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Senkaku Islands Dispute Between China And Japan In East China Sea Review From International Law

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ABSTRACT

Territorial disputes are problems that often become a problem for countries in the world. Later the world was presented with a territorial dispute between China and Japan. The dispute is over ownership of a group of islands in the East China Sea, the Senkaku Islands, which are thought to have the largest oil and gas reserves in Asia. International law for several centuries has continued to develop in regulating the issue of determining the sovereignty of a disputed territory. Regarding the archipelagic dispute, the question arises about how the state's sovereignty over the sea area according to international law is? How are territorial disputes resolved according to international law? And how about the settlement of the Senkaku Islands dispute between China and Japan according to international law?. The research method used is library research or normative research, namely by selecting and collecting data from various books, scholarly opinions, dictionaries, encyclopedias and international legal literature related to thesis writing. According to Article 38 of the UN Charter, the sources of international law consist of international treaties, international customs, principles common law recognized by civilized nations, court decisions and doctrines of scholars. An international territorial dispute is a dispute or dispute between two countries fighting over a certain area, for example, over an island. The Senkaku Islands dispute between China and Japan has actually been going on for a long time. However, the situation that has developed recently has worried the international community. This dispute caused relations between the two countries to worsen with the occurrence of a number of incidents related to the seizure of ownership of the islands. Settlement of territorial disputes is regulated in the United Nations Charter and the 1982 Law of the Sea Convention. Dispute settlement according to the United Nations Charter requires states to resolve their disputes peacefully based on the principles of international law. The UN Charter also prohibits states from using violence in resolving their disputes as stated in Article 2 Paragraph 4. While the 1982 Law of the Sea Convention provides several dispute resolution mechanisms to deal with problems that occur in the sea area.

1. Introduction

Territorial disputes between neighboring countries have always been a very sensitive matter to be discussed. Considering the notion of the state itself cannot be separated from the basic concept of the state as a geographical unit with its respective sovereignty and jurisdiction. Starting with the signing of the Westphalia Peace Treaty[1]which produces the characteristics of

an international society based on national states. One of them states that the state is a sovereign territory. Each country within its territory has exclusive supreme power.

The requirement that a country must have a certain territory is crucial for the formation of a state provided that there is certain recognition of what it characterizes as "consistency" of the territory concerned and its inhabitants. The basic concept of the enactment of the sovereignty of a country has the highest power over the territory of the country, so that the state has the highest power within its boundaries. According to Oppenheim, without a territory with certain boundaries, a country cannot be considered a subject of international law.

Thus, the territory of the state becomes the most fundamental concept (fundamental) in international law, to show the existence of the highest and exclusive power of the state within its territorial boundaries.

Regarding the importance of the role of territory in a country, it is not surprising that there are many territorial disputes between countries in the world. In practice, territorial disputes in general can be caused by two things, namely in the form of claims to a territory from a country, as is the case in the Arab-Israeli dispute; or it can also be in the form of a claim to a part of the territory of a bordering country, such as between Indonesia and Malaysia regarding the islands of Sipadan and Ligitan. Lately the world is presented with a dispute between the two countries with the largest economic powers in Asia, Japan and China, which are fighting over the ownership status of the Senkaku/Daioyu islands.[5] in the East China Sea.

The dispute over the ownership of this 7 km2 archipelago began after World War II. But the basis of each party's claim has been going on long before that. On January 14, 1895, after conducting a survey for 10 years and then setting the islands uninhabited, Japan established a sovereign boundary that officially included the Senkaku Islands into Japanese territory. The Senkaku Islands were later designated as part of the Nansei Shoto archipelago, also known as the Ryukyu Islands, and are now referred to as Okinawa. Based on the 1895 Treaty of Shimonoseki[7]after the Sino-Japanese War, Taiwan was ceded to Japan which became the initial Japanese claim to ownership of the Senkaku Islands. UN report[8]in 1969, which revealed the presence of natural gas and oil in the area around the Senkaku/Daioyu islands, sparked Chinese protests against Japan's claims to the islands. Based on Chinese government estimates, there are at least 17.5 trillion cubic feet of natural gas and 20 million barrels of oil there, equivalent to one-fifth of China's natural gas reserves. Then in 1970, Japan and the United States signed an agreement to return Okinawa, including the Senkaku/Daioyu islands to Japan. This is what China then protested, because China felt that the island was its own. This dispute further developed in 1978, when Japan built a lighthouse on Daioyu Island to legitimize the island.

