

## **Indonesia's Participation in the World Trade Organization Dispute Settlement System**

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### **Abstract**

*Based on the description of literature or research result shows that the dispute settlement system of the World Trade Organization (WTO) has made progress in which the interests of developing countries began to be accommodated in the dispute settlement system of the WTO. It is, among others, indicated by the increasing participation of developing countries in using the dispute settlement system of the WTO. But not a few others in the literature on the various constraints faced by developing countries in dispute resolution practice of the WTO, especially when faced with the developed countries. This condition becomes important to study in order to see accommodation trade interests of developing countries in general and in particular the Indonesian state and national trade interests of the Republic of Indonesia in the practice of dispute resolution system of the WTO.*

### **Introduction**

The WTO dispute settlement system has made progress in which the interests of developing countries began to be accommodated within the WTO dispute settlement system. It is, among others, indicated by the increasing participation of developing countries in the WTO dispute settlement system to use in order to protect the national interests of their trade areas. However, some literature has suggested the existence of various constraints faced by developing countries in the WTO dispute settlement practice, especially when faced with the member countries from the group of developed countries.

Those constraints not only lies in the field of law, but can also arise from non-legal fields such as economic constraints and political terms or a combination of all three. This condition becomes important to study in order to see accommodation trade interests of developing countries in general and Indonesia in particular national trade interests in the practice of the WTO dispute settlement system.

This study analyzes how the challenges and opportunities faced by developing countries in general and in particular the conditions experienced by Indonesia in the international trading system under the WTO. Furthermore, the focus of this research is the legal consequences posed by the WTO agreement in an atmosphere of national law. The final part of this study examines how the consideration of the Government of the Republic of Indonesia in making a decision whether to use the WTO dispute resolution forum or not related to any violation of the obligations of the WTO by other member states.

The method used in this study is a normative juridical analysis of the norms of international trade law applicable within the framework of the WTO, especially regarding the dispute settlement system. Additionally normative approach is also used in this study to analyze the norms of national law in force in Indonesia in relevance with the WTO norms as mentioned above. Overall this study basically aims to draw conclusions on the existence and benefits of the WTO dispute settlement system in the perspective of national trade interests of Indonesia where it brings direct impact on the use of Indonesian participation in the WTO dispute settlement forum.

### ***A. Challenges and Opportunities of Indonesia in the World Trade Organization (WTO) Dispute Settlement***

In general, opportunities and obstacles faced by the developing countries must also be experienced by Indonesia in its activities when getting involved in the settlement process of international trade dispute in the World Trade Organization (WTO). The consequence of the position of Indonesia as a developing country is that its position becomes weak when dealing with the developed countries. This happens due to the difference of economic power among the states that become the members of the World Trade Organization (WTO).

According to Christina L. Davis, there are four reasons why the legal-based dispute settlement system can help the developing countries when litigant with particularly the developed country,<sup>1</sup> among other things, first, the availability of the option to file a lawsuit gives strength to the developing countries to force the developed countries to come to the negotiating table to discuss their interests. Second, the dispute settlement system such as Disputes Settlement Understanding (DSU) has made the international trade law as a benchmark to reach an agreement. Third, using a mutually agreed rules will facilitate developing countries to get allies who have similar interests to support their case. Fourth, long-term economic interests can be used to support the regulationsto encourage the compliance with the regulations.

The previous dispute settlement in the General Agreement on Tariffs and Trade (GATT) prioritized the settlement through diplomacy was regarded as unfavorable to the developing countries, especially when they were in conflict with the developed countries. With the Disputes Settlement Understanding (DSU), the settlement of the disputes in World Trade Organization (WTO) has more priority to legal approach that all parties have the opportunity to win a dispute if they do not really violate the rules of World Trade Organization (WTO) especially for the developing countries that can move more freely to file a dispute.<sup>2</sup>

