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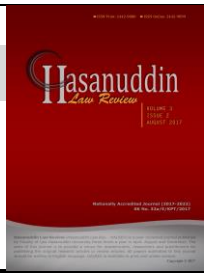

Legally Binding of the World Trade Organization Dispute Settlement Body's Decision

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ABSTRACT

Dispute settlement system of the WTO DSB can be categorized as a judicial dispute settlement system. Decision (rulings and recommendations) in a dispute settlement made by the WTO DSB is binding and should be performed. In some cases, decisions made by the WTO DSB were not performed, and there is no sanction against the non-compliance with the decisions. The objective of this study is to analyze the legally binding character of the WTO DSB's decision as a decision of a judicial organ. From the data analysis, it can be concluded that the WTO does not provide adequate sanctions against the non-compliance with the DSB's decision. It leads to the interpretation of the DSB's decision is international soft law norm which is not legally binding. Moreover, it can hamper the enforcement of the WTO Agreement and the achievement of the WTO's goals. The WTO judicial system should be strengthened and improved by creating WTO independent court or tribunal, which has authority to make legally binding decision as international hard law.

1. Introduction

The General Agreement on Tariff and Trade 1947 (GATT 1947) Uruquay Round Negotiation (1986-1994) resulted the Agreement Establishing the World Trade Organization (WTO Agreement), which has entered into force since 1 January 1995. The WTO Agreement is enclosed with 4 annexes, comprises of Agreements on Trade of Goods, Agreement on Trade of Services, Agreement on Trade of Intellectual Property Rights, Agreement on Dispute Settlement, Agreement on Trade Policy Review Mechanism and four Plurilateral Trade Agreements. The WTO Agreement and Annexes has become the most important multilateral trade agreement in regulating the international trade until in the recent days.[1]

[1] At the end of the year 2016, the WTO had 164 members and 22 states became observers at the WTO.

As a part of international law relating to the international trade regulation[2], the WTO Agreement should be well implemented and obeyed by it's members. The main dominant factor of the implementation and the compliance with the WTO Agreement is the enforcement system and mechanism. The WTO Agreement (WTO Laws) should be well enforced against any breach and violation. Any breach and violation of the WTO Law can raise disputes among the WTO members. For this reason, regulation of WTO dispute settlement become very important element in the WTO laws enforcement. John H. Jackson *et al*, said that dispute settlement system and mechanism become central elements of WTO/GATT.[3]

The WTO dispute settlement system and mechanism is regulated under the Understanding on Rules and Procedures Governing the Settllement of Disputes or oftenly known as Dispute Settlement Understanding (DSU). Basically, the DSU constitute improvements of the GATT 1947 (the WTO predecessor) dispute settlement regulation (Article XXII dan Article XXIII GATT 1947). Under the DSU, WTO Dispute Settlement Body (WTO DSB) was established to handle WTO disputes. The WTO DSB has two organs, namely Panels and Appellate Body.

Under the DSU, principle of otomation is applied in the WTO dispute settlement mechanism. Based on the otomation principle, the procedure of WTO dispute settlement will prevail in settling a dispute and the parties to the dispute shall follow the process and the procedure sequently. The decision (rulings and recommendations) of the WTO DSB in a dispute settlement is automatically binding and must be performed by the losing respondent.

The binding character of the WTO DSB's decision in a dispute settlement can be concluded from Article 17 paragraph (14) of the DSU, which stated, *"An Appelate Body report shall be adopted by the DSB and unconditionally accepted by the parties to disputes unless the DSB decides by consensus not to adopt the Appeallate Body report within 30 days following the circulation to the Members."* The parties to the dispute are bound by the WTO DSB's decision (rulings and recommendations) in the particular case and they have obligation to implement and obey the decision.[4] No longer than 30 days after the adoption of Panel/Appellate Body report by the WTO DSB, the losing respondent (the party which has obligation to perform), shall to inform the WTO DSB about it's willingness to implement and perform the decision.[5]

Eventhough has a binding character and must be performed, in some cases the WTO DSB's decisions were not obeyed and perfomed by the losing respondent. This happened toward decision of the WTO DSB in the dumping case (DS312) between Indonesia (as complainant) and South Korea (as respondent) and in the cigarette case (DS481) between Indonesia (as complainant) and the United States (as respondent). The WTO DSB's decision in those two cases were in Indonesia favor, but South Korea

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2 For instance, Joost Pauwelyn said: "*the WTO Laws is a part of Public International Law*". See Pauwelyn, J. (2003). *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*. New York: Cambridge University Press, p. 25.

3 Jackson, J.H., Davey, W.J., & Sykes, A.O. (1995). *Legal Problems of International Economic Relations*. West Publishing Co, St. Paul, MNN, p. 340.

4 See also Simanjuntak, D.E., and Pangestu, M.E. (1994), "*GATT 1994, GATT 1994, Peluang dan Tantangan, Dokumen dan Analisis*", Jakarta, p. XI-8

5 Article 21 paragraph (3) of the DSU state: "*At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB*".

and the United States as the losing respondents did not perform and implement the WTO DSB's decisions. Non-compliance with the WTO DSB's decisions also happened in other some cases, namely, dispute Number DS70 (Brazil versus Canada), DS132 (the United States versus Mexico), DS141 (India versus the European Union), DS207 (Argentina versus Chile) and DS386 (Mexico versus the United States). For those non compliance with the WTO DSB's decisions, the WTO did not give any organizational sanctions, because the WTO Agreement, particularly the DSU, do not regulate and provide any sanction against the non compliance with the DSB's decision.

