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HOW IS THE DISPUTE RESOLUTION MECHANISM IN INTERNATIONAL BUSINESS LAW?

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ABSTRACT

Alternative dispute resolution exists as a dispute resolution mechanism that offers advantages or advantages compared to dispute resolution through court mechanisms. Currently, international business activities are increasingly complex, and there are also many potential disputes between business people. Therefore, the existence of a dispute resolution mechanism is important to provide, especially a more effective and efficient dispute resolution mechanism. Rivalry or competition that is increasing and intense between these countries often creates conflicts and disputes that must be resolved immediately, but the resolution of these disputes must pay attention to the structure and nature of the international community and the different national communities. The handling of international disputes that are in the hands of each country is also reflected in the arrangements for handling disputes in the General Agreement on Tariffs and Trade (GATT) which was a joint agreement of each of its member countries before the World Trade Organization (WTO) was formed. As for the study of the field of dispute resolution law, dispute resolution mechanisms that are considered more effective and efficient usually refer to the concept of Alternative Dispute Resolution (Alternative Dispute Resolution).

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1. INTRODUCTION

One of the efforts made by humans to fulfill their needs is through business activities (Albar, 2019). Meanwhile, according to Ariani (2012) and Achmad (2022) explicitly business can be interpreted as a form of activity carried out by an individual in which there is an exchange of goods, services or money that is mutually beneficial or provides benefits to one another. In addition, business can also take place because of the interdependence between individuals and opportunities for mutual development so that they are finally able to improve human living standards. Considering that this business activity occurs within the scope of everyday human life, namely society, it is not surprising that this activity also requires a legal institution, which is called a business law institution, to regulate everything related to it. This is of course also in line with the saying that, where there is a community, there is also a law that regulates it (Fadillah & Putri, 2021).

The results of Kurniati's research (2016) explain that when viewed from the point of view of its meaning, regulations regarding business activities can also refer to terms such as commercial law, commercial law, economic law, and business law itself. However, in reality business law does contain a very broad meaning and is still suitable for use, especially in today's global era, both in terms of concepts, realities on the ground or the practice of its use.

Kaparang (2019) says that, business law is a set of legal rules governing ways of carrying out trade, industrial or financial affairs or activities associated with the production or exchange of goods/services by placing the money of entrepreneurs at certain risks. The business law also contains several instruments whose function is to enforce all rules relating to business law when the business law is violated or a dispute arises in its implementation. This at the same time also implies that the object of study of business law does have a very broad scope even in dispute resolution activities (Latumeten, 2019).

The above explanation is certainly increasingly relevant when connected with the state of business activities in this increasingly global era, where business activities can be carried out by almost all citizens in the world, causing the boundaries of a country's territory to become limitless and begin to form a global village pattern. As for Mayangsari et al, (2020) argues that, international trade which is based on the principles of free trade always uses economic indicators that are oriented towards efficiency,

transparency, and open competition between business actors that are cross-border, this of course can have an impact on all fields, including business law itself.

From this perspective, it can be seen that globalization is closely related to the economic sector, due to the fact that the development of the world economy is currently leading to increased and openness, especially in terms of international trade (Muryati & Heryanti, 2011). The acceleration of the globalization process in the last two decades has fundamentally changed the structure and patterns of international trade and financial relations. This is an important phenomenon as well as a new era marked by the high growth of international trade between countries in the world (Nugroho, 2017).

In the Puspita journal (2018) several motives or reasons why a country finally carries out international business transactions in this modern era, apart from making it easier to find the goods and services needed and indeed cannot be produced independently, these activities are also allegedly to overcome the problem of scarcity of raw materials production materials that are sought after by citizens of the country, because as we know natural resources are materials whose availability varies in each place (country).

Basically the existence of international business law is a field of law that is experiencing very rapid and extensive development. This is based on the high demand for increasingly diverse human needs which has given birth to trade relations between countries (Putra, 2020). The establishment of an international trade relationship is not only aimed at meeting the needs of a country but also to expand the market and increase the production of goods and foreign exchange through exports to other countries to increase the growth of the economic sector and absorb as many workers as possible.