Nevertheless, although the Disputes Settlement Understanding (DSU) is one of the best achievements oneof the World Trade Organization (WTO), there are still several drawbacks in the WTO dispute settlement system that could potentially cause problems for the developing countries to obtain maximum results.<sup>3</sup> The constraints are, among other things, first, the lack of knowledge and experience in the field of the law of the World Trade Organization (WTO) blocks the efforts to achieve maximum results from the dispute settlement system.<sup>4</sup> Developing countries, especially the small ones, do not have adequate numbers of human resources who are expert in the field of law and economy, either of the private or government parties, to understand the substance of the law of World Trade Organization (WTO).<sup>5</sup> In contrast, in the developed countries, the private sector is very active in overseeing its market access, and the government also has an effective mechanism to maintain relations between the private sector and the government so when they are involved in the dispute, almost all of the related work such as collecting facts, economic analysis, and analysis of legal argumentation, have been undertaken by the industry associations that are most affected by the trade dispute.<sup>6</sup> Second, the problems for the developing countries to participate in the dispute settlement system of the World Trade Organization (WTO) is the costs for litigants. These costs are not only themoney that will be spent by the litigants to hire the lawyers and economists, but also to pay the cost of political economy, especially when the dispute is between the developing countries and the developed countries.<sup>7</sup> Indian ambassador to the World Trade Organization also provides a view that the high cost of litigation in the use of the mechanism in the World Trade Organization are key factors hindering the use of this system for some developing countries.<sup>8</sup>

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<sup>1</sup> Cristina L. Davis, "Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam", [http://www.princeton.edu/~cldavis/files/davis\\_WTO\\_and\\_developing\\_countries.pdf](http://www.princeton.edu/~cldavis/files/davis_WTO_and_developing_countries.pdf), December 2011.

<sup>2</sup> Elvis Napitupulu, Elvis Napitupulu, *Memaksimalkan Kegunaan Sistem Penyelesaian Sengketa World Trade Organization Bagi Kepentingan Negara Berkembang*, Thesis, Post Graduate Programme of Law Faculty of University of Indonesia, Jakarta 2012, p. 52.

<sup>3</sup> Ibid

<sup>4</sup> Peter van den Bossche, Daniar Natakusumah, Joseph Wira Koesnadi, *Pengantar Hukum WTO*, Yayasan Obor Indonesia, Jakarta 2010, p. 105.

<sup>5</sup> Elvis Napitupulu, op.,cit., p. 53

<sup>6</sup> Timothy Stotad, "Trappings of Legality, Judicialization of Dispute Settlement in the WTO, and its Impact on Developing Countries", in 39 *Cornell International L.J.*, volume 811 2006, p. 825.

<sup>7</sup> This view has been espoused by the African Group in the context of negotiations on DSU review. Proposal by the African Group, *Negotiations on the Dispute Settlement Mechanism Understanding*, TN/DS/W/15, September 25, 2002, p. 2. See also Bown and Hoekman, "Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes forthcoming, *The World Economy*, Fourth Edition, 2000, p. 889.

<sup>8</sup> P Presentation by Ambassador Bhatia of India. H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO, "Settling Disputes Among Members", Presentation at the WTO Public Forum 2008, Session 6, September 24, 2008.

Estimated costs spent only for the litigation process can reach US\$ 500,000.00 to request information from the exporters with a pretty good ability to know the market of the trade related to the dispute.<sup>9</sup> The cost spent in legal proceedings is certainly greater, plus the cost of paying the related parties to get a report of the result of the panel, can reach more than US \$ 10 million<sup>10</sup>

Third, the weaknesses that exist in the implementation stage is associated with the retaliatory capacity of developing countries. The mechanism of retaliation is not always implementable particularly in the dispute between the developed countries and the developing countries that are economically very dependent on the developed countries. Developing countries do not necessarily have the ability to perform retaliation against the developed countries that do not want to carry out their obligations. In this case, the mechanism of retaliation does not have any meaning for the developing countries. Because the position of developing countries and the developed countries is unbalanced, the developing countries cannot make use of the mechanism. Along with the above mentioned circumstances, there was a result of analysis saying that the main constraints that limit the use of dispute settlement system of the World Trade Organization (WTO) by the developing countries is the inability of this system to enforce the rules when confronted with the developed countries.<sup>11</sup>

Fourth, a dispute can last a long time or up to two years. The dispute could also cause economic difficulty as a result of the trade barriers implemented by another country during the dispute settlement process. The action taken by the state that is not consistent with the provisions of the World Trade Organization (WTO) will not be canceled until two or three years after the action began to be processed through the dispute settlement system of the World Trade Organization (WTO).<sup>12</sup> Even, the settlement process of one of the dispute cases occurred in the World Trade Organization (WTO) took up to 6 (six) years.<sup>13</sup> Davey concluded that the analysis of his observations reveals that the experience to date shows that the World Trade Organization (WTO), in many cases, took too long to settle a dispute.<sup>14</sup>

