

DISPUTE SETTLEMENT BODY CONSTRAINTS IN THE U.S.-CHINA TRADE**DISPUTE: CASE STUDY (DS543)****LAURIA MELIA NENNO¹****RAHMAH DANIAH, S. IP, M.Si²**

ABSTRAK: Sengketa dagang AS-Tiongkok terjadi karena adanya pemberlakuan tarif bea produk impor tertentu yang dilakukan oleh AS yang tidak sesuai dengan perjanjian/pasal yang telah disepakati. Kasus DS543 yang diberi nama yaitu US-Tariff Measure on Certain Goods From China oleh DSB mengalami kendala dalam penyelesaiannya terutama dikarenakan factor impetus pemberlakuan tarif, faktor lemahnya institusional dan faktor individual situation berbagai kebijakan dari Presiden Trump. Kendala pada DSB sebagai badan organisasi internasional untuk menengahi perselisihan antar AS-Tiongkok ini tentunya menjadikan negara-negara bersikap lebih proteksi terhadap perdagangan internasionalnya.

Kata Kunci: DS543, WTO, DSB, Amerika Serikat, Tiongkok

BACKGROUND OF THE STUDY

A trade war is a condition in which a country imposes import tariffs or quotas and foreign countries retaliate with a similar form of trade protectionism. Trade protectionism can be said to be a defensive action that leads to political motives. In the short term, it may be successful, but in the long term, protectionism will actually harm the economy because it makes the country and its industry less competitive.

The trade war that has attracted quite a lot of international attention is the trade war that occurred between the US and China in 2018. The long-standing trade relationship between the U.S. and China has had its ups and downs over the way each country's leaders conduct bilateral relations and determine their foreign policy. During the Obama administration, the relationship between the U.S. and China was defined as "No Conflict or Confrontation and win-win cooperation". Obama's policy on China tries to build on the same principles of relations that Richard Nixon had as president. Some of these principles include peacefully accepting China's growing influence and continuing to abide by international rules; creating a wide network of contacts with Chinese elites and ordinary people; and establishing a formal multilateral cooperation framework involving the US, China, and several regional countries.

At the time Donald Trump served as the 45th president of the United States. In an effort to protect the country's industry, With the slogan "Make America Great Again" he wants to return control of the economy to the US. In this case, the phrase refers to the prosperity and progress of the US people which is expected to experience a downturn during the administration of President Barack Obama. Trump then established a protectionist policy against China by imposing high tariffs on imported goods. This aims to reduce the impact of China's economic growth on the United States and reduce the American trade deficit.

Economic protectionism is prohibited in the Free Trade Agreement, but the U.S. issued this policy because it considers that China has imitated and stolen U.S. intellectual property rights (IPR) by hacking several U.S. websites and technology databases that contain information about manufacturing industry products and features. Therefore, the US is free to adopt a policy of protectionism towards China. On the contrary, China vehemently denies the allegations and also carries out a protectionist policy against the US, namely imposing tariffs

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on imported goods. When countries impose tariffs on each other and hinder external economic growth, this leads to a trade war between the US and China. (Sinintya, W, 2018).

The increase in duty rates imposed by the US certainly has a significant impact on the Chinese economy. China experiences inequality in its country's foreign exchange income. President Xi Jinping responded to this by complaining about this matter to the WTO. One of the key areas of the WTO structure is settlement dispute. Its existence is one of the five functions of the WTO, namely: "The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement. According to World Trade Organization, in a report based on the case United States – Tariff Measures on Certain Goods from China (DS543), the content of this DS543 report is about China taking the first step through a request for consultation to the WTO regarding the US trade policy on several imported products from China based on the Trade Act of 1974 on April 4, 2018. The US revealed that the steps taken by the Chinese Government are irrelevant to article 4 of the DSU, although the US still stated that it is willing to carry out consultations with the Chinese Government on April 13, 2018. China has expressed objection to allegations by the U.S. stating that China's letter of April 4, 2018 is inconsistent with Article 4 of the DSU. Even so, the Chinese government is still willing to continue consultations with the US. Thus, on April 25, 2018, the Chinese government submitted a request to DSB and each of its members to respond to the United States' letter of disapproval on April 13, 2018.

China made a request for additional consultation in addition to completing the consultation request on April 4, 2018. China is based on a US publication dated June 15, 2018, regarding the imposition of ad valorem duties of 25% by the US on several lists of products from China since July 6, 2018. Referring to the OECD Glossary of Statistical Terms, Ad Valorem is a rate set or levy imposed based on a certain percentage of the price of goods. This tariff is only imposed on goods from China that far exceed the bound tariff set by the US. Furthermore, on July 16, 2018, the US submitted a request to the DSB leadership to disseminate additional information from China on July 6, 2018, to member states, stating that there are also certain additional duties on certain imported products from the US imposed by the Chinese Government.

Based on the chronological order, the Chinese Government submitted an initial consultation file on April 4, 2018, followed by an additional request on July 6, 2018, and two additional consultations on July 16, 2018, and September 18, 2018. The basis of China's consultation refers to the publication of a list of Chinese products subject to 10% duty on the import of certain products from China by the US on July 10, 2018. Consultations were then carried out twice, on August 28, 2018, and October 22, 2018, but no mutual agreement was found between the Chinese and US governments. Thus, in accordance with Articles 4.7 and 6 of the DSU and Article XXIII of the GATT 1994, the Chinese Government submitted an application to the DSB to establish a panel on December 6, 2018.