In international business law itself there are several legal subjects where one of them places the state as a subject that has power and an important role in developing international business transactions (Rahmawati & Mantili, 2016). Due to the fact that international traffic relations continue to grow and develop every year, the presence of the state can function as a supervisor and at the same time monitor all impacts that will be caused by these international business activities. However, the more complex the intertwined international business relations, the greater the potential for disputes in the business. Therefore, the existence of a dispute settlement mechanism is important to provide, especially a more effective and efficient dispute resolution mechanism.

Based on Riza & Abduh's research, (2019) explains that juridically, as stated in Article 1 number 10 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, both are "dispute resolution institutions or dissenting opinions through procedures agreed upon by the parties, namely through out-of-court settlement by way of consultation, negotiation, mediation, conciliation, or expert judgment." There are several considerations that will usually be taken into account in choosing one of the dispute resolution mechanisms, including the governing law and the application of both. As the opinion of some experts, law is a system consisting of a set of rules (legal substance), as well as the entire legal process that includes the legal structure, as well as legal culture, in which the three components of the legal system will influencing the choices of business people, including international business, in resolving all disputes they are currently facing (Syafira, 2021).

International business disputes can originate from various potential disputes, because this activity generally involves two countries which certainly have different legal backgrounds, for this reason the most important factor in resolving a dispute in the study of international business law lies in the agreement of the parties. Therefore, it is the parties who can determine how the dispute will be resolved to obtain legal certainty. In addition, the choice of law is one of the clauses that is quite important in the contract to provide certainty to the parties to direct which law they must use in resolving their contract disputes (Syahrin, 2018; Achmad & Fadlurrohim, 2023). Basically the settlement of a dispute is usually classified into two domains which have different backgrounds and procedures in solving each problem, while this process is now commonly known as diplomatic and conventional law. In general, disputes within the scope of international business are often preceded by settlement by negotiation, if this method of settlement fails, then both parties will take other methods such as going through court or arbitration. So, based on the description and explanation of the background that was previously submitted, the researcher is interested in finding out more about Alternative Dispute Resolution Mechanisms in the Context of International Business Law.

2. METHOD

The research method used is through a normative juridical approach, namely by inventorying, studying and analyzing and understanding law as a set of positive norms in the legal system that regulates international business problems with the specification of analytical descriptive research, namely research to describe the flow of scientific communication and analyze the problems that will be

presented in a comprehensive manner descriptive (Yulianah, 2022). The type of data used is secondary data which includes library materials related to research, secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials. Then data collection was carried out through literature study through a review of literature related to the problem under study, then the data were analyzed qualitatively-normative.

3. RESULTS AND DISCUSSION

International Trade Dispute Settlement Process through Mediation

Mediation is the process of resolving disputes through a process of negotiation or consensus of the parties assisted by a mediator who does not have the authority to decide or enforce a settlement. The main feature of the mediation process is negotiation which is essentially the same as the process of deliberation or consensus. In accordance with the nature of negotiations or deliberations or consensus, there should be no compulsion to accept or reject an idea or settlement during the mediation process and everything must obtain the consent of the parties. Mediation is also a way of resolving disputes through a third party, while those who become third parties are international organizations, countries and individuals. This third party in a dispute is called a mediator.

The main function of the presence of this international organization is to find solutions (settlements), identify things that can be agreed upon by the parties and make proposals that can end disputes, are informal, and are active. In the negotiation process in accordance with Articles 3 and 4 of the Hague Convention on The Pacific Settlement of Disputes (1907) which states that the proposals made by the mediator should not be considered as a friendly action towards a party (who feels aggrieved) (Ukas, 2018) .

Furthermore, according to Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts, mediation is defined as a way of resolving disputes through a negotiation process to obtain an agreement between the parties assisted by a mediator. The role of the mediator helps the parties seek various possibilities for dispute resolution by not deciding or imposing views or judgments on issues during the mediation process. However, dispute resolution through mediation has now been widely used by people who want to resolve their disputes.

Meanwhile, Wibowo (2021) said that the reasons people prefer to use mediation in resolving their disputes are because (a) the dispute resolution process is relatively fast, because usually the dispute resolution process can generally be realized within one or two months. and only two or a maximum of three negotiating meetings are needed. (b) Low cost (inexpensive). In general, the cost of the mediation process is not expensive because the process can be completed in a relatively short time. In addition, this is also due to the role of the mediator who is only involved in giving advice. (c) Is confidential (confidential). One of the principles of public order that must be upheld by the mediator in a trial is that the trial is not open to the public, confidential, may not be covered, and may not be published. (d) The mediation process is also a fair dispute settlement through compromise, and the dispute settlement is carried out in an informal manner, meaning that dispute settlement is not based on rigid and coercive procedural provisions.

