A PROPOSAL TO ADDRESS PROBLEM OF NON-COMPLIANCE WITH THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BODY RULINGS

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ABSTRACT

Objective: This study aims to analyze the problems of non-compliance with several of the rulings of the Dispute Settlement Body of the World Trade Organization and how to overcome the problem to increase the effectiveness of the WTO Law.

Methods: This research is normative legal research. The study uses secondary data consisting of primary and secondary legal materials. The data were analyzed by using qualitative method, and conclusions are drawn by deductive method.

Result: Some of the WTO DSB rulings have status the compliance proceedings is completed with findings of non-compliance. It meant that some of the WTO DSB rulings were not implemented. This could result in decreased the compliance with the WTO Law and further to hamper the achievement of the WTO objectives.

Conclusion: The weakness of the enforcement measures led to non-compliance with some of the DSB WTO rulings. This paper proposes to strengthen the enforcement mechanism to overcome the problem of non-compliance with the WTO DSB rulings through the application of monetary compensation sanctions, temporary prohibition to make complaints and the establishment of WTO DSB rulings enforcement body. An effective WTO law enforcement mechanism was needed to increase international trade and World economic growth, so it was important in achieving the development program goals, including the Sustainable Development Goals.

Keywords: DSB rulings, non-compliance, enforcement, sanctions.

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UMA PROPOSTA PARA RESOLVER O PROBLEMA DO INCUMPRIMENTO DAS DECISÕES DO ÓRGÃO DE RESOLUÇÃO DE LITÍGIOS DA ORGANIZAÇÃO MUNDIAL DO COMÉRCIO

RESUMO

Objetivo: O presente estudo tem por objetivo analisar os problemas de incumprimento de várias decisões do Órgão de Resolução de Litígios da Organização Mundial do Comércio e como superar o problema para aumentar a eficácia da legislação da OMC.

Métodos: Esta pesquisa é pesquisa legal normativa. O estudo utiliza dados secundários que consistem em material legal primário e secundário. Os dados foram analisados pelo método qualitativo e as conclusões são tiradas pelo método dedutivo.

Resultado: Algumas das decisões do ORL da OMC têm o estatuto de processo de conformidade concluído com conclusões de não conformidade. Tal significou que algumas das decisões do ORL da OMC não foram executadas. Tal poderá resultar numa diminuição do cumprimento da legislação da OMC e em novos entraves à realização dos objetivos da OMC.

Conclusão: A debilidade das medidas de execução levou ao incumprimento de algumas decisões do ORL às OM C. O presente documento propõe o reforço do mecanismo de execução para superar o problema do incumprimento das decisões do ORL da OMC através da aplicação de sanções de compensação monetária, da proibição temporária de apresentar queixas e da criação de um órgão de execução das decisões do ORL da OMC. Era necessário um mecanismo eficaz de aplicação da lei da OMC para aumentar o comércio internacional e o crescimento econômico mundial, pelo que era importante para alcançar os objetivos do programa de desenvolvimento, incluindo os Objetivos de Desenvolvimento Sustentável.

Palavras-chave: decisões da DSB, não cumprimento, aplicação, sanções.

1 INTRODUCTION

The World Trade Organization (WTO) Agreement was signed in 1994 and came into force on 1 January 1995. Since 29 July 2016, the WTO has 164 members and 25 observers governments (www.wto.org). From the time it came into force until now, the WTO Agreement has become the most important multilateral trade treaty concerning with the regulation of international trade.

As a body of rules, the WTO law shall be obeyed and shall be well implemented by all of the WTO members in regulating international trade among them. As a body of rules, the WTO law shall be able to be enforced against any breach and any violation. Therefore, dispute settlement mechanism has become one central issue of the WTO law. One of the WTO’s important functions is to help its members to settle trade disputes (Marianne Schneider-Petsinger, 2020).

For enforcing the WTO law against every violation, the WTO provides a dispute settlement mechanism based on the Agreement on Understanding on Rules and
Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding (DSU). As stated at Article 3.2 of the DSU, dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The WTO dispute settlement system comprises of political dispute settlement mechanism and judicial dispute settlement mechanism (See I Gusti Ngurah Parikesit WIDATEDJA, 2020). The WTO judicial dispute settlement mechanism is done by WTO Dispute Settlement Body (WTO DSB) through its two organs, Panel and Appellate Body.