Without any sanction and the absence of WTO body which has authority to give sanctions against the non compliance with the DSB's decision, can raise a problem of legally binding of the WTO DSB's decision. According to some writers WTO DSB's decision (rulings and recommendation) is not binding based on law, but is binding based on morality. For instance, Judith H. Bello said that the WTO DSB's decision has no legal binding and the obligation to obey and perform is voluntary by the WTO members. The WTO has no enforcement body, such as police, prosecutors, bail and jail for the pupose of DSB WTO's decison enforcement.[6] Judith H. Bello's opinion/ argumentation was criticized by John H. Jackson. According to John H. Jackson, WTO DSB's decision (rulings and recommendations) is legally binding and raise an obligation based on international law to the parties in the dispute to implement and obey.[7] Based on the controversy, this paper will analyse the legally binding of the WTO DSB's rulings and recommendations, it's impact to the WTO laws enforcement and the solution to improve the WTO judicial dispute settlement system.

2. DSB WTO Dispute Settlement Mechanism

Since 1 January 1995 to the midle of August 2016, the total number of WTO disputes registered at the WTO Secretariat was 509.[8] WTO disputes shall be settled by the WTO DSB based on mechanism and procedures of the DSU.

Process of WTO disputes settlement is started with a consultation between the parties to the dispute (complainant and respondent). Consultation in the WTO dispute settlement is a negotiation by the parties to the dispute to settle the dispute base on the agreement between them. The consultation shall have be done after 30 days (for a particular case 10 days) since the request to do consultation made by the complaining party. The maximum period of time to do concultation is 60 days.

If the consultation failed to settle the dispute, the complaining party can make a request to the DSB to establish a Panel. The respondent has the right to reject the request of establishing WTO Panel one time. And afterward, the complaining party can request the establishment of Panel for the second time, and based on this request WTO DSB will automatically establih a Panel, unless the establishment of a panel by consensus is not agreed by all of WTO members.

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6 Bello, J.H. (1996), "The WTO Dispute Settlement Understanding: Less is more", *American Journal of International Law,* 90(3), p. 198.

7 Jackson, J.H. (2004), "International Status of WTO Dispute Settlement Reports: Obligation to comply or Option to Buy Out?", *American Journal of International Law*, 98(1), p. 109.

8 WTO-dispute settlement chronological list 2016. Source: http://www.wto.org, Accessed on 20 August 2016.

Usually, WTO Panel comprises of three persons, elected from WTO members which their state have no direct interest to the dispute. The parties to the dispute have a right to reject the panel if there is an indication that the panel will not be neutral panel.[9] The Panel's members have to do their job in their own capacity and they can not accept any instruction from their governments. In examining and make Panel's report, the WTO Panel will get assistance from some officers of the WTO Secretariat.

The WTO Panel shall examine the fact of the dispute, all of any legal summaries made by both parties, hear all of direct orally explanations from both parties, and the laws and regulations that can be applied to settle the dispute. After the examination of the dispute, the WTO Panel shall make conclusions and adopt a report (decision). The time for Panel to examinine and adopt a report is six months, maximum in nine months.

Before the report is adopted, Panel shall to circulate to the parties to the dispute for getting comments, and based on the comments Panel can make some improvements. The final report of WTO Panel is delivered to the WTO DSB, and the WTO DSB will adopt the Panel's report become the DSB's decision (rulings and recommendations), unless a party to the dispute formally notifies the DSB of it's decision to appeal or the DSB by consensus not to adopt the report.

If a party to the dispute notify the DSB on it's decision to appeal the Panel report, the WTO Appellate Body shall examine any claim of mistake in applying the laws and regulations in the Panel's report. The WTO Appelate Body shall adopt a report on the dispute in 60 days. The WTO Appellate Body's report will be adopted by WTO DSB become the DSB's decision (rulings and recommendations) within 30 days following its circulation to the Members, unless the DSB decides by consensus not to adopt the report.

The decision (rulings and recommendations) of the DSB WTO unconditionally accepted by the parties to the dispute and shall be performed. Concerning with the final and binding character of the DSB decision, Robert Reed stated that once a Final or Appelate Body Report has been adopted by the DSB, its recommendation and rulings become binding on the parties to a dispute and the losing respondent is required to brings its trade regime into compliance with the WTO rules.[10]

The implementation of the WTO DSB's decision (rulings and recommendations) shall be done voluntary by the parties to the dispute based on their commitment to obey all of WTO laws and decisions when they became members of the WTO. Article 3 paragraph (1) of the DSU stated, "*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.*"

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9 Panel, David M Schw, said: "The Parties' Objection Rights A key mechanism ensuring the composition of an impartial panel is a party's right to object to panel nominees.'" When the Secretariat proposes a panelist, a party can only oppose the nomination for "compelling reasons. "While the text of the Understanding does not define the compelling reasons equirement, past practice reveals the establishment of an accepted standard."' A party's belief that a panelist may be biased has often constituted a compelling reason." Parties have rejected proposed panelists based merely upon the belief that the individual would not vote in the party's favor.' See: Schw, D.M. (1995), "WTO Dispute Resolution Panels: Failing to Protect Against of Conflicts of Interest", *American University Law Review,* 10(2), p. 972.