Then the mediation process is also flexible, meaning that it is not bound by rigid legal provisions, even dispute resolution can set aside formal law, which basically only determines who is right and who is wrong (Wicaksono, 2021). And finally the mediation process is able to give full freedom to the parties to submit the desired proposal, but must also be willing to accept proposals submitted by other parties. As for the provisions in Article 6 (3-5) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Mediation is a process of activity as a continuation of failed negotiations by the parties.

While the stages of mediation according to Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution as stipulated in Article 6, the settlement of disputes or differences of opinion through alternative dispute resolution is resolved in a direct meeting by the parties within a maximum period of fourteen days and the results are set forth in a written agreement. Furthermore, if the parties within a maximum period of 14 (fourteen) days with the help of one or more expert advisors or through a mediator fail to reach an agreement, or the mediator fails to bring the two parties together, the parties may contact an arbitration institution or alternative dispute resolution to appoint a mediator. After the appointment of a mediator by the arbitration institution or alternative dispute resolution institution, within a maximum of 7 (seven) days the mediation effort must be started, and most importantly the dispute settlement effort through mediation must strictly adhere to confidentiality, and be signed by all parties involved.

Basically, mediation is not always appropriate to be applied to all disputes or not always needed to resolve all issues in a particular dispute. Mediation will succeed or function properly if it is in accordance

with predetermined conditions, including (1) The parties have comparable bargaining power, the parties are concerned about future relationships, there are issues that allow for exchange (2) There is an urgency or time limit to resolve (3) There is no long-standing and deep animosity, if the parties have supporters or followers, they cannot be controlled (4) Setting a precedent or defending a right is not more important than solving an urgent problem, and lastly, if the parties are in a litigation process, other interests will not be treated more favorably than mediation.

The end result of the mediation process is a peace agreement whose implementation depends on the good faith of the parties, unlike the mediation conducted in the arbitration process conducted at BANI. If the mediation process is successful, then the parties express their mediation agreement through a peace deed, the peace deed is then set forth in an arbitration award that is final and binding on the parties. However, dispute resolution through mediation is different from settlement through court or arbitration, because the mediator does not have the authority to decide disputes between the parties. In this case, the disputing parties authorize the mediator only to help them resolve the problems between them (Winata, 2023).

However, in practice the mediator is not a judge who has the right to determine which party is wrong and which party is right, but only acts as a helper. Therefore, many parties claim that mediation is not always appropriate to apply to all types of disputes. Mediation will only be required if a dispute contains conditions, including: a. The parties have comparable bargaining power. b. The parties are concerned about the future relationship. c. There are many issues that make exchange possible. d. There is an urgency or time limit to complete it. e. The parties do not have long-lasting and deep animosity, and if the parties have supporters or followers, they do not have much hope, but can be controlled.

Handling of International Trade Disputes through the WTO (World Trade Organization).

An international dispute arises when a party's attempt to impose its will by using force is challenged or resisted by the party it is imposing. So in essence a dispute must be a clash between two parties or more wills that cannot accept that coercion. Theoretically, there are two types of disputes that are commonly encountered in human legal processes, namely: (1) legal/justiciable disputes and secondly, political/non-justiciable disputes. The difference between legal disputes and political disputes is only in the legal principles of disputes in relation to the authority to handle a dispute. The handling of international disputes that are in the hands of each country is also reflected in the arrangements for handling them where disputes within the General Agreement on Tariffs and Trade (GATT) are a joint agreement of each of its member countries prior to the World Trade Organization (WTO) formed.

The WTO itself is a permanent organization whose existence has been confirmed since January 1, 1995. The WTO has a basic instrument known as the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", which contains principles, objectives, structure and way of working of the organization. The WTO also has member countries and has organs to carry out its functions and the WTO also has a secretariat based in Geneva. As an international organization, the position/status of the international organization is not only recognized as a subject of international law that has legal personality such as the power to make contracts, but also that the international organization must carry out its functions effectively in accordance with the mandate entrusted by its 10 members.

