and commitments enshrined in WTO agreements.⁶⁴

The sustained impartial independence of the AB is critical to sustaining the rule of law in the world of trade. The rule of law is thus becoming a prerequisite for ensuring the security and predictability of the rule-based multilateral trading system for the benefit of all WTO Members.⁶⁵ When the AB is unable to carry out this function, the rule of law in international trade is no longer present. If this happen then WTO members may easily disregard and violate WTO agreements as the law enforcement under the WTO has been paralyzed through the absence of the AB.

Responding to the reason of the US in blocking the appointment of AB judges, the integrity, impartiality, and independency of that one Member, and, by extension, the whole AB, should not be called into question by a decision on reappointment of an AB Judge based on decisions in which that Member participated as a part of the divisions in particular appeals. Neither appointment nor reappointment to the AB should be based on doctrinal preference, lest the AB be reduced to the status of a mere political weapon. Rather, the standard for both appointment and reappointment should be whether the individual is “of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements in general,” as enshrined in Article 17.3 of the WTO DSU.⁶⁶

The other concern is related to the trend of the selection of new members of the AB that has been increasingly politicized. The AB’s legitimacy is harmed by this politicization, which casts doubt on its judicial independence. The Member of AB, David Unterhalter, expressed his concerns about the threat to AB members’ independence from the nomination process, and thus the “legitimacy and authority of the WTO dispute settlement system” in his farewell speech in January 2014.⁶⁷ In the selection of the new AB judges to replace David Unterhalter, WTO members failed to reach an agreement. The presence of two African nominees has incurred a refusal from the US. Shree Baboo Chekitan Servansing, a career diplomat from Mauritius without earning a law degree, was finally appointed to fill the vacant place by the DSB in September 2014. The AB’s reputation and power outside of the Geneva community may suffer if WTO

⁶³ *Ibid.*

⁶⁴ D. Ravi Kanth, AB Members Challenge US Over Reappointment of Seung Wha Chang, http://www.twn.my/tide2/wto.info/2016/ti_160516.htm. Accessed on 3 June 2022.

⁶⁵ *Ibid.*

⁶⁶ World Trade Law, Letter from Former Appellate Body Members to the Chair of the WTO Dispute Settlement Board, <http://worldtradelaw.rypepad.com/filesabletter.pdf>. Accessed on 4 June 2022.

⁶⁷ David Unterhalter, Appellate Body Member, WTO Dispute Settlement Body, Farewell Speech in Geneva, <http://www.wto.org/english/tratop-e/dispu-e/unterhalterspeech-e.htm>. accessed on 3 June 2022.

members appoint AB judges based on diplomatic sensitivity rather than legal capability. As a result, future AB decisions may provide less principled conflict resolution advice, reducing the AB's intermediate authority.⁶⁸

Various solutions have been proposed to resolve the WTO deadlock. There is an urgent need to consider adding at least two new judges to the AB. With nine AB Judges, three divisions could operate concurrently without any composition overlap. Furthermore, given the increased volume and complexity of appeals, the membership may consider making AB judges' status full-time, as opposed to their current part-time status. In addition, rule 20 of the Working Procedures needs to be modified to make the panel report final-without recourse to the AB.⁶⁹

During the deadlock of the appointment of AB Judges, Indonesia has involved in some WTO cases. In *Australia-Anti-Dumping Measures on A4 Copy Paper*, Indonesia proposed consultations with Australia over policies concerning to the infliction of an anti-dumping order on A4 copy paper and the probe and discovery leading to it.⁷⁰ Indonesia asserted that the policy seem to be incompatible with the following articles, including: Articles 2.2 and 2.4 of the Anti-Dumping Agreement. The panel then agree with this claim, stating that Australia has issued an illegal anti-dumping order on A4 copy paper product from Indonesia. Fortunately, both parties agree with the Panel Report and this case did not go through to the AB.⁷¹

In *Indonesia - Measures Relating to Raw Materials*, Indonesia has imposed a ban on nickel ore exports. Indonesia imposed a ban on nickel ore exports, which went into effect in January 2020, two years earlier than planned. This measure was designed to encourage local extractors to refine ore at home and export higher-value commodities. Therefore, Indonesia intended to be more than just a raw material supplier for its mineral resources.⁷² As a result, millions of tons of supply could be removed from the market, threatening a global shortage. The European Union (EU) responded by filing a WTO complaint, claiming that Indonesia's export ban has improperly constricted its producers' access to nickel. On 29 April 2021, the panel was composed the panel, and it was expected that the panel would complete its final report to the parties in the end of 2022.⁷³ Indonesia is, to some extent, slightly benefited from the deadlock of the appointment of AB Judges. Indonesia has a plenty time to impose this export restriction although this measure, in the presence of the AB, will not be justified under the current procedure.

⁶⁸ Gregory Shaffer, Manfred Elsig, and Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body, Law and Contemporary Problems* vol.79, no. 1 edition of 2016, pg. 274.

⁶⁹ Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?*, <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>. Accessed on 1 June 2022.

⁷⁰ Australia — Anti-Dumping Measures on A4 Copy Paper, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds529_e.htm, accessed on 11 June 2022.

⁷¹ *Ibid.*

⁷² Indonesia – Measures Relating to Raw Materials, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds592_e.htm, accessed on 17 June 2022.

⁷³ *Ibid.*

3. CONCLUSION

The role of the WTO has been doubtful as the gap between developed and least-developed countries is somewhat getting wider. Some WTO members also impose discriminatory measures, promoting the significance of national interest. The failure to conclude multilateral trade agreements, such as the DDA has exacerbated this situation. Despite all of the criticism, the existence of the dispute settlement mechanism has salvaged the future of the WTO. This kind of mechanism works better than many other international judicial organizations or some court systems in many nations. Beside the most amentaceous international dispute resolution process, it has consistently applied a rule-oriented mechanism in upholding the commitments made during trade negotiations.

Since the last five years, however, the dispute settlement process has confronted an existential crisis. While conflict resolution through consultations and panels continues, the process under the AB has been forced to stop. The United States has impaired the appointment of additional judges to this body, preventing it from obtaining the quorum required to hear appeals. This deadlock has jeopardized the viability of multilateral trading system as there will be no proceeding to hear the dispute at the appellate level. Some cases that involved Indonesia are also affected, particularly if the parties are willing to continue this process to the AB.

The WTO members states should promptly resolved this deadlock. The first one is to modify the status and composition of AB Judges. Specifically, it is sensible to add the number of AB judges from seven to nine; extend term of office for each AB judges from four to six years; and increase status of the judges as full-time job. The role of the US in determining the appointment or reappointment of AB judges should also be balanced. Hence, the refusal of one particular member would not impede the selection process of AB judges. For Indonesia, it can continue its measure in imposing export restriction while waiting for the completion of this deadlock. However, Indonesia should seek an alternative fora for trade negotiations under both multilateral and bilateral agreements, especially if these kinds of agreements have provided comprehensive DSM.

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