

## THE IMPLEMENTATION OF MEDIATION IN THE RESOLUTION OF INTERNATIONAL TRADE DISPUTES

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### **Abstract**

The purpose of this paper is to find out mediation in the settlement of disputes or international trade disputes by Business Actors, and the role of the ITPC in the event of a dispute between the parties involved in international trade transactions. This research used a normative juridical approach. The research results state that settlement of international trade disputes, in its implementation, business people prefer the mediation route, because of the benefits or advantages that business people get when using the mediation route. Among other things, the parties requested or appointed by the parties are neutral parties, procedures are fast, informal, time and cost efficient, confidentiality is maintained, prioritizes maintaining a sustainable working relationship in business as well as settlement decisions determined and agreed upon by the parties to create peace.

**Keywords:** *Dispute; International; Mediation; Resolution; Trade.*

### **A. INTRODUCTION**

Since Indonesia's independence until the 1960s the development process was practically non-existent. This is due to the unstable national social and political conditions. Since the end of the year in the 1960s, the government began to plan and seriously carry out economic development through the *Repelita* program (five-year development plan).<sup>1</sup> The revolution for the awakening of the Indonesian nation as a former colony and confined in the realm of feudalism for so long, had to struggle with two revolutions, namely the political revolution (national) and the socio economic revolution.<sup>2</sup>

In terms of increasing trade and stimulating export activities in Indonesia,<sup>3</sup> Trade and investment are highly connected that could be illustrated as two sides of the same coin.<sup>4</sup> The Ministry of Trade and the Ministry of Foreign Affairs must cooperate in particular in order to improve

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- 1 Krismiaji, Peranan Hukum Dalam Pembangunan Ekonomi di Indonesia, *Wahana*, Vol.14 No.2 Agustus 2011, page.91-100
  - 2 Siti Rodhiyah Dwi Istinah, Sri Kusriyah, Rakhmat Bowo Suharto, The Human Rights Protection in The Economic Affairs of Indonesia, *Jurnal Pembaharuan Hukum*, Vol.8 No. 2, August 2021, page.273-289
  - 3 Hasni, Fitria Faradila, Penentuan Negara Prioritas Pengembangan Atdag Dan ITPC Melalui Metode Analitical Hierarchy Process, *Buletin Ilmiah Litbang Perdagangan*, Vol.10 No.1, July 2016, page.63-85
  - 4 Debra P Steger, International Trade and Investment: towards a Common Regime?" in Roberto Echandi, Pierre Sauve (eds), *Prospects in International Investment Law and Policy*, Cambridge: Cambridge University Press, 2013, page.159

international market access by sending trade representatives abroad. They will become "ambassadors of the nation" whose job is to carry out trade diplomacy through the promotion and development of Indonesia's image in the eyes of the world. The traders have also had an important role through their economic potential. They were able to control power by establishing a trade network.<sup>5</sup>

In the era of economic globalization, Indonesia is facing a process of free trade that is developing continuously which will ultimately provide influence, opportunities and challenges to trade activities.<sup>6</sup> The development of the world economy and the pattern of relations between countries generally show the distance between one country with another declining state, making the opening of trade between countries and increasing market access of products to other countries.<sup>7</sup> Currently, the Ministry of Trade and the Ministry of Foreign Affairs have placed trade attaché officials and the Indonesian Trade Promotion Center (ITPC) in various countries, including Denmark, Saudi Arabia, Canada, Switzerland, the Philippines, Italy, Thailand, Spain, Nigeria, Japan, Hungary, Africa. South, Korea, Nigeria, United Arab Emirates, France, and Washington DC (USA). The role of this trade attaches is very important because every country has different conditions, so they are expected to understand the constraints and potentials that exist in each country where they work. Trade attaches function as representative institutions of Indonesia diplomatically to manage trade where they work, while ITPC is tasked with promoting the development of Indonesian trade.

