

**THE SOUTH CHINA SEA ARBITRATION: IMPLICATION TOWARDS
INDONESIAN EXCLUSIVE ECONOMIC ZONE**

A BACHELOR DEGREE THESIS



By:

ENDAH ELLIANA SINTA

Student Number: 13410143

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FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

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CHAPTER I

INTRODUCTION

A. Context of Study

In geographical terms, the South China Sea covers an area of sea around 3.5 million square kilometres, semi-enclosed by Brunei, China, Malaysia, the Philippines, and Vietnam.¹ It is dotted by numerous islands, islets, shoals, cays, reefs, and rocks that, in the area surrounded by China's nine-dash line, which are conveniently gathered into a group of island. Four group of islands, including more than two hundred islands, islets, reefs, shoals, and rocks, are pertinent to the present context, known to both Chinese and foreign sources as the Xisha, or Paracel, Islands.²

Recently, the political issue in the South China Sea reached a high tension. Even though, Indonesia is not involved directly into the conflict in terms of ownership of the territorial sea area in South China Sea but the Indonesian area which is located near the South China Sea have a high possibility to raise tension as well. If we look deeper, South China Sea is actually a semi-enclosed and full of potential sea which becomes the busiest sea lanes besides Suez Channel.³ The territorial dispute over South China Sea began since the world war II, in 1945 China issued eleven dashed-line before it was modified into nine dashed-line in

¹ Zhiguo Gao and Bing Bing Jia. 2013." The Nine-Dash Line In the South China Sea: History, Status, and Implication". *American Journal of International Law*. Vol.98. p.8

² *Ibid.*

³ Direktorat Jendral Kerjasama ASEAN Kementerian Luar Negeri RI. 2013. *Special Report: Pengelolaan konflik Laut China Selatan*. ASEAN Community Magazine. first Edition/January-March. p. 8

October 1949 and triggered the conflict with Vietnam, Brunei, Malaysia, Philippines Japan, and Taiwan.⁴ The Chinese claims are based on the norms of the customary international law of the sea and justifies it as a claim through what they called as historic rights to the sea areas covered by the nine-dash line.⁵

Moreover, other states are also involved in these waters, there are; United States, India, Japan, and Australia. These countries only showed their power, effort, and existence only as a supporting role in the wake of the conflicted state who claim the South China Sea.⁶ The security and military stakes are high in the South China Sea.⁷ Association of South East Asian Nations (ASEAN) as a regional organization has facilitated conflicts between states which include the member of the ASEAN itself more than once to avoid the military disputes between states.⁸ It is known that in the international law there is a basic norm which should uphold peace above anything else. In 2002, ASEAN and China together signed a Declaration on Conduct (DOC) of Parties in the South China Sea in regard of their desire to settle the conflict in accordance with international law by adopting “a Code of Conduct (COC) in the South China Sea.”⁹

⁴ Rafał Tarnogórski. 2016. “South China Sea Arbitration: Roots and Consequences” *Journal of The Polish Institute of International*, 43(893), p. 1. <https://www.pism.pl/publications/bulletin/no-43-893> accessed on 18 April 2017

⁵ *Ibid*

⁶ Davit Scott. 2012. “Conflict Irresolution ion South China Sea”. *Journal of Asian Survey* 52, No.6. page 119. <http://e-resources.perpusnas.go.id:2071/docview/1266426981?pq-origsite=summon> accessed on 10 March 2017

⁷ Chris Rahman and Martin Tsamenyi, 2010. “A Strategic Perspective on Security and Naval Issues in the South China Sea”. *Journal of Ocean Development & International Law* Vol.41, No.4, p. 315

⁸ David Scott. *Loc,cit.*

⁹ Rafal Tarnogorski. *Loc,cit.*

While Indonesia become the head of ASEAN in 2011, Indonesia gave a clear point to maintain the stable situation with the establishment of regional COC, a guidelines for the Implementation of the DOC 2002 for the Parties in the south China Sea which agreed and signed by ASEAN Representative and China.¹⁰ This guidelines consider as a big breakthrough for ASEAN which prioritize the principle of peaceful dispute resolution.¹¹ Unfortunately the result over the years are not significant, otherwise it just increased tension between states which participate in south China Conflict. The Guidelines considered in lack of details and not comprehensive, therefore Philippines was the most vocal critics at that time.¹²