Fifth, the existence of political and economic pressures experienced by the developing countries if they choose to fight the developed countries in a dispute of the World Trade Organization (WTO). Experts have noted that the developing countries and the underdeveloped countries may be unwilling or reluctant to choose a dispute settlement process at the World Trade Organization (WTO) when dealing with the developed countries as they, in particular cases, have a vulnerability to get "revenge" in other sectors such as the delay of development aid or the ease or being privileged in certain markets such as preferential market access.<sup>15</sup> The weaknesses of the dispute settlement system of the World Trade Organization as mentioned above will surely become the barriers for the developing countries like Indonesia, but it would be better if it is seen or regarded as a challenge. If possible, the system implemented in the Disputes Settlement Understanding (DSU) should consider the position and role of the developing countries which constitute the majority member of the World Trade Organization which exceeds 70% of the total member states of the World Trade Organization. It is not possible that the constraints existing in the Disputes Settlement Understanding (DSU) will hinder the purpose of the World Trade Organization (WTO) in creating trade bebas.<sup>16</sup>

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<sup>9</sup> Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' 2005 JIEL 8(4) 861, p. 870. Nordström and Shaffer come to a similar conclusion for a dispute of medium complexity through to the Appellate Body stage. See also H. Nordström and G. Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure', ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2, June 2007, p. 9-10.

<sup>10</sup> Nordström, H. (2005), The World Trade Organization Secretariat in a Changing World, 39 Journal of World Trade 5 (October), pp. 819-853. Referring to the legal fees in the context of the Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper ('Japan – Film'), WT/DS44/R, adopted April 22, 1998. Presumably that figure will have been exceeded in subsequent complex disputes.

<sup>11</sup> Hunter Nottage, Hunter Nottage, Developing Countries In The WTO Dispute Settlement System, Working Paper pada Global Economic Governance System, 2000, p. 5.

<sup>12</sup> World Trade Organization, [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)

<sup>13</sup> Ibid.

<sup>14</sup> W. Davey, The WTO Dispute Settlement System', JIEL 3(1) 15, 2000, p. 50.

<sup>15</sup> C. Bown and W. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' JIEL 8(4) 861, 2005, p. 863.

<sup>16</sup> Elvis Napitupulu, *op. cit.*, p. 56.

The next concern is by letting the great hopes be hung in the international dispute settlement at the World Trade Organization (WTO), it is worth noting how the opportunities of the developing countries, especially Indonesia in the dispute settlement system. With the status as a developing country, Indonesia is certainly possible to get a special treatment in the dispute settlement mechanism, but the special treatment and various assistances in the process of dispute settlement do not mean a reduction of liabilities or an increase of substantive rights.<sup>17</sup>

The opportunity of Indonesia as a developing country is that it is considered to be very capable of representing the aspirations of the interest of national trade. Although the experience of defeat in national car dispute still overshadows this country,<sup>18</sup> but, in fact, in several disputes, Indonesia became the winning party even though dealing with the developed countries.

For example, the disputes between Indonesia and the United States related to kretek cigarettes originated from the enactment of Article 907 (a) (1) (A) "Family Smoking Prevention and Tobacco Control Act" (hereinafter referred as the Tobacco Control Act) by President Obama on June 22, 2009, and came into force in September 2009.<sup>19</sup>

The regulations ban the distribution of all cigarettes with aroma and flavor (flavored cigarettes), including kretek/clove-flavored cigarettes, in the United States. Although these rules do not prohibit the cigarettes with the aroma and flavor of menthol that tends to be majoritily produced by domestic manufacturers, the United States government issued a ban on the production and sale of clove-flavored cigarettes based on the health regulations which also hindered the sales of other cigarettes with flavors or aromas such as wine, coffee, and strawberry, in order to prevent young people from to be addicted to smoking.<sup>20</sup> Indonesia brought up an objection to the United States in the World Trade Organization (WTO) by stating that the prohibition made by the US government was discriminative because the US government did not impose the same prohibition to the menthol flavored cigarettes. In its decision, the World Trade Organization (WTO) accepted and agreed with the argumentation brought up by Indonesia and said that the policy made by the US government violated the fair trade regulations that has been the principle of World Trade Organization (WTO).<sup>21</sup>