The Indonesia Trade Promotion Center (ITPC) is a forum for trade promotion and market brie or market opportunities under the Ministry of Trade of the Republic of Indonesia. The Indonesia Trade Promotion Center (ITPC) was established based on the Decree of the Minister of Trade dated March 23, 2011 and the Decree of the Minister of Foreign Affairs dated August 24, 2011 regarding the formation of 18 officials from the Ministry of Trade who were appointed as Trade Attachés (Atdag) as well as heads of the Indonesia Trade Promotion Center (ITPC).<sup>8</sup>

Indeed, trade promotion can be done in various ways. The Indonesia Trade Promotion Center (ITPC) will be more optimal if it is supported by online promotions regarding Indonesian tourism and products, considering that cyberspace is not limited and can be accessed by many people in the world. Because actually Indonesian products are not inferior when compared to goods produced abroad, but unfortunately we are still lacking in

5 Hafid Setiadi, Worldview, religion, and urban growth: a geopolitical perspective on geography of power and conception of space during Islamization in Java Indonesia, *Indonesian Journal of Islam and Muslim Societies*, Vol.11 No.1, 2021, page.81-113

6 Nurlaili, Analisis Daya Saing dan Faktor-Faktor yang Mempengaruhi Ekspor Produk Alas Kaki Indonesia ke Amerika Serikat Ditinjau dalam Perspektif Ekonomi Islam, *JIEI: Jurnal Ilmiah Ekonomi Islam*, Vol.7 No.02 2021, page.1019-1029

7 Amin Purnawan, Taxing Policy Reconstruction Based on Justice Value to Encourage Industrial Competitiveness in the Global Era, *International Journal of Law Reconstruction*, Vol.1 Issue 1, September 2017, page.161-176

8 Raudah Oktaviani, Kebijakan Pemerintah Indonesia Membentuk Indonesia Trade Promotion Centre (Itpc) Terhadap Korea Selatan Tahun 2012, *JOM FISIP*, Vol.2 No.2, October 2015, page.1-14

promotion so that not many countries know and know about Indonesian products. So the role of the ITPC is very important, in addition to promoting the development of Indonesian trade, ITPC is also expected to understand the constraints and potentials that exist in each country where they work because of the different conditions of each country. Promotion can be done in various ways. The Indonesian Trade Promotion Center (ITPC) will be more optimal if it is supported by online promotions regarding Indonesian products and tourism, considering that cyberspace is not limited and can be accessed by many people in the world. This happens because economic diplomacy based on efforts to prosper the people has become a substantial matter for countries in the world. One way to achieve this is to increase trade diplomacy.<sup>9</sup>

Globalization is essentially a process of social transformation that will bring the different conditions of mankind scattered in the world to a single tradition that knows no regional boundaries. This era was marked by the rise of activity in the economic field. The era of globalization as a result of the rapid progress in the field of transportation and communication economics has resulted in greater interdependence between nations, and the sharper level of compensation has also emerged.<sup>10</sup> Along with the times, in this era of globalization, the world of trade and the business world is also developing. In the current era of globalization, technology is developing rapidly, national boundaries and distances are increasingly being narrowed by the presence of technology, especially information technology (internet). One of the effects of the development of science and technology is in the trade activity sector.<sup>11</sup>

Trade relations that are cross-border in nature can include buying and selling goods or commodities to complex trade transactions. The complexity of international trade relations or transactions is due to the existence of technology services (especially information technology) so that trade transactions take place more quickly. National borders are no longer a barrier to transactions. Even with the rapid development of technology, today's traders do not need to know or know their trading partners who are far away in other parts of the world. This can be seen with the birth of transactions called E-commerce.<sup>12</sup> Regarding e-commerce, the agreement between the parties is contained in a standard contract, so it is difficult to accommodate matters related to regional jurisdiction, choice of law and choice of forum because the parties transacting basically have a relatively

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- 9 Resha Roshana Putri, An-An Chandrawulan, Prita Amalia, Peringkat Arus Investasi Indonesia Dalam Kerangka Asean-China Free Trade Agreement (Perbandingan Dengan Singapura, Malaysia, Thailand, Dan Vietnam) Ditinjau Dari Prinsip Fair And Equitable Treatment, *Jurnal Hukum & Pembangunan*, Vol.48 No.2, 2018, page.275-298
- 10 Hutrin Kamil, M.Ali Mansyur, Kajian Hukum Online Dispute Resolution (ODR) Di Indonesia Berdasarkan Undang-Undang Nomor 30 Tahun 1999, *Jurnal Pembaharuan Hukum*, Vol.I No.2 May-Agustus 2014, page.111-120
- 11 M. Najib Imanullah, Nadiah Azizatunnida, Penerapan Asas Keadilan Dalam Transaksi Jual Beli Online, *Jurnal Privat Law*, Vol.V No. 2, July-December 2017, page.19
- 12 Huala Adolf, *zHukum Perdagangan Internasional*, PT. Raja Grafindo Persada, Jakarta, page.1

unbalanced bargaining position, so that required a set of legal rules that regulate the resolution of disputes in e-commerce.<sup>13</sup>

