




Maritime Dispute Resolution With Mediation Techniques

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Abstract

Introduction: In resolving ordinary maritime disputes related to national borders, from several types of dispute resolution, mediation is the right way to resolve disputes involving third parties.

Purposes of the Research: This paper aims to find out that in resolving maritime disputes the law is contained in international law, namely UNCLOS 1982 which regulates maritime disputes.

Methods of the Research: The type of research is normative juridical with analysis using legal documents in the form of primary legal materials, secondary legal materials, and tertiary legal materials.

Results of the Research: Alternative settlement of territorial boundary disputes can be done by, first, referring to UNCLOS 1982 through Bilateral Mutual Agreement in drawing a temporary line (equidistant line) using the equity principle and considering relevant factors and the possibility of modifying the equidistant line with the diplomatic approach of both countries, second, through the ASEAN mechanism, and, third, through the mechanism of the International Court of Justice by promoting equitable principles and relevant circumstances. However, resolving with the second alternative is more appropriate because it can use mediation methods in maritime dispute resolution.

1. INTRODUCTION

The state is the foremost, most important subject of law and has the greatest authority as a subject of international law. The state has all the legal prowess. The legal capacity of a state to assert its rights before international (and national) courts, to be the subject of some or all of the obligations provided by international law, to be able to conclude valid and binding international treaties under international law, and to enjoy immunity from the jurisdiction of domestic courts. These legal skills are the main international law capacities to realize the international legal personality.¹

As a subject of international law a sovereign state means that it does not recognize a power higher than its own. This supreme power is limited by the territory of the state, so the state has supreme power within its territorial limits according to international law.² A definite territory (fixed territory) is a fundamental requirement for the existence of a state.

¹ Sefriani, *Hukum Internasional: Suatu Pengantar* (Yogyakarta: Rajawali Pers, 2018), p. 94.

² Ismi Yulia Masfiani, L. Tri Setyawanta R, and Nanik Trihastuti, "Penyelesaian Sengketa Batas Maritim Antara Costa Rica Dan Nicaragua Di Laut Karibia Dan Samudra Pasifik Dalam Perspektif UNCLOS 1982," *Diponegoro Law Journal* 5, no. 3 (2016): 1-19, <https://doi.org/10.14710/dlj.2016.12898>.

The territory can be both land and water. Nevertheless, there is no requirement in international law that all borders be final and that there be no further border disputes with neighbouring states either at the time of the new state's proclamation or thereafter.³

United Nations Convention on the Law of the Sea (1982)/ UNCLOS III) is used to determine how much power a country has in its territorial waters. Broadly speaking, the convention divides the sea into two maritime zones, namely zones that are under and outside national jurisdiction.⁴ Furthermore, maritime zones under national jurisdiction are subdivided into maritime zones under the full sovereignty of a coastal state, and maritime zones parts of which a coastal state can exercise the special powers and rights provided for in the convention. Although given the right to manage the sea, between countries separated by Waters has the potential for disputes in determining maritime boundaries between countries (maritime boundary delimitation).⁵ The study of Public International Law recognizes two types of international disputes, namely legal disputes (legal or judicial disputes) and political disputes (political or nonjusticiable decisions). Actually, there are no clear and generally accepted criteria for the meaning of both terms.⁶

J. G. Starke classifies a method of resolving international disputes peacefully or amicably, namely arbitration, judicial settlement, negotiation, good offices, mediation, conciliation, investigation, and settlement under the auspices of the United Nations organization . When a dispute arises, peaceful ways of resolving the dispute can be done if the parties have agreed to find an amicable solution. In the practice of countries in the world, dispute resolution through the mediation of the International Court of Justice, is the most widely adopted Option. This is based on the consideration that the decision of the International Court of Justice will be permanent and binding on the states parties to one of the disputes brought to the International Court of Justice (ICJ), namely the dispute between Costa Rica and Nicaragua entered in 2014 on the dispute over maritime boundary delimitation in the Caribbean Sea and the Pacific Ocean.

2. METHOD

This paper uses normative research methods. In this study used an approach in the form of legislation approach (the statute approach), through the study of legislation and regulations that are related to the issue being discussed, and in this case the various legal rules that become the focus as well as the central point of research. In addition, the approach of analysis of legal concepts (conceptual approach) is also another approach used in this study.⁷

3. RESULTS AND DISCUSSION

3.1 Alternative Maritime Dispute Resolution Options Through UNCLOS

³ Masfiani, R, and Trihastuti. *Ibid.* p. 95.