There were many more disputes won by Indonesia such as the dispute between Indonesia and South Korea, a country that can be categorized as the country with a bigger economic condition. Indonesia became the major plaintiff in the case with South Korea in relation to the application of anti dumping import duty by South Korea on certain paper originated from Indonesia that was imported by Korean importer.<sup>22</sup> Through the process of consultation commencing on July 7, 2004, Indonesia asked South Korea, in this case Korean Trade Commission (KTC), to call off the anti dumping additional duty because, in the opinion of Indonesia, that action was not in accordance with the existing anti dumping regulations based on the provision of World Trade Organization (WTO).<sup>23</sup> In fact, the process of bilateral consultation between Indonesia and Korea did not reach the agreement.<sup>24</sup> Since there was no agreement resulted by the consultation process, Indonesia continued the process into the litigation which was eventually won by Indonesia.

Based on the two cases above, it has been proven that inspite of the constraints faced by Indonesia especially those hindering the use of dispute settlement system of World Trade Organization (WTO), Indonesia had the adequately good opportunities to win the disputes, of course, if Indonesia was in the right and strong position. Diplomatic and economic powers of Indonesia were very reliable in fighting for the national interest in the field of international trade, especially in the incident of international trade dispute where Indonesia is in the position as either defendant or plaintiff.

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<sup>17</sup> Ibid

<sup>18</sup> See further on: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds59\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds59_e.htm), about the dispute, see also: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds54\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm), dan lihat juga selengkapnya sengketa [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds64\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds64_e.htm)

<sup>19</sup> "Indonesia Taklukkan AS di WTO dalam Sengketa Rokok Kretek," see the case on <http://www.jaringnews.com/ekonomi/umum/12979/indonesia-taklukkan-as-di-wto-dalam-sengketa-rokok-kretek>, 2014.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid

<sup>22</sup> Freddy Josep Pelawi, "Penyelesaian Sengketa WTO dan Indonesia", Direktorat Pengamanan Perdagangan, Ditjen Kerjasama Perdagangan Internasional, Trade Department of Republic of Indonesia, 2007, p. 35.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

### ***B. The Agreement of the World Trade Organization (WTO) in the Perspective of Indonesian Law and its Legal Consequences***

The establishment of World Trade Organization (WTO) has given the consequences for Indonesia as one of the 125 countries that participated in signing the agreement of the World Trade Organization (WTO) and has been ratified it through Law No. 7/1994 dated November 2, 1994. With this ratification, the entire provisions of the World Trade Organization (WTO) must be executed by Indonesia. The implementation of the provisions of the World Trade Organization (WTO) are performed by adjusting all of the existing provisions applicable to the field of trade to the provisions of World Trade Organization (WTO). It means that Indonesia must harmonize or at least do its best to make the regulation of legislation consistent with the provisions of World Trade Organization (WTO).<sup>25</sup>

The provisions of World Trade Center (WTO) is basically an agreement between the countries in the world that functions as the main sources of international law. The implementation of the provisions of World Trade Center (WTO) is a new facility for the development of national law and is very meaningful in materializing legal relationship between the international law and national law existing in the sector of international trade. In the perspective of national law, the regulation of the application of the international agreement in the national law can be seen in Article 11 of the 1945 Constitution stating that "President with the agreement of Parliament declares war, makes peace and agreement with other countries". But, in practice, not all of the international agreement needs the agreement of Parliament before its implementation. The approval of the international agreement by the Government of Republic of Indonesia is performed as long as it is required by the international agreement itself". Then, in paragraph (2), it is stated that:" The approval of international agreement as meant in paragraph (1) can be implemented by the law or presidential decree".

Based on that regulation, it is clear that there is an international agreement that needs the agreement of Parliament in which its approval is performed through the law (such as the issues of politics, peace, defence, national security, territorial change or reestablishing the boundaries or territory of the Republic of Indonesia, national sovereignty or sovereign rights, human rights and life environment, the establishment of new legal norms, foreign loans and/or grants), and there is also an international agreements that can be made by the government without requiring the approval of the House of Representatives/Parliament where the approval is done through Presidential Decree (for the issues other than politics, peace, defense and others as mention above).

