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by Muhammad Nur Rifqi Amirullah Dkk

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The Role of UNCLOS as the Basis for Marine International Law in Settling the South China Sea Dispute between China and ASEAN Countries

Arqam Muhammad Amrullah [1], Fatimah Nuraini [2], Muhammmad Rafi Abdussalam [3], Vensky Ghaniiyyu Putri Permana [4], Muhammad Nur Rifqi Amirullah [5]
Faculty of Law, International Program for Law and Sharia
Universitas Muhammadiyah Yogyakarta
Email[1]: arqam.muhamad.law19@mail.umy.ac.id
Email[2] : Fatimah.nuraini.2016@law.umy.ac.id
Email[3] : rafiabdussalam@gmail.com
Email[4] : vensky.g.law19@mail.umy.ac.id
Email[5] : m.nur.law19@mail.umy.ac.id

Abstract

The sea is one of the areas that has the potential of abundant natural resources that have a large economic power. Therefore, many countries make use of the potential of these marine natural resources as their main focus to increase national income (GDP). Not infrequently this creates a conflict of interest between countries. Conflicts that usually occur are sea territorial disputes between countries. Countries with sea territorial borders directly bordering other sea territorial boundaries will have a greater potential for conflict. China is an example. The South China Sea territorial area is directly adjacent to several ASEAN countries. These conditions created several conflicts between China and several ASEAN countries. One of them is the conflict dispute over the South China Sea territorial boundary between China and several ASEAN countries. All countries involved in this dispute conflict use international legal references as a legal basis to strengthen their respective justification opinions. China is accused of having harmed several ASEAN countries for violating international law by taking action against UNCLOS in setting boundaries for the territorial territories of the South China Sea. Meanwhile, China made a defense by declaring that it had complied with the existing international law in setting the territorial boundaries of its sea. As the basis of international maritime law governing the boundaries of the Exclusive Economic Zone (EEZ), UNCLOS has an important role in resolving this dispute conflict. Therefore, the position of UNCLOS in international law is an interesting topic to discuss. Referring to this, in this paper the author will discuss more specifically about the role of UNCLOS as the basis for international maritime law in the settlement of the South China sea dispute and.

Keywords: International Law, South China Sea Dispute, UNCLOS.

Abstrak

Laut merupakan salah satu wilayah yang memiliki potensi sumber daya alam yang sangat melimpah sehingga memiliki daya ekonomi yang besar. Oleh karena itu, banyak negara menjadikan pendayagunaan potensi sumber daya alam laut ini sebagai fokus utamanya untuk meningkatkan pendapatan nasional (GDP). Tidak jarang hal tersebut menimbulkan konflik kepentingan antar negara. Konflik yang biasanya terjadi adalah sengketa wilayah territorial laut antar negara. Negara yang wilayah territorial lautnya berbatasan langsung dengan batas territorial laut negara lain akan memiliki

Potensi konflik yang lebih besar. China merupakan salah satu contohnya. Wilayah territorial laut Cina Selatan berbatasan langsung dengan beberapa negara ASEAN. Kondisi tersebut menciptakan beberapa konflik antara China dengan beberapa negara ASEAN tersebut. Salah satunya adalah konflik persengketaan batas territorial laut China Selatan antara China dan beberapa Negara ASEAN. Semua negara yang terlibat dalam konflik persengketaan ini menggunakan acuan hukum internasional sebagai dasar hukum untuk menguatkan opini pembenaran mereka masinging-masing. China dituduh telah merugikan beberapa negara ASEAN karena telah melakukan pelanggaran hukum internasional dengan melakukan tindakan melawan UNCLOS dalam menetapkan batas wilayah territorial laut China Selatan. Sementara itu, China melakukan pembelaan dengan menyatakan telah mematuhi aturan hukum internasional yang ada dalam menetapkan batas wilayah territorial lautnya. Sebagai dasar hukum laut internasional yang mengatur batasan Zona Ekonomi Eksklusif (ZEE), UNCLOS memiliki peranan penting dalam penyelesaian konflik persengketaan ini. Oleh karena itu, kedudukan UNCLOS dalam hukum internasional menjadi topik yang menarik untuk dibahas. Mengacu pada hal tersebut, dalam paper ini penulis akan membahas lebih spesifik tentang peran UNCLOS sebagai dasar hukum laut internasional dalam penyelesaian sengketa laut China Selatan.
Kata Kunci: Hukum Internasional, Sengketa Laut China Selatan, UNCLOS.