Therefore, Other states in the region are looking for the protection from United Nation Convention on Law of the Sea (UNCLOS) 1982 regarding the territorial sovereignty and delimitation of the of the maritime areas particularly Malaysia and Vietnam.¹³ China asserts that they are entitled to more than the 200 nautical miles from its shores. It's claim overlaps with the EEZ of Vietnam, the Philippines, Malaysia and Brunei. The reason of the states to seek protection under UNCLOS is because China's position as a state who ratified UNCLOS on June 1997 are bound by the UNCLOS regulation itself.¹⁴ Thus, The tribunal noted that China's action on its obligation as a member of UNCLOS were contrary and have a fundamentally different understanding of the respective right under

¹⁰ Direktorat Jendral Kerjasama ASEAN Kementerian Luar Negeri RI. *Loc, cit.*

¹¹ *Ibid*

¹² Storey Ian and Cheng yi-lin. 2016. *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions*. Singapore : ISEAS Publishing. p. 139

¹³ Rafal Tarnogorski. *Op,cit.* p. 2

¹⁴ *Ibid*

UNCLOS in south China Sea water.¹⁵ This kind of misunderstanding is considered as the root of the problem which occurred in the South China Sea.¹⁶

The Philippines, who once again raised more voice about the case in 2013 after China seized control of Scarborough Shoal, welcomed the ruling on 12th of July 2016 after The Permanent Court of Arbitration in Den Haag gave the Decision on arbitration between China and Philippines. It determined that The Nine dash line established by China is not based on UNCLOS.¹⁷ Philippines submitted 14 arbitration clause,¹⁸ the result of the arbitration surely gave impact and reaction to not only either parties or the states that have claimed but also to the country which are located side to side with the conflicted area including Indonesia.

Moreover, Indonesia also had an incident with China earlier regarding an exclusive economic zone (EEZ) generated from the Natuna Islands, overlapping China's so-called 'nine-dash-line claim' in the South China Sea. In hence of Chinese trawler lowering its nets in waters at coordinates who placed it within Indonesia's Exclusive Economic Zone (EEZ) north of the Natuna Islands. The Indonesian ship named KP HIU 101, was operating as part of Indonesia's Fisheries Monitoring duty in charged with enforcing the country's jurisdiction.¹⁹

¹⁵ Robert Beckman. *The Tribunal Awards: What it means*. ASEAN Focus. Special Issue. July 2016, p. 5

¹⁶ *Ibid*

¹⁷ Press Release Permanent Court of Arbitration. *The South China Sea Arbitration: The Republic of Philippines v. The People of Republic China*, 12 July 2016

¹⁸ *Ibid*

¹⁹ Donald E. Wetherbee. 2012. *Re-Assessing Indonesia's Role in the South China Sea*. Researchers at ISEAS, Yusof Ishak Institute.

As we know, Indonesia is geographically located in a strategic area near the South China Sea which connects Asia, Australia, and even America and two oceans, Pacific and Indian. Therefore, any other state located near the Indonesian territory will get benefits too. In this case any state who owns the South China Sea will also get benefit to be located near the business boulevard, Indonesia. China as one of the most economically developed country who tries to enhance their business management including their business in Indonesia, surely will never let South China sea fall into other state without any effort. In fact, China clearly reject the judgment by the international tribunal in Hague and uphold that they own 90% of South China Sea Territory.²⁰

The result of the arbitration which stated that the nine dash line is not according with UNCLOS gave a major impact to state nearby.²¹ Indonesian government which in the last several years had a conflict with China related with sovereign right in Exclusive Economic zone. Thus, the Indonesian Government's response regarding the result of South China Sea Arbitration is essential in order to keep stability and Indonesia's long-term interest.

²⁰<https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> accessed on 12 March 2017

²¹ Tom Allard and Bernadette Christina Munthe. *Asserting sovereignty, Indonesia renames part of South China Sea*. The Reuters 14 July 2017. <https://www.reuters.com/article/us-indonesia-politics-map/asserting-sovereignty-indonesia-renames-part-of-south-china-sea-idUSKBN19Z0YQ>

B. Problem Formulation

1. What are the implication of the Permanent Court of Arbitration's Decision on South China Sea towards the Indonesian Exclusive Economic Zone?
2. What should be done by the Indonesian Government as a response to the Permanent Court of Arbitration's Decision on South China Sea?