Table 1. Status in consultation DS543: United States - Measurement of tariffs on certain products from China

KEY FACTS	
Complainant	China
Respondents	United States
Consultation requested	April 4, 2018
Panels requested	December 6, 2018
Molded panel	January 28, 2019
Distributed panel reports	September 15, 2020
Agreement quoted	(as quoted in the request for consultation) Art. I: 1, II: 1, II: 1 (a) GATT 1994 Art. 23.1, 23.2 Dispute Settlement Understanding (DSU)

Source: WTO DS543: United States – Tariff Measures on Certain Goods from China.

The Chinese government expressed its disapproval before the panel over an additional 25% duty on the first group of products (List 1) with an estimated annual trade value of USD 34 billion imposed in June 2018, as well as additional duties on the second product group (List 2) with an estimated annual trade value of USD 200 billion. The initial tariff imposed on the product was 10% in September 2018 but was increased by the US government in May 2019 to 25%.

The Chinese government stated that the additional duties were not in accordance with Articles I:1 and II:1 (a) and (b) of the 1994 GATT. In this regard, the US gave a response that was divided into two main points. The U.S. government explained that in order to resolve trade issues in bilateral negotiations – including some in the dispute between the U.S. and China – each party has taken several measures to resolve disputes outside the WTO, so that a "settlement of the problem" has been reached in accordance with the third sentence of Article 12.7 of the DSU. Therefore, the Panel is sufficient to provide a brief statement on its report of the facts and notes that a settlement has been reached.

The next point conveyed by the U.S. Government is that under Article XX(a) of the 1994 GATT, the imposition of additional duties to protect U.S. public morals, which is deemed to have been violated through the actions, policies, and practices of the Chinese state that under the Section 301 Report amounts to "state-approved theft", such as misuse of U.S. technology, intellectual property and commercial secrets.

In summary, the Panel delivered the conclusion that the U.S. has failed to provide an explanation of how the imposition of additional duties on certain imported goods on Lists 1 and 2 is likely to contribute to the U.S. ethical goal of protecting public morality. As a result, the Panel found that the U.S. was negligent in meeting its obligations showing that the action was provisionally justifiable under Article XX(a).

The Panel's report containing "Concluding Comments" is an additional emphasis on the panel's awareness that the WTO system operates in a broader context, which is "one that reflects an unprecedented set of global trade tensions". The panel would like to emphasize that it is not part of the panel's duties and functions in making legal conclusions or drafting recommendations other than for the specific issues assigned to the panel to be addressed. In this regard, the Panel appealed to the US Government to immediately take decisions under the WTO DSU regarding the measures imposed by the Chinese Government in accordance with the responses that have been submitted by the US Government previously. The Panel has made its utmost efforts in accordance with its judicial role under Article 11 of the DSU on matters regulated in its frame of reference. The panel encouraged the U.S. and Chinese governments to continue to work to find mutually agreeable solutions to the issues raised in the dispute. Finally on October 26, 2020, the DSB was informed of the U.S. decision on the filing of an appeal to the Appellate Board of legal issues and certain legal interpretations in the panel's report.

Supposedly, decisions related to the US-China trade war case in the DS543 report can be resolved by the WTO or rather handled by members of the DSB body concisely and firmly so that the US and China can comply with decisions related to the trade war between the two sides. But in fact, DSB has experienced difficulties and obstacles in resolving disputes between the two countries, although this is not the first time DSB has handled a trade dispute case between the US and China. So, in this study, the author also wants to see what factors obstacles for DSB are in resolving the trade war between the US and China in the case of DS543. Based on the context described above, the problem can be formulated as follows: Why are there obstacles in the trade dispute between China and the United States in Report DS543?.

RESEARCH METHOD

The type of research used in this study is descriptive, namely presenting, collecting data, analyzing data and providing a systematic overview of the Dispute Settlement Body Constraints in the United States-China Trade War Dispute: A Case Study (DS543). And then, this study uses qualitative data analysis techniques, qualitative data or also known as narrative data, specifically the data in the study explains and describes a phenomenon of general things that cannot be calculated. That is why the data is called qualitative data because it is obtained based on the quality of an object or object. This qualitative data also has the ability to explain and describe the subject matter in detail with a picture that cannot be explained numerically. Therefore, although it cannot be measured with certainty, it is still possible to study using qualitative data.

DISCUSSION

This is clarified by the statement of the Chinese government stating that the additional duties are not in accordance with Articles I:1 and II:1 (a) and (b) of the GATT 1994 which contain

Article I: General Treatment of the Nation

1. In respect of customs duties and levies of any kind imposed on or in connection with imports or exports or imposed on international payment transfers for imports or exports, and in respect of the methods of collection of such duties and levies, and with respect to all rules and formalities in respect of imports and exports, and in respect of all matters mentioned in paragraphs 2 and 4 of Article III,* Any advantage, privilege, privilege or immunity granted by any party to the Contract to any Product originating from or destined for any other country shall be granted immediately and unconditionally to similar Products originating from or destined for the territory of all other parties to the Contract.