⁴ Putriana Septi Nauli and Stivani Ismawira Sinambela, "Upaya Penyelesaian Sengketa Demimitasi Batas Maritim, Diwilayah Greater Sunrise Antar Timor Leste Dan Australia Dari Perspektif Kajian Hukum International," *Jurnal PIR: Power in International Relations* 6, no. 1 (2021): 80-94, <https://doi.org/10.22303/pir.6.1.2021.94-108>.

⁵ Utami Gita Syafitri, "Sengketa Pulau Dokdo Antara Jepang Dan Korea Selatan," *Dharmasisya" Jurnal Program Magister Hukum FHUI* 2, no. 2 (2012): 639-52.

⁶ Made Chintya Sastri Udiani, Dewa Gede Sudika Mangku, and Ni Putu Rai Yuliantini., "Hukum Internasional Sebagai Sumber Hukum Di Dalam Menyelesaikan Sengketa Internasional," *Ganesha Law Review* 4, no. 2 (2022): 73-83.

⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2006), p. 93.

In the majority of delimiters between states, the territory of the state is usually limited by the ocean and this is where maritime disputes often occur, the settlement is carried out in accordance with the provisions of Chapter V of UNCLOS on the settlement of disputes also contains a number of ambitious provisions. States are obliged to resolve by peaceful means any dispute concerning the interpretation or application of the convention. If it is not possible to reach an agreement on the basis of negotiations, then the states must submit a part of the type of dispute to a compulsory procedure for issuing binding decisions; the provisions in this regard are set forth in Section 2 entitled “compulsory Procedures Entailing Binding decisions”. States have four options in the mandatory procedure. According to Paragraph 1 of Article 287 (second article in Section 2) a state at the time of signing, ratifying or acceding to the convention or at any time thereafter shall be free to choose, by written declaration, one or more ways of resolving disputes in favour of the interpretation and application of the convention: the International Court of Justice, Tribunal/ITLOS, arbitration under annex VII of UNCLOS, or special arbitration in in annex VIII. 3 settlement of disputes in the field of law of the sea prior to the 1982 Convention on the law of the Sea was carried out within the framework of the settlement of international disputes in general. In this case, disputes over the law of the sea are resolved through existing mechanisms and institutions of international justice, such as the International Court of justice.⁸

Today the exclusive rights over the land area have developed, the sea area remains considered *res communis* available to all parties. *Mare liberum* (“free sea”) applies to all areas of the ocean or high seas, except territorial sea lanes bordering the coasts that are used to protect local fishing interests and security. The development of legal instruments and institutions that regulate the allocation of rights to marine areas is relatively recent. The rights to marine areas are allocated through a process different from land allocation and according to very different jurisprudence. The allocation of marine areas is based on legal provisions and is separated from the physical act of occupation. The United Nations Convention on the law of the Sea (UNCLOS) was the first multilateral treaty to contain mandatory provisions for conflict resolution. In 1982, April 30, 1982 in New York, the United Nations Convention on the Law of the Sea (UNCLOS-United Nations Convention on the Law of the Sea) has been well received in the United Nations conference on the law of the Sea III. The UNCLOS regulates the regimes of the law of the sea, including Island States. The 1982 Convention on the law of the Sea (UNCLOS) has comprehensively codified international law relating to various other issues, such as shipping Rights, pollution control, marine scientific research and fisheries provisions.⁹

The strategy adopted by UNCLOS to own marine areas is not based on ownership or control like land ownership, but through a process of jurisprudence. The doctrine states that the allotment does not depend on physical use or possession but on a geographical approximation that came to be called the *ab initio* doctrine, which means that the allotment or part is already owned from the beginning that is the part that is already fused and does not need a certain effort for the coastal state to acquire it. The International Court of justice declared the *ab initio* doctrine adopted at the Geneva Conference as a means of protecting coastal states that make no declaration of their rights to the continental shelf and have no tools to explore and exploit their resources. All coastal countries accept the doctrine this is

⁸ Fauzia Dyah Ayu Paramitha, “Strategi Jepang Dan Korea Selatan Dalam Menyelesaikan Sengketa Teritorial Pulau Takeshima/Dokdo” (Skripsi: Universitas Airlangga, 2023).