C. Research Objective

1. To Identify the Impacts of the Permanent Court of Arbitration's Decision on South China Sea towards the Indonesian Exclusive Economic Zone
2. To determine what can be done by the Indonesian Government as a response to the Permanent Court of Arbitration's Decision on the South China Sea.

D. Definition of Terms

Adolf in his book stated that Arbitration is one of the dispute settlement through the law method after the peaceful ways had already been exhausted and voluntary dispute submission into third party which considered as a neutral party, with the binding and final result decision to the conflicted party.²² In addition, the third party is an expertise of the subject matter and the conflicted party submit the arbitration clause.

The South China Sea is a sea of the western Pacific Ocean that connected to the Southeast Asian mainland which bordered by Brunei, Cambodia, China, Indonesia, Malaysia, the Philippines Singapore, Taiwan, Thailand and Vietnam.²³ South China Sea have an area of about 1,423,000 square miles (3,685,000 square km), with a mean depth of 3,976 feet (1,212 metres).

Based on Black's Law Dictionary, Sovereign is a state vested with independent and supreme authority and the ruler of an independent state which for the word sovereign itself contain the meaning of supreme dominion, authority of the rule, the supreme authority of an independent state, and the state itself.²⁴

²² Adolf, Huala. 2004. *Hukum Penyelesaian Sengketa Internasional*. Jakarta: Sinar Grafika. p 35

²³ <https://www.lowyinstitute.org/issues/south-china-sea> accessed on 1 October 2017

²⁴ Mahendra Putra Kurnia. 2011. *Hukum Kewilayahan Indonesia*. UB Press: Malang. p.

E. Theoretical Review

John Collier & Vaughan distinguished between dispute and conflict, dispute is : “a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter claim or denial by another.”²⁵ While conflict is a term from hostility between parties which frequently not focus.²⁶

According to John G. Merrills the subject of dispute can vary, ranging from disputes over a country's policy to border issues. Thus According on Timo Kivimäki in his book called War and Peace in South China stated that the major reason for the dispute is not being military security, but because the disputed area contain many important resources.²⁷ For the people of Southeast Asia, the dispute constitutes a major interest because of the majority of people live by the sea. So that this issue will automatically affects the populations economically and ecologically.²⁸

Moreover, the South China Sea in fact rich of any resources, especially on natural gas and fisheries. Thus, technically the fundamental issue in the South China Sea is over who has sovereignty over the islands and their adjacent waters

²⁵ John Collier and Vaughan Lowe. *The Settlement of Disputes in International Law*. Oxford University Press.

²⁶ Sefriani. 2014. *Hukum Internasional Suatu Pengantar*. Jakarta: Rajawali Press. p 322

²⁷ Timo Kivimäki. 2012. *War or Peace in the South China Sea?*, Copenhagen, Denmark: NIAS Press.

²⁸ Sacha Amri 2015. *An Analysis of the South China Sea Dispute: Focusing on the Assessment of the Impact of Possible Solutions on the Economies of the Region*. Master Thesis. New York, United States: City College of New York.

as well as sovereign rights and jurisdiction in the exclusive economic zone and continental shelf measured from the islands.²⁹

However, the provisions of UNCLOS on baselines, the regime of islands, low-tide elevations, the exclusive economic zone, the continental shelf, maritime boundary delimitation and dispute settlement are all applicable to the South China Sea. Since 2009 the ASEAN claimants have taken measures to clarify their claims and bring them into conformity with UNCLOS.³⁰ They maintain that under UNCLOS claims to the natural resources in and under the waters in the South China Sea can only be derived from claims to land features.³¹

China has clarified its claim to some extent, but it is still not clear to the ASEAN claimants whether China is making claims to the resources in the South China Sea based on its claim to sovereignty over the land features or whether it is claiming rights in all of the maritime areas inside the nine-dashed lines.³² Up to now, Indonesia has been an honest broker among the disputing neighboring states: China, Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. On June 23, 2014, Hunan Map, a Chinese publishing company had redrawn China's territorial boundary of the South China Sea from the former nine dash-lines and transformed it to the "ten dash-lines."³³

