International Journal of Science Academic Research
Vol. 04, Issue 07, pp.5899-5905, July, 2023
Available online at http://www.scienceijsar.com

ISSN: 2582-6425

Research Article

SOLUTION ON THE LEGALITY AND LEGITIMACY TENSION WITHIN THE WORLD TRADE ORGANIZATION LAW BASED ON THE POSITIVISM SCHOOL OF THOUGHTS

***Putu George Matthew Simbolon and Agus Brotosusilo**

Universitas Indonesia Faculty of Law, Jakarta, Indonesia

Received 15th May 2023; **Accepted** 20th June 2023; **Published online** 17th July 2023

Abstract

This research is written based on the notion that legality and legitimacy in public international law including the WTO law are generally conflicting. Regardless of this reality, these elements may be harmonized. The harmonization of these elements is expressed by implementing the thoughts of classical positivist scholars, microeconomic scholars, and political scholars. Those classical positivist scholars are Austin, Hart, Kelsen, and Triepel. The method implemented in this research is the normative method with a prescriptive and interdisciplinary nature. This research consists of two discussions. The first discussions analyze the tension between legality and legitimacy within the WTO law based on the positivist school of thought. Meanwhile, the second discussion discusses the solution in the form of the vacuum in the Appellate Body. The first discussion of this research stated that the existence of the WTO law as an imperfect legal system, the various economic forces of each WTO member, and the ability of powerful states in determining the validity of a norm is the cause of the tension between the legality and legitimacy in the WTO law. Furthermore, the solution to a concrete issue in the form of the vacuum in the Appellate Body can be solved through the establishment of an exclusive committee having the purpose of pointing out the Appellate Body members. This though is based on good faith and the collective will as the philosophical basis of the international law existence. The authors of this research article hope that this conceptual basis implementation is applied in the next research discussing other branches of public international law.

Keywords: Legality, Legitimacy, WTO, Appellate Body, Positivism.

INTRODUCTION

The concept of legality and legitimacy has always been applied in the same line.[1]Since the development of international law, these elements are conflicting with one another.[2]Such harmony can be seen in the finding by the Permanent Court of Justice on the *Lotus* Case. This case is caused by the complaint from the French government to the Turkish government due to its action by applying its criminal law jurisdiction on the Lotus Ship's Officer causing an injury to the Boz-Kourt Ship in the open sea.[3] In this arrest, the PCIJ led by Max Huber opined that once a customary international law or an international treaty does not prohibit particular action, such action is not prohibitive under international law.[4]This finding also states that a state may not act exceeding its sovereignty constituted under international law on its jurisdiction.[5]Within this limit, a state's authority to exercise its authority is left to the sovereignty of that state.[6] The nexus between a norm and a will has shown that public international law has indeed a positivistic character.[7] In understanding international law literature applying this case as the concept of jurisdiction, it can be understood that this judgment is generally accepted by international scholars.[8]One of the international law scholars accepting this finding is Hiedrich Triepel. He states that international law is made based on the collective will of states.[9] A different circumstance can be seen in the inability of the United Nations (UN) to always count on the Security Council in responding to the genocides including the genocide in Rwanda.[10]Another example concerning the trust in the Security Council is the military intervention by the North Atlantic Treaty Organization (NATO) in Kosovo in 1999 caused by NATO's legitimacy contrary to the equal sovereignty principle and the human rights principle recognized by international law.[11]This reality caused the UN General Council to adopt Resolution Number 63/308 concerning Responsibility to Protect in 2005 which was then implemented in 2009.[12] This issue does not only occur in the practice of public international law concerning peace and security, but it does also occur in public international law concerning international trade. Since May 2016, the United States has blocked the appointment of the World Trade Organization (WTO) Appellate Body member.[13]This situation has grown even worst on December 10th, 2019, when the mandate of the two Appellate Body Adjudicators have become

Corresponding Author:** ***Putu George Matthew Simbolon
Universitas Indonesia Faculty of Law, Jakarta, Indonesia

[1] Pierre d' Argent, *International Law Textbook: Upholding Peace*,(Louvain: UCLouvain & edX, 2021), page. 87.
[2] *Ibid*.
[3] Pierre d' Argent, *International Law Textbook: Making International Law*,(Louvain: UCLouvain & edX, 2021), page. 9.
[4] International Court of Justice, *Collection of Judgments: The Case of the S.S. Lotus* (Hague: International Court of Justice, 2023), page. 17 s.d 19.
[5] *Ibid*.
[6] *Ibid*.
[7] Pierre d' Argent, *International Law Textbook* …., page. 11.
[8] Sefriani, *Hukum Internasional Suatu Pengantar*, (Depok: Raja Grafindo Persada, 2018), page. 222.
[9] I Made Pasek Diantha, Ida Bagus Wyasa Putra, dan I Dewa Gede Palguna, *Bahan Ajar Hukum Internasional*, (Denpasar: Universitas Udayana, 2017), page. 58.
[10] Obasesam Okoi, "Ukraine and the Failure of the Responsibility to Protect Norm," *E-International Relations* (5 December 2022), page. 1.
[11] *Ibid*.
[12] Global Centre for the Responsibility to Protect, "What Is R2P?," *Global Centre for the Responsibility to Protect* (September 5th, 2022), page. 1.
[13] Elisa Baroncini, "The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Article 25 DSU Interim Appeal Arbitration as a Bridge Between Renovation and Innovation" dalam Meredith Kolsky Lewis, ed., *A Post-WTO International Legal Order*, (Cham: Springer, 2020), page. 115.