These tensions continued when Japan expelled a Taiwanese ship from the Senkaku/Daioyu waters. Despite constant protests from both China and Taiwan, in the 1990s Japan returned to officially repair the lighthouse that the Japanese right had built in Senkaku/Daioyu.

Disputes over overlapping claims between the two countries have developed into tensions and have caused unrest in many parties. The action of the Japanese government which officially decided to buy and transfer ownership of the Senkaku Islands to the country made the situation even more heated. China responded to this action by sending a number of patrol boats to the disputed area as a form of affirmation of state sovereignty. China's response made tensions in relations between the two countries increase drastically. The Japanese PM set up a task force to deal with the issue, and also summoned the Chinese ambassador to protest.

In China, anti-Japanese protests spread to the largest scale since the two countries normalized diplomatic relations in 1972. These demonstrations forced several Japanese-owned companies

in China such as Panasonic and Canon to stop their operations, because the anti-Japanese action was followed by destruction of production networks as well as attacks on Japanese business interests. The escalating tension between the two neighboring countries has caused both of them to cancel the 40th anniversary of diplomatic relations between the two countries, which should have been held on September 27, 2012.

The worsening diplomatic tension between China and Japan has become the international spotlight which prompted a number of parties to react, including the United States. US Defense Secretary Leon Panetta visited Beijing to speak with China's defense minister and the country's leaders. The protracted dispute between the two countries has had a negative impact on both the economic sector and the security sector. The dispute poses a serious threat to the stability of peace and security in the region with the possibility of armed conflict at sea. The security agreement between the United States and Japan has officially stated that the Senkaku issue is within the scope of the United States-Japan alliance agreement. Therefore.

Until now, the condition of Japan and China, which are still in a tense situation regarding the dispute over the Senkaku/Daioyu Islands, has become a concern for the international community. The territory of the state which is fundamental to the formation of a state makes the two countries insist on maintaining the archipelago, especially after it is known that the rich natural resources contained therein.

Territorial disputes often trigger public emotions, which lead to nationalist sentiments for the people of the countries involved, especially if very sensitive historical background ties are involved in the relations between the two countries.[11] Territorial disputes involving neighboring countries usually prefer diplomatic routes such as negotiations or mediation to resolve the dispute, but for the Senkaku/Diaoyu Islands dispute, the two countries do not show any intention to go there. The current condition of the two countries, on the other hand, has shown an adamant attitude that has only exacerbated the situation. The absence of an agreement between the two countries has hampered taking further steps to resolve the dispute, which has also led to unclear ownership status of the Senkaku/Diaoyu islands and hampered exploration and exploitation of natural resource content in the islands.

2. Method

This study uses a normative juridical approach. The normative juridical approach is an approach that conducts legal analysis of statutory regulations and judges' decisions. In this paper, the normative juridical approach is used to examine the applicable legal norms governing the sovereignty of a country in the sea area and how to resolve territorial disputes as contained in the law. international law and treaties.

This research is a type of descriptive research, which is a research method that describes all data which is then analyzed and compared based on the ongoing reality and then tries to provide a solution to the problem.

The data in this study were analyzed qualitatively. Qualitative data analysis is an activity process that includes, recording, organizing, grouping and synthesizing data and then interpreting each data category, looking for and finding patterns, relationships, and presenting findings in the form of narrative descriptions, charts, flow charts, matrices and images. - images that can be understood and understood by others.

3. Analysis And Results

3.1 Regional Dispute Settlement According To International Law

a. Dispute Resolution According to International Law

International relations often cause disputes between countries in the world. As explained earlier, the causes of disputes vary, they can be in the form of natural resources, environmental damage, trade and the most common are territorial or border disputes. The vulnerability of disputes in relations between countries is often in the spotlight of the international community and for that international law responds to it by providing international dispute resolution efforts by providing ways on how the parties resolve disputes according to international law. The aim is to create better relations between countries based on the principles of international peace and security.