²⁹ *Ibid*

³⁰ Timi Kivimaki, *Op cit.*

³¹ Kevin A. Baumert. 2016. "The South China Sea Dispute and the Law of the Sea". *American Journal of International Law* Vol.110 No. 152

³² *Ibid*

³³ Ahn, Nguyen Thi Lan. *New Ten-Dashed Line Map Revealed China's Ambition*. Originally Published on Vietnam Plus on July 17, 2014. <http://southchinaseastudies.org/en/publications/vietnamesepublications/1094-new-ten-dashed-line-map-revealed-chinas-ambition> Accessed April 12, 2017

Basically, J.G Starke classified the dispute resolution mechanism into two categories³⁴ :

1. Methods of peaceful settlement, ie if the parties have agreed to find a friendly solution.
2. Forced or violent of settlement, where the solution used or imposed is by force.

First, the Dispute settlements with the peaceful methods stated on UN Charter article 33(1).

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

Based on The Non jurisdictional or diplomatic methods, distinguished into negotiation, enquiry, mediation, conciliation, and good offices. While The Diplomatic are not able to settle the case, conflict party going through Arbitration or Litigation methods through International Tribunal. These are the understanding of the Dispute settlement methods:

³⁴ J.G Starke. 2001. *Pengantar Hukum Internasional 2*. Translated from Bambang Iriana Djajaatmadja dari Inroduction to International Law(1989). Jakarta:Sinar Grafika. P.646

1. Negotiation

Negotiation considered as the oldest, most common, and the simplest methods of settling international disputes. Negotiation literally consists of discussions between the concerned parties with a view to understand of the dispute parties and no third party needed.

2. Inquiry

The two Hague Conventions of 1899 and 1907 established commissions of inquiry as formal institutions for the pacific settlement of international disputes.³⁵ They provided a permanent panel of names from which the parties could select the commissioners. The function of commission of inquiry was to facilitate the solution of disputes by elucidating the facts by means of an impartial and conscientious investigation. The report of a commission was to be limited to fact-finding and was not expected to include any proposal for the settlement of the dispute in question.³⁶

3. Mediation, Conciliation and Good Offices

Mediation, conciliation and good offices are three methods of peaceful settlement of disputes by which third parties seek to assist the parties to a dispute in reaching a settlement. Mediation is a process through which an outside party (third party) endeavours to bring the disputants together and assists them in reaching a settlement.

³⁵ The 1899 Hague Convention for the Pacific Settlement of Disputes arts. 9, 10, 11, 14 & 32; and the 1907 Hague Convention for the Pacific Settlement of Disputes arts. 9, 12, 45 & 57

³⁶ J.G. Merrills. 1998. *International Dispute Settlement*, 3rd ed. Cambridge
<https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/14-peaceful-settlement-of-disputes> accessed on 13 April 2017

Conciliation is a process of settling a dispute by referring it to a specially constituted organ whose task is to elucidate the facts and suggest proposals for a settlement to the parties concerned.

Good offices may be utilized only with the agreement or the consent of both disputants. A third party attempts to bring the disputants together in order to make it possible for them to find an appropriate settlement to their differences through their negotiations.

4. Arbitration

International Arbitration are Alternative Dispute Resolution (ADR) or a more recently called as non-litigation alternative Arbitration was defined in the 1899 Hague Convention for the Pacific Settlement of Disputes as “the settlement of differences between states by judges of their choice and on the basis of respect for law”,³⁷ this same definition was repeated in the 1907 Hague Convention. Arbitration is a method of dispute resolution by submitted the dispute to certain persons, freely chosen by the disputing parties to decide on the dispute.³⁸

5. Litigation through International Tribunals

The Dispute settlement through the International Tribunals known as the Judicial Settlement. The international character of the tribunal is in both its organization and its jurisdiction. International tribunals

³⁷ The 1907 Hague Convention for the Pacific Settlement of Disputes art. 37.

³⁸ F.Sugeng Istanto. 1994. *Hukum Internasional*, Universitas Atmajaya:Yogyakarta.

include permanent tribunals, such as the International Court of Justice (ICJ), the International Tribunal for the law of the Sea (ITLOS), the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human rights, and include *ad hoc* tribunals, such as the United Nations Tribunal in Libya.³⁹

Besides the methods above the dispute settlement by the peaceful method can be done by the International Regional Organization with its own policy or mechanism to settle the dispute. While the dispute settlement by the force or violation way based on JG. Starke distinguished into: Armed conflict and non Armed Conflict. use of force, acts of retaliation, peaceful blockade, and intervention.