10 Reed, R. "Dispute Settlement, Compensation and Retaliation Under the WTO", in the Gaisford J. and Kerr, W.A., editors. (2005). "Hand Book on Trade Policy", Cheltenham: Edward Elgar, p. 10.

To keep the implementation of the WTO DSB decision, the DSU govern the procedure of the DSB decision implementation under the title of "Surveillance of Implementation of Recommendations and Rulings". Under Article 21 paragraph (3) is stated that:

> *"At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so."*

The reasonable period of time can be proposed by the Member concerned or determined by the agreement made by the parties to the dispute or determined by the decision made by arbitration.

Concerning with the surveillance of the WTO DSB decision in "the Hand Book on the WTO Dispute Settlement System" is stated: "The DSB keeps implementation by a Member of its recommendations or rulings (in other words the implementation of adopted panel (and Appellate Body) reports) under surveillance."[11] For the purpose of surveillance of the WTO DSB rulings and recommendations implementation, Article 21 paragraph (6) of DSU stated:

> *"The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings."*

Based on the provisions it also can be concluded that the WTO DSB decision in a dispute settlement raise an obligation to the parties in the dispute to obey and implement the decision.[12]

In the case of there was no implementation of the WTO DSB decision (rulings and recomendations) in the reasonable period of time, the Member concerned can make a negotiation of trade compensation within 20 days. Concerning with the negotiation of trade compensation, Article 22 paragraph (2) of the DSU stated:

> *"... If no satisfactory compensation has been agreed within 20 days after the date of expire of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreement."*

Compensation and suspension of concession as a solution in the WTO dispute settlement is temporary and is not a permanent solution. The parties to the dispute are able to make agreement on suspension of consession in a reasonable period of time. If

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[11] World Trade Organization. (2004). *A Hand Book on the WTO Dispute Settlement System*. Cambridge University Press, Cambridge, the United Kindom, pp.77-78.

[12] Adolf, H. (2014). *Hukum Penyelesaian Sengketa Internasional*. Jakarta: Sinar Grafika, p. 149.

there was no agreed reasonable period of time, the Member concerned can bring the dispute to the arbitration.[13]

In case if the WTO DSB decision (rulings and recommendations) was not obeyed and performed by the losing party, the Member concerned (the wining party) has a right to do trade retaliation against the losing party. Based on the Article 22 paragraph (1) of the DSU, the trade retaliation shall be done at the same sector/product (parallel retaliation). If parallel trade retaliation did not work well, retaliation at the different sector/product (cross retaliation) can be done by the Member concerned.[14] As a measure of WTO DSB decision enforcement, the trade retaliation is not sufficient and effective.

Concerning the weakness of the trade retaliation as a sanction against the non-compliance with the WTO DSB rulings and recommendation, Karen J. Alter,[15] said that:

> *"There is no provision for retaliation to correct for past wrongs, and only parties that raised the dispute are authorized to retaliate. This means a country can violate WTO rules until it loses a dispute settlement case and, without cost, drag out implementation until the day retaliation is at hand. And it can continue to violate rules with respect to countries that were not involved in the original WTO case. The system also, by design, allows the rich to buy their way out of compliance by accepting retaliation instead. Whether accepting retaliation is a legitimate option is debatable".*

Moreover, Robert E. Hudec,[16] stated:

> *"The only enforcement sanction provided by the WTO dispute settlement procedure is trade retaliation… And trade retaliation by smaller developing countries, it is argued, simply does not inflict any significant harm on larger industrial countries. In the end, the argument concludes, retaliation will harm the developing country imposing it far more than it will harm the industrial country it is supposed to punish".*

The WTO does not provide any other sanctions against the non compliance with the WTO DSB decision other than trade retaliation. The WTO also has no organ or body of enforcement of the WTO laws and decisions, such as police force, prosecutors, bail and jail.[17] In some cases the wining parties in the WTO disputes settlement had to do measures of selfhelp to force the losing party in implementing the WTO DSB decision (rulings and recommendations).

3. The Legally Binding of the WTO DSB's Decision

Some writers said that based on the existence of the dispute settlement body, fixed procedure and the binding character of the decision, the WTO DSB dispute settlement system is a yudicial/adjudicatory dispute settlement system.[18] The WTO dispute

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13 *Ibid.*

14 Yohanes, T. "Sengketa AS – Indonesia Soal Kuota Impor (Dispute Between Indonesia and the United States on Import Quota)", Article on Kedaulatan Rakyat News Paper, Yogyakarta, 11 March 2013.

15 Alter, K.J. (2003). "Resolving Or Exacerbating Disputes? The WTO's New Dispute Resolution System", *International Affairs*, 79(4), p. 786.

16 Hudec, R.E. (2002), "The Adequacy of WTO Dispute Settlement Remedies, A Developing Country Perspective", in the Hoekman, Bernard, *et. al.*, (eds). "Development, Trade and the WTO", Washington, DC, published by the World Bank, p. 81.