From a legal point of view, international organizations as entities that already have the position/personality status will certainly have their own authority to carry out actions in accordance with the provisions stipulated in their main instruments as well as the decisions of the international organization that have been approved by its 11 members. Likewise, the WTO linkage which has the position/status as an international organization for dispute resolution as stipulated in Article III: 2 of the Agreement Establishing the Multilateral Trade Organization is a forum for resolving any disputes (dispute forum) that arise between its member countries and This dispute resolution procedure is then further regulated by the WTO in Annex 2.

The power to resolve disputes that belong to the WTO certainly has a legal personality and capacity that is more recognized by international law ("International Legal Capacity") to carry out legal achievements. Both in relation to other countries or its member countries including other entities. The process of settling international trade disputes in the WTO is a determining factor in efforts to uphold the international trade regime through the provisions contained in the WTO (Yudha et al., 2022).

In dispute resolution by the WTO, of course, there are legal aspects that must be obeyed by member countries, which these aspects are formed and made by member countries to be obeyed and based on mutual agreement by member countries as a result of collective bargaining, a dispute resolution mechanism. What is regulated in the WTO refers to the provisions of articles 22-23 of the 1947 GATT, so

that with the establishment of the WTO, the provisions of the 1947 GATT were merged into the WTO regulations27. In the dispute resolution regulations regulated in Article 22 and Article 23, it regulates simple provisions, Article 22 requires that the parties to the dispute resolve their disputes through bilateral consultations on any issues affecting the agreement or GATT provisions. In the settlement of trade disputes in the WTO system there are rules that are made to refer to the settlement of trade disputes, it is necessary to note that in the settlement of trade disputes in the World Trade Organization system the parties that resolve disputes and dispute resolution through the WTO are only WTO member countries , in the international trade organization becomes the umbrella law that regulates 28 types of agreements on trade in goods and services as well as protection of intellectual property rights and property as well as investments related to international trade relations.

Settlement of International Business Disputes Through Arbitration Efforts

One way to resolve disputes between countries, including business entities, is through arbitration where according to Article 1 point 1 of Law Number 30 of 1999, arbitration is "a way of settling a civil dispute outside of a general court based on an arbitration agreement which made in writing by the parties to the dispute. In the context of the history of international law, arbitration has been used since the Greek era. In the Christian era, disputes between kings and rulers were submitted to papal arbitration. Vitoria, Suarez, and Grotius have used arbitration to resolve disputes. Based on history, it can also be understood that arbitration turned out to be the first way of settling disputes and which inspired the formation of permanent international judicial institutions.

In real terms, international trade law is a fast-developing field of law. The scope of this field of law is quite broad, where trade relations that are cross-border in nature can cover many types, from the simple form, namely from bartering, buying and selling of goods or commodities to very complex trade relations or transactions. This is also caused by the existence of technology services (especially information technology) so that trade transactions take place more quickly and national borders are no longer an obstacle in transactions.

The process of settling international trade disputes through the arbitration stage has actually been contained in articles 65 to article 69 of Law No. 3 of 1999. Which among other things states that the international arbitration award is only recognized and can be enforced in the jurisdiction of the Republic of Indonesia if the decision is handed down by the Indonesian arbitral tribunal related to bilateral agreements and multilateral agreements regarding the recognition and enforcement of international arbitral awards. As previously explained, international arbitral awards are arbitration awards decided outside the jurisdiction of the Republic of Indonesia. These decisions must be registered at the Central Jakarta District Court. The Central Jakarta District Court is authorized by Law No. international arbitration.20 In the event that an international arbitration award concerns the State of the Republic of Indonesia, the court that has the authority to issue an exequatur is the Supreme Court21. International arbitral awards can be implemented in Indonesia after obtaining an exequatur from the chairman of the Central Jakarta District Court, and this decision cannot be appealed or cassation. 22 However, if the decision of the chairman of the central Jakarta district court is to refuse to recognize and enforce an international arbitration award, then this decision cassation can be filed (Kasim, 2018).

Perma No. 1 of 1990 concerning procedures for the implementation of foreign arbitral awards is the main regulation regarding the manner of implementing foreign (international) arbitral awards. The significance of this regulation is because even though the government has passed Law No. 5 of 1968 concerning the settlement of disputes between states and foreigners regarding investment and has joined the convention on the settlement of investment disputes between states and nationals of other. As for the meaning of international arbitral awards, it is formulated in article 1 paragraph (1) of the 1958 new york convention, as follows: This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the regulation and enforcement of such awards are sought.