The decision (rulings) of the WTO DSB in settling a dispute is binding upon the disputing parties and shall be implemented by them. Even though bound in character, there are some of non-compliance with the rulings and recommendations of the WTO DSB. The non-compliance with the WTO DSB rulings will lead to the ineffectiveness of the WTO law and cause the achievement of the WTO’s goals to be hampered.

Based on the problem of non-compliance with the WTO DSB rulings, this research will examine the causes and the impact of the non-compliance with the WTO DSB rulings. Thereafter the research will make a proposal as an effort to overcome the problem of non-compliance with the WTO DSB rulings. Overcoming the problem of non-compliance with the WTO DSB rulings is important to make the WTO dispute settlement mechanism become more effective. The effectiveness of the WTO dispute settlement will increase the obedience to the WTO law, so that the goals of the WTO will be easier to achieve. The achievement of the WTO’s goals is essential in efforts to increase the economic prosperity of all the people of the World through international trade. Increasing economic prosperity will also support the achievement of the development programs goals, including the United Nations Sustainable Development Goals (SDGs) program for 2015 – 2030.

2 METHOD OF RESEARCH

This research is normative legal research that focuses on secondary data. Secondary data in this research is in the form of primary and secondary legal materials. Primary legal materials include WTO Agreement and Its annexes, the United Nations Charter, Statute of the International Court of Justice, and the United Nations General Assembly Resolution 70/1 (2015) on the 2030 Agenda for Sustainable Development. Secondary legal materials consist of previous legal research results, books, journal
articles, website related to the research topic. Normative legal research is a process of finding legal rules, principles, and doctrines to answer the legal issues of this research.

The data of this research are collected by library research. Data collection techniques in this study were carried out by literature study of both primary legal materials and secondary legal materials. The data that has been collected is then analyzed both vertically and horizontally to find synchronization and harmonization and then analyzed with a conceptual approach to answer the legal problems raised. The conclusion of this research was done by deductive method.

3 LITERATURE REVIEW
3.1 LEGAL THEORY OF INTERNATIONAL DISPUTE SETTLEMENT

International disputes here are defined as disputes between subjects of international law, especially disputes between countries. These international disputes can be divided into political disputes and legal disputes (Huala Adolf, 2005).

Based on the theory of international dispute settlement, there are various ways of resolving international disputes, which can be broadly divided into two categories: 1). Peaceful means of international disputes settlement and 2). Settlement of international disputes by non-peaceful or coercive means. Peaceful means of international disputes includes resolving disputes through negotiation, mediation, with the assistance of good offices, conciliation, inquiry, arbitration and legal (judicial) settlement. The means of international disputes settlement by coercion include retortion, reprisal, blockade in peacetime, intervention, and the use of war.

The UN Charter prohibits its members from using armed violence (although with exceptions) and requires UN members to resolve every international dispute through peaceful means, which do not endanger international peace and security. In general, peaceful means of international disputes settlement is distinguished between political (diplomatic) means of dispute settlement and judicial (adjudicatory) means of dispute settlement. Peter Malanczuk categorizes the means of dispute settlement stated by Article 31 paragraph (1) of the UN Charter into: 1). diplomatic means of dispute settlement, 2). legal (or judicial) means of dispute settlement and 3). dispute settlement procedures among the member states of international organizations (Peter Malanczuk, 1997).
3.2 LEGAL THEORY OF SANCTIONS AGAINST INTERNATIONAL LAW VIOLATIONS

One of the characteristics of law is that the sanctions come from outside the perpetrator (external power). Likewise with the rules of international law, there are various sanctions from outside the perpetrator of the violation. Various forms of sanctions that can be applied to enforce international law include sanctions from other countries, sanctions from international institutions and sanctions that is stated by decision of international courts.

According to Tim Hillier, unlike national law which has a uniform enforcement mechanism, international law does not have a uniform enforcement mechanism. Hillier further introduced the various international law enforcement mechanisms available as follows: 1) enforcement through the UN, 2) enforcement through the courts, 3) enforcement by eliminating the rights and preferential treatment of perpetrators of violations of international law as well and 4) self-enforcement (self-help) by countries that suffer losses due to violations (Tim Hiller, 1998).