Before discussing the settlement of international disputes, it is better to know the division of disputes according to international law. There are two types of disputes in international law, namely political disputes and legal disputes. Political disputes are disputes in which a country bases its claims on non-juridical considerations, for example on political grounds or other national interests. The settlement of this political dispute is also resolved by political means because it is not legal. Meanwhile, legal disputes are disputes in which a country bases its dispute or claim on the provisions contained in a treaty or which have been recognized by international law.[85] In practice it is difficult to distinguish a dispute as a legal dispute or a political dispute because each dispute has two accompanying aspects, political and juridical aspects.

Territorial dispute is a dispute between two or more countries fighting over the ownership of an area in the form of sea or land. Unclear territorial boundaries between countries can lead to overlapping claims for that international law regulates the settlement of territorial disputes.

b. International Dispute Resolution According to the United Nations Charter

1) Peaceful Settlement of International Disputes

a) Negotiation

Negotiation is a method of dispute resolution carried out by the disputing parties through ordinary diplomatic channels.[89] Negotiations, also known as direct negotiations, are usually carried out by foreign ministers, ambassadors or representatives specially assigned to negotiate within the framework of ad hoc diplomacy.[90] These negotiations can take place both in a bilateral and multilateral framework. Dispute resolution through negotiation is known as effective and practical dispute resolution because this dispute resolution only involves the disputing parties so that the disputing parties can provide each other with an understanding of what is desired and help the parties resolve their disputes wisely. Negotiation's goal is not necessarily to resolve the dispute at hand, but the negotiations carried out can give birth to an arrangement that can prevent a worse situation from occurring or can also defuse a situation that can lead to a more serious dispute. The weakness of negotiations is that negotiations can only take place if the parties are willing to negotiate, but often the parties to the dispute, especially those involved in serious disputes, are reluctant to negotiate and often withdraw their diplomatic representatives.

b) Good Services (Good Offices)

Good services are one way of resolving disputes that involve intervention from third parties who offer good services. This procedure can be chosen by either party to the dispute or both.[93] The third party intervention is to try to bring the disputing parties closer so that they can negotiate. In practice, third parties are not directly involved in the negotiations but only seek to meet the disputing parties and provide suggestions on the steps that the disputing parties need to take in resolving their disputes. Third parties can be individuals or individuals, countries or international organization. The role of the third

party is completed when the parties have negotiated successfully. An example of good services that have been carried out is when Switzerland, which is a neutral country, acts as protecting power or a protective state in an area where an armed conflict is occurring. France, which provided good services in the Vietnam war, had succeeded in bringing together Vietnam and the United States to negotiate to resolve the Vietnam war in 1973.

c) Mediation

Mediation is one of the international dispute resolutions that also uses the role of a third party, but in contrast to good services, the role of third parties in mediation is more active because third parties are directly involved in negotiations between the disputing parties and even the mediator can be the leader of negotiations between the parties. who are in dispute. Mediation may be offered or requested by the parties to the dispute. The disputing parties can use proposals from the mediator. The proposal given by the mediator can come from legal principles or principles outside the law whose aim is that the parties can compromise to resolve the dispute without any coercion to accept the proposal submitted by the mediator. The mediator is obliged to keep the parties to the dispute confidential. As in good services, mediators can be individuals, countries or international organizations. Countries that become third parties can use their influence so that the disputing countries make mutual concessions in order to reach a settlement. Basically, it is very difficult to differentiate between goodwill and mediation procedures because they both have something in common. The equation is good services or mediation using the services of a third party or intervention from a third party, intervention by a third party does not give any obligation to the disputing countries, the disputing party can reject the basic proposals for negotiations and the proposed dispute resolution formulation. by a third party and it is often the case that countries that provide good services act as mediators.

d) Questionnaire (Inquiry)

The method of resolving disputes using questionnaires was first carried out in 1899 at the Hague I Conference at the initiative of Emperor Nicholas I.[97]This method is a non-juridical dispute resolution that aims to collect the facts that caused the dispute. The inquiry procedure is the same as for good offices and mediation is facultative in its use and nature of the decision. Questionnaire aims to provide a solid basis for the course of a negotiation for that objective data is needed regarding the causes of the dispute. The data obtained can come directly from the disputing countries but with different versions from each other. For this purpose the collection and analysis of data is left to an international commission which will endeavor to arrive at a single version of the facts causing the dispute.