In Indonesia, when viewed in depth, the procedure for peaceful dispute resolution has long been and is commonly used by the Indonesian people<sup>14</sup> if there is a dispute or failure of achievement from one of the parties involved in a trade transaction, then the dispute resolution is carried out through litigation (the Court) where the positions of the parties are opposite to each other. This process takes a very long time, therefore litigation settlement is not always acceptable in the business world because it is not in accordance with the demands of its development. Courts are considered an ineffective institution for the resolution of business disputes. Besides the length of time required to undergo the trial process, an open court decision can also "dead" the reputation of a business actor. Meanwhile, in the business world, reputation is a very important element. In addition to the court forum, the parties can also resolve their disputes through alternative dispute resolution (ADS), commonly known as ADR (Alternative Dispute Resolution).<sup>15</sup> The dispute resolution mechanism in ADR can be divided into several forms, namely negotiation, mediation, conciliation, and arbitration.

The practice of using ADS, including mediation, is not followed by clear regulations regarding its implementation. Often the use of ADS institutions is in vain because one party does not want to do it voluntarily, so many parties question the legal certainty of using a mediation institution.<sup>16</sup> One of the goals of law is that benefits can be obtained through social philosophy that every citizen seeks peace and tranquility.<sup>17</sup> Mediation is a form of dispute resolution that is held out of court, where the disputing parties request or use the assistance of a neutral third party to help resolve their dispute in order to achieve justice. This mediation is different from other alternative forms of dispute resolution such as negotiation or arbitration, because in this mediation, apart from presenting a neutral mediator, in theory it is built on several philosophical foundations such as confidentiality, voluntariness, empowerment, neutrality, and unique solution. In the settlement of international disputes, mediation is quite often carried out by countries if the negotiation road has reached a dead end.<sup>18</sup>

13 Moh. Ali, *Prinsip Otonomi Para Pihak Dalam Kontrak Elektronik Konsumen (Elektronik Consumer Contract) Secara Transnasional*, Disertasi in Program Doktor Ilmu Hukum, Universitas Airlangga, Surabaya, 2018, page.47.

14 Tesalonika Clara Roringpandey, *Mediasi Sebagai Alternatif Penyelesaian Sengketa Perdagangan Internasional Di Tinjau Dari Undang-Undang Nomor 7 Tahun 2014 Tentang Perdagangan, Lex Et Societatis*, Vol. VIII No.1 Jan-Mar, 2020, page.180-187

15 Huala Adolf, *Op.cit*, Page.4

16 Risa Restiyanda, *Penyelesaian Sengketa Dagang Internasional Melalui Mediasi Sebagai Alternatif Penyelesaian Sengketa Pada Pemilihan Hukum Dan Forum Kontrak Dagang Internasional, AKTUALITA*, Vol.3 No.1 2020, page.130-146

17 Ayudya Rizqi Rachmawati, Rahmadi Indra Tektana, Dyah Ochtorina Susanti, *Prinsip Kemanfaatan Penyelesaian Sengketa Elektronik Sebagai Alternatif Penyelesaian Sengketa Transaksi Perdagangan Elektronik, JHAPER*, Vol. 6 No. 2, July-December 2020, page.67-79

18 Syahrizal Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional*, Kencana Prenada Media Grup, Jakarta, 2011, page.28.