Based on the principles of international law, states that violate international law can be required to be held internationally responsible based on the doctrine of state responsibility. Anthony Aust said that: "A state is responsible in international law for conduct in breach of its international obligations." Anthony Aust also said that the law regarding state responsibility is customary international law. Customary international law binds all subjects of international law, especially states. Based on the doctrine of state responsibility, internationally wrongful acts committed by a state that cause losses to other parties have consequences, the country that has done the wrong is obliged to compensate other parties for losses resulting from these wrongful acts. Compensation (redress) in this case can be in the form of immaterial compensation (satisfaction) and material compensation (pecuniary reparation).

4 DISCUSSION
4.1 PROBLEM OF NON-COMPLIANCE WITH THE WTO DSB RULINGS

The implementation of the WTO law in regulating international trade sometimes face problems of disobedience committed by one or more of the WTO members. Sometimes some of the WTO members take a trade policy which are not in accordance with the WTO law and violate the WTO law. Violation of the WTO law by a WTO
member can cause other members suffer of economic or trade losses. The suffering WTO Member has a right to make a complaint before the WTO DSB. Consequently, there will be a WTO dispute between the complaining member (called as “complainant”) and the violating member (called as “respondent”).

For settling WTO disputes, the WTO established DSB, as a WTO’s organ which function is to handle of WTO disputes and provides some regulations and mechanisms of dispute settlement. As already mentioned, the main regulation of the WTO dispute settlement is the DSU. It is said that the DSU is an agreement that elaborate and modify the General Agreement on Tariff and Trade (GATT) 1947 dispute settlement system, the WTO’s predecessor. Compared to dispute settlement provisions in other fields of international law, the WTO’s dispute settlement system is characterized by a high level of legalization, streamlined and timely processes, and a high degree of formal compliance with treaty obligations (Manfred Elsig, 2017).

One of the important modifications of the WTO dispute settlement system is the application of the principle of automation. Based on the principle of automation, the procedure of dispute settlement before the WTO DSB is binding upon the disputing parties and shall be carried out sequentially. The WTO litigation process has become automatic and more expeditious (Don Moon, 2013). The WTO DSB’s decision (rulings) in settling a dispute is automatically binding for the disputing parties. Based on these characters, the dispute settlement mechanism done by WTO DSB can be categorized as a judicial dispute settlement mechanism. Aydin Baris Yildirim stated that the WTO dispute settlement system is a legal system that unfolds in several discrete steps (Aydin Baris Yildirim, 2020). Some writers said that the WTO DSB is an international court and called as the WTO Court.

According to Rachel Brewster, the WTO norms that have effectively governed trade disputes for two decades involve three major principles: acceptance of multilateral adjudication, a prohibition on counter retaliation, and the regulation of remedies (Rachel Brewster, 2019). In contrast with the GATT 1947 dispute settlement mechanism which is more based on compromise between the disputing parties, the WTO dispute settlement is more based on legal settlement. The procedure of the GATT 1947 dispute settlement is more political, while the dispute settlement procedure of the WTO through Panel and Appellate Body is more juridical. The WTO judicial dispute settlement decision is binding, so the implementation of WTO judicial dispute settlement decision is more
certain. It is said that the enforcement of the judicial decision made by WTO DSB to persuade reluctant losing defendants to comply with the rulings is more powerful than the GATT 1947 (Carsten Daugbjerg and Adrian Kay, 2014).

The WTO DSB will examine and settle any dispute which are brought by a WTO member (complainant) without any agreement of the respondent. Another WTO members which have the same interest in the dispute can joint in the dispute as third party. So, there will be complainant, respondent and possibly third party in the WTO dispute settlement. Since the time of establishment until 18 September 2023, the DSB WTO has handled 621 WTO disputes and over 350 rulings have been issued (Dispute settlement – chronological list of dispute cases, https://www.wto.org, 2023).

Based on the DSU, the first step of WTO DSB judiciary dispute settlement procedure is consultation between the disputing parties. The consultation is a negotiation done by the disputing parties to get solution in settling the dispute based on agreement made by the disputing parties. The maximum time for consultation is 60 days.