I. Introduction

South China Sea disputes between China and other ASEAN countries are important disputes fought over in the 21st century (Pete Cobus, 2016). China and other ASEAN countries such as Brunei, Malaysia, Vietnam, the Philippines, and Taiwan mutually claim that the South China Sea is still within its maritime territorial boundaries, not only that, they enrich each other's arguments by revealing facts from the historical side by saying that the country - countries they have sailed in the South China Sea for centuries ago. The conflict is not only about the territorial boundaries of the South China Sea. In the South China Sea there are natural resources that are so rich that many countries are so dependent on the natural resources of the South China Sea, especially regarding their abundant oil and natural gas.

China still feels superior in maintaining its supremacy in mastering the South China Sea, China claims to have a nine-dash line that is their reference for having a complete South China Sea. Nine-dash line is a line that stretches as far as

2,000 km from mainland China to several hundred kilometers from the Philippines, Malaysia and Vietnam. (Liu Zhen, 2016) Nine Dash Line initially appeared on the map of China as 11 Dash Line in 1947. At that time, the navy of the People's Republic of China controlled several islands in the South China Sea that had been occupied by Japan during the Second World War. After the People's Republic of China was founded in 1949 and Kuomintang troops fled to Taiwan, the communist government declared itself the sole legitimate representative of China and inherited all maritime claims in the region (Muhammad Syahrianto, 2020) But according to the United Nations, the nine-dash line cannot be used as a reference or reference for China in order to control the South China Sea, because the country's Exclusive Economic Zone (EEZ) is 200 miles drawn from the country's ecoastline, while the nine-dash line has claims covering an area of 2,000 km, of course this contradicts the contents of the UNCLOS III agreement.

ASEAN countries that did not accept unilateral claims from China also reported to the United Nations for these unilateral claims, and in the end the UN forced China to comply with the territorial limits or EEZ that had been agreed in UNCLOS. China thinks that what the UN does is only cornered, so that the South China Sea can be claimed and controlled by countries that need the presence of the South China Sea. The UN feels China does not comply with regulations because the nine-dash line which is the legal basis for China is a claim itself that is not in accordance with the UNCLOS agreement.

The United Nations has an important role in resolving international disputes, that is the oldest in the Charter of Nations in Article 1 Paragraph (1), which states that:

"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace ... and to bring about by peaceful means, and in conformity with the principles of justice and international law , adjustment or settlement of international disputes or situations which might lead to a breach of peace. "

The role and function of the United Nations itself is to maintain security by taking effective joint actions to overcome and eliminate various threats; and resolve it with a peaceful path that is consistent with the principles of international law.And in Article 2 paragraph (3), it states that: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, are not endangered". Article 2 paragraph (3) explains the obligations in pursuing a peace agreement. First, that states which are members of the nations' nations must resolve the dispute must be carried out in a peaceful manner. Secondly, the other obligation that countries in resolving international conflicts must refrain from acts of violence and the use of weapons against other countries. This is contained in the Charter Article 2 paragraph (4), which reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purpose of the United Nations". (Huala Adolf; 15, 2004)

The existence of a solution to problems in international relations is very necessary, so that the solution of the problem can be taken a middle way and not cause divisions, not least the problem of the South China Sea between China and

other ASEAN countries. There are several efforts that can be made to resolve conflicts in international relations:

1. Arbitration,
2. Negotiations,
3. Mediation,
4. Conciliation,
5. Judicial Settlement.

Settlement of international relations disputes can also be carried out through legal or non-legal / negotiation channels. ASEAN countries and China should be able to solve the problem, both through legal and non-legal channels, because UNCLOS has determined the limits of a country's International Sea Law.

II. RESEARCH QUESTION

1. What is the position of UNCLOS in International Law?
2. How is UNCLOS's implementation of South China Sea dispute resolution?