e) Conciliation

Conciliation is a method of resolving international disputes by an organ that has been previously formed or formed later on the agreement of the disputing parties after the birth of the disputed issue.Conciliation is a procedure regulated by the convention and is a mandatory procedure because states parties to a convention promise to submit their disputes to conciliation commissions. The conciliation commission is permanent which is formed immediately after the entry into force of the convention and its formation must be in accordance with the provisions contained in the convention. This commission consists of 5 members, namely 2 from each country in dispute and one representative from another country.

f) Settlement through the United Nations and Regional Organizations

Several international and regional organizations have the authority to settle international disputes. In this case, the United Nations which covers almost all fields in its activities has a major role in maintaining world security and peace. In accordance with Article 2 paragraph 3 of the United Nations Charter which states that each member of the United Nations must resolve international disputes peacefully in order to achieve international peace and security. The United Nations in resolving international disputes has established a system that recognizes the main role of major powers. The Charter then authorizes intervention to resolve disputes peacefully, both to the Security Council and the General Assembly although in principle the main responsibility rests with the Security Council. Article 33 of the United Nations Charter stipulates that one way of peaceful settlement of international disputes can be through regional arrangements and intervention from regional organizations and bodies. In addition, CHAPTER VII of the Charter also stipulates the same thing, in particular Article 52 which refers to the resolution of international disputes through regional arrangements and regional agencies. Regional arrangements are agreements made bilaterally or multilaterally where countries located in a certain region (region) agree to resolve disputes between them without involving other permanent institutions or regional organizations as international legal entities.

g) Arbitration (Arbitration)

Arbitration is a method of peaceful dispute resolution which is formulated in a decision of the arbitrators chosen by the disputing parties.[104]Arbitration has been known since Greek times and in the Middle Ages various political unions were formed within the framework of the Roman Empire. The first recognized modern arbitration was the Jay Treaty of 1794 between the United States and Britain regarding the establishment of three "Joint Mixed Commissions" to settle certain disputes that could not be resolved during.

h) Legal Settlement

Settlement of international disputes can be done by legal or judicial settlement, usually this settlement is taken if an agreement is not reached between the litigants after the settlement through diplomatic channels, but international law itself has never stated that there is a necessity for the disputing parties to take the diplomatic route. before submitting the dispute to a judicial settlement. This means that the disputing parties can submit the dispute to a judicial settlement without having to go through a series of previous diplomaticsettlements.

c. Violent International Dispute Resolution

Settlement of international disputes by violence occurs when an agreement is not reached between the disputing countries in the settlement of their disputes peacefully. So that to solve the problem, violent means are used that aim to benefit their own side. There are several ways to resolve international disputes violently in international law, namely:

1) Retortion (Retorsion)

Retort is an act of revenge carried out by a country against inappropriate actions from other countries, these actions are unfriendly acts and these acts of violence are not contrary to international law. Retort actions can be in the form of severing diplomatic relations, limiting the movements of diplomatic representatives of the opposing country, withdrawing the exequatur for the consuls of the opposing country, eliminating the privileges or privileges of citizens/companies belonging to the opposing country, closing the boundaries for traffic flows, and rejection of imported goods from the opposing country or the increase in import duties for the products of the opposing country.

2) Acts of Retaliation (Reprisals)

Retaliation is a method used by a country to obtain compensation from other countries as a result of the actions of the opponent who does not want to resolve it by peaceful means, then it is taken by taking retaliatory actions.
The basic difference between retaliation and retaliation is that retaliation includes actions, which in general can be regarded as illegal acts but in contrast to retaliation which is an act of retaliation that can be justified by the law of the treaty negotiations.

3) Peaceful Blockade (Pacific Blockade)

Peaceful blockades are usually carried out to force countries whose ports are blocked to comply with requests for compensation for losses suffered by the blockading country. Article 24 of the UN Charter states that a peaceful blockade is one of the actions that can be taken by the UN Security Council in carrying out its duties to restore and maintain international peace and security.The benefits of using blockades peacefully are that they are far less violent than war and blockades are flexible. Usually the use of a peaceful blockade is carried out by a strong maritime country to avoid the burden of war and the difficulties caused by war.