Article II: Concession Schedule

1. Each party to the agreement shall provide no less favorable treatment to the trade of the other party in the agreement compared to that provided in the appropriate Section of the Schedule attached to this Agreement.
 - a. a levy equivalent to a domestic tax imposed in accordance with the provisions of Article III* paragraph 2 in respect of similar domestic products or in connection with an item from which the imported product is made or produced in whole or in part.
 - b. antidumping or countervailing import duties that are applied consistently with the provisions of Article VI. (World Trade Organization, 2020).

Because China has suffered many losses due to the imposition of tariffs by the US, this is the beginning of the trade war between the US and China. The form of trade war that occurs between these two countries is the imposition of tariffs. The implementation of duty rates is an effort to restrict the entry of imported products (both goods and services), which is usually a form of retaliation for unhealthy business practices carried out by partner countries in order to protect domestic producers.

The implementation of the tariffs by Trump began with a 25% increase in aluminum and steel import tariffs which was signed on March 8, 2018 at the White House and the import duties will take effect immediately within fifteen days after being signed. The plan to increase the duty rate for washing machines by 20% in the first year and 50% for washing machines above that size was also published by the US later for products such as solar panels, aluminum and steel.

According to research conducted by Eddy Bekkers and Sofia Schroeter in the journal Economic Research and Statistics Division (1), All of these products are the main consideration of the US to increase tariffs. There are at least four reasons for imposing tariffs on Chinese

imports: (i) to correct bilateral trade imbalances; ii) increase in reciprocal rates; iii) restoring employment in industry; (iv) address the negative impacts of Chinese policies, such as poor protection of intellectual property rights, support for state-owned enterprises, and forced technology transfers. (Bekkers E, Schroeter, 2020) In particular, four different reasons have been put forward in the U.S. policy debate to increase tariffs on steel and aluminum imports under Section 232 of the Trade Import Act and Section 301 of the Trade Act of 1974 regarding imports from China:

1. Jobs in the manufacturing sector must be returned to the United States. As discussed for example in Goswami (2019), there is an argument that manufacturing import tariffs can contribute to this.
2. Tariffs must be "reciprocal" at the bilateral level. As discussed in Griswold (2019), bilateral reciprocal tariffs, as defined by the United States in this context, require that the tariff level at the tariff line level imposed by the U.S. must be at the same level as the tariff faced by the U.S.
3. The bilateral trade deficit with China must be eliminated. As discussed by Pettis (2019), for example, the gap between the tariffs imposed and the tariffs faced is considered an important driver of the U.S. bilateral trade deficit against its various trading partners, particularly China. Raising import tariffs on imports in general and Chinese imports in particular will help reduce the trade deficit in general and the bilateral trade deficit with China in particular.
4. China must change various policies that have a bad impact. The following policy issues have been used to motivate import tariffs from China, as discussed for example in Ciuriak (2019): weak intellectual property rights protections in China, technology transfers imposed by foreign companies investing in China, and the Chinese government's extensive involvement in the Chinese economy through (indirect) subsidies to state-owned enterprises (SOEs).

The US implements a protectionist policy against China by imposing high tariffs on imported goods, which aims to reduce the impact of China's economic growth on the US. Economic protectionism is actually prohibited in the Free Trade Agreement (FTA), but the US issued the policy because China imitated and stole American intellectual property rights (IPR) by hacking several websites and technology databases in the US that contained such information. and the capabilities of the industrial products it produces. Therefore, the US is free to take a protectionist policy towards China.

However, protectionism is a policy prohibited in the Free Trade Agreement (FTA), where each country is not allowed to apply this policy to other countries. This aims to advance the global economy through international trade and economic cooperation between countries that can help the economies of developing countries. The US implemented this policy because China stole its country's intellectual property rights. In its explanation, the US considers Chinese companies in America and various electronic products, including application programs, to be tools of the Chinese Communist Party that compete with it to hack and steal American-owned technology, such as U.S. military weapons and industry. This is also supported by evidence of Chinese military weapons, such as airplanes, whose designs are similar to American weapons. Based on this claim, the US is free to apply protectionist policies towards China. The Chinese government responded to the accusations incorrectly and stated that China would be more free and open to international trade with other countries to overcome the impact of protectionist policies.

Responding to the considerations and also the imposition of tariffs carried out by the US, China believes that the US has violated the Schedule of Commitment/SoC that has been agreed upon by both countries. Continuing from China's belief that the US has violated the norms in

the international trade agreement, China brought the US to the WTO dispute settlement body, namely the Dispute Settlement Body/DSB, the first consultation submission was made on April 4, 2018 on the basis of a report that the policy imposed by the US was not in accordance with the 1994 GATT agreement; articles I: 1, II: 1, 1 (a) and DSU article 23. 1 and 23. 2. Beyond this, China has also threatened to impose similar tariffs on certain U.S. imports such as pork, steel pipes, and wine of 15% each. The consultation requested by China continued until the formation of the panel on January 28, 2019, which was later named the report 'DS543: United States – Tariff Measures on Certain Goods from China' by DSB.