III. RESEARCH METHOD

A. The Kind of Research

The kind of writing used in this paper writing is normative type of legal research. (Soekanto and Mamudji, 2007) This paper contains reviews, summaries, and thought authors about several library resources (articles, books, information from the Internet, etc.). A Paper publication of a national and International journal the topic of South China Sea disputes, UNCLOS 1982 and other topics that will be discussed in this paper.

The legal approach and the liquid case approach are done in this paper. This is due to, because this paper uses the normative method of legal research. The legal approach that refers to the law is the approach that makes several laws and regulations as a reference in case resolution. Meanwhile, the case

approach is an approach by studying and studying cases that have occurred similar to the problems discussed and studying the case in a deeper. (Nasution, 2008)

B. Technique of Collecting Data

The techniques used by group members or writers in data collection begin with the search for a trusted journal on the South China Sea, United Nations Convention on the Law of the Sea (UNCLOS 1982), South China Sea disputes and other topics. Afterwards, the author collects relevant references. Soft-Copy edition references can be obtained from accessible internet sources such as Google Scholar and other sources.

After a reference search is relevant to the required data, then the group members understand and analyze the information data that has been gathered deeply. Afterwards, the group members filter information that has been gathered from sources, journals and references. Then, authors of the paper found the problem solving and introduction of the paper content of the figure that will be discussed. In addition, group members also evaluate or assess the correctness or eligibility of information that has been obtained from sources for reference to the issues to be discussed and to check what needs to be corrected. Sources used for reference in this paper are derived from reliable sources, as well as from Google Scholar, library, and other sources. The source used as a referral in this paper is books, articles, journals, and other trusted references, which can be used as references in this paper. (McConville and Chui, 2012)

C. Data Analysis Method

Based on this paper, the data presented will be analyzed systematically and legally. Analysis systematically and legally here is the research in this paper analyzed based on international law that applies. The data were analyze systematically through juridical qualitative approach. Systematically through evaluative, where the data was taken relating to the issues to be researched. (Ibrahim, 2006) The current International law concerns about cross-border issues across the country, territorial disputes in the sea, Law of the Sea, United Nation Convention Law of the Sea (UNCLOS 1982), and the Southern China Sea dispute case. Juridical thought here is related to the Convention, principle of law and rules relating to the discussion in this paper.

IV. RESULT AND DISCUSSION

A. The International Law Perspective on China's Claim

The historical and geographical basis is used by countries whose sea territories are in the South China Sea so that these territories become their territories. Countries in a dispute over the South China Sea region are China, the United States, and most ASEAN members. Specifically, the dispute refers to two islands of the Paracel and Spratly islands (Junef, 2018:222).

China is considered as the party that insists on controlling the South China Sea based on the potential access for oil and gas (Dobson and Fravel, 2017:258) and also fishing in the area (Zha, 2001:575). The foreign policy of China recognizing that energy and raw materials are very important sources for state income (Zweig, 2005:36).

Initially, the recognition of the South China Sea by the Chinese Government was followed up by forming a note verbal called "nine-dash line"

map that originated in 1947. The government enacted the map as an official document when it was submitted to the United Nations in 2009 (Gewirtz, 2016:10). The reason for the recognition of China's water sovereignty because 200 BC of traditional Chinese fishermen have explored the Paracel and Spratly Islands (Junef, 2018:220). The international agreement through UNCLOS 1982 occurred after 60 years of the establishment of the nine-dash line (U-line) 1947. According to China, it cannot advocate for the interests and unfairness for the historical right which is upheld by China (Buszynski, 2012:140).

China's claims for the entire South China Sea region are governed by two principles namely "effective occupation" and UNCLOS 1982. Since 1928, the Permanent Court of Arbitration assigned the "effective occupation" in which marine jurisdiction is determined on the condition that there are no interruptions (Buszynski, 2012:140).

According to Jones (1945) that the theory of determining borders can be categorized into four, namely:

1. Allocation;
2. Delimitation;
3. Demarcation; and
4. Administration (Jones, 1945).

Simply put, the border diplomacy process can be done with the process of allocation and delimitation (Arifin, 2009:190).

Allocation is the scope of the territory of a country, where the area borders with neighboring countries. The territory of a country is regulated based on international law. As a subject of international law, the 1993

Montevideo Convention regulates the elements of the state, as stated in Article 1 below:

1. Permanent residents;
2. Internationally recognized boundary;
3. Government;
4. Capacity for international relations (David, 1983:81-84).