Mediators can be individuals (entrepreneurs) or professional or trade institutions or organizations. The mediator participates actively in the negotiation process. Usually he is in his capacity as a neutral party in the form of reconciling the parties by providing advice on dispute resolution. Proposals for settlement through mediation are made rather informal. This proposal is made based on the information provided by the parties. Not on the investigation. If the proposal is not accepted, the mediator can still continue his mediation function by making new proposals. Therefore, one of the main functions of the mediator is to find various solutions (settlement), identify matters that can be agreed upon by the parties and make proposals that can end the dispute. As in negotiations, there are no specific procedures that must be followed in the mediation process. The parties are free to determine the procedure. What is important is the agreement of the parties starting from the process (selection) of the mediation method, whether or not to accept the proposals given by the mediator, to the termination of the mediator's duties. The mediator should be neutral and impartial.<sup>19</sup> Although it is increasingly common for contracts to require mediation as a precondition to starting a binding form of dispute resolution such as arbitration or litigation, most mediation follow the voluntary agreement of the parties to use this form of ADR<sup>20</sup>

Indonesia Trade Promotion Center (ITPC) has a very important role in realizing Indonesia's national interests abroad, including as one of the government representatives in providing various information and market promotion activities, facilitating trade cooperation, market penetration efforts, business intelligence, and helping to bridge trade relations between Indonesia and several countries.<sup>21</sup>

In relation to the ITPC's role in promoting trade and facilitating business actors from different parts of the world and very far away, it is unavoidable that in such business transactions there is the potential for disputes and disputes to arise between the parties conducting trade transactions. Several cases, including disputes, breaches of achievement and cases of trade fraud also often occur which are not impossible and can potentially cause harm to one party or even the parties to the transaction. Not only material losses in the form of value for money, but also losses in terms of time and efficiency. In the event of a dispute, of course, the transacting parties have anticipated it by including a dispute resolution option clause in the event of a failure or dispute. However, not all entrepreneurs do this.

The purpose of this paper is to find out mediation in the settlement of disputes or international trade disputes by Business Actors, and the role of

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19 Sudiarto, *Negosiasi, mediasi, dan Arbitrase Penyelesaian Sengketa Alternative Indonesia*, Pustaka Reka Cipta, Bandung, 2015, page.36-37.

20 Meria Utama, Irsan, General Overview on Selecting and Drafting Construction Contract Disputes Resolution, *Sriwijaya Law Review*, Vol.2 Issue 2, July, 2018, page.152-169

21 Karina Nilu Fari, Peran Indonesia Trade Promotion Centre Dalam Meningkatkan Perdagangan Indonesia Di Luar Negeri Tahun 2017, *Jurnal Politik Indonesia Dan Global*, Vol.1 No.1, April 2020, page.54-63

the ITPC in the event of a dispute between the parties involved in international trade transactions, involving entrepreneurs from Indonesia.

## **B. RESEARCH METHODS**

The research method used was normative juridical, where this research includes research on laws and regulations and facts regarding the application of laws and regulations to dispute resolution outside the courts to problems that occur in international trade transactions through the mediation process. Data analysis was carried out with a qualitative approach, where researchers collected data obtained to be studied, understood and concluded to be able to explain the reality or facts of the need for dispute resolution through the mediation process to avoid the settlement process through the courts in overcoming problems that arise in an international trade transaction facilitated by ITPC.

## **C. RESULT AND DISCUSSION**

### **1. Implementation of Mediation in the Settlement of International Trade Disputes or Disputes by Business Actors**

In business models that pass through state jurisdiction, usually the alternative dispute resolution taken is the arbitration method which bridges legal interests with different legal systems. The problem is that the existing arbitration method still uses the conventional model which requires the disputing parties to meet in person, whereas in e-business the parties to legal relations come from various parts of the world. Therefore, the modern business world turns to alternative dispute resolution, as an alternative dispute resolution because modern business needs require fast dispute resolution and do not hinder the business climate.<sup>22</sup>

If viewed from the benefits and reasons for using mediation as an alternative in resolving dispute issues, then the mediation process that occurs in the settlement of cases discussed in this paper has not been fully implemented as intended in PERMA No. 1 of 2008 concerning Mediation Procedures in Court by because these cases occur in the world of international trade where the parties are far from each other across countries with different legal systems and regulations. The process of resolving disputes that occur is indeed carried out through mediation by a neutral third party, namely the ITPC party who is requested for assistance or is involved by one of the parties who feel aggrieved. This procedure is carried out because in general these cases occur because the parties to the transaction do not regulate the choice of dispute resolution forum in the contract clause, even the parties do not make an agreement or contract for the sale and purchase transaction that they have mutually agreed upon.