17 Judith H. Bello, *Loc.Cit.*

18 According to the Black's Law Dictionary, "adjudicatory" means legal process of resolving dispute and "judicial" means "having the character of judgment or formal legal procedure" and "proceeding of a

settlement system is different with the GATT 1947 (the predecessor of the WTO) dispute settlement system, which was oftenly said as a political or diplomatic dispute settlement system. According to Lowenfeld,[19] over the forty years of GATT dispute settlement, there has been an ebb and flow between the diplomatic and adjudicatory models. It seems clear that the adjudicatory model prevailed in the Uruguay Round. Other writers, who have the same opinion with Lowenfeld are A. Miller, Rebecca A. Bratspies and Robert E. Hudec.

As a judicial dispute settlement system, decision (rulings and recommendations) made by the WTO DSB should be regarded and treated as decision of an international court (judicial decision). As a decision of a judicial organ, decision of WTO DSB WTO in a dispute settlement can be categorized as a source of international law in the meaning of Article 38 paragraph (1) d of the International Court of Justice (ICJ) Statute.[20] Concerning with this characteristic of the WTO DSB decision Andrew D. Mitchell,[21] said:

> *"The reasoning and decisions of WTO Tribunals (that is, 'judicial decisions' within the meaning of Article 38(1)(d) of the ICJ Statute) may provide evidence or confirmation of the existence of particular principles of WTO law contained in the WTO agreements; they could also serve as an independent source of such principles even if they were not set out in the WTO agreements."*

As a judicial decision, WTO DSB decision (rulings and recommendation) is legally binding based on the "judge made law theory" and secondary sources of international law theory in the meaning of Article 38 paragraph (1) Statute of the ICJ. As secondary sources of international law, judicial decision will be used by the ICJ judges when the primary sources of international law (international conventions/treties, international customary laws and general principles of law) can not be used in settling a dispute brought before the ICJ.[22]

Most of the international law writers said that judicial decision will not prevail as general (universal) international law. Rebecca M. Wallace said, there is no stare decisis in international law, which based on the stare decisis principle the ICJ judges have obligation to follow the previous decision in settling similar (the same) case. Eventhough there is no stare decisis, the ICJ judges and other international courts/ tribunals, usually will see and make consideration base on the law which had been applied by the previous judges at the similar or same cases.[23]

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court of justice". See: Black, H.C. (1990). *Black's Law Dictionary*, sixth edition, West Publishing Co, St. Paul, Minn, p. 42 and p. 846.

19 Lowenfeld, in the M. Sornarajah. See Chia Siow Yue and Joseph L.H. Tan, editors (1996), "WTO Dispute Settlement Mechanism: An ASEAN Perspective", Institute of Southeast Asian Studies, ASEAN Secretariat, Singapore, p. 117.

20 Article 38 paragraph (1) of the International Court of Justice Statute state : "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :a). international conventions, whether general or particular, establishing rues expressly recognizes by the contesting states, b). international custom as evidence of a general practice accepted as law, c). the general principal of law recognized by civilized nations; d). subject to the provisions of article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*".

21 Mitchell, A.D. (2008). *Legal Principles in WTO Disputes*, Cambridge University Press, New York, p. 34

22 See Adolf, H. (2011). *Hukum Perdagangan Internasional (The Law on International Trade).* Jakarta: Rajawali Pers, p. 90.

23 Wallace, R.M. (1993), "International Law", translated in Bahasa by Arumanadi, B. Semarang: IKIP Semarang Press, p. 27.

Eventhough a judicial decision is not legally binding as general internastional law norms, a judicial decision basically is binding to the parties to the dispute in the particular case. The legally binding character of judicial decision can be concluded base on Article 59 of the ICJ Statute which stated: *"The decision of the Court has no binding force except between the parties and in respect of that particular case."*[24] Provision of Article 59 ICJ Statute can be applied in all of international courts or tribunals, included WTO judicial organ (DSB). Under international law, WTO dispute settlement decisions that have been adopted by the DSB are binding on the parties with respect to resolving a dispute between them.[25]

As a judicial decision, WTO DSB decisions in a dispute settlement should be legally binding. Binding here means *"something that must be obeyed"*.[26] Legally means based on law.[27] Legally binding of the WTO DSB decision means the binding force of the DSB decision based on the prevailing laws and regulations, so if there is no implementation and compliance with the decision can raise legal effect based on international law. Consequently, the non-compliance with the WTO DSB's decision raise a breach of international law and the non-compliance party can be sanctioned based on international law.

As have been discussed at the previous part of this paper, in some cases WTO DSB was not being performed and implemented, such as WTO DSB decisions in the dispute between Indonesia and South Korea and dispute between Indonesia and the United States in the different cases. Indonesia won in those two disputes, but South Korea and the United States as the losing parties did not performed and complied with the decision.

Due to the absence of sanctions and enforcement measures provided by the WTO Laws and regulations against the non-compliance with the WTO DSB's decision, in some cases the Member concerned (the wining party) to the dispute had to do measures of self-help by their own powers to force the losing respondent to implement the decisions. In those two cases involving Indonesia, as a developing country Indonesia has no enough power to force South Korea and the United Stated to implement the WTO DSB's decisions. Consequently, South Korea and the United States never be sanctioned over their non-compliance with the WTO DSB's decisions in those disputes.