expired.[14] This issue has caused the coherence aspired by the WTO to be more difficult to be achieved.[15] The United States authority causing the paralysis in the world trade system may be considered as an issue impossible to be solved by referring to Article IX Paragraph 1. of the WTO Agreement concerning the decision-making mechanism. This article states that the decision-making of the organization shall be based on the consensus of the whole members.[16]Furthermore, Article X paragraph 1. of the WTO Agreement states that the amendment of the agreement and its annexes may only be conducted based on the consensus of the whole members or based on a vote cast by two per three of the members.[17] It can be understood that the issue concerning legality and legitimacy under public international law *in concreto* public international law is an issue that may not be resolved in the dogmatic realm of legal studies. The gap between *das sollen* and *das sein* in this research background has shown a situation where international law is adopted based on the collective will of states and a situation where the Appellate Body is unable to exercise its authority due to the lack of legitimacy from the WTO members. In response to this gap, the legal issue herein will be analyzed based on the classical positivism school of thought recognized in jurisprudence literature. This research consists of two discussions herein. The first discussion explains the issues faced by the Appellate Body constituted under the Dispute Settlement Understanding (DSU) and how such issues shall be responded to by WTO members. Meanwhile, the second issue discusses how classical positivist scholars are supposed to respond to such legal issues. Those legal issues will be analyzed based on the thoughts of scholars explained in the literature review. Furthermore, those issues will also be responded to base on the microeconomics scholars and political science scholars explained below.

LITERATURE REVIEW

Huala Adolf dan An An Chandrawulan etymologically defined positivism by stating that positive law is an instrument adopted by the authorities.[18] The word is positive originated from the Latin, "*positium*" which means "established".[19]This school of thought generally states that law shall be empirically analyzed from an objective phenomenon.[20]This research is implementing the thoughts of John Austin, HLA Hart, Hans Kelsen, and Hiedrich Triepel in answering the two legal issues mentioned in the introduction. International law may be perceived as a legal norm not originating from a sovereign authority, yet it can be originated from public opinions and it is enforced solely through moral sanctions.[21]Austin, therefore, perceives international law not as a positive law, but only as an international morality.[22] The doctrine concerning a sovereign authority can be countered based on Argent's opinion stating that international law is created by a state and international law is the master of international law.[23] These two legal subjects may achieve their own will to produce a law due to their active personality.[24] On the other side of the house, Austin's opinion concerning the moral sanction can be enhanced with the managerial approach by Chayes and Chayes stating that international law is a naming and shaming mechanism implemented through an international treaty.[25]These thoughts will be implemented in explaining whether the existence of sanctions is the only effective means of implementing the public international law *in concreto* the WTO law.

Hart perceives international law under the same stance as Austin, and by implementing the classification of legal norms. He classifies norms into primary rules and secondary rules.[26]Primary rules are a set of rules obliging its subject to act or not to act.[27] Meanwhile, the secondary rules constitute how the primary rules are adopted, amended, identified, or controlled.[28]

He also states that international law has no sanction, and this includes Chapter VII of the UN Charter since the implementation of those set of stipulations can be paralyzed through the veto rights of the P5 members.[29]Furthermore, Hart's opinion concerning the right to impose sanctions which are also owned by developing countries does not ensure that the condemned powerful states will comply with such sanctions.[30]Such thoughts are indeed relevant once it is connected to DSU providing the authority to WTO members including developing countries winning a dispute, to retaliate against the member violating the WTO Agreement.[31] Hart, therefore, views international law solely as primary rules.[32]This doctrine is implemented in explaining how different economic forces may influence the implementation of the WTO law.

Regardless of its primitive nature, this research will not lose its prescriptive nature since it implements Kelsen and Triepel's point of view herein. Kelsen separated the concept of the norm as an ought from the concept of an act as an is. Therefore, it can be explained that a norm shall remain valid regardless of the fact absence of its implementation.[33]He also refused Austin though's stating that a norm shall be complemented with sanction.[34]This refusal is delivered by stating that a norm is a psychological element that is not attributed to a role, while sanction is a matter dependent on non-legal factors.[35]

[14] *Ibid*., page. 116.
[15] Jaemin Lee, "What Can We Learn from Our Struggling Cousin?: Recent Discussion on Reform of International Investment Law and International Investment Law and Investment Dispute Settlement Proceedings" dalam Meredith Kolsky, ed., *A Post-WTO International Legal Order*, (Cham: Springer, 2020), page. 149.
[16] World Trade Organization, *Agreement Establishing the World Trade Organization* (Geneva: World Trade Organization, 2022), page.1.
[17] *Ibid*.
[18] Huala Adolf dan An An Chandrawulan, *Pengantar Filsafat Hukum*, (Bandung: KENI Media, 2019), page. 58.
[19] *Ibid*.
[20] Huala Adolf, *Filsafat Hukum Internasional: Perspektif Negara Sedang Berkembang* (Bandung: KENI Media, 2020), page. 40.
[21] Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A Hart," *The European Journal of International Law* Vol. 21 No. 4 (2011), hlm. 969.
[22] *Ibid*.
[23] Pierre d' Argent, *International Law: Setting the International Law Stage*, (Louvain: UCLouvain & edX, 2021), hlm. 5.
[24] *Ibid*.
[25] Jaemin Lee, "What Can We…. , hlm. 161.
[26] Mehrdad Payandeh, "The Concept of… , hlm. 973.
[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*., hlm. 975.
[30] *Ibid*.
[31] World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Geneva: World Trade Organization), page. 1.
[32] *Ibid*. page. 976.
[33] Jimly Asshiddiqie dan M. Ali Safa'at, *Teori Hans Kelsen tentang Hukum*,(Jakarta: Konstitusi Press, 2021), page. 37.
[34] Jimly Asshiddiqie, *Teori Hierarki Norma Hukum*,(Jakarta: Konstitusi Press, 2020), page. 27.
[35] *Ibid*.