Business actors who experience disputes tend to ask for help from a neutral third party, namely the ITPC to resolve their disputes,

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22 Kasmudin Harahap, The Online Dispute Resolution in Pancasila's Frame, *Jurnal Pembaharuan Hukum*, Vol.8 No.2, August 2021, page.157-171

especially those who feel they have been harmed. In cases that ultimately lead to trade fraud, the party who feels aggrieved who comes asks the ITPC to help resolve it, even though from the start the parties did not involve ITPC in the introduction process until a trade transaction was agreed between the two parties. The ITPC party is also willing to assist in solving problems that arise in international trade transactions involving the two countries of origin of the business actors, by acting as a peacemaker.

The efforts made by the ITPC are the role of mediators who in principle always seek a peaceful settlement in dispute resolution with a win-win solution for the parties. The case experienced by PT. CKC and Anthony Okoye show that there is a desire on the part of the parties involved in international trade relations to seek a resolution to the problems that occur through a third party who can mediate those who are very far apart. Long distance communication is certainly not easy but in terms of cost and time it will certainly be more efficient than if the parties face each other to resolve their disputes. Thus, mediation has become an option for business parties who carry out international trade transactions in the event of a dispute between them.

## **2. The role of ITPC in the event of a Dispute between the Parties involved in International Trade Transactions**

The questionable contribution of trade and investment agreements along with the rise of the spirit of national interest from their member states may end up with the questions whether Indonesia should keep joining in trade and investment agreements.<sup>23</sup> In the world of trade, there are often disputes involving the parties conducting transactions. The differences in the interests of each party tend to cause conflict between the parties. One of the reasons for conflicts that lead to disputes is the existence of unachieved achievements from one party or even from both parties. A performance loss can occur in the event that one or several important elements are not fulfilled by one of the parties as stated in the contract or agreement and have been agreed upon by the parties.

If this is the case, then the settlement of disputes that occur can be done through legal channels, especially for middle and upper companies that have regulated the dispute resolution process in the clauses of their trading contracts. However, if you take the legal route through the courts, it will certainly take a long time and of course the costs are not small. Moreover, if it involves cross-border trade relations, of course the trial process in another country and the cost of appointing a lawyer is not a matter of low cost. The result of the legal process will also bring one of the parties to a loss and disrupt the business relationship between the parties.

23 I Gusti Ngurah Parikesit Widiatedja, I Gusti Ngurah Wairocana, I Nyoman Suyatna, Why Indonesia Should Keep Joining in Trade and Investment Agreements? *Hasanuddin Law Review*, Vol.5 Issue 1, April 2019, page.1-18

One form of dispute resolution or dispute that has begun to develop at this time is through mediation. Mediation is an alternative for dispute resolution outside the courts but can be used to protect the parties from a loss that will arise from their dispute. Although it is not a legal rule, mediation can be a legal instrument to protect parties conducting international trade transactions, especially if the business actors are middle class entrepreneurs and SMEs.

The Indonesia Trade Promotion Center has a very important role in realizing Indonesia's national interests abroad, including as one of the government representatives in providing various information and market promotion activities, facilitating trade cooperation, market penetration efforts, business intelligence, and helping to bridge trade relations between Indonesia and several placement countries.<sup>24</sup> In relation to ITPC's duties as government representatives in charge of promoting Indonesian trade and facilitating trade relations between Indonesia and countries where ITPC representatives are located, disputes between parties conducting trade transactions also often occur. So if this happens, the ITPC is also often asked for help by one or both parties to the dispute to resolve their problems. With regard to dispute resolution issues, large-scale and even international business actors have set out their contract clauses either through litigation or other ADR forums.

However, in practice there are those who come and ask for ITPC's assistance as a neutral party to resolve disputes that occur, usually for lower-middle companies that do not regulate the dispute resolution process in their contracts or trade agreements. In several examples of disputes, disputes and trade frauds that have occurred involving the ITPC Lagos, ITPC Dubai and ITPC Sydney, it shows that in the event of a dispute, the party who feels aggrieved will ask the ITPC to resolve the problem and seek a peaceful solution.