In this context, it does not lie in the area of a country, but its consistency as a sovereign state (Shaw, 2003:141).

Delimitation is the process of determining the boundaries of national borders with neighboring countries in overlapping areas (Arifin, 2009:194). In general, according to Prof. Hasjim Djalal that the majority of countries in the world had ratified UNCLOS 1982 and made it a key document as a legal frame for maritime boundary delimitation (Lestari, 2010:39). The determination of this boundary line adopts the principle of *uti possidetis juris* in determining land borders and sea law regimes in determining sea boundaries (Lestari, 2010:41).

Historically, *uti possidetis juris* originated from Roman law which meant the territory or boundaries of a country followed the territory or boundaries of the powers of the previous colonizers or their predecessors (Ghebrewebet, 2006). Determination of power limits with the principle of *uti possidetis juris* becomes a customary international law that serves to preserve the boundaries of emerging as state colonies (Lestari, 2010:39).

The main purpose of using this principle is to prevent conflicts over competing borders so that they become part of the International Customary

Law (Jawahir and Pranoto, 2006:183). The application of this principle is no longer an acknowledgment of an area based on *terra nullis* (territory belonging to no state) (Hensel, Allison, and Khanani, 2004:3). Territorial boundaries or jurisdictional boundaries are determined by the countries negotiating in the delimitation process. If this is not successful, the parties will use the dispute resolution mechanism regulated in international law such as the arbitration process or the intermediary of the International Court of Justice (Arifin, 2009:195).

The second principle governing China's claims against the South China Sea is UNCLOS 1982. Firstly, there are things to remember in using UNCLOS that the arbitration tribunal cannot decide on sovereignty issues except through the role of the International Court of Justice. Requirements to be able to adjudicate regarding sovereignty in the South China Sea if there is an agreement between the parties. Secondly, Part XV of UNCLOS provides "compulsory procedures" where the parties must agree to settle the case in a "binding way". China invokes an agreement with the Philippines excluding UNCLOS's compulsory legal procedure, while this statement is rejected by the arbitration tribunal (Gewirtz, L, 2016:5).

China adopted Article 298 of UNCLOS to reject the application of UNCLOS rules in dispute resolution in the South China Sea. Based on Article 298 on Optional Exceptions that a State may declare in writing that it does not accept the procedures provided for articles 15, 74 and 83 relating to disputes: sea boundary delimitations, or those involving historic bays or titles (Hong, 2016:359).

Article 121 of UNCLOS 1982 regarding "Regime of Islands" is used as a legal basis for disputes that occur in the South China Sea (Zuxing, 2016:5). This article is to define "island" (paragraph 1), then determine what maritime rights are come with sovereignty over "the island" (paragraph 2), and then state exceptions to those maritime rights only for "stone" (paragraph 3). To decide whether the island is the territorial sea, the contagious zone, the exclusive economic zone and the continental shelf of an island, it must meet the definition of "island" in part 1 where the "area" is naturally formed soil, surrounded by water, which is above water at high tide. This is an exception in section 3 because even though it meets the definition "island," but it is only "rock". The category in section 3 is the stone that cannot be a human residence or become their economic source, so it will not have an exclusive economic zone or continental shelf (Gewirtz, 2016:8).

The continental shelf concept regulated by UNCLOS 1982 is different from the 1958 Geneva Convention on the continental shelf that sets the width of the continental shelf based on depth criteria or the ability to exploit (Beckman, 2014). In other words, there is no limit as long as a country is capable of exploitation, while the Convention UNCLOS 1982 based its provisions on various criteria (Many, 2017), namely:

1. The distance of up to 200 nautical miles if the outer edge of the continent does not reach a distance of 200 nautical miles;
2. Natural prolongation of the land area under the sea to the outer edge of the continent whose width must not exceed 350 nautical miles measured from the bottom of the Territorial Sea if outside the

200 nautical miles there is still a seabed area which is a natural continuation of the land area and if it meets the sedimentation depth criteria set out in the convention;

3. May not exceed 100 nautical miles from 2500 meters in depth line (isobath) (Malanczuk, 2002:183).

If in the 1958 Geneva Sea Convention the Continental Shelf is included in the Exclusive Economic Zone regime (EEZ), but in the 1982 UNCLOS, the Continental Shelf is regulated in a separate Chapter, namely Chapter VI, starting from Article 76 to Article 85. This relates to the acceptance of natural sustainability criteria the land area to the outer edges of the continental shelf, which allows the width of the continental shelf to exceed the width of the Exclusive Economic Zone (Gewirtz, L, 2016:5).