The Chinese panel's request is as follows: The requested action includes actions taken by the United States based on the USTR's investigation of China's activities, policies, and practices related to the transfer of technology, intellectual property, and innovation under Section 301 of the Trade Act of 1974. pursuant to Articles 301(b), 301(c), and 304(a) of the Trade Act of 1974 and pursuant to the Presidential Proclamation to impose ad valorem duties in addition to certain imports from China. These activities are examples:

On June 15, 2018, the USTR announced an additional 25% ad valorem duty on imports from China worth approximately \$34 billion, which was applied through a Federal Register notice dated June 20, 2018 (Notice of Action and Request for Public Comment Section 301 of the Act: China Initiatives, Technology Transfer, Intellectual Property, and Innovation-Related Policies and Practices (83 Fed. Reg. 28.710)); And

1. An additional 10% ad valorem tax on imports from China worth about \$200 billion was implemented on September 24, 2018, and the additional tax will increase to 25% on January 1, 2019, according to the USTR announcement.
2. September 21, 2018 (Notice of Amendment to Article 301: Transfer of Chinese Technology, Intellectual Property, and Innovation Actions, Policies and Practices, (83 Fed. Reg. 47974)). (WT/DS543/7, p.2).

In the end, the Panel made the decision, namely that the Panel is aware of the broader context in which the WTO system operates in 2018-2020. This reflects unprecedented global trade tensions. At the same time that the trade dispute occurs, the panel has no role in making findings or recommending legal conclusions on any issue other than that specifically assigned to it through the dispute settlement process. In this regard, the panel reminded that the US government has not yet begun to act within the framework of the WTO.

The Dispute Settlement Agreement for all Chinese actions in response to the U.S. action in this dispute. The Panel emphasized that, in accordance with the requirements of Article 11 of the DSU, the Panel has made earnest efforts to fulfil its legal role in matters within which the dispute resolution process is competent. In addition, the panel noted that the process panel was structured in such a way that the parties had time to assess the progress of the process and to further explore the possibility of reaching a mutually satisfactory solution. The panel therefore recalled Article 3.7 of the DSU which states that the purpose of the dispute settlement system is to achieve positive dispute resolution, and the panel noted that this constitutes a constant incentive for the parties to make additional efforts to achieve that goal. Settlement of the dispute. A mutually satisfactory solution to the issues raised earlier in this dispute. Based on the reasons set forth in the DS543 Report, the Panel concludes that:

- a) the parties have not reached a satisfactory settlement as referred to in Article 12.7 of the DSU, or waived their right to WTO dispute settlement measures in respect of the actions at issue in this dispute;
- b) all actions opposed by China are included in the Panel's terms of reference, and it is appropriate for the Panel to make findings and recommendations in respect of the first action

- as identified in the Chinese panel's request (25% additional duty on List 1 products), and the second action as amended on 9 May 2019 (25% additional duty on List 2 products);
- c) the actions challenged are prima facie contrary to Articles I:1, II:1(a) and II:1(b) of the 1994 GATT; And
 - d) The United States has not fulfilled its obligation to show that the action is provisionally justified under Section XX(a) of the 1994 GATT.

As a consequence, the Panel concluded that the measures in question were not in accordance with Articles I:1, II:1(a) and II:1(b) of the 1994 GATT. Under Article 3.8 of the DSU, in the event of a breach of the obligations covered under the protected agreement, the action is considered prima facie as a case of cancellation or devaluation of value. The Panel concluded that, to the extent that the measures in question were inconsistent with certain provisions of the 1994 GATT, they had eliminated or diminished the benefits obtained by China under the treaty within the meaning of Article XXIII:1(a) of the 1994 GATT. Under Article 19.1 of the DSU, the Panel recommends that the United States adapt its actions to its obligations under the 1994 GATT.

Dispute Settlement Body (DSB) World Trade Organization (WTO)

International trade between countries in the world often causes disputes, for example international trade transactions in the form of export-import activities and the production of goods or services based on a contract or agreement. Although international trade is regulated by rules such as GATT and GATS (General Agreement on Trade and Services) as well as the international organization that regulates international trade, namely the WTO, the potential for disputes between parties in international trade is still possible.

In 1994, the General Agreement on Tariffs and Trade (GATT) was officially replaced by the World Trade Organization (WTO). The outcome of the Uruguay Round 8-year agreement signed between 1986 and 1994 ushered in a new era in world trade. In addition to the formation of the WTO institution, the Uruguay Round succeeded in creating a more comprehensive system and mechanism. In addition, it is very important to establish an OMC Dispute Settlement Body (DSB) that is authorized to resolve trade disputes between member states. In the WTO dispute settlement mechanism, all countries have the same rights and obligations. We expect honesty and fair competition in world trade.

The World Trade Organization (WTO) itself is an organization or institution designed to resolve international trade disputes, so that disputes resolved by the WTO are legal disputes, namely legal disputes. disputes arising from a breach of the Agreement or the content of the Agreement. International trade However, in international trade disputes, the settlement is often preceded by settlement through negotiations. If this method does not work, then other methods of settlement can be used, such as settlement through court or arbitration. A dispute resolved through court or arbitration is usually based on a pre-agreed clause between the parties, which is laid out in the body of the contract or agreement, or often also referred to as the Choice of Forum Clause. This means that it needs to be emphasized in advance that not all international trade disputes are resolved through the WTO.

A dispute resolution forum regulated by international commercial law that can be chosen by the parties is essentially the same as a dispute resolution forum in international dispute resolution law. The dispute must also be resolved peacefully through various means, such as negotiation, investigation, mediation, conciliation, arbitration, settlement in court or other dispute resolution forum selected based on the agreement of the parties. Peaceful settlement of disputes using these methods is a form of maintaining world peace and security. This is in accordance with Article 33 paragraph (1) of the UN Charter which reads "The parties to any

dispute, the constituance of which is likely to endanger the maintenance of international peace and security, shall first at all such a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choices" or "The parties to the dispute, whose constitution is likely to endanger the maintenance of international peace and security, shall first settle the dispute through negotiation, investigation, mediation, conciliation, arbitration, legal settlement, use of regional bodies or arrangements, or other peaceful means of their own choice".