If consultation failed to reach a solution for settling the dispute, the complaining party can make a request to the WTO DSB to establish a Panel. The WTO DSB will establish a Panel to examine the dispute unless all of the WTO DSB Members by consensus agree not to establish the Panel. The WTO Panel shall comprise of three persons, or it could be comprises of five persons based on the agreement made by the parties in the dispute.

The function of the Panel is to assist the DSB in discharging its responsibilities under the DSU and the other WTO agreements. The WTO Panel must make an objective assessment of the matter, including the facts of the case and its conformity with the relevant covered agreements. The Panel has also to make findings for assisting the DSB in giving rulings and recommendations.

Panel shall examine the dispute in six months, and three months for a certain dispute or in cases of urgency, including those relating to perishable goods. The Panel will examine all of the written document from both parties, and also do oral examinations by hearing every explanation given by the representatives of both parties. The Panel examines the dispute, all of evidence and the regulations that can be applied to make a conclusion of the dispute. After the examination of the dispute is completed, the Panel will issue a report.
The draft of the WTO Panel report will be delivered to the parties in the dispute to get any comments. Based on the comments of the disputing parties, the WTO Panel can make some improvements of the report. Final WTO Panel report will be delivered to the WTO DSB. The WTO Panel report will be adopted by the WTO DSB as its decision (rulings and recommendations), unless all of the WTO Members agree not to adopt the Panel report, or if the report is appealed to the WTO Appellate Body.

If the report of the Panel is appealed, the WTO Appellate Body will examine the WTO Panel report. The WTO Appellate Body consists of seven persons who serve for four years and can be elected once again. The examination of the dispute at the appeal level is done by three of WTO Appellate Body members.

The WTO Appellate Body shall examine any claim of mistakes in applying the law in the Panel report in 60 days. The report of the WTO Appellate Body is delivered to the WTO DSB and will be adopted as the WTO DSB rulings and recommendations, unless all of the WTO members agree not to adopt the report. The report of the WTO Appellate Body adopted by the WTO DSB is the final decision in the WTO judicial dispute settlement process. As has been said, the WTO DSB rulings is binding upon the disputing parties and shall be performed by them. The WTO DSB keeps the implementation of the rulings and recommendations. When Panel or Appellate Body concludes that there is a violation of the WTO law, the WTO DSB recommends that the violating member stops the violation and brings measure into conformity with the WTO law (Yoshinori Abe, 2013).

In the first ten years of its establishment, the WTO dispute settlement system has an excellent compliance record. The implementation record of WTO decisions for the first ten years found a compliance rate of 83% (William J. Davey, 2009). However, as of August 2nd, 2023, non-compliance with the DSB WTO rulings occurred in some cases (Https://www.wto.org). Thus, in these cases the rulings and recommendations of the WTO DSB are ignored and are not implemented by the parties to the disputes who are obliged to implement them.
List of the WTO DSB rulings that ended without compliance.

<table>
<thead>
<tr>
<th>Dispute Number</th>
<th>Complainant</th>
<th>Respondent</th>
<th>Subject of the Dispute</th>
<th>Current Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>DS427</td>
<td>The United States</td>
<td>China</td>
<td>Dispute relating to the anti-dumping and countervailing duty measures on broiler products from the United States.</td>
<td>Compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
<tr>
<td>DS381</td>
<td>Mexico</td>
<td>The United States</td>
<td>Dispute relating to the measures concerning the importation, marketing and sale of tuna and tuna products.</td>
<td>Authorization to retaliate granted. compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
<tr>
<td>DS312</td>
<td>Indonesia</td>
<td>Republic of Korea</td>
<td>Dispute relating to the anti-dumping duties on imports of certain paper from Indonesia.</td>
<td>Compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
<tr>
<td>DS207</td>
<td>Argentina</td>
<td>Chile</td>
<td>Dispute relating to the price band system and safeguard measures relating to certain agricultural products.</td>
<td>Compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
<tr>
<td>DS141</td>
<td>India</td>
<td>European Communities</td>
<td>Dispute relating to the anti-dumping duties on imports of cotton-type bed linen from India.</td>
<td>Compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
<tr>
<td>DS132</td>
<td>The United States</td>
<td>Mexico</td>
<td>Dispute relating to the anti-dumping investigation of high-fructose corn syrup from the United States.</td>
<td>Compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
<tr>
<td>DS70</td>
<td>Brazil</td>
<td>Canada</td>
<td>dispute relating to the measures affecting the export of civilian aircraft</td>
<td>Compliance proceedings completed with finding(s) of non-compliance.</td>
</tr>
</tbody>
</table>