In the article above it is explained that, what is meant by international arbitral awards are decisions made in the territory of a country other than the country where the recognition and implementation of the execution of the arbitral award in question is requested. Based on this article, the main requirement for an arbitral award to be called an international arbitral award is an arbitral award made outside the country of the country requested for recognition and execution. Furthermore, another requirement for determining a decision must be regarding disputes that arise between individuals or legal entities. In this case it should be underlined that the factor of difference in nationality is not absolute. In addition to the matters stated above, which are included in international arbitral awards according to Article 1 paragraph (2) of the 1958 New York Convention, are not only decisions handed

down by ad hoc arbitral bodies or arbitrators appointed for each case, but include every decision taken by a permanent arbitral body or permanent arbitral body which is also commonly called institutional arbitration.

As for Article 60 of the Arbitration Law, it states that the arbitral award is final and has permanent legal force that binds the parties. 27 In theory, after an arbitration award is made, there are no other legal remedies that can be filed by the losing party and the winning party only has to carry out the execution. In fact, the execution of an arbitral award is not as easy as turning the palm of the hand. Article 61 of the Arbitration Law states that: 28 In the event that the parties do not voluntarily enforce the arbitral award, the award is carried out based on an order from the head of the district court at the request of one of the parties to the dispute.

Then in order for an arbitral award to truly benefit the parties, the award must be executable, where this can be done by an authorized court body. The method of executing an arbitration award is as follows (1) Voluntary execution is an execution that does not require intervention from the chairman of any district court, but the parties carry out voluntarily themselves what has been decided by the arbitration concerned. Then forced execution is when the party who has to carry out the execution, but voluntarily does not want to carry out the contents of the decision. For this, forced efforts are necessary.

(1) Before giving an order for execution, the chairman of the district court as referred to in paragraph (1) checks beforehand whether the arbitral award complies with the provisions of Article 4 and Article 5, and does not conflict with decency and public order. The provisions in this article mean that the District Court does not allow it to examine the substance of the case again, but its duty is only to permit or deny execution. The competent court may reject an application for the enforcement of an arbitral award if there is reason for that. Against this refusal there are cassation efforts available, while against the decision of the Head of the District Court which recognizes and implements the arbitral award there are no legal remedies whatsoever (Kusen, 2016; Achmad & Yulianah, 2022).

Based on Article 1 point 1 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, arbitration is defined as a method of settling civil disputes outside the general court based on an arbitration agreement made in writing by the parties to the dispute. 18 Settlement through arbitration can be done by individuals or institutions or institutions. Currently arbitration is increasingly being used in resolving national and international trade disputes. However, before an arbitration clause can be used, there are several requirements that must be met first, namely: a. The arbitration agreement must be in writing; b. Concerning an existing or new dispute; c. Disputes are concerned with the legal relationship between the parties, whether contractually or not; d. The dispute is a matter that can be resolved by arbitration. 20 In addition, 2 (two) more conditions are also added, namely that the parties must have the capacity to choose arbitration, and also arbitration clauses are permitted by the laws of their respective countries.

4. CONCLUSION

One of the most prominent relations between countries today is trade relations that cross national boundaries. This trade relationship is realized by way of cooperation, helping each other to obtain each other's needs. The impetus arising from the development of the world economy and trade has encouraged many countries to expand their trade through unhealthy market competition, in addition to measures to protect their domestic economy which are sometimes very extreme. Rivalry or competition that is increasing and intense between these countries often creates conflicts and disputes that must be resolved immediately, but the resolution of these disputes must pay attention to the structure and nature of the international community and the different national communities. The handling of international disputes that are in the hands of each country is also reflected in the arrangements for handling disputes in the General Agreement on Tariffs and Trade (GATT) which is a joint agreement of each of its member countries before the World Trade Organization (WTO) was formed. As for the study of the field of dispute resolution law, dispute resolution mechanisms that are considered more effective and efficient usually refer to the concept of Alternative Dispute Resolution (Alternative Dispute Resolution). There are several considerations that will usually be taken into account in choosing one of the dispute resolution mechanisms, including the governing law and the application of both.

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