The WTO has a role as a "road" for a country in order to expand its market access. Therefore, the WTO as an international organization in the field of international trade has two important roles that can be described as follows:

- a) The role of the legislature is the WTO as an international organization or institution in which there are various agreements that have been signed by its members. The legislative role of the WTO is limited to actions in international trade relations that occur among WTO member states.
- b) The role of adjudication is that the WTO acts as a place for its members to consult and also plays a role in adjudicating disputes that occur among WTO member countries related to regulations in agreement within the scope of the WTO. Of course, in carrying out its role, the WTO is supported by important organs in it consisting of the Ministerial Conference, the General Council, the Council Trade in Goods, the Council for Trade Related Aspect of International Property Rights, the Dispute Settlement Body (DSB), and the Trade Policy Review. The organ responsible for resolving disputes between WTO member countries is the Dispute Settlement Body (DSB) which is the embodiment of the General Council. DSB is the only dispute resolution body in the WTO that regulates and resolves disputes arising from the agreement contained in the final act. In other words, the DSB has the authority to determine the adopts and appellate reports, maintains oversight in the application of rules and recommendations and gives authority in the rules of retaliation in matters of non-implementation of recommendations.

DSB is a unique function of the WTO towards world economic stability. Since the rules can be broken, if there are only rules, the system will not function properly. The WTO establishes rules to improve the security and stability of the trading system and establishes a timetable for resolving cases. The Dispute Settlement Body is the only WTO dispute settlement body that resolves disputes through legal (judicial) mechanisms, like international courts in general. Due to the nature of international dispute resolution bodies, legal procedures and decisions are usually binding on the parties to the dispute. Therefore, in the settlement of international trade disputes through the WTO, the jurisdiction of DSB is binding and binding on the members of the WTO in dispute, so it must be implemented by the parties to the dispute.

The DSB only has the authority to establish an expert panel to assess, accept, or reject findings or appeals. Panels selected in consultation with the countries in dispute are referred to as court-like panels. The panel, which consists of three or even five specialists from different countries, is tasked with examining the evidence and drawing conclusions about the truth. DSB dispute resolution has two stages, namely:

1. The first stage is consultation, the time is up to 60 days. Before taking any other steps, the disputing countries should consult each other to find out whether or not they can resolve their problems on their own. If they can't, they can also ask the WTO Director General for help as an intermediary.
2. The second stage is the panel, where the time given to appoint the panel is a maximum of 45 days, plus 6 months to form the panel. If negotiations fail, the disputing countries can request the appointment of a panel. Officially, this panel helps VLOs make decisions or

recommendations. However, because the Panel's report can be rejected unanimously in the Dispute Settlement Board (DSB), the Panel's findings are difficult to overturn. The panel's conclusions should be based on these agreements. The main stage of the panel is divided into several stages, namely:

- a) Before the first hearing: each party to the dispute submits his or her case in writing to the panel.
- b) First Hearing: the case for the complaining country and defence. That is a case regarding the complaint that was responded to and the plaintiff submitted his case at the first session of the panel.
- c) Rebuttal, where the countries concerned raise written objections and oral arguments at the panel meeting.
- d) Experts, i.e. if the other party raises a technical issue, the panel can consult with experts to prepare an advisory report.
- e) The first draft, at this point, the panel forwarded to both sides the descriptive part of its report (containing facts and arguments) and gave it two weeks to provide comments. This report does not contain findings or conclusions.
- f) The Interim Report, i.e., the panel then provides an interim report to both parties containing its findings and conclusions. One week to request a review.
- g) Comment, the examination period should not be more than two weeks. During this time, the Panel may hold additional meetings for both parties.
- h) Final Report, the final report will be sent to both parties and distributed to all WTO members after three weeks. In general, a final report must be submitted to the parties to the dispute within six months. In urgent cases, such as perishable goods, the period is shortened to three months.
- i) Report becomes judgment: this means that both parties can appeal the report within 60 days.

The Dispute Settlement Body (DSB) is an international trade dispute settlement body under the WTO, which is regulated by a dispute resolution system regulated by the Dispute Settlement Rules and Procedures (DSU). The DSU was established as an international trade dispute settlement system that covers all WTO agreements and emphasizes that the WTO does not have a dispute settlement system regulated by each agreement, so that the DSU is a form of agreement between member states to propose dispute settlement systems that can provide fair decisions and ensure legal certainty.

The implementation of the WTO Framework Agreement Trade Dispute Settlement Mechanism exists and must be implemented by its members in accordance with existing provisions to achieve effective dispute resolution. In addition, the international trade dispute system running within the WTO must ensure equal protection and equality of status among WTO member states.

Constraints of Dispute Settlement Body

In the Institutional Bargaining Game theory, there are three elements and four important factors as the main basis related to DSB's constraints in the US-China trade war in the DS543 case. These elements include the type of problems involved in a negotiation, the individual situation of the actors (the position of international powers, domestic coalitions, and the beliefs of politicians that affect the national actors), and whether or not there is an institution where the negotiations take place. Also factors that need to be considered include impetus, good and externalities, individual situations, and institutions.