Legally, the agreement of the World Trade Organization (WTO) has become part of national law which must be carried out because the Government and the Parliament has approved the Agreement on Establishing the World Trade Organization (WTO) through Law 7/1994. Legal consequences arising from the ratification of the WTO agreements in national law is a need for harmonization of laws, such as the agreement of the World Trade Organization (WTO) in the field of investment (Trade Related Investment Measures / TRIM)has encouraged the passing of Law 25/2007 on Investment replacingthe previous legislation, among other things, in order to make the harmonization as previously mentioned. Similarly, the agreement of the World Trade Organization (WTO) for the field of intellectual property rights (Intellectual Property Rights Trade / TRIPs)has encouraged the enactment of a variety of new laws such as the Law 19/2002 on Copyright, Law 14/2001 on Patent, Law 30/2000 on Trade Secret and others. With participation in the World Trade Organization (WTO),at least, Indonesia can take advantage of the market opportunities in other countries that would be more open in accordance with the demands of the World Trade Organization (WTO).

### ***C. Consideration of the Government of Indonesia in using the Dispute Resolution Forum of the World Trade Organization (WTO)***

If seen from the Government Agencies which is competent in an attempt to file the dispute to the forum of the World Trade Organization (WTO), the competence is the hand of the Ministry of Trade of Republic of Indonesia (Kemendag) because substantively all of the disputes of World Trade Organization (WTO) is clearly in the field of trade.

<sup>25</sup> Zulkarnain Sitompul, "Pemanfaatan Sistem Perdagangan Multilateral Untuk Kepentingan Indonesia", this paper presented on a seminar of Pembaharuan Hukum Menuju Perekonomian Global, held by Bina Hukum with University of Prima, Medan, 14 December 2011 .p. 22. See also Zulkarnain Sitompul, "Penguatan *Domestic Regulation* dan Perbaikan Iklim Usaha", paper presnetd on a Workshop of *Indikator Iklim Usaha dan Review Regulasi*, held by Badan Kebijakan Fiskal, Department of Fiscal, Surabaya December 3, 2009.

Besides, the delegation of the Government of Republic of Indonesia that signed the results of the agreement of the World Trade Organization (WTO) are also originated from the Ministry of Trade of Republic of Indonesia (Kemendag, RI). In spite of it, the Ministry of Trade of Republic of Indonesia (Kemendag, RI) will keep coordination with the other government agencies from the sector that are related to the subject of dispute. For example, if the export of Indonesian agricultural product is inhibited by the United States, the Ministry of Trade that will archive this case in coordination with the Ministry of Agriculture. The other government agencies that are not less important in the attempt of Indonesia to file the dispute to the World Trade Organization is the Ministry of Foreign Affairs (Kemenlu). In relation to the above-mentioned coordination, Ministry of Trade coordinates with the Ministry of Foreign Affairs because the Ambassadors of Indonesia abroad are the facilitators representing Indonesia, the Ambassador of Indonesia abroad even participate in representing Indonesia in the dispute settlement process of World Trade Organization (WTO).<sup>26</sup>

In filing the dispute to the forum of World Trade Organization (WTO), the government of Republic of Indonesia basing itself on a number of considerations, ranging from trade concern whose dispute will be filed to the political considerations, and the diplomatic relations with the countries that would be complained, for example, at least it will be taken into account when a country turns out to be sued has a lot of investments in Indonesia, it is worried that due to the lawsuit will be submitted over the country would make foreign investors pull out from Indonesia. But then, there are other important considerations even with its main character, which is a kind of consideration related to the enforcement of dignity of the nation.<sup>27</sup>

Economic political consideration, for example, can be seen in the dispute with the United States in the case of kretek cigarettes (strawberry, clove flavored and so forth that is not allowed to be imported to the United States). The decision of appeal has, in fact, not obeyed and implemented yet by the US Government. If Indonesia then, based on the disobedience of the US Government, get the authority to do a retaliation, it is worried that this action of retaliation will be contra-productive for the national investment climate in which many American investors will leave Indonesia. Besides, it is also worried that the action of retaliation will bring negative impact to the export of Indonesia to the United States.