Based on the facts, some writers said that even though the WTO DSB's decision is binding and can be regarded as judicial decision, the WTO DSB's decision have no executorial title. The implementation of the WTO DSB's decisions cannot be enforced automatically.[28] The WTO does not provide effective and adequate measures to force the implementation of the WTO DSB's decisions. For this reason, the WTO DSB's decision can be said have not been a real judicial decision.

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[24] Carter, B.E., and Trimble, P.R. (1995). *International Law, Selected Documents.* Little, Brown and Company, New York, p. 41

[25] Gathii, J.T. (2005). "Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions." *Georgia Journal of International and Comparative Law*, 35(1): 8.

[26] Departemen Pendidikan dan Kebudayaan Republik Indonesia (1988), "Kamus Besar Bahasa Indonesia" (Indonesian Dictionay), Balai Pustaka, Jakarta, p. 322.

[27] *Ibid*, p. 508.

[28] See Fuady, M. (2004). *Hukum Dagang Internasional (Aspek Hukum Dari WTO)*. Jakarta: PT Citra Aditya Bhakti, p. 57.

According to Rusli Pandika, the WTO dispute settlement system comprises of one political institution, namely DSB WTO, and two independent "judicial" institutions, namely Panel and the Appelate Body.[29] Unfortunately, as judicial organs, the WTO Panel and Appellate Body have no authority to make binding decisions in WTO dispute settlement. The WTO Panel and Appelate Body only have authority to issue a "report". The Panel and Appelate Body's reports will be adopt by the WTO DSB become decision (rulings and recommendations) of the WTO DSB. Based on analysis made by Rusli Pandika, the WTO DSB decision can be regarded as a decision of international organization, and is not a judicial decision.

Decision of an internasional organization is not being source of international law based on Article 38 paragraph (1) ICJ Statute. At the different side, according to some modern writers of international law, after the Second World War era, some decisions of international organizations are able to be sources of international law. For example, beside sources of international law stated by Article 38 paragraph (1) of ICJ Statute, there is another source of international law, namely decision of international organization, soft law and equity (justice).[30] Moreover, J.G. Starke said: "The material sources of international law may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation. These principle fall into five principals categories of form: 1). Custom, 2). Treaties, 3). Decisions of judicial or arbitral tribunals, 4). Juristic works, 5). Decisions or determinations of the organs of international institutions."[31]

The legally binding of decision made by international organizations as a source of international law still become controversy among the international law writers.[32] According to some writers, majority of decision of international organization, soft law and equity (justice) have weak binding force because there is no legal sanctions against the non-compliance and violation. Until now, some international organization adopted resolutions in the field of international economic relations, but the legal character of the resolutions is not clear. For instances, the legally binding of the General Assembly (GA) Resolution on the New International Economic Order 1974[33] and the GA Resolution on the Charter of Economic Rights and Duties of States 1974 are doubtful due to the rejection of some developed countries. The binding force the GA Resolutions are similar with the international soft law norms.[34] Without any effective sanctions against the non-compliance can lead to the interpretation of the WTO DSB's decisions as international soft law norms, are not international hard law norms.

As a comparasion, some writers of international law make differences between hard law and soft law in the international law system using the criterion "binding" and "not binding". For example, Shaffer and Pollak said that many legal scholars use a simple

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29 Pandika, R. (2010). *Sanksi Dagang Unilateral Di Bawah Sistem Hukum WTO*. Bandung: Alumni, p. 237.

30 See Malanczuk, P. (1997). *Akhurst's Modern Introduction to International Law*, London and New York, Routledge, pp. 52 – 57.

31 Starke, J.G. (1989). *Introduction to International Law*, ninth edition. London: Butterworth, p.31

32 Adolf, H. (1997). *Hukum Ekonomi Internasional, Suatu Pengantar*. Jakarta: PT RajaGrafindo Persada, p. 120.

33 About the New International Economic Order, see also McWhinney, E. (1987). *The International Court of Justice and the Western Tradition of International Law*, Martinus Nijhoff P, Dordrecht, pp. 11-12.

34 Another example of internationalsoft law is Code of Conduct for Multinational Enterprises. See Hans W. Baade, "The Legal Effects of Code of Conduct for Multinational Enterprises", in the Nobert Horn, editor (1980), "Legal Problems of Code of Conduct for Multinational Enterprises", Kluwer, Deventer/ Netherland, p. 8.

binary binding/nonbinding divide to distinguish hard from soft law".[35] Based on the criterion, international hard law usually defined as legally binding international law norms, and on the other hand international soft law usually defined as unlegally binding of international law norms. Wolfgang Reinicke and Jan Martin in theirs paper said that 'Soft' law as used herein means normative agreements that are not legally binding.[36] Moreover, Francis Snyder in his paper said: *'[S]oft law'... mean[s] 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects"*.[37] Eventhough has no legal binding force, usually international soft law should be obeyed in international relations, because any breach of international soft law will caused practical effects in international relations, such as deteroriation of international relations/cooperations, reprisals from other state, morality sanctions, etc.