The first element of the Institutional Bargaining Game theory that will be described in this case is the type of problem involved in a negotiation, as well as the element related to the impetus factor or initial motivation that results in a change in the interaction that affects the previous setting. The type of problem between the United States and China in the case of the DS543 is a trade war. The problem began with the US action in imposing unilateral tariffs, which the US believes is a policy that must be carried out based on the assumption that China has stolen its country's intellectual property rights. The change in interaction between the two countries can also be seen from the development of the DS543 trade dispute case where both parties continued to reply regarding the implementation of the tariff from 2018 to 2020. With the imposition of additional tariffs worth up to 100 billion US dollars, China has suffered many losses because China's largest income is through export-import activities. (Clinton, W. J, 2019).

Chinese Foreign Minister Wang Yi said the US and his country should be partners, not enemies in trade. The trade war that emerged as a result of Trump's policies, according to the Managing Director of the International Monetary Fund (IMF), Christine Lagarde, will not benefit any party. The dynamics of the cooperative relationship between these countries is increasingly changing with the retaliation made by China in the form of imposing tariffs on several US imported products as well, until finally the Chinese government complained to the US to the World Trade Organization (WTO) after which this case was followed up by the Dispute Settlement Body (DSB).

The second element is the Individual Situations of the actors (the positions of international power, domestic coalitions, and the beliefs of politicians that affect the national actors) and the Individual Situations factor. Trump's political convictions while serving as president affect all decisions taken by the US, including in international trade. In contrast to Obama, Donald Trump's administration reflects dissatisfaction with the Obama administration's excessive multilateralism. Most of Trump's policy options are highly competitive and anti-China. Competition and confrontation between the US and China also arise related to trade and technology issues.

It can be seen in the dynamics of the US-China trade relationship from the beginning of the cooperative relationship between the two countries until the occurrence of this trade dispute (2018-2020), regardless of anyone's leadership period, trade disputes are indeed inevitable for both parties. Trade disputes between the two countries have often occurred before, such as the example of the DS5440 case in 2012, as well as other consultations requested by the US and China to the WTO. But in history have these problems never once involved the imposition of tariffs or the enactment of protectionist policies as Trump did.

The third element is the existence or absence of the institution where the negotiations take place and the institutional factor. The WTO through the DSB organ is an institution that is a forum where discussions related to the trade war or the DS543 case are carried out. The organ responsible for resolving disputes between WTO member countries/in this case the US and China is the Dispute Settlement Body (DSB). In this case, DSB has the authority to carry out its role in determining the Panel and Appellate Reports. To carry out its proper role, the DSB must carry out an orderly process starting from the consultation stage with a report to a decision where both parties to the dispute can appeal.

The Appellate Body is an important aspect in the implementation of legal provisions in the WTO, because the Panel or Appellate Body will conclude if a certain action is not in accordance with WTO rules, in this case the Panel or Appellate Body recommends that the Member concerned adjust its activities to comply with WTO rules.

The Appeal Board itself consists of seven members appointed by the Dispute Settlement Board (DSB) for four years. Anyone can be reappointed for a second four-year term. The requirements are drafted in stages, which ensures that all members do not start and complete

their requirements at the same time. The Appeals Agency is unable to process appeals at this time because there are still vacancies. Each member of the Appellate Board must be a person of recognized authority with proven expertise in the areas of law, international trade, and general contractual matters.

They must also not be affiliated with any government and must represent WTO membership broadly. The chairman is elected from among the members for a one-year term and can be extended for one year. The Chairman is responsible for the general business administration of the Appeal Board. A panel of three people is selected to review each complaint; Each ward elects a chairman. The division's selection process is designed to ensure randomness, uncertainty and opportunities for all members to serve, regardless of nationality.

To ensure continuity and consistency in decision-making, the panel exchanges views with other members of the appellate body before finalizing the appellate body's report. The behavior of members of the Appeal Board and the Secretariat of the Appeal Body is regulated in the Rules for Understanding Provisions and Procedures for Dispute Resolution (DSU). This regulation emphasizes that members of the Board of Appeal must be independent, impartial and avoid conflicts of interest.

And in order to assist WTO Members in the settlement of trade disputes and implement WTO agreements, members of the Appeal Body are also requested, through binding arbitration under Article 21(3)(c) of the DSU, to determine a "reasonable time" for WTO members to implement the decisions of the Appeal Body or the Panel, as advised by the DSB. Members of the appeal board act at their own risk when conducting arbitration proceedings under Article 21(3)(c). The secretariat of the appellate body provides legal and administrative assistance to the appellate body (Article 17.7 of the DSU). To ensure the independence of the Appellate Body, the Secretariat is only administratively connected to the WTO Secretariat, but separately. The Secretariat of the Appellate Body is located together with the WTO Secretariat at the WTO headquarters in Geneva, where the Panel and the Appellate Body meet. (WTO Secretariat, 2012).

One of the main reasons for the establishment of the Appellate Body has been the automatic acceptance of panel reports since the establishment of the DSU.¹ In the current dispute settlement system, individual WTO members can no longer prevent disputes from arising. approval of the panel's report, unless they have tacitly consented to all other members represented in the DSB. The virtual automated nature of the adoption of the panel report not only prevents the lost opportunity of the "losing" party to block the enforcement of the report, but also prevents the parties or other members from rejecting the panel's report due to substantive disagreements.