Concerning the criteria made by the Government of Republic of Indonesia to determine whether or not a dispute is worthy to be filed to the forum of dispute settlement of World Trade Organization (WTO) must be based on the rules of World Trade Organization (WTO). If national trade is hindered by the other countries even though in small value, it openly violates the rules of World Trade Organization (WTO), the fore, the government will take an action to safeguard the interest of national export. For example, in the dispute of foot wear with Argentina on April 22, 1998. The Government of Republic of Indonesia did not look at the nominal value of the dispute but more on the enforcement of national right in the framework of multilateral trade of World Trade Organization (WTO). In the dispute mentioned above, since the right of Indonesia was violated, the Indonesian government required Argentina that violated the rules of the World Trade Organization (WTO) to restore its right. That consideration of the Republic of Indonesia is included as the consideration of national dignity/prestige of the nation. Another example for the consideration of dignity is that if the action taken to safeguard our national interest from the other countries has inflicted loss to our national trade interest which is the right of Indonesia therefore the right must be demanded.<sup>28</sup>

Based on the result of this study, it is found out that financially the cost spent by the Government of Republic of Indonesia to file a dispute to the forum of World Trade Organization (WTO) is casuistic or depending on the relevant dispute. In several existing cases, it only needed a service of a lawyer, but for several other cases, many delegations were needed to be present in Geneva. The budget was to spend for the litigants in the dispute resolution forum of World Trade Organization (WTO) is in each ministry, for example, for the staff of Ministry of Foreign Affairs, the costs are budgeted by the Ministry of Foreign Affairs, while for the staff of Ministry of Trade, the costs are budgeted by the Ministry of Trade itself.<sup>29</sup>

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<sup>26</sup> Interview with Herliza, Chairman of the International Trade Advocacy Center, Ministry of Commerce of Republic of Indonesia, Jakarta, April 28, 2014.

<sup>27</sup> Ibid. See also: Hikmahanto Juwana, "Hukum Internasional Dalam Perspektif Indonesia Sebagai Negara Berkembang", PT. Yarsif Watampone, Jakarta, 2010, p. 12.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

In more detail, the budget of the costs for accommodation per person is about Rp. 50,000,000. The number of persons that may be present is 3 to 5 persons so the amount of the costs that need to be budgeted is from Rp.150,000,000 up to Rp. 250,000,000. Meanwhile, the frequency of meeting in one case is at least 3 times in the form of an oral hearing which must be attended or can be up to 5 times if the delegates present to the decision of the panel or appellate decisions. Based on that circumstance, the costs that must be budgeted by the Government of Republic of Indonesia to file a dispute in the forum of the World Trade Organization (WTO) is Rp. 450,000,000 up to Rp. 1,250,000,000.<sup>30</sup>

That much budget funds will still be added if the Indonesian government needs to have the services of a Lawyer Advisory Centre for WTO Law (or law firm ACWL) or the other law firms. Nevertheless, it is still possible that the businessmen whose interest of trading businesses is disadvantaged by the other state members of the World Trade Organization (WTO) can pay the service of the lawyer they need to bring their disputes in the World Trade Organization (WTO).

Another issue that is equally important to pay attention to in the context of the use of dispute settlement system of the World Trade Organization (WTO) by Indonesia is related to the capacity or capability of the Human Resources of Indonesia where it has become a specific obstacle.

Considering the conditions, the Ministry of Trade of Republic of Indonesia since 2010 has established a Legal Advocacy Centre under the Legal Bureau to produce capable human resources to do legal process in the dispute resolution forum of World Trade Organization (WTO). In addition, the Ministry of Trade has also sent many of its staff to attend various international meetings related to the dispute settlement system of World Trade Organization (WTO) to improve the capacity of the Indonesian human resources.