Kelsen also countered Austin's opinion by stating that a norm has a dynamic nature due to its dynamic adoption process.[36]This point of view has an object in the form of activities consisting of the adoption and implementation of the law.[37]This point of view is interrelated with Triepel's view stated that international law is adopted and implemented by the collective will of states through the implementation of customary international law.[38] These doctrines shall be perceived as the most important element of public international law. It may respond to issues concerning the tension between legality and legitimacy in the practice of public international law including the practice of the WTO law. By referring to Kelsen's though stating that the implementation of sanctions is interrelated with non-legal factors, this research applies the doctrines expressed by Adam Smith and David Ricardo. Smith states that the international division of labor in producing goods and in achieving international specialization, along with production efficiency are absolute requirements to conduct international trade.[39] In explaining Smith's antithesis, Ricardo expressed that each state shall conduct a production allocation on certain goods since each state has its economic power.[40]This notion can also be related to Hart's view stating that each state has its level of economic force, regardless of its sovereignty.

Jurgen Habermas states that politics has always been influenced by legal facticity and legal validity.[41] Legal facticity is an emphasis on the legal certainties element, while legal validity is an illustration concerning the moral legitimation of the law itself.[42] Harbemas furthermore expressed that these elements are conflicting and such conflict has caused normative paralysis and reduced into intimate interweaving which leads to an anomy or chaos.[43]This point of view is implemented to explain that legality and legitimacy have a strong relationship with the political interests of each WTO member. These non-legal doctrines will also be implemented as the conceptual basis in expressing the fact that the legality and legitimacy in the practice of the WTO law are influenced by non-legal factors *in concreto* the economic and political factors. The doctrines explained in this section are implemented in answering the legal issues mentioned above based on the method explained herein.

RESEARCH METHODS

The writing of this article is a result of normative research through the implementation of the law in the books in the form of legal doctrines implemented to answer concrete issues.[44] The following method is complemented with the conceptual approach which is the implementation of classic positivism scholars explained in the literature review.[45]The implementation of this method is based on Kelsen'sthought stating that the *adressat* of a legal norm shall comply with the order addressed to him or her.[46] This concept therefore states that each WTO member as the legal subject of this research shall conduct what they ought to do, regardless of the legal uncertainties concerning the existence of sanctions.

This research also implements the approach adopted by positivist scholars stating that law is created through the implementation of political will owned by an entity having a political authority.[47] This research, therefore, provides a solution in the form of how a political will is needed to respond to the tension between legality and legitimacy that existed in the practice of the WTO law implemented by its sovereign members. Since this article is implementing Kelsen's thought stating that sanction is related to non-legal[48], the discussions of this article thereby implement Smith and Ricardo's point of view. Sanction is also related to political elements, so this article therefore related to Habermas's opinion concerning legal facticity and legal validity. This research, therefore, has its prescriptive and interdisciplinary nature by implementing other science related to law in solving its formulated issues.

The legal sources implemented in this research are primary legal sources in the form of international treaties and case law and secondary legal sources from books and journal articles.[49] The international treaties implemented in this research are the WTO Agreement, General Agreement on Tariff and Trade (GATT) dan Annex 2 WTO Agreement concerning Dispute Settlement Understanding (DSU). The case law implemented in this article is the Lotus Case by PCIJ explained in the introduction of this research. Meanwhile, the secondary sources of this research are the thoughts of positivists explained in the literature review. Those thoughts or doctrines are implemented in the discussions herein.

RESULTS AND DISCUSSION

Analysis of the tension between legality and legitimacy within the world trade organization legal system based on the positivism school of thoughts

World Trade Organization is an international organization established after the Marrakesh Round in April 1994.[50]This trade round adopted a set of rules completing and enhancing the legal norms under the GATT 1947, an international treaty adopted in Geneva in 1947.[51] Article II paragraph 2. of the WTO Agreement states that the WTO Agreement is related to legal instruments under Annexes 1, 2, and 3 WTO of the Agreement, and those three annexes are binding to the WTO members.[52]