4.2 OVERCOMING THE PROBLEM OF NON-COMPLIANCE WITH THE WTO DSB RULINGS

The non-compliance with the WTO DSB rulings will lead to an increase in the WTO law violations. Consequently, the disobedience to WTO law will also increase. The
increasing of the disobedience to WTO law will endanger the smoothness of international trade because the WTO agreements is the most important multilateral trade treaty that the World has today.

Even though WTO has reformed and improved the GATT dispute settlement system, in practice the WTO dispute settlement mechanism, especially regarding WTO judicial dispute settlement, still contains some weaknesses. Some observers have criticized the WTO judicial dispute settlement system. There are no sanctions against the non-compliance with the WTO DSB rulings. The absence of sanctions and others coercive means for the non-compliance with the WTO DSB rulings may render legal binding force of the rulings becomes meaningless. Some observers have criticized the weak sanctions for non-compliance with the WTO DSB rulings. Others stated that the enforcement mechanism of the WTO DSB rulings should be improved by creating some more rigorous enforcement mechanism (Mark L. Movsesian, 2003). Concerning with the role of sanctions in overcoming the problem noncompliance with the WTO law, Sungjoon Cho stated that sanctions may play a certain role in inducing compliance with the WTO rules through the deterrence of similar violations in the future (Sungjoon Cho, 2004).

The weaknesses of the WTO dispute settlement system will obstruct the enforcement of the WTO law against any violation. Furthermore, this will lead to the disobedience to the WTO law and will hamper the achievement of the WTO’s goals. To support the achievement of the WTO’s goals, it needs to strengthen the WTO law enforcement mechanism by creating sanctions against non-compliance with the WTO DSB rulings. At this time the effort to improve and strengthen the WTO judicial dispute settlement mechanism is urgent and has been being focus of discussions among the WTO law writers (Cosette D. Creamer & Zuzanna Godzimirska, 2016). According to Sivan Shlomo Agon, the improvement of the WTO dispute settlement system is needed for securing compliance with the WTO law and sustaining the operation and legitimacy of the WTO regime (Sivan Shlomo Agon, 2020).

One of the weaknesses of the current WTO judicial dispute settlement is the WTO does not have the ability to coerce the losing party in the dispute to comply with the WTO DSB rulings (Jeffrey Walters, 2011). Besides, the WTO law does not provide sufficient coercion measures to force the parties in the dispute to implement the WTO DSB rulings.

In the case of the implementation of a WTO DSB ruling is not happened in the period that has been determined, the winning party can ask trade compensation based on
the agreement with the party which does not implement the rulings. If trade compensation negotiation fails, the winning party can take a measure of self-help in the form of applying trade retaliation. In applying trade retaliation as a measure of self-help, approval of the WTO DSB is required. Trade retaliation as a measure of self-help in the enforcement of the WTO DSB rulings is required to be limited to the damage conducted, rather than the profit made, by the illegal trade measure (Jay Butler, 2020).

Trade retaliation as a mean of self-help of the winning party to force the losing party in the WTO dispute settlement has some weaknesses, unpredictable to be of any real use, particularly in asymmetric disputes between powerful and powerless economies (Mark L. Movsesiann, 2003). In applying trade retaliation as a mean of enforcement in the implementation of the WTO DSB rulings, political and economic power of the winning party has a significant role. In some cases, the effectiveness of trade retaliation as a measure of self-help depends on the ability (power) of the winning party to force the losing party. This measure of self-help will be effective if the winning party has enough power to force the losing party. For example, if the winning party is a developed country and the losing party is a developing country or least developed country (LDC), the measure of self-help will be effective. But on the contrary, if the winning party in the dispute is developing country or LDC and the losing party is a developed country, trade retaliation as a measure of self-help provided by the WTO will not be effective. In this case, it is not easy for the developing country and LDC to seek redress from the unfair trade impositions of powerful countries (Mohammad Ali Taslim in Gregory C. Shaffer and Ricardo Mele´ Ndez-Ortiz, eds, 2010).