Based on the result of this research, it is known that there has been no comprehensive evaluation conducted by the Government of the Republic of Indonesia concerning the accommodation of national trade interests in trade dispute settlement system of the World Trade Organization (WTO). For example, of the 8 cases filed from 1998 through 2013, there is no general evaluation that can be used to describe whether or not the dispute settlement process of the World Trade Organization (WTO) has been successful in protecting the interests of the Indonesian national trade.<sup>31</sup>

The evaluation is being conducted by the Government of the Republic of Indonesia today is in the form of an evaluation of the policies that have been or have not been run by the members of the World Trade Organization (WTO) whose disputes have been decided by the Panel or Appellate Body. Monitoring of the on-going cases is also being conducted by the Government of the Republic of Indonesia, for example whether or not the Government of United States has run the Panel decision regarding the case of cigarette. Therefore it can be concluded that the evaluation of the Government of the Republic of Indonesia is casuistically not generally or comprehensively done.

Since becoming a member of the World Trade Organization, from 1995 to 2013, Indonesia had been involved in 18 cases of resolved by the Dispute Settlement Body (DSB), in 6 cases as a plaintiff, in 4 cases as defendants in and in 8 cases as a third party in the case. This amount is relatively small when compared with the involvement of Thailand. In the same period, Thailand involved in 73 cases with details of 13 cases as a plaintiff, in 3 cases as a defendant and 57 cases as a third party. If compared with Malaysia, Indonesia seems to be more active because Malaysia was only involved in 5 cases. In the two cases as a plaintiff and the defendant respectively and in the other three cases as a third party.

As the plaintiff, Indonesia had to adjust the policy taken in order to be in line with the decisions of Disputes Settlement Body (DSB), while as the defendant, Indonesia asked its trading partners to adjust the policy they took in order not to inflict loss to the interest of Indonesia and be consistent with the provisions of World Trade Organization (WTO).<sup>32</sup>

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Sonya Claudia Siwu, "Sistem Penyelesaian Sengketa World Trade Organization (WTO) bagi Negara Berkembang", Law Journal of Yustika, Faculty of Law, University of Surabaya Volume 10, December 2, 2007. Also on: T. N. Srinivasan, "The Dispute Settlement Mechanism of the WTO: A Brief History and An Evaluation from Economic, Contractarian, and Legal Perspectives", October 12, 2005

The following is the analysis about several cases involving Indonesia to provide the description about the role of the provisions of World Trade Organization (WTO) in influencing the government's policies especially those related to trade.

This case involves the Indonesian government policy known as the National Car Programme. (i) The 1993 Program provides import tax reduction or exemption for the import of auto parts (ii) 1996 National Car program provides various benefits such as exemption of luxury tax or import tax exemption and the qualification of the car (Local Content) or Indonesian companies. The issues about the products are imported cars and auto spare parts.

The principles of Panel's findings in the case are as follows:

a. Article 2.1 of the TRIMS Agreement (local content requirements)

The panel found that the 1993 National Automobile program violated the provisions of Article 2.1 of TRIMS and Article III.2 of GATT (national treatment). According to the Panel (i) the policy is a "trade-related investment measure" and (ii) the policy is a policy related to local content requirements stipulated by paragraph 1 of the Illustrative List of TRIMS in the Annex to the TRIMS Agreement which describes the trade-related investment policies that violates the national treatment obligations under Article III: 2 of the GATT.

b. Article III.2 of GATT (National Treatment)

The panel found that the sales tax policies applied in the national car program in violation of the provisions of Article III.2, first sentence and either the second sentence of Article III.2 GATT. The panel noted that the program is based on a national car, car imports will be taxed higher than domestic cars under the first sentence of Article III.2 and also every car imports is not imposed the same tax as to a directly competitive or substitutable domestic car based on the national car program which is intended to advance the national automobile industry.

c. Article I: 1 of the GATT (MFN Treatment)

The Panel found that the national car policy is in the conflict with the provisions of Article I: 1 because "advantage" (in the form of sales tax exemption) granted to importing cars from Korea is not in accordance with the obligations "unconditionally" to "like" the product of the other members of the World Trade Organization (WTO).

d. Article 5 (c) ASCM (serious prejudice)

The Panel found that the sales tax exemption based on the national car program 1996 is a "specific Subsidies" which can cause "serious prejudice" through significant price cuts under Article 6.3 (c) of the like products imported from the EU (no impact for products imported from USA) under Article 5 (c).

e. Other issues

Based on the decision of the Appellate Body in the case of EC - Bananas, the Panel for the first time allowed the private legal advisor to be present at the panel hearing activity as a portion of the delegates of the parties.



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