Based on the above analysis, due to the lack of legal sanctions and institution enforcement measures, both as judicial decision and as international organization decision, WTO DSB's decision (rulings and recommendations) can be interpreted as international soft law norms, not as international hard law norms. But this interpretation is not ideal for the WTO Laws enforcement and the implementation of the WTO Agreement as a part of international law concerning with international trade. Moreover, this interpretation is not in accordance with the goals of the WTO and the fact of WTO as an international treaty which has legal binding based on *pacta sunt servanda* principle.

4. Strengthening and Improving the WTO Judicial System

The WTO DSB judicial dispute settlement system has some weaknesses. The DSB WTO and its subsidiary organs, Panel and the Appellate Body, are not representing real judicial institutions such as a court or tribunal. As judicial organs of the WTO, Panel and the Appellate Body have no authority to make their independent and binding decision. The authority to make decision in WTO dispute settlement belong to the WTO DSB and the WTO DSB is not a judicial organ, but a political institutional. Consequently, the WTO DSB's decision in WTO dispute settlement can be regarded as decision of an international organization.

Moreover, concerning with the weakness of the WTO dispute settlement system, according to Ernst-Ulrich Petersmann said that both ad hoc arbitrators and WTO panelists often perceive themselves as 'agents' of the disputing parties mandated, inter alia, to 'give them adequate opportunity to develop a mutually satisfactory solution' (Article 11 DSU). In view of their limited mandates, and in contrast to members of 'courts of justice', ad hoc arbitrators and WTO panelists do not wear traditional 'robes of justice' and may not perceive themselves as 'judges.'"[38] Based on the statement, it is can be concluded that the political/diplomatic dispute settlement system still become the dominant factor in the WTO judicial dispute settlement system. As Petersmann said members of the WTO Panel oftently think that they are mediators representing the

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[35] Shaffer, G.C., and Pollack, M.A. (2010). "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International," *University of Minnesota Law School Legal Studies*, 9-23, p. 712.

[36] *Ibid*.

[37] *Ibid*.

[38] Petersmann, E.U. (2009). "Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit 'Grave Injustice'?" *The Law and Practice of International Courts and Tribunals* 8, p. 335.

interests of the parties to the dispute, and their duty is to make a solution for the dispute that can be accepted and sastified both parties to the dispute. WTO Panel members never act as judges of international court and not wear traditional robes of justice, due to their limited mandates in settling WTO disputes.

As judicial organs, the WTO Panel and Appellate Body should be given authority to make independent and binding decisions in WTO dispute settlement. As decision of judicial organs, WTO Panel's decision and Appellate Body's decision in WTO dispute settlement are not necessary to be circulated to all WTO Members, but it should be published and be delivered to the parties in the dispute.

Until now, the main weakness of the WTO judicial dispute settlement is the WTO has no body and sufficient means of enforcement in implementing the WTO DSB's decisions (rulings and recommendations). As Mark L. Movsesian said, "*Still, WTO dispute settlement has drawn great criticism, much of it focusing on the new enforcement mechanism.*" Several commentators argue that the retaliation remedy is too weak and unpredictable to be of any real use, particularly in asymmetric disputes between large and small economies. These critics advocate reforms that would make the enforcement mechanism more rigorous, such as authorizing collective retaliation against offending members, or granting WTO rules direct effect in domestic courts".[39] Consequently, in some cases WTO DSB decisions (rulings and recommendations) were not being perfomed and implemented and over those disobedience and the non-compliance threre was no WTO sanctions can be applied.

In some cases of non-compliance with the WTO DSB, which a developing country won against a developed country, the WTO DSB's decision tend to be an international soft law norm, because it could not be enforced due to the lack of power belong to the winning developing country to force the losing developed country. In those case the WTO judicial dispute settlement system were not effective as a mean of WTO laws enforcement system. Consequently, developed countries which did not comply with the WTO DSB's decision in WTO dispute against developing countries oftenly were not be sanctioned. It will lead to the disobedience of the WTO laws and regulations.

The disobedience of the WTO laws and regulations will lead state members of the WTO prefer to take unilateral trade sanctions against the other state which violated WTO laws. This situation will lead trade war among the WTO members and this trade war will endanger international economic and trade cooperations/relations based on the mutually advantages and principle of justice. Moreover, this situation will caused developing countries and Least Developed Countries suffer of economic losses and injustice in some international trade and economic relations.

The weakness of the WTO judicial system and mechanism make a contrainst in the WTO laws enforcement[40] and in achieving the object of the WTO dispute settlement system. The prime object and purpose of the WTO dispute settlement system is the prompt settlement dispute between WTO members concerning their respective rights

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[39] Movsesian, M.L. (2003). "Enforcement of the WTO Rulings: An Interest Group Analysis," *Hofstpa Law Review,* 32(1): 2-3

[40] About the enforcement of the WTO Laws, Yoshinori Abe said: *"Where a Panel or Appellate Body concludes that a measure is inconsistant with a covered agreement, DSB recommends that the Member concerned bring the measures into conformity with that agreement."* See: Abe, Y. (2013). "Implementation System of WTO Dispute Settlement Body: A Comparative Approach", *Journal of East Asia International Law*, 6: 7-28.

and obligations under WTO laws.[41] Furthermore, the weakness of the judicial system of the WTO will contrainst the achievement of WTO's goals, particularly the effort to enhance the World economic wellfare through trade liberalization.[42]

Considering the weaknesses of the WTO judicial dispute settlement system, there sould be some modifications and improvement. A strong, credible, independent, fair, and transparent judicial system should be established for enhancing the enforcement of the WTO laws and regulations. The WTO judicial dispute settlement should be able to protect every rights of the WTO members based on the the WTO agreement, especially when the rights are impaired due to the violation of the WTO regulations done by another member.