With the panel's legal analysis, if a dispute involves one of the members, usually the "winning" party, whose primary motivation is to win the dispute, then such a refusal is not possible even if the panel's report is legally flawed. In contrast, in the old GATT 1947 dispute settlement system, some panel reports were not accepted because the parties disagreed on the legal interpretation of certain GATT provisions from a substantive point of view. Although this can no longer be done, the role of the Appellate Body examining the appeal now is to correct any legal errors that the Panel may have committed. In doing so, the Appellate Body also ensures consistency of decisions, which is in line with the main objective of the dispute settlement system to provide security and predictability to the multilateral trading system (Article 3.2 DSU).

In the case of DS543, there were obstacles experienced by DSB in carrying out its proper role, this can be seen in the US response to the WTO's final decision stating that China won over the US. Instead of accepting the WTO decision and appealing in accordance with the applicable legal process, the US opposed the WTO decision, saying that the WTO was too

partial to China and that the US also threatened to leave the WTO and would no longer be a member. Margaret Cekuta, a former U.S. trade representative official, said the WTO's final decision also at least supports the U.S. argument for reforming the 25-year-old trade body. (Foreign Affairs, 2022).

In addition, what is of concern regarding this settlement process is that the US appealed the decision, but in the appeal process, the US deliberately blocked the appointment of judges to the WTO appeal body. This condition also prevents the minimum number of judges needed to hear a case. "The Panel is well aware of the broader context of the WTO's current operating system; This reflects an unprecedented series of global trade tensions," the WTO said in its report on the trade war case. Of course, this is an obstacle for the WTO in resolving this trade dispute, because the DSB body cannot carry out the role and function of the legal stages that should be carried out/legal defects occur.

The Appellate Body essentially functions as the Supreme Court in world trade. The body listened to the appeal against the decision of the WTO Dispute Settlement Body. The decision is binding on member states. About two-thirds of all disputes in the WTO are appealed and taken to the appellate body. According to the official WTO report in article 17 of the DSU, the Appeal Body consists of seven members appointed by the DSB for a four-year term, and this system requires at least three judges to form a panel to adjudicate a dispute, with the possibility of being reappointed once.

In December 2020, all seven seats on the Appeal Board were vacant. After the Trump administration refused to appoint new members, the appeals panel will no longer operate until 2024, and due to the absence of a judge on the appellate board, many other trade dispute cases have also been unresolved by the DSB until now. The term of office of the last sitting member ends on November 30, 2020 with the following list of names;

1. Hong Zhao
2. Thomas R. Graham, P
3. ether Van den Boscche,
4. Ricardo Ramirez-Hernandez,
5. Yuejiao Zhang,
6. Seung Wha Chang,
7. David Unterhalter. (Bown, C. P & Keynes, S, 2022)

One of the answers to why Trump did this appeared on February 11, 2020, when the Office of the United States Trade Representative (USTR) released a report from the World Trade Organization's Appellate Body. The 174-page report accuses the Appellate Body of acting *ultra vires* (outside its jurisdiction) and *obiter dicta* (ongoing). They complained that judges were stripping away members' rights and adding new obligations in ways that U.S. policymakers never intended when they joined the WTO. From this collection of Latin lawyers, one can easily conclude that a philosophical debate of the law is taking place in the Trump administration.

In the section of the report, "Appellate Body's Error in Interpretation of WTO Agreement Raises Significant Concern and Harms the WTO," four of the five alleged errors relate to "trade measures." According to WTO rules, members pledge not to raise their tariffs above a certain level. However, in exceptional circumstances, governments may violate these restrictions to implement trade solutions. This includes anti-dumping duties to protect against cheap imports; balancing import duties to protect against subsidized imports; and maintain tariffs in response to increased imports. By reducing the pressure of harmful foreign competition, this defense mission is expected to maintain the political legitimacy of the regime.

The USTR report stated that the decline in the use of trade tariffs was caused by irregularities in the WTO's Appellate Body. After joining the organization, the United States'

use of trade solutions has been heavily criticized by other member states. About two-thirds of the disputes filed by other member states are related to trade agreements. From 2002 to 2019, between one-third and 60% of U.S. trade decisions through import tariffs were the subject of formal WTO disputes. The US government has repeatedly defended its actions before Arbitration. After the defeat, the company changed its actions to comply with the decision of the Appeal Board. But as time went by, the resentment grew. For people like USTR Robert Lighthizer, this Geneva judge's decision weakens the power of U.S. negotiators to protect and influence U.S. policy decisions in any way, only through Congress. (Lighthizer RE, 2020)

The Trump administration is not alone in finding fault with the WTO Appeals Body. However, the settlement drew criticism because the number of arbitrators was too small to make the dispute resolution system work properly. For example, USTR Michael Froman of the Obama administration summed up the idea of a final decision system supported by the international trade community, not just one organization, as "a huge step forward in the last 20 years." Proponents of this system may point out.

The United States has dealt with some of the most aggressive disputes among WTO members and won most of those disputes in favor of American companies and workers. Some policymakers outside the United States hope that other American administrations will act, recognizing the importance of an independent international mediator and returning the Appellate Body to its former glory. Otherwise people should do the same. First, we need to understand the source of American discontent in addition to cultural discontent. And they must start looking for long-term political improvements.