Long distances between countries will potentially cause delays or damage to goods in the process of transportation and delivery. Likewise, if the goods are damaged or do not meet the specifications requested, then if this happens, there will be a potential for dispute between business actors. In connection with these problems, the ITPC will play a role in solving problems that occur, especially if the buyer does not want to receive the goods that have been sent by the seller.

In the event of a dispute between business actors involving the ITPC in the mediation process for their dispute resolution, the settlement effort usually takes a short time and is a complicated procedure, unless the case results in a crime such as fraud. Because the settlement of such cases will involve other institutions authorized to handle the case. However, in the case of a case that is disputed by both parties purely because of an achievement made by one of the parties, in general the ITPC will help establish communication as a mediator from both parties.

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24 Karina Nilu Fari, Ma'mun Murod, Usni, Peran Indonesia Trade Promotion Centre Dalam Meningkatkan Perdagangan Indonesia Di Luar Negeri Tahun (2017), *INDEPENDEN: Jurnal Politik Indonesia Dan Global*, Vol.1 No.1, April 2020, page.54-63



The ITPC party's effort is to communicate the wishes of each party to the other party to find the best solution that can be agreed and accepted by both parties. In the event that each party maintains its will, the ITPC will provide a solution to the problem that can more or less bring mutual benefits between the disputing/disputing parties and reduce losses for the other party. In the event of such a situation, in general the disputing/disputing parties will accept the solution provided by the ITPC. And in the event that agreement is reached between the disputing/disputing parties on the solution offered, then what ITPC does is submit the settlement decision to each disputing party.

The spirit of national interest also threatens the existence of trade and investment agreements, looking at their failures to conclude significant trade and investment deals.<sup>25</sup> If the case that occurs is a fraud or a fictitious company case experienced by one of the business actors who feel aggrieved who requests a settlement through the ITPC, then the efforts that can be made by the ITPC in solving the problem are limited to reporting the case to the authorities in charge of fraud cases and crime, namely the state Police related to the perpetrators of the crime. In general, cases of trade fraud occur, where business actors communicate and transact directly without going through trade promotion facilities or media carried out by the ITPC. The parties who are far from each other never meet or visit their business partners.

The transaction agreement is only carried out through the internet media and agreement or contract is made for the trade transactions that they have agreed on. Thus, this has the potential for fraud or fraud and even crimes against trade through internet media, known as cybercrime. However, the ITPC still plays a role in helping those who feel disadvantaged by communicating this to their business partners (if any and can be contacted) and other related parties to resolve the problems that occur. And the outcome of the settlement of the case is highly dependent on the type of case and the wishes or decisions of the parties involved in the dispute or dispute on international trade transactions that occur.

#### **D. CONCLUSION**

Settlement of international trade disputes, in its implementation, business people prefer the mediation route, because of the benefits or advantages that business people get when using the mediation route. Among other things, the parties requested or appointed by the parties are neutral parties, procedures are fast, informal, time and cost efficient, confidentiality is maintained, prioritizes maintaining a sustainable working relationship in business as well as settlement decisions determined and agreed upon by the parties to create peace. The Indonesian Trade Promotion Center (ITPC) is a government agency tasked with carrying out

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25 I Gusti Ngurah Parikesit Widiatedja, I Gusti Ngurah Wairocana, The Rise of the Spirit of National Interest and the Existence of World Trade Organization Agreement: A Case Study of Indonesia, *Padjajaran Journal of Law*, Vol.4 No.2, 2017, Page.319.

trade promotion activities abroad and facilitating business players in trade transactions through released trade information and through trade exhibitions held both in Indonesia and in local countries. In the event of a dispute between business actors, ITPC is often asked by one party who feels aggrieved or both parties to the dispute to help resolve the problems that occur between the parties. From several examples of cases of trade fraud that occurred, the ITPC plays a role in helping parties who feel aggrieved by communicating this to their business partners and other related parties to resolve the problems that occur. In the case of a trade dispute, the ITPC will mediate both parties to resolve the case according to the wishes or decisions of the parties involved in the dispute or dispute.

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