B. UNCLOS Implementation in The Settlement of The South China Sea Dispute

In resolving disputes under the law of the South China Sea, there is still much controversy from many ASEAN countries such as Indonesia, the Philippines, Malaysia, Vietnam, Brunei Darussalam, China and other countries bordering the South China Sea. The South China Sea is a consensus of the United Nations Convention on Sea Law or UNCLOS. Each country has an obligation to resolve its dispute peacefully as stated in UNCLOS III of 1982 article 279.

Under the United Nations Convention on the Law of the Sea in 1982, the freedom of disputing countries to resolve their problems is strengthened in article 280. This article requires the disputed countries to settle their disputes

peacefully through channels agreed by both parties. There is no part in this article that results in the taking or damage of the rights of each disputing country to choose the peaceful means used to resolve the problem and the time limit in accordance with the agreement between the disputing countries.

In Article 281 paragraph (1) and (2) there are rules regarding the procedure for dispute resolution contained in Article 281 paragraph (1) and (2). In paragraph 1 it is stated that the countries which vote are free to choose the path of solving their respective problems following the agreed agreement. If in solving the problem, there is no clear meeting point. So, in this case, the problem was resolved through judicial channels and further procedures outlined in UNCLOS III 1982. Article 281 paragraph 2 emphasizes the deadline for solving the problem. If the parties concerned have agreed to the agreed time limit, the provisions contained in paragraph 1 only apply if the agreed time expires.

Following Article 287 of UNCLOS 1982, there are alternative dispute settlement procedures and procedures for States relating to maritime territories or zones. There are two alternative forms of dispute resolution in which countries are given the freedom to choose which form of resolution they deem most appropriate in the disputes faced (Kantjai, 2019). Alternative forms of dispute resolution can be through a peaceful settlement (non-litigation) or mandatory procedures (litigation).

The settlement of problems through non-litigation channels such as negotiation, mediation, conciliation, and arbitration is contained in article 280 of UNCLOS III. One of the organizations that deal with arbitration is the

Permanent Court of Arbitration (PCA). Decisions issued by the Permanent Court of Arbitration (PCA) have the same power, final and appeal, with the International Court's Decision. If no agreement is reached in the peaceful resolution of disputes, the parties can use mandatory procedures that produce binding decisions. This dispute resolution is called litigation. There are four forums established by the Nation of the Nation-Nation (UN) which can be selected by the disputing countries in solving their problems as contained in article 287 paragraph 1 of UNCLOS 1982 namely the International Court of the Law of the Sea (ITLOS) established under Annex VI, International The Court of Justice (ICJ), the Arbitral Tribunal established by Annex VII, and the Special Arbitral Tribunal constituted following Annex VIII which has one or more of the categories of disputes specified therein.

The International Court of Justice (ICJ) is the main judicial body established on June 26, 1945. This body must adjudicate disputes relating to international law questions, the International Convention treaty, violations of international law, the PPB Charter, and compensation for violations of obligations under international law. The International Tribunal for the Law of the Sea (ITLOS) is an independent judicial body established by the United Nations to adjudicate the maritime tribunal. The UN also formed a Permanent Court of Arbitration (PCA). PCA is not a court of law for an intergovernmental organization that provides services in international securities settlement.

Geographically, the South China Sea region is close to many ASEAN countries namely, China, Vietnam, Cambodia, Thailand, Malaysia, Singapore,

Indonesia, Brunei Darussalam, the Philippines, and Laos, and the Macau dependent region (Darajati, 2018). Article 3 of UNCLOS III of 1982 asserts that each country has the right to determine its territorial sea width measured from the baseline to a limit that does not exceed 12 nautical miles. The northern part of Indonesia is directly bordered by the southern China Sea. Then Indonesia issued Law No. 17 of 1985 which was adopted under UNCLOS III of 1982 Article 3 that the territorial sea boundaries of countries bordering the South China Sea have an Exclusive Economic Zone (EEZ) along 200 nautical miles calculated from the base where the width of the territorial sea where freedom of shipping applies (Farhana, 2016).