4) Intervention

Intervention is a way of resolving disputes between parties involved in a dispute. This intervention is carried out by a third party with the intention of resolving disputes between the parties involved in the dispute. This intervention is different from good offices, mediation and third party advice in seeking dispute resolution. This intervention aims to make the disputing parties take a peaceful settlement method or by accepting the conditions proposed by a third party.

5) War and Non War Armed Action

War is the last method taken by the disputing parties to subdue the opposing country and to impose the desired dispute resolution so that the opposing country has no other way but to comply. Karl Von Clausewitz (1780-1831) said that war is a struggle on a large scale intended by one party to subdue his opponent in order to fulfill his will.

3.2 Dispute Settlement According to the Law of the Sea 1982

Settlement of maritime law disputes prior to using the 1982 Law of the Sea Convention was carried out in the same way as other international dispute resolutions, namely through diplomatic dispute resolution mechanisms or through international judicial institutions such as the International Court of Justice or ICJ. Considering the complexity of issues concerning the sea, the international community is aware that the methods of resolving international disputes are generally not sufficient to deal with problems that occur in the sea area.

To deal with this matter, a dispute resolution system was created by the 1982 Law of the Sea Convention. Judging from the development of the international justice system, the mechanism of this Convention is the first that can direct participating countries to accept compulsory procedures.[126]. The existence of this Convention system makes the states parties to the Convention unable to delay their maritime law disputes by hiding behind the concept of state sovereignty because the principle of the Convention itself requires states parties to resolve their disputes through the Convention mechanism. The states party to the convention can leave the dispute unresolved only if the other party agrees with it, but if the other party does not agree, then the mechanism for coercing the Convention will apply.

a. Arbitration

Arbitration is governed by Annexes VII and VII of the 1982 Law of the Sea Convention. Arbitration according to Annex VII begins with the sending of a written note by one party to the other by stating the claim and the legal basis of the claim.[138]. Each country proposes four arbitrators with qualifications experience in maritime matters, competence and integrity.

Arbitration for each case consists of five members, each party to the dispute chooses one member and the other three members are nationals of third countries (unless otherwise determined by the parties concerned) elected with the consent of the parties. The parties to the dispute shall appoint a Chair of Arbitration from the three members. In the event that no consensus is reached, the Chairman or Senior Member of the Court of Law of the Sea will make an appointment. Unless the parties to the dispute agree otherwise, the Arbitration will establish its own procedures and guarantee that each party is given full opportunity to be heard and present their case.

b. Special Arbitration

The method of settlement with this special arbitration is by sending a written note to the other party. The memorandum must be accompanied by a statement of what is being claimed and the grounds for filing the claim. A list of experts for the four fields mentioned above will be formed based on the appointment of experts by each member country of the convention who can appoint two people for each of the fields mentioned above who have legal, scientific or technical capabilities and other fields. above and who are generally known and have a high reputation in their vocational and integrity[151]. Special Arbitration consists of five members, each party chooses two people, preferably from a list of available experts, while the fifth member is usually taken from a third citizen who will be the Chair of the Special Arbitration and is elected by the parties concerned. If this fails, the appointment is made by the Secretary-General of the United Nations[152].

c. International Tribunal for the Law of the Sea

The statutes of the International Tribunal for the Law of the Sea or also known as the International Tribunal for the Law of the Sea (ITLOS) are contained in Annex VI of the 1982 Law of the Sea Convention with provisions on organization, competence and procedures and includes the Seabed Dispute Chamber (Sea -Bed Disputes Chamber).

d. International Court of Justice

States parties to the 1982 Law of the Sea Convention can take their disputes to the International Court of Justice or the ICJ. However, international organizations that are parties to the Convention cannot elect the International Court of Justice because according to its Statute, the Court only has jurisdiction to try states.