[36] Sidharta, *Positivisme Hukum* (Jakarta: Penerbit Universitas Tarumanegara, 2020), page. 29
[37] Jimly Asshiddiqie, *Teori Hierarki Norma* …., page. 87.
[38] I Made Pasek Diantha, Ida Bagus Wyasa Putra, dan I Dewa Gede Palguna, *Bahan Ajar Hukum* …., page. 58-59.
[39] Serlika Aprita dan Rio Adhitya, *Hukum Perdagangan Internasional*, (Depok: Raja Grafindo Persada, 2020), page. 15.
[40] Hendri Jayadi, Putu George Matthew Simbolon, dan Angel Damayanti,"Safeguard Measure Application As Asean Sustainable Framework To Recover From the Post-Covid-19 Pandemic Crisis," *Quest Journals: Journal of Research in Humanities and Social Science* Vol. 11 No. 2 (2023), page. 217.
[41] Fajlurahman Jurdi, *Teori Negara Hukum*,(Malang: Setara Press, 2016), page. 207.
[42] *Ibid*.
[43] *Ibid*.
[44] Ammiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Depok: Raja Grafindo Persada, 2018), page. 163.
[45] *Ibid*. hlm. 167.
[46] Jimly Asshiddiqie dan M. Ali Safa'at, *Teori Hans Kelsen* …., page. 37.
[47] Sidharta, *Positivisme Hukum* …., page. 18.
[48] Jimly Asshiddiqie, *Teori Hierarki Norma* …., page. 27.
[49] Ammiruddin dan Zainal Asikin. *Pengantar Metode Penelitian* …., page. 118.
[50] Mahfud Fahrazi, *Hukum Dagang Internasional: Optimalisasi Sistem Hukum Tindakan Pengamanan Perdagangan di Indonesia*, (Bandung: Refika Aditama, 2020), page. 25.
[51] Mohammad Sood, *Hukum Perdagangan Internasional: Edisi Kedua*,(Depok: Raja Grafindo Persada, 2018), page. 29.
[52] World Trade Organization, *Marrakesh Agreement Establishing*…., page. 1.

The WTO Agreement has given authority for its members to impose sanctions due to nullification or impairment caused by another member. Those rules are set forth under Article XXIII GATT dan Annex 2 WTO Agreement concerning the DSU. Article XXIII GATT (*Nullification and Impairment*) is a stipulation concerning dispute settlement due to a measure incompatible with the WTO Agreement, and a measure injuring another member.[53] Article 3 paragraph 1. DSU states that this agreement is the elaboration and the modification of stipulations under Article XXIII GATT.[54]

The concrete basis for a member in imposing sanctions on other members violating the WTO Agreement can be found in Article 22 of the DSU. Paragraph one of this article states that compensation or the suspension of a concession or another obligation is a temporary act that may be imposed if the panel or the Appellate Body recommendation is not complied with by a member obliged to bring its measure into conformity under a reasonable period.[55]Paragraph 4 of this article states that the DSB gives authority to the state to suspend its concession or apply other obligations equivalent to the amount of loss caused by the nullification or the impairment, of a state proven to violate the WTO Agreement. [56] If the procedures under Article 22 DSU are analyzed under Hart's view, it can be understood that the set of rules within the WTO Agreement is primary rules *per se inter alia* consisting of orders and prohibitions for each of its members. Adolf states that secondary rules are a set of rules constituting the primary rules.[57] One of the sub-parts of the secondary rules is the power to adjudicate or the rules which established a power to rule a concrete issue.[58] In perceiving the DSB within the DSU by stating that it can be constituted as secondary rules, this research analyses the WTO Dispute Settlement Mechanism further based on Austin and Hart's doctrine herein.

Austin states that an order which does not consist of an implicit element of sanction that may achieve compliance is an order which may not be qualified as a legal norm.[59]Such order may only be classified as a positive morality.[60] The application of this doctrine in the WTO Agreement is relevant in understanding the particular subordinative nature of international law regardless of its general nature as a coordinative law. Sefriani explains that international law has a coordinative nature since it recognizes the equal sovereignty principle applies to all states.[61] The coordinative nature of international law thereby triggers Austin to state that international law is not a legal norm due to the absence of an institution higher than a state which may impose sanctions on a non-compliance state.[62] If the authority to retaliate entitled to a complainant state to a respondent state ordered to bring its measure to conformity is analyzed based on Hart's doctrine concerning the power to adjudicate, the stipulation under the DSU thereby may be qualified as secondary rules. But once these procedural rules are taken into account based on another Hart's notion concerning the economic force as a dependent variable in international law, the authority given by the DSU to a member in a case where the following member a developing state, while the condemned member is a developed state, may not be qualified as secondary rules. The DSU thereby may not be qualified as secondary rules due to its ineffective application once it is imposed on developed states. This set of rules thereby may not be qualified as secondary rules. Hart's notion concerning the role of economic forces is explained further by applying Ricardo's opinion concerning comparative advantage. Ricardo stated that each state has its production capacity thereby.[63] Such diversity is caused by the difference in natural resources and human capital which exist in each state.[64]Such a point of view is the antithesis of Smith's notion stating that each state shall conduct a division of labor, goods specialization, and production efficiency so that it can engage with another state in international trade.[65] This diversion thereby cause a WTO member which is a developing country may not effectively impose the rules on retaliation to another WTO member which is a developed country.