⁹ M. Fauzi A and Syafri Harto, “Kepentingan Amerika Serikat Dalam Upaya Memperbaiki Hubungan Bilateral Jepang-Korea Selatan Pasca Distorsi Sejarah,” *Jurnal Online Mahasiswa (JOM) Bidang Ilmu Sosial Dan Ilmu Politik* 1, no. 2 (2014): 1-15.

without a doubt mainly due to the negative consequences that prevent the race for ownership of the territory and the taking of resources on the seabed by some countries.

With the ratification of the 1982 Convention on the Law of the Sea, it does not mean that the convention has been able to accommodate all the interests of states. One of the uses of the sea that can cause disputes is the regulation and security of the right of passage for foreign ships in waters that are under the jurisdiction of a country. Regulation and security of the right of passage for foreign vessels through the Straits used for international shipping will have an impact not only on the Straits Settlements and other countries, but also directly and indirectly on the political, military and economic aspects of life. With regard to the issue of borders between countries, the existence of differences in the legal regime of the continental shelf in the 1982 Convention on the Law of the Sea and previous arrangements, where the criterion of geomorphological attachment (natural prolongation) is no longer considered a measure in calculation of the continental shelf claim of a coastal country. In contrast, the 1982 Convention on the Law of the Sea introduced the distance factor as one of the determining factors in the measurement and delimitation of a country's territory, given that a minimum claim to the continental shelf can be made against coastal states up to 200 nautical miles.

The 1982 Convention on the Law of the Sea produced a new formulation of the legal regime of the continental shelf by providing a minimum claim limit of 200 nautical miles and a maximum claim of 350 nautical miles for coastal states with certain criteria. Based on the new formulation, the relationship of geomorphological and geophysical factors with the land of a coastal country is only related to the maximum claim of the continental shelf.¹⁰

3.2 Mediation As An Alternative Dispute Resolution In Maritime Dispute Resolution

International law recognizes two types of disputes, namely legal disputes and political disputes. These differences have logical consequences related to the settlement model. Settlement of international disputes can be done in two ways, namely peaceful and war. a. Amicably: litigation: International Arbitration and the International Court of Justice (via International Court of Justice and International Criminal Court) and Non-litigious: negotiation, mediation, goodwill, mediation, Investigation, Discovery of facts, regional settlement, settlement under the authority of the United Nations (Article 33 of the UN Charter). b. Through violence, namely retorsi, reprisal (retaliation), peacetime blockade, and war. Article 51 of the UN Charter allows the use of force in the settlement of disputes on the grounds of self-defence. Article 39 of the UN Charter provides for the authority of the UN Security Council to make recommendations and decide actions in dispute resolution.¹¹

In distinguishing the two types of disputes depend of the object of the dispute. Article 2 Paragraph (3) of the Charter The United Nations (UN) states that all members shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered. The article contains the principle of good Faith (Good Faith), and Prohibition of use violence. In the case of territorial boundary disputes, it does not distinguish the type of dispute. This refers to the opinion of Oppenheim and Hans Kelsen quoted by Adolf that All disputes have their political aspects by the very fact that they concern relations between sovereign states. Disputes which, according to the

¹⁰ Suryo Sakti Hadiwijoyo, *Batas Wilayah Negara Indonesia: Dimensi Permasalahan Dan Strategi Penanganan* (Yogyakarta: Gava Media, 2009), h. 98.

¹¹ Novi Setiawati, Dewa Gede Sudika Mangku, and Ni Putu Rai Yuliantini, "Penyelesaian Sengketa Kepulauan Dalam Perspektif Hukum Internasional," *Jurnal Komunitas Yustisia* 2, no. 3 (2019): 168-80, <https://doi.org/10.23887/jatayu.v2i3.28782>.

distinction, are said to be of a legal nature might involve highly important political interests of the states concerned; convertely, disputes reputed according to that distinction to be of a political character rather than concern the application of a principle or a norm of international law. This means that every dispute has political and legal aspects. So that in the settlement of disputes that have a legal nature, there may be political aspects that can be applied, or in disputes that have a political nature, international human rights principles can occur.¹²

Dispute resolution is done by diplomatic means through negotiation and should be based on UNCLOS 1982. Both countries ratified UNCLOS in 1982. According tunclos 1982 the island of Borneo has an original hakerite s EJ auh 12 m il Sea, an additional zone as far as 24 nautical miles, as well as EEZ as far as 200 nautical miles.¹³