3.3 Senkaku Islands Dispute Resolution Efforts

As explained in the previous chapter regarding international dispute resolution, it is known that there are several ways that can be taken in resolving the Senkaku Islands dispute between Japan and China. .

a. Dispute Resolution Through Diplomatic Paths

1) Negotiation
   Negotiation is the easiest way to resolve territorial disputes with neighboring countries. For example, in the past, China succeeded in establishing delimitation of boundaries with Russia and India. The Kingdom of Denmark and Germany succeeded in completing the delimitation of their boundaries with an agreement based on the ICJ award in 1969. Mutual transfer of territory can provide a transfer of sovereignty, negotiation is also one of the most convenient ways of resolving disputes for both countries.
2) Mediation
   Mediation is a way of resolving the continuation of negotiations, the difference is in the participation of third parties. As previously explained, in mediation there are mediators who act actively in seeking and proposing dispute resolution to the disputing parties. The disadvantage of mediation is that as a result of mediation not all problems can be resolved, it is not uncommon for failure to resolve disputes to be

unavoidable.

3) Conciliation

Conciliation is almost similar to mediation, the difference is that the role of third parties is more semi-judicial in evaluating factual and legal issues. In other words, conciliation places third party intervention on a more formal basis and institutionalizes the mediation process in contrast to arbitration, the outcome of conciliation is not binding on the parties.

b. Investigation

Under Article 50 of the ICJ Statute, the principle of inquiry allows the parties to a dispute to establish an independent body to determine the facts relating to the dispute.

3.4 Senkaku Islands Dispute Resolution Solution

The settlement of the dispute over the Senkaku Islands, both through diplomatic and legal channels, is considered unable to resolve the ongoing dispute. The most possible and appropriate solution that can be taken by Japan and China in resolving their dispute is the Joint Development Agreement (JDA).

Joint Development Agreement is an agreement between two countries to develop, so that they can share together in agreed proportions based on cooperation between countries and national measures, offshore oil and gas in the defined zone of the seabed and subsea soil of the continental shelf where one or both participating countries are entitled under international law.[189]

4. Conclusion

The Senkaku Islands dispute between Japan and China has been going on for a long time. The dispute between Asia's two largest economic powers is a dispute over the islands in the waters of the East China Sea. Both countries claim ownership of the islands where Japan claims the Senkaku Islands were originally a terra nullius territory and then owned by Japan since its official annexation in 1895, while China claims that the Senkaku Islands are part of China's territory since the Ming and Qing dynasties. can be proven by historical evidence, therefore the Japanese claim that the Senkaku Islands are terra nullius cannot be justified. Basically this dispute is a territorial dispute but the main cause lies in the potential for oil and gas reserves and fisheries potential around the waters of the Senkaku Islands. This dispute has caused strained diplomatic relations between the two countries and recently the development of the dispute has increasingly worried the international community. International law has governed state sovereignty since the Peace Treaty of Westphalia which ended the Thirty Years' War in 1648 which gave birth to the concept of the modern state. According to international law, state sovereignty over territory is divided into three parts, namely land, sea and air above it. State sovereignty in the sea area is regulated in the 1982 Law of the Sea Convention which divides the sea area as follows, namely inland waters, territorial seas, additional zones.

Settlement of international disputes is regulated in the United Nations Charter which obliges states to settle disputes peacefully. This is a consequence of Article 2 Paragraph 4 of the United Nations Charter which prohibits states from using violence in resolving their disputes. Articles 1, 2 and 33 of the United Nations Charter regulate the provisions on how to settle disputes peacefully which has become universal international law. However, in practice the state is given full authority in determining the ways of resolving disputes as long as they are resolved peacefully. Settlement of international disputes according to the 1982 Law of the Sea Convention regulates how to resolve international disputes either through diplomatic channels or through international judicial institutions as provided by the Convention.

Settlement of disputes over the Senkaku Islands according to international law can be pursued through diplomatic channels such as negotiation, mediation, investigation, conciliation or through laws such as the International Court of Justice and the International Tribunal for the Law of the Sea as regulated in the United Nations Charter and the 1982 Law of the Sea Convention. above, there is a method for resolving the dispute over the Senkaku Islands which is considered more effective and appropriate, namely the Joint Development Agreement (JDA) in the form of a joint development agreement to exploit mineral resources in the disputed area.

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