The discussion concerning the tension between the legality and legitimacy within the WTO legal system does not end at a point where the various economic forces of each member have caused inefficiency in operating the rule-based system. As it is explained above, the complaint by the United States on the Appellate Body findings and judgments has caused the Appellate Body seats to be empty.[66] This vacuum is caused by the judicial activism of the United States on the appointment of the Appellate Body members.[67] By referring to Articles 17 concerning the appellate review and 22 concerning the suspension of concession of the DSU, it can be understood that this vacuum has also caused the inability of members to utilize its authority to retaliate against another member disputing with it.[68] This malfunction is caused by the fact that the panel's report may not be applied through retaliation if the respondent state violating the WTO Agreement exercised its right to conduct the appeal into the void.[69] An appeal into the void is a situation that arises due to the Appellate Body vacuum if a member proposed to appeal to the empty tribunal. This situation also arose since the retaliation may only be imposed after the examination through the Appellate Body is conducted *prima facie*.[70] This tension is caused by the United States' political consent which reflects the notion concerning legal facticity and legal validity.[71] This tension may furthermore be perceived by understanding the non-existence of certainties within the WTO dispute settlement mechanism. This is because the moral legitimation withdrawn by the United States has caused an international anomy. Such anomy can be seen in understanding the decision-making and the amendment mechanism within the WTO Agreement may not be conducted

[53] World Trade Organization, *General Agreement on Tariffs and Trade* (Geneva: World Trade Organization, 2023), hlm. 1.
[54] World Trade Organization, *Marrakesh Agreement Establishing*…., hlm. 1.
[55] World Trade Organization, *Understanding on Rules* …., page. 1.
[56] *Ibid*.
[57] Huala Adolf, 2020, *Filsafat Hukum Internasional* ...., page. 45.
[58] *Ibid*.
[59] John Austin, *The Province of Jurisprudence Determined*,(Cambridge: Cambridge University Press, 2001), page. 6.
[60] *Ibid*., page. 10.
[61] Sefriani, 2018, *Hukum Internasional* …., page. 3.
[62] Mehrdad Payandeh, "The Concept of …., page. 969.
[63] Serlika Aprita dan Rio Adhitya, *Hukum Perdagangan Internasional* …., page. 15.
[64] *Ibid*., page. 18.
[65] N. Gregory Mankiw, *Principles of Microeconomics*, (Harvard: South Western Cengage Learning, 2009), page. 54.
[66] Chang-fa Lo, Junji Nakagawa, dan Tsai-fang Chen, *The Appellate Body of the WTO and Its Reform*,(Singapore: Springer Nature Singapore, 2020), page. 4.
[67] *Ibid*.
[68] World Trade Organization, *Marrakesh Agreement Establishing*…., page. 1.
[69] World Trade Organization, *Understanding on Rules* …., page. 1.
[70] RizkyBanyualamPermana, "PenyelesaianSengketadalamPerjanjianPerdagangan Megaregional: *Regional Comprehensive Economic Partnership (RCEP) Agreement*," *Arena Hukum: Jurnal Ilmu Hukum*, Vol. 16, No. 1, (2023), page. 160.
[71] Fajlurahman Jurdi, *Teori Negara Hukum* ….., page. 207.

that easily. Questions concerning what is the proper legal mechanism for solving this issue thereby shall be addressed. This research expressed that this issue may only be solved through the collective will of the entire WTO members in adopting a dispute mechanism that may overcome the vacuum of the Appellate Body. This notion is explained further in the second discussion of this research.

Solution on the appellate body vacuum in the world trade organization dispute settlement understanding

Unlike Austin's perception, Kelsen perceives norm non only as a static matter, but also as a dynamic matter.[72] This dynamic norm has an object in the form of activities consisting of legal norm adoption and the implementation of that norm.[73] The dynamic nature of a legal norm is influenced by the basic norm constituting the establishment of those legal norms.[74] He also states that in a national legal system, *grundnorm* constitutes the establishment of a legal norm.[75]It shall therefore be questioned whether the concept of *grundnorm*is also applicable in the international legal system. Kelsen states that the international legal system also has its fundamental norm or constitution known as the *pacta sunt servanda*.[76]This existence has caused international law also to have its subordinative nature like national law.[77]He also correlates his notion concerning *pacta sunt servanda* as a fundamental norm with the dynamic concept of legal norms, by expressing that this fundamental norm is utilized in the establishment of an international treaty and customary international law.[78]*Pacta sunt servanda* may also be perceived as the international customary law having a higher position once it is compared with the international treaty.[79] The values in the form of legal certainties and good faith can be found in the *pacta sunt servanda* by understanding the stipulation under Article 26 Vienna Convention on the Law of Treaties 1969.[80] Kelsen's opinion explained above is in line with Triepel's opinion stating that international law is adopted based on the collective consent of states.[81]That collective consent is tacitly actualized through international customary law.[82]Under Article 38 paragraph (1) ICJ Statute, customary international law is explained as evidence of a general practice accepted as law.[83]Scholars like Wolfke stated that the general practice element within this legal source shall be applied in practice in a consistent manner, and without interruption, so that it may acquire its status as an international customary law.[84]Meanwhile, scholars like Cheng state that an act may still be considered an international customary law regardless of its lack of repetition. This statement is addressed by Cheng by referring to the fact that international customary law in airspace law does not need such frequency repetition.[85]