Based on some cases, the effectiveness of self-help measures as an enforcement means in implementing international law is depends on the ability of the coercive state against the coerced state. In the implementation of the WTO DSB rulings, economic and political power of the winning party to force the losing party will determine the effectiveness of using trade retaliation as a measure of self-help provided by WTO Law. The measure of self-help mechanism provided by the WTO Law will benefit powerful state and harm the weak (powerless) state members. Thus, there is a lot of potential for trade retaliation not being used as a measure of self-help in the enforcement of the DSB rulings if the winning party is a powerless (weak) state and the losing party is a powerful state. Thus, in this case, the violation of the WTO law will continue without any sanctions.
The limitation of retaliation as an effective enforcement tool have long been recognized by trade law scholars. Politically and economically powerful members cannot be forced to comply with the WTO DSB rulings, and power inequalities in the global economy ensure that weaker members cannot coerce the powerful ones into compliance (Jeffrey Walters, 2011). Consequently, before implementing an authorized retaliation against a developed country as a mean to enforce WTO favorable decision, a developing country should consider the effectiveness of the sanction (Jacqueline Spolador Lopes in Alberto do Amaral Júnior, et. al, 2019). This will bring about the non-compliance with the WTO rulings occur when a developing country or LDC wins in a WTO dispute against a developed country (powerful) member.

As has been said, the status of some judicial decisions made by the WTO DSB are compliance proceeding completed with finding of non-compliance. There is no sanctions provided by the WTO for the non-compliance. It can lead to the interpretation that the binding force of the WTO DSB rulings lays between legally and morally binding. It also can lead to the assumption that the WTO DSB rulings can be regarded as international soft law norm.

The difference between international soft law norms and international hard law norms lies in the legally binding force. International soft law norms are international norms which have no legally binding force, but it has practical effects in international relations (Gregory C. Shaffer and Mark A. Pollack, 2010). International soft law norms have no legal sanctions for any violations, and the violations of international soft law norms cannot be enforced through judiciary dispute settlement mechanism. The enforcement of international soft law norm is usually done through measures of self-help. Different from international soft law norms, the international hard law norms have legally binding force and have legal sanctions for every violation, so it can be enforced through international judiciary dispute settlement mechanism.

The absence of sanctions provided by the WTO law for the non-compliance with the WTO DSB rulings can lead to uncertainty of the WTO dispute settlement mechanism. Furthermore, if the enforcement of the implementation of the WTO DSB rulings depends on the ability of the winning party to force the losing party, it will raise injustice in the WTO dispute settlement. Developing countries and LDCs do not have enough power to force the developed countries when they win in a dispute against developed country Member of the WTO. Consequently, developing countries and LDCs are potentially will
suffer of some injustice when they are involved in WTO disputes against powerful member of the WTO. Furthermore, there will be inequality among the WTO members in the WTO dispute settlement system. Meanwhile the World Trade Organization (WTO) was designed to be free of these power inequalities (Jeffry Walters, 2011). For fulfilling the principles of justice and equality among the WTO members and ensuring legal certainty in the WTO dispute settlement system, the WTO DSB rulings should be regarded as international hard law norms through some interpretations.

Firstly, the WTO DSB rulings should be interpreted as a judicial decision in the meaning of Article 38 (1)(d) of the ICJ Statute. Based on the Article 38 (1)(d) of the ICJ Statute, judicial decision is a part of international law that shall be applied by the ICJ in examining and making decision of a dispute. Based on the Article 50 of the ICJ Statute judicial decision itself does not establish a general international law, but it has legal binding upon the parties in the dispute for the case. Most of the WTO members want the judicial dispute settlement system of the WTO become a real international court. As Isabelle van Dame said: “An increasingly large number of WTO members consider the WTO dispute settlement bodies, in particular the Appellate Body, to perform a judicial function in the same manner as, for example, the ICJ or the Court of Justice of the European Union” (Isabelle Van Damme, 2017). As a judicial decision, the WTO DSB rulings has legal binding upon the parties in the dispute as international hard law norm.