2. Indonesian Sea Territory

Boundary is generally a line between sovereign states. Previously, a society which live in particular region did not sense the difference, and oftentimes the society came from the same race but with the appearance or existence of the state border and the state itself also appear the differentiation of the society which based on the citizenship.⁴⁰ This Limitation give a result that every foreign (Other citizenship) should granted the permission before entering the other state area.⁴¹

⁴⁰ Darmaputera Rizal. 2009. *Manajemen perbatasan dan reformasi sector keamanan, panduan pelatihan tata kelola sektor keamanan untuk organisasi masyarakat sipil: sebuah Toolkit, Institute for Defense. Security and Peace studies (IDSPS)- Geneva centre for Democratic control of Armed forces (DCAF), IDSPS Press, Jakarta.*

⁴¹ *Ibid*

Deeper, territorial sea boundary area as written by Mahendra Putra Kurnia that essentially is the end line of the full sovereignty of the state toward their determined territory⁴². Thus, what called as a territorial sea consist of sea and the land under UNCLOS 1982 distinguished the regime of law of the sea into eight zones, there are:⁴³ Internal Waters, Archipelagic Waters, Territorial waters, contiguous waters, Exclusive economic zone, Continental shelf, High Sea, and International sea bed area. Thus, the state's sovereign right only up to Exclusive economic zone and ended in high sea⁴⁴. In the exclusive economic zone coastal state have exclusive right to explore and exploit the resources, also have a exclusive jurisdiction to making artificial islands, building installations, marine scientific research, and maintain the marine environment.⁴⁵

Indonesia have established many regulations and agreements with several states in order to protect and maintain sovereignty of the Indonesian territorial sea. The establishment of regulation and agreements do not automatically avoid Indonesia from the problem in it is territorial sea sovereignty. One of the problems are the violation of China toward the Indonesian Exclusive economic zone in Natuna areas. This problem is the impact of the Historic right stated by China over the South China Sea. Through these historic right uphold by their government, China able to sail up to near Natuna area because it included in the nine dash-line area made by China.

⁴² Mahendra Putra Kurnia. 2011. *Hukum Kewilayahan Indonesia*. UB Press: Malang. p. 83

⁴³ Sefriani., *Op.Cit*, p.212-213

⁴⁴ Mahendra Putra Kurnia, *Op.cit*. p.84

⁴⁵ *Ibid*, p. 86

3. Principles

There are several principles used in arbitration in order to drawn the Synthesis of the reseach about South China Sea Arbitration and it is implication towards Indonesian Exclusive Economic Zone. Especially, related with the Permanent Court of Arbitration on giving their decision on the South China Sea.⁴⁶

1. The principle of sovereignty

The principle of sovereignty is the highest principle, every state has their own sovereignty that should be respected by other state.

2. Principle of Equality and Dignity

The principle of equality and the dignity means every state has an equality to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, and cultural. All state are equal before the law and have the right to equal protection and benefit of the law.

3. Principle of Openness

The principle of openness is no secrecy and all kind information related to lawsuit or any information should give to the states must mention clearly with transparency.

⁴⁶ Bab II About Authority of International Tribunal, Statute of the International Tribunal

4. Special Norms

There are several norms of UNCLOS 1982, especially Chapter II and Chapter V on the Territorial Sea and Exclusive Economic Zones. In addition, this research also used Decision of Permanent Court of Arbitration No. 2013-19 on Decision on marine dispute cases South China Sea between the Philippines VS China, especially on the conclusion of the dispute filed by the Philippines against China.

F. Research Method

This type of research is a normative legal research. Research objects are the things that will be examined which are the Impacts from the Permanent Court of Arbitration decision on South China Sea.

1. Legal Materials

Within this research, the legal materials which use are Primary Legal Materials, Secondary Legal Materials and Tertiary Legal Materials.

a. Primary Legal Materials

Primary Legal Materials are legally binding in terms of juridical manners⁴⁷ that relate to the object of research, including:

- 1) Permanent Court of Arbitration Decision 20 July 2016 In matter of South China Sea between The