The academic debate concerning the applicability of international customary law has caused uncertainties in the applicability of this formal source of international law.[86]Such uncertainties shall be solved by applying Raaz's commentary on Kelsen's thought concerning the concepts of an "*is*" andab "*ought*". He states that Kelsen's thought can be understood as an act with a relevant nature in the making of customary international law.[87]This, though, has caused the object of jurisprudence consisting of norms and acts may not be strictly divided. The concept stating that an "*ought*" and an "*is*" may not be divided has triggered Kelsen to state that the concept of a "*vacuum of law*" is indeed unreasonable.[88]He states that the "*vacuum of law*" will not occur once the judiciaries have the authority to rule a case as a legislator, on a case which is not constituted under any legal basis.[89]The legislators in this case also realize the fact that the legal norm that they have adopted has caused unfairness in certain situations or cases.[90]Therefore, there will be no possibility for legislators to state that the legislative function of the judiciaries in a certain case is not constituted under any legal basis as an excessive means to exercise their authority.[91]

Based on the theoretical crime conducted by Kelsen[92], the classical positivism school of thought can be understood not only as a school focusing on the existence of a positive norm but also on the ability of state organs to exercise their authority. Even though Kelsen's notion concerning the vacuum of law is relevant in the context of national law, especially to states adopting the separation of power concept, such a situation is not applicable in the context of the WTO law or the WTO legal system. The influence of politics as explained in the first discussion can be internalized under a notion where the judiciaries of the WTO *in concreto* the Appellate Body may not be utilized due to its current *de facto* non-existence. Meanwhile, it may also be understood that the other WTO permanent organs such as the Ministerial Conference and the General Council are neither the legislators nor the executors of the WTO due to the single undertaking concept being difficult to be applied practically.

This discussion, therefore, affirmed Matsushita's view stating that the concept of *checks and balances* shall be adopted in every institution, especially the WTO.[93]The nonexistence of the *check and balances* in the appointment of the Appellate Body judges can be qualified as the WTO institutional disability.[94]This statement is in line with Petersmann's statement expressing that the United States hegemony on the WTO has caused the limitations on the "*check and balance*" and the occurrence of "*constitutional restraints*" within the WTO legal system.[95]These institutional constraints can be seen from the failure of the "*member-driven*" negotiation on the DSU reform which has been conducted since 1998 causing the

[72] Sidharta, *Positivisme Hukum* …., page. 28.
[73] Jimly Asshiddiqie dan M. Ali Safa'at, *Teori Hans Kelsen* …., page. 87.
[74] *Ibid*.
[75] Jimly Asshiddiqie, *Teori Hierarki Norma* …., page. 69.
[76] Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems," *European Journal of International Law* Vol. 15 No. 3, (2004), page. 548.
[77] *Ibid*.
[78] *Ibid*., page. 549.
[79] *Ibid*., page. 548.
[80] United Nations, *Vienna Convention on the Law of Treaties (1969)* (New York: United Nations, 2005), page. 12.
[81] I Made Pasek Diantha, Ida Bagus Wyasa Putra, dan I Dewa Gede Palguna, *Bahan Ajar Hukum* …., page. 58-59.
[82] *Ibid*. page. 58.
[83] International Court of Justice, *Statute of the International Court of Justice* (Hague: International Court of Justice, 2017), page. 1.
[84] Jörg Kammerhofer, "Uncertainty in the …., page. 530.
[85] *Ibid*.
[86] *Ibid*., page. 531.
[87] *Ibid*., page. 546.
[88] *Ibid*., page. 547.
[89] Jimly Asshiddiqie dan M. Ali Safa'at, *Teori Hans Kelsen* …., page. 119.
[90] *Ibid*.
[91] *Ibid*. page. 120.
[92] Jörg Kammerhofer, "Uncertainty in the …., page. 546.
[93] Mitsuo Matsushita, "Reforming the Appellate Body," dalam Chang-fa Lo, ed., *The Appellate Body Of The WTO And Its Reform*, (Singapore: Springer, 2020), hlm. 49.
[94] *Ibid*.
[95] Ernst-Ulrich Petersmann, "Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trade Organization," dalam Chang-fa Lo, ed., *The Appellate Body Of The WTO And Its Reform*, (Singapore: Springer, 2020), page. 27.

imperfection of the DSB and this institution to become incomplete.[96] Babu states that the United States' arbitrary acts on the Appellate Body are caused by the inability of the WTO political organ consisting of the Ministerial Conference and the General Council to achieve *checks and balances* which has caused the adoption of the WTO Agreement only centralized to certain states which were its founding members.[97]The statement herein is in line with this research background stating that the decision-making mechanism and the amendment mechanism of the WTO Agreement have caused this problem has no way out. Such a point of view based on the DSU amendments on the stipulations concerning the Appellate Body will never be achieved if the United States still shows its disagreement. The United States' political influence has also caused difficulties in the amendment of the WTO Agreement based on the two per three votes.

The solution to this problem can be found in the Sutherland Report 2005. This report *inter alia* states that the WTO shall establish a group of experts functioned to conduct the selection on the appointment of panels and the Appellate Body judges or members.[98]The Sutherland Report is thereby in line with Triepel's view stating that states shall be bound to international law by exercising their tacit consents based on the international customary law. This statement is addressed based on a hypothesis stating that once the Sutherland Report is implemented without the amendment of the WTO Agreement, such collective will thereby shall be considered as the *tacit consent* which reflects the application of the international customary law necessary to be applied in such a particular situation.