Secondly, the legal binding of WTO DSB rulings can be based on the binding force of a treaty. Based on Article 3 of the DSU members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein. As an international agreement, the WTO DSU has legally binding character based on the “pacta sunt servanda” principle which stated that every treaty is binding upon the parties and must be performed by them in good faith (Article 26 of the 1969 Vienna Convention on the Law of Treaties).

Based on the above interpretations, non-compliance with the WTO DSB can be regarded as violation of “international hard law” norm. A state is responsible in international law for conduct in breach of its international obligations (Anthony Aust, 2005). Based on the general principle of international law, every breach of obligation based on international law carries the consequence of an obligation to pay compensation for the violator. This principle also stated by the Permanent International Court of Justice.
Consequently, the WTO member that does not comply with the WTO DSB rulings shall be responsible to pay compensation. On the other hand, the WTO member that suffers of losses due to the non-compliance with the WTO DSB rulings has the right to get compensation.

Compensation (redress) for violations of international law can be in the form of satisfaction and pecuniary reparation (Martin Dixon, et all, 2011). Satisfaction can be applied to the recovery of immaterial losses due to the violations of international law, while pecuniary reparation can be applied to the recovery of material losses. One of the pecuniary reparations as a remedy for international law violation is monetary or financial compensation.

Monetary compensation can be proposed for the proper compensation for losses that arise because of the non-compliance with the WTO DSB rulings. The reason of monetary compensation as the redress for the non-compliance with the WTO DSB rulings is because there are some material injuries that can be calculated in a sum number of money. For applying monetary (financial) sanctions, the WTO should establish regulations that can be used to apply monetary compensation as a remedy for the non-compliance with the WTO rulings.

Beside monetary compensation, the WTO should make a temporary prohibition to make a complain before the WTO DSB for every member that does not comply with the DSB rulings and that fail to pay monetary compensation due to the non-compliance with the WTO DSB rulings. The sanction of prohibition to make a complain before the WTO DSB applied if the member does not comply with the previous WTO DSB rulings is fair and legally logical. The sanction will be able to force the WTO members to comply with the WTO DSB rulings when they will make a new complaint.

For the implementation of the WTO sanctions against the non-compliance with the WTO DSB rulings, there should be a WTO organ that has authority to force the application of the sanctions. If there is a WTO body that has authority to implement sanctions against the non-compliance with the WTO DSB rulings, the measures of self-help will not anymore become the main tool of the enforcement mechanism of the WTO law. Economic, political, and perhaps military power of the winning party will not become the dominant factor in the enforcement of the WTO DSB judicial decision.
anymore. Furthermore, the WTO dispute settlement will become fairer for all the WTO members and will become more effective in enforcing the WTO law.

The effectiveness of the WTO Law will lead the international trade increased, so it will increase the World’s economic growth. High economic growth is needed for the achievements of development program goals, including the SDGs currently being implemented by the United Nations for the year of 2015 – 2030. The important role of the WTO in the achievement of the SDGs is expressed in the following statement: “The WTO is central to achieving the 2030 Agenda for Sustainable Development and its SDGs, which set targets to be achieved by 2030 in areas such as poverty reduction, health, education and the environment.” (Https://www.wto.org).

5 CONCLUSION

For overcoming the problem of non-compliance with the WTO DSB rulings, monetary compensation, and temporary prohibition to make a complaint before the WTO DSB should be applied as new sanctions. The non-compliance with the WTO DSB rulings can be regarded as a breach of international obligation that causes material injuries. Consequently, the suffering WTO members due to the non-compliance with the WTO DSB rulings have the rights to get compensation in sum number of money. In addition, the WTO also should make a prohibition for every WTO Member that does not comply with the WTO DSB rulings or that fail to pay monetary compensation for its non-compliance. Further, a WTO enforcement body should be established for the application of the sanctions.

Overcoming the problem of non-compliance with the WTO DSB rulings is necessary so that the WTO dispute settlement mechanism could become more effective, and the WTO Law will be well implemented. Furthermore, the international trade and economic growth will increase, and this will support the achievement of development program, including the SDGs.

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REFERENCES


Huala Adolf, Penyelesaian Sengketa Dagang Dalam World Trade Organization (WTO), Mandar Maju, Bandung, 2005.


Yildirim, Aydin Baris (2020), Value Chains and WTO Disputes Compliance at the dispute settlement mechanism, Springer Nature Switzerland AG, Switzerland.