The WTO judicial body should be named the WTO Court or WTO Tribunal, comprises of the WTO First Court/Tribunal and the WTO Appellate Court/Tribunal, which respectively has authority to make an independent and binding decision in settling WTO disputes. Beside the WTO Court/Tribunal, the WTO should also establish a permanent WTO Arbitration Tribunal completed with an WTO arbitration rules as alternative of WTO dispute settlement.

As a judicial decision, the decision of WTO judicial organ should be interpretated as international hard law norms and can be enforced by international law enforcement mechanism. For the purpose of WTO judicial decisions enforcement, WTO should establish effective sanctions against the non compliance with the decisions. Concerning with the role of sanctions in the implementation of WTO judicial decision, Sungjoon Cho admittedly, sanctions may play a certain role in inducing compliance with the WTO rules through the deterrence of similar violations in the future, beyond a narrower remedial role of penalties or satisfaction."[43]

The WTO also should establish an organ which has authority to apply sanctions to the WTO member which does not comply with the WTO judicial decision. The WTO can follow the enforcement of ICJ's decision model, which the United Nations Security Council can take some actions in the implementation of the ICJ's decisions. Some proposals of sanctions against the non compliance with the WTO DSB decisions (rullings and recommendations) have been made by some WTO members and some writers. Monetary compensations or financial sanctions and collective retaliation are sanctions proposed by most writers and WTO members.

The idea of monetary compensation as a sanction against the non compliance with the WTO/GATT judicial decision had been proposed by some developing countries far before the establishment of the WTO, but unfortunately this proposal was not accepted in the Uruguay Round Negotiation. Concerning with this proposal, Robert E. Hudec,[44] said that the most important challenge to the exclusively forward-looking view of GATT remedies was a 1965 effort by GATT developing countries to add monetary compensation to the list of dispute settlement remedies. According to Asim Imdad Ali

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41 Peter van den Bossche. (2005). *The Law and Policy of the World Trade Organization*. New York: Cambridge University Press, pp. 182 – 183.

42 See Feichtner, I. (2012). *The Law and Politics of WTO Waivers, Stability and Flexibility in Public International Law*. New York: Cambridge University Press, p. 21.

43 Cho, S. (2004). "The Nature of Remedies in International Trade Law", *University of Pittsburgh Law Review Summer*, Westlaw Download Summary Report, p. 9.

44 Hudec, R.E. (2000), "Broadening the Scope of Remedies in WTO Dispute Settlement", article at http://www.worldtradelaw.net, first published 2000, p. 16.

the monetary compensatioan proposal is similar with the monetary compensation applied in the European Community. Based on the Treaty on Establishment of the European Community, monetary compensation will be applied toward the European Community member which failed to implement the decision made by the European Tribunal.[45]

Beside monetery compensation, the proposal of collective retaliation as a sanction against the non compliance with the WTO judicial decision, also had been made by some developing countries in the same time with the proposal of monetary compensation. The 1965 developing country proposals on remedies included a proposal calling for collective retaliation.[46]

For applying sanctions against the non-compliance with the WTO judicial decisions, WTO should take some actions which are needed to forced the implementation of the decision by the losing respondent. In applying the sanctions, the WTO also should make some cooperations with some organs of the United Nations, such as the International Monetary Fund (IMF), the World Bank and the United Nations Security Council. For examples, in applying monetary compensantion as a sanction of the non compliance with the WTO judicial decision, the WTO can make cooperations with the IMF and the World Bank[47], and in applying collective retaliation the WTO can make cooperations with the United Nations Security Council.

Beside monetary compensation and collective retaliation the WTO also should prohibit the WTO member which failed to implement the WTO judicial decision to make a complain before the WTO DSB for at least until the member fulfill it's obligation to implement the decision. Furthermore, the WTO should make a black list of members which did not comply with the WTO judicial decisions. WTO also should make a declaration to condemn the non compliance with the WTO judicial decisions.

5. Conclusion

The absence of effective sanctions against the non compliance with the WTO DSB's decision (rulings and recommendetions) leads to the interpretation of the rulings and recommendations are international soft law norms which are not legally binding. It can decrease the credibility of the WTO dispute settlement system and can cause the disobedience to the WTO Agreement. As judicial decision, the WTO DSB's decision (rulings and recommendations) should be interpreted and regarded as international hard law norms, and it should be able to be enforced by international law sanctions.

The judicial dispute settlement system of the WTO should be improved by establishing independent, impartial, fair and transparent WTO judiciary organ and procedure. The WTO judicial organ should be named the WTO Court or Tribunal, comprises of WTO First Court/Tribunal and the WTO Appellate Court/Tribunal. For the implementation of the WTO judicial decisions, the WTO should provide adequate enforcement measures comprises of effective sanctions and institutional actions. The WTO judicial

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45 Article 171 of the Treaty on the Establishment of European Community. See also Ali, A.I. (2003). "Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System," *Journal of Public and International Affairs,* 14, p. 17.