In answering whether the adoption of this committee can be qualified as international customary law or not, this research considers the conceptual framework herein. Yannick Radi states that the adoption of the UN Resolution 1803 concerning the permanent sovereignty on natural resources has triggered the developed states to recognize the permanent sovereignty as a general practice having an *opinio juris*.[99]This explanation is in line with Pierre d' Argent thought stating that a state having a strong political influence will also have the ability to determine what practices can be qualified as international customary law and which practices aren't.[100] The WTO member states therefore need to initiate the adoption of an exclusive committee to point the Appellate Body members or judges and such initiative shall be conducted through the General Council. This statement is addressed since the General Council has the authority in conducting the daily assignment of the WTO.[101]This research furthermore does not recommend the adoption of this committee through the Ministerial Conference an organ functioned to adopt the multilateral treaties since such a process will require a longer time.[102]In knowing whether such collective will through the General Council will be legitimated by the United States and its allies in this case, this question will be answered based on the doctrine herein. Martti Konskenniemi stated that the tension between apology and utopia is inherent in the practice of international law.[103] This point of view shall be considered as a basis for this research to adopt an optimistic stance by stating that the WTO members impaired due to the United States judicial activism on the Appellate Body shall collectively initiate a meeting for the establishment of a committee tasked for the appointment of the Appellate Body. This notion is not only in line with Triepel's point of view, but it is also in line with Kelsen's. Kelsen's point of view referred to in this paragraph is his statement concerning the validity of a norm according to its higher norms regardless of the nonexistence of sanction.[104] By understanding the fact that the collective will of states in establishing this committee is based on good faith in reviving the WTO crown jewel, this solution is hereby in line with the fundamental value of international law which is good faith. The existence of good faith as the fundamental value of international law is the actual implementation of Kelsen's opinion stating that *pacta sunt servanda* is the basic norm (*grundnorm*) of international law.[105] Through the implementation of these conceptual bases, the applicability of the WTO law shall not only be perceived as a static norm, yet it shall also be perceived as a dynamic norm. This discussion may express that regardless of the tension of legality and legitimacy that exist within the public international law *in concreto*the WTO law, such paradox shall not be perceived as a problem without a solution due to the existence of the good faith principle.

Conclusion

International law is a set of legal norms adopted based on the general and collective will of states. Such a point of view can be interpreted through an understanding that the legality and legitimacy shall be harmonized since these concepts are built based on those collective will. By taking into account both the economic factors and political factors in the form of the various economic forces of each state and the various political influences, these two elements may conflict with one another. The Appellate Body vacuum discussed in this research is one of the examples of the tension between legality and legitimacy. At first sight, the problem occurred in the WTO Appellate Body due to the United States judicial activism may be perceived as a problem with no way out due to the existence of the single undertaking mechanism and the addendum mechanism under the WTO Agreement. The economic factor has caused the legality and legitimacy within the WTO law may conflict with one another since each country has its economic forces, which causes this legal institution unable to effectively apply its sanction. The political factor on the other side caused tension within the WTO as a community since only the powerful states which generally may determine which general practice shall be considered as international customary law. Such pollical influence may also be used to determine the legitimacy of an international legal norm. In responding to this issue, the WTO members shall collectively initiate the establishment of a committee tasked with the appointment of the Appellate Body members or judges. This collective will may be conducted since good faith is the fundamental value of international law. The research herein still upholds this idea concerning the collective will of the WTO members even

[96] *Ibid*.
[97] R. Rajesh Babu, "WTO Appellate Body Overreach and the Crisis in the Making: A View from the South," ISBN 978-981-15-0254-5 (2020), page. 92.
[98] *Ibid*., page. 102.
[99] Yannick Radi, *International Investment Law Textbook*, (Louvain: UC Louvain & edX, 2021), page. 9.
[100] Pierre d' Argent, 2021, *International Law Textbook* …., page. 6.
[101] Peter Van den Bossche dan Werner Zdouc, *The Law and the Policies of the World Trade Organization*,(Cambridge: Cambridge University Press, 2022), page. 265.
[102] *Ibid*., page. 264.
[103] Pierre d' Argent, *International Law Textbook* …., page. 28.
[104] Jimly Asshiddiqie, *Teori Hierarki Norma* …., page. 27.
[105] Jörg Kammerhofer, "Uncertainty in the …., page. 548.

though the influence of the United States still surrounds the applicability of the WTO law. To close this research article, it shall be understood that the collective will of states in overcoming the tension between apology and utopia shall also be applied in other international law branches, other than the public international law and the WTO law.

REFERENCES

Adolf, Huala dan An An Chandrawulan. *Pengantar Filsafat Hukum*. Bandung: KENI Media, 2019.

Adolf, Huala. *Filsafat Hukum Internasional: Perspektif Negara Sedang Berkembang*. Bandung: KENI Media, 2020.

Ammiruddin dan Zainal Asikin. *Pengantar Metode Penelitian Hukum*. Depok: Raja Grafindo Persada, 2018.

Aprita, Serlika dan Rio Adhitya. *Hukum Perdagangan Internasional*. Depok: Raja Grafindo Persada, 2020.

Argent, Pierre d'. *International Law Textbook: Making International Law*.Louvain: UCLouvain & edX, 2021.

Argent, Pierre d'. *International Law Textbook: Upholding Peace*. Louvain: UCLouvain & edX, 2021.