Equitable solution is done by negotiating a bilateral agreement to determine a single line in determining the boundaries of the country's maritime territory. Determination of maritime boundary lines can be reached by drawing a temporary line (equidistant line) using the principle of equidistance (equity principle) taking into account factors relevant to the possibility of modifying the equidistant line with the diplomatic approach of the two countries.¹⁴ The solution is known as the two stage approach and has been applied in some cases the boundary between Libya-Malta and Greenland Jan Mayen.¹⁵

Articles 74 and 83 of UNCLOS 1982, regulate the criteria for the delimitation of the EEZ and the continental shelf between countries whose coasts are adjacent or opposite have several elements, namely by agreement (by agreement) based on sources of international law, as stated in Article 38 of the statute of the International Court of justice for the achievement of an equitable solution. The equity principle does not specify a specific method but only requires an equitable solution. This is different from the formulation of Article 6 of the 1958 Continental Shelf Convention which formulates through agreements, pert im bangan special circumstances or with the median line or equidistance principle. The definition of special circumstances is only limited to aspects of geography such as coastal configuration, the existence of beaches, the existence of islands and reefs and shipping lanes. According to Churchill and Lowe relevant circumstances, has a broader scope, namely:¹⁶ a) Geographical and geomorphological circumstances; b) The location of the land frontier and advance maritime boundaries; c) Historic rights; d) Economic circumstances.

Another alternative to the settlement of maritime disputes is mediation and negotiation with bilateral agreements using the determination of the equidistan line, the settlement of territorial disputes between the two countries can use the mechanism of the Association of Southeast Asian Nations (ASEAN). In Indonesia, Article 22 paragraph (1) of the ASEAN Charter 2007 regulates the principles of peaceful dispute resolution through dialogue, consultation and negotiation. Article 23 of the ASEAN Charter regulates the settlement of disputes using mediation or goodwill, with third parties Secretary General of ASEAN or other ASEAN member states. In boundary issues, it will not be easy to agree to

¹² Huala Adolf, *Hukum Penyelesaian Sengketa Internasional* (Jakarta: Sinar Grafika, 2014). p. 1.

¹³ Farrel Fawzi Adhipratama and Ida Bagus Wyasa Putra, "Penyelesaian Sengketa Alternatif Sebagai Model Penyelesaian Sengketa Maritim Antara Yunani Dan Turki," *Kertha Desa* 9, no. 10 (2021): 25–38.

¹⁴ I Made Andi Arsana, *Batas Maritim Antar Negara. Suatu Tinjauan Teknis Dan Yuridis* (Yogyakarta: Gadjah Mada University Press, 2007), p. 46.

¹⁵ R Churchill and A Lowe, *The Law of The Sea* (Manchester: Manchester University Press, 1999), p. 187.

¹⁶ OnumaYasuaki, "International Law in and with International Politics: The Function of InternationalLaw in International Society," *European Journal of International Law* 14, no. 1 (2003): 105–39.

bring disputes over national boundaries to ASEAN.¹⁷ An out-of-court settlement is the first option, as the decision of the International Court of Justice is final and binding. If the dispute is to be resolved by litigation mechanism through the International Court of Justice, then the decision must consider the equitable principle by considering the relevant circumstances as in the case of Tunisia - Libya 1982. By considering the relevant circumstances, the quality of the International Court of Justice's decision can meet the aspects of certainty and justice because it is not only based on formal juridical aspects but also considers aspects of Geography, History, Economics and geomorphology.

4. CONCLUSION

Settlement of maritime disputes according to international law of the Sea, namely by providing freedom for both countries to choose the desired procedure as long as it's mutually agreed upon. In the PPB Charter Article 33 (1) mention if there is a dispute should be resolved by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement resort to regional agencies imposing arrangements imposing other peaceful means on their own choice. Dispute resolution by mediation or involve third parties diplomatically as a first step to resolve strife. This can be seen from the meetings that have been conducted by representatives of both countries. Settlement of maritime boundary cases it can be done by mediation or with the help of third parties. So mediation is the right method in the dispute of intimacy.

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¹⁷ Rizal Dwi Novianto, Dimas Agung Firmansyah, and Naufal Adi Pratama, "Penyelesaian Sengketa Di Laut Natuna Utara," *Jurnal Hukum Bisnis Bonum Commune* 1, no. 1 (2010): 69-78.

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