For more than two decades, the United States has expressed concern that the World Trade Organization's (WTO) dispute settlement system, particularly its Appellate Body, is not working in accordance with the rules adopted by the United States and other WTO members. In particular, the Appellate Body increases the obligations of the United States and reduces its rights by not complying with WTO rules, to address issues that it does not have the authority to decide, to take action without the right to download and interpret treaties. These continuing violations constitute serious violations of the appellate body's limited rights under WTO rules.

On a more fundamental level, this practice violates the basic principles of American governance. In a democratic and constitutional system, there is no right for any country to be subject to a law passed by three people sitting in Geneva without the consent of the United States or the consent of the United States Congress. The Appellate Body continues to seek to increase its power while reducing the power of the United States and other WTO members, who, unlike the Appellate Body, are accountable to their own citizens: citizens who live and earn a living. It affects life. Based on the WTO decision. The WTO has changed the rights and obligations of member states through the interpretation of WTO agreements. Some of these interpretations are critical of America's ability to combat economic disruption caused by non-market practices by countries like China that harm citizens, workers, and businesses.

The Appellate Body's failure to follow the agreed rules violates the United States' trust in the World Trade Organization (WTO) and its free and fair-trading system. Due to violations committed by administrators, no WTO member can be sure that existing or newly designed regulations will be complied with. In fact, WTO members have not reached an agreement on important new rules since the WTO's inception. The WTO's efforts to transform the WTO from a forum for discussion and negotiation to an adjudication forum.

According to the US, concerns about this appellate body have been ignored for too long, the problem has worsened, and as a result the WTO dispute settlement system has deteriorated. WTO members must accept the failure of the Appellate Body if it is to achieve lasting and effective reform of the WTO dispute settlement system. The U.S. said it would engage with every WTO Member committed to returning the WTO dispute settlement system to the role

assigned by WTO Members and ensuring that the dispute settlement system supports, not undermines, the WTO as a forum for discussion, monitoring and negotiation.

Several WTO Members have issued proposals to revise certain Appellate Body procedures. Some of these proposals will take the form of additional guidelines that reiterate that the panel and the Appeal Board must follow the rules set by the Members. However, the problem of the functioning of the Appellate Board cannot be effectively overcome if the Members fail to address the underlying problem. This honest and genuine dialogue on how and why the WTO arrives in 2024 is needed so that any reform can be meaningful and lasting. This requires WTO Members to engage in a more in-depth discussion of why the Appellate Body feels free to deviate from what has been agreed upon by the Member. Without this understanding, there is no reason to believe that adopting new or additional texts, in any form, will solve these endemic problems.

Dissatisfied with a decision in the WTO dispute settlement system that disproportionately targeted the use of U.S. trade solutions, the U.S. discontinued the entire system in 2019. There are many obstacles in adopting new requirements for the use of trade solutions, and thus restoring part of the WTO's dispute settlement system. First, the change affects the flexibility of user access policies for various business solutions. Second, although Chinese exports are the main target of trade stimulus measures, exporters from other countries are increasingly taking China's trade stimulus measures. Third, significant differences stemming from China's economic model may require new regulations to regulate trade, but no consensus has been reached. Even some of the most promising reforms have practical limitations, present additional challenges, or may not be politically feasible.

Conclusion

In the dynamics of US-China trade relations from the beginning of the establishment of cooperative relations between the two countries until the occurrence of this trade dispute (2018-2020), regardless of anyone's leadership period, trade disputes are indeed inevitable for both parties. Trade disputes between these two countries have often occurred before, but in history, problems have occurred. This has never once involved imposing tariffs or enforcing protectionist policies as it did during Trump's presidency.

The impetus factor in the case of the DS543 trade war that distinguishes it from the previous US-China trade dispute or dispute is the imposition of tariffs itself. Negotiation efforts as well as mediation that have been carried out to resolve the problem of the imposition of this tariff have also failed, so this case must be resolved at the WTO through DSB where the institutions factor plays an important role in this research. Trump's political beliefs or individual circumstances during his presidency affect all decisions taken by the US, including in international trade.

In the settlement of the DS543 case, there were obstacles experienced by DSB in carrying out its proper role. The obstacles experienced are inseparable from the policies taken by Trump unilaterally. In addition, what is of concern regarding this settlement process is that, with the defeat not accepted, the US considers that the WTO is too partial to China and ignores the facts that occurred in the DS543 case. The US then appealed the decision. The U.S. has submitted a long list of procedural complaints to the appellate body, but there are also broader concerns for the U.S. that the WTO system has failed to address China's trade practices. So in the process of filing an appeal, the US deliberately blocked the appointment of judges to the WTO appeal body. This condition also prevents the minimum number of judges needed to hear a case.

Of course, this is an obstacle for the WTO in resolving this trade dispute, because the DSB body cannot carry out the role and function of the legal stages that should be carried out/legal defects occur. Without an appellate body to adjudicate a case, which has major implications

for the WTO's ability to mediate disputes, the move is part of a broader approach to global governance under President Donald Trump, which is seen as an attack on the liberal trading order. If the U.S. veto cripples the dispute system, it would end 23 years of WTO enforcement, which is the cornerstone of international efforts to prevent trade protectionism, at a time when global trade tensions are rising.

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