Argent, Pierre d'. *International Law: Setting the International Law Stage*. Louvain: UCLouvain & edX, 2021.

Asshiddiqie, Jimly. *Teori Hierarki Norma Hukum*. Jakarta: Konstitusi Press, 2020.

Austin, John. *The Province of Jurisprudence Determined*.Cambridge: Cambridge University Press, 2001.

Babu, R. Rajesh. "WTO Appellate Body Overreach and the Crisis in the Making: A View from the South." Dalam Lo, Chang fa, Junji Nakagawa dan Tsai-fang Chen. *The Appellate Body Of The WTO And Its Reform*. Singapore: Springer Nature Singapore, 2020. P. 91-110.

Baroncini, Elisa. "The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Article 25 DSU Interim Appeal Arbitration as a Bridge Between Renovation and Innovation". DalamLewis, Meredith Kolsky, Junji Nakagawa, Rostam J. Neuwirth. *A Post-WTO International Legal Order*. Nature: Springer, 2020. P. 115-132.

Bossche, Peter Van den dan Werner Zdouc. *The Law and the Policies of the World Trade Organization*.Cambridge: Cambridge University Press, 2022.

Diantha, I Made Pasek, Ida Bagus Wyasa Putra, dan I Dewa Gede Palguna. *Bahan Ajar Hukum Internasional*. Denpasar: Universitas Udayana, 2017.

Fahrazi, Mahfud. *Hukum Dagang Internasional: Optimalisasi Sistem Hukum Tindakan Pengamanan Perdagangan di Indonesia*. Bandung: Refika Aditama, 2020.

Global Centre for the Responsibility to Protect. *What Is R2P?* New York: Global Centre for the Responsibility to Protect, 2023.

International Court of Justice. *Collection of Judgments: The Case of the S.S. Lotus*. Hague: International Court of Justice, 2022.

Jurdi, Fajlurahman. *Teori Negara Hukum*.Malang: Setara Press, 2016.

Jayadi, Hendri, Putu George Matthew Simbolon, dan Angel Damayanti. "Safeguard Measure Application As Asean Sustainable Framework To Recover From the Post-Covid-19 Pandemic Crisis." *Quest Journals: Journal of Research in Humanities and Social Science* Vol. 11 No. 2 (2023). P. 215-222.

Kammerhofer, Jörg. "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems." *EJIL* Vol. 15 No. 3 (2004). P. 523-553.

Lee, Jaemin. "What Can We Learn from Our Struggling Cousin?: Recent Discussion on Reform of International Investment Law and International Investment Law and Investment Dispute Settlement Proceedings". DalamLewis, Meredith Kolsky, Junji Nakagawa, Rostam J. Neuwirth. *A Post-WTO International Legal Order*. Nature: Springer, 2020. P. 149 s.d 166.

Lo, Chang-fa, Junji Nakagawa, dan Tsai-fang Chen, *The Appellate Body of the WTO and Its Reform*. Singapore: Springer Nature Singapore, 2020.

Mankiw, N. Gregory. *Principles of Microeconomics*. Harvard: South Western Cengage Learning, 2009.

Matsushita, Mitsuo. "Reforming the Appellate Body". Dalam Lo, Chang fa, Junji Nakagawa dan Tsai-fang Chen. *The Appellate Body Of The WTO And Its Reform*. Singapore: Springer Nature Singapore, 2020. P. 43-52.

Mehrdad Payandeh. "The Concept of International Law in the Jurisprudence of H.L.A Hart." *The European Journal of International Law* Vol. 21 No. 4 (2011). P. 967-995.

Okoi, Obasesam. "Ukraine and the Failure of the Responsibility to Protect Norm." *E-International Relations*. September 5th, 2022.

Permana,Rizky Banyualam. "Penyelesaian Sengketa dalam Perjanjian Perdagangan Megaregional: *Regional Comprehensive Economic Partnership (RCEP) Agreement*." *Arena Hukum: Jurnal Ilmu Hukum*. Vol. 16. No. 1. (2023).P. 148-173.

Petersmann, Ernst-Ulrich. "Between "Member-Driven Governance" and "Judicialization" Constitutional and Judicial Dilemmas in the World Trade Organization". Dalam Lo, Chang fa, Junji Nakagawa dan Tsai-fang Chen. *The Appellate Body Of The WTO And Its Reform*. Singapore: Springer Nature Singapore, 2020. P. 15-42.

Radi, Yannick. *International Investment Law Textbook*. Louvain: UC Louvain & edX, 2021.

Sefriani, 2018. *Hukum Internasional Suatu Pengantar*. Depok: Raja Grafindo Persada, 2018.

Sood, Mohammad. *Hukum Perdagangan Internasional: Edisi Kedua*. Depok: Raja Grafindo Persada, 2018.

United Nations. *Vienna Convention on the Law of Treaties 1969*. New York: United Nations Treaty Series, 2005.

World Trade Organization. *Agreement on the Establishing the World Trade Organization*. Geneva: World Trade Organization, 2023.

World Trade Organization. *General Agreement on Tariffs and Trade*. Geneva: World Trade Organization, 2023.

World Trade Organization. *Understanding of Rules and Procedures Governing the Settlement of Disputes*. Geneva: World Trade Organization, 2023.

****