46 *Ibid*., p. 26.

47 See Van Grasstek, C. (2013). *The History and Future of the World Trade Organization*. Geneva: WTO Publications, pp. 171 -172.

decision should be able to be enforced through effective sanctions done by WTO organs such as the WTO DSB, the WTO Ministerial Conference or the WTO General Council.

References

Abe, Y. (2013). "Implementation System of WTO Dispute Settlement Body: A Comparative Approach", *Journal of East Asia International Law*, 6: 7-28.

Adolf, H. (1997). *Hukum Ekonomi Internasional, Suatu Pengantar*. Jakarta: PT RajaGrafindo Persada.

Adolf, H. (2011). *Hukum Perdagangan Internasional (The Law on International Trade)*. Jakarta: Rajawali Pers.

Adolf, H. (2014). *Hukum Penyelesaian Sengketa Internasional*. Jakarta: Sinar Grafika.

Ali, A.I. (2003). "Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System," *Journal of Public and International Affairs,* 14.

Alter, K.J. (2003). "Resolving Or Exacerbating Disputes? The WTO's New Dispute Resolution System", *International Affairs,* 79(4): 786.

Bello, J.H. (1996), "The WTO Dispute Settlement Understanding: Less is more", *American Journal of International Law,* 90(3): 198.

Black, H.C. (1990). *Black's Law Dictionary*, sixth edition, West Publishing Co, St. Paul, Minn.

Carter, B.E., and Trimble, P.R. (1995). *International Law, Selected Documents.* New York: Little, Brown and Company.

Cho, S. (2004). "The Nature of Remedies in International Trade Law", *University of Pittsburgh Law Review Summer*, Westlaw Download Summary Report, 9.

Feichtner, I. (2012). *The Law and Politics of WTO Waivers, Stability and Flexibility in Public International Law*. New York: Cambridge University Press.

Fuady, M. (2004). *Hukum Dagang Internasional (Aspek Hukum Dari WTO)*. Jakarta: PT Citra Aditya Bhakti.

Gaisford J. and Kerr, W.A., (eds). (2005). "Hand Book on Trade Policy", Cheltenham: Edward Elgar.

Gathii, J.T. (2005). "Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions." *Georgia Journal of International and Comparative Law*, 35(1): 8.

Hudec, R.E. (2000), "Broadening the Scope of Remedies in WTO Dispute Settlement", article at http://www.worldtradelaw.net, first published 2000.

Hudec, R.E. (2002), "The Adequacy of WTO Dispute Settlement Remedies, A Developing Country Perspective", in Bernard, H., *et. al*., (eds). "Development, Trade and the WTO", Washington, DC, published by the World Bank.

Jackson, J.H. (2004), "International Status of WTO Dispute Settlement Reports: Obligation to comply or Option to Buy Out?", *American Journal of International Law*, 98(1): 109.

Jackson, J.H., Davey, W.J., & Sykes, A.O. (1995). *Legal Problems of International Economic Relations.* West Publishing Co, St. Paul, MNN.

Malanczuk, P. (1997). *Akhurst's Modern Introduction to International Law*, London and New York, Routledge.

McWhinney, E. (1987). *The International Court of Justice and the Western Tradition of International Law*, Martinus Nijhoff P, Dordrecht, pp. 11-12.

Mitchell, A.D. (2008). *Legal Principles in WTO Disputes.* New York: Cambridge University Press.

Movsesian, M.L. (2003). "Enforcement of the WTO Rulings: An Interest Group Analysis," *Hofstpa Law Review,* 32(1): 2-3

Pandika, R. (2010). *Sanksi Dagang Unilateral Di Bawah Sistem Hukum WTO*. Bandung: Alumni.

Pauwelyn, J. (2003). *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*. New York: Cambridge University Press.

Petersmann, E.U. (2009). "Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit 'Grave Injustice'?" *The Law and Practice of International Courts and Tribunals* 8, p. 335.

Schw, D.M. (1995), "WTO Dispute Resolution Panels: Failing to Protect Against of Conflicts of Interest", *American University Law Review,* 10(2), p. 972.

Shaffer, G.C., and Pollack, M.A. (2010). "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International," *University of Minnesota Law School Legal Studies*, 9-23.

Starke, J.G. (1989). *Introduction to International Law*, ninth edition. London: Butterworth.

Van den Bossche, P. (2005). *The Law and Policy of the World Trade Organization*. New York: Cambridge University Press.

Van Grasstek, C. (2013). *The History and Future of the World Trade Organization*. Geneva: WTO Publications.

Wallace, R.M. (1993), "International Law", translated in Bahasa by Arumanadi, B. Semarang: IKIP Semarang Press.

World Trade Organization. (2004). *A Hand Book on the WTO Dispute Settlement System*. Cambridge University Press, Cambridge, the United Kindom.

Yohanes, T. "Sengketa AS – Indonesia Soal Kuota Impor (Dispute Between Indonesia and the United States on Import Quota)", Article on Kedaulatan Rakyat News Paper, Yogyakarta, 11 March 2013.

Yue, C.S., and Tan, J.L.H., (eds). (1996), "WTO Dispute Settlement Mechanism: An ASEAN Perspective", Institute of Southeast Asian Studies, ASEAN Secretariat, Singapore.