The South China Sea is a source of territorial disputes, both bilateral and multilateral (Luhulima, 2017). In the case of Spratly island disputes claimed by six countries (China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei), and the Paracel Islands claimed by three countries (China, Taiwan, and Vietnam) (Jasuli, 2013). The Spratly Islands are claimed by many countries because the Spratly islands have oil and natural gas reserves of 17.7 billion tons which are greater than oil reserves in Kuwait (Ningsih, 2016).

China claims most of the Spratly region was part of the Chinese nation 2,000 years ago. In 1947, China issued a map detailing two series of islands (Spratly and Paracel) that entered their territory. Vietnam refuted the claim because until 1940 China had never declared that the island was his. That way Vietnam also said they controlled Paracel and Spratly since the 17th century. The Philippines also claimed that the Spratly islands were included in its territorial territory due to geographical proximity. Likewise with Malaysia and

Brunei, they claim that parts of the South China Sea belong to their exclusive economic zone, as stipulated in the 1982 UN Convention on the Law of the Sea.

In resolving the Spratly Island dispute, the countries concerned chose to use a peaceful route with bilateral and multilateral laws. One settlement through bilateral negotiations such as China and the Philippines met to explore and develop the Spratly region. In 2005, China-Vietnam-Philippines held multilateral negotiations and they signed a Memorandum of Understanding in the field of energy exploration and agreed to stop the claim of ownership of the Spratly Islands. Besides, the state also resolves disputes through abrasives. Arbitration is a method that is approved outside the court, based on an arbitration agreement made by the parties, and is carried out by an arbitrator who is chosen and given the authority to make decisions (Soemartono, 2006: 2). This method is a quick step to decide on a final and appeal decision.

On January 22, 2013, the Philippines brought the South China Sea dispute with China to the Permanent Arbitration Court (PCA) (Silviani, 2019). Several lawsuits filed by the Philippines in the Permanent Arbitration Court (PCA) based on Memorial of the Philippines Volume III Annexes including:

1. Declares that China's maritime claims in the South China Sea based on its so-called "nine-dash line" are contrary to UNCLOS and invalid;
2. Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef have submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at

high tide, which qualify as "rocks" under Article 121(3) of the Convention, and generate an entitlement only to a Territorial Sea no broader than 12 M; and China has unlawfully claimed maritime entitlements beyond 12 M from these features;

3. China has unlawfully prevented Philippine vessels from exploiting the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef;
4. The Philippines is entitled under UNCLOS to a 12M Territorial Sea, a 200M Exclusive Economic Zone, and a Continental Shelf under Parts II, V, and VI of UNCLOS, measured from its archipelagic baselines.

Based on the South China Sea Arbitration Award which is an international court decision on July 12, 2016, the Permanent Court of Arbitration (PCA) issued a decision related to the dispute over the South China Sea between the Philippines and China, including:

1. Based on the 1982 Law of the Sea Law the concept of the nine-dash line is declared to have no legal basis so that China has no historical rights to the South China Sea;
2. Nothing in the Spratly Islands gives China the right to an Exclusive Economic Zone;
3. China's actions have exacerbated conflicts with the Philippines because the Tribunal found that China has aggravated and extended the disputes between the Parties through its dredging, artificial island-building, and construction activities; etc.

Decisions issued by the Permanent Arbitration Court (PCA) are appeal and final. In the development of international justice mechanisms to date there have been several hardships through the International Court of Justice (ICJ), a judiciary formed based on certain international agreements, ad hoc judicial bodies, and other judicial bodies (Pramudianto. 2017). That way, every issue issued by judges in international justice becomes a consideration and source of law that must be obeyed in the development of international law, especially for the countries in dispute in deciding their problems. This is reinforced in Article 31 which is under Article 59 of the International Court of Justice that for disputing countries, the decisions of judges and the teachings issued by legal experts in various countries can be used as a compliment and basis for determining decisions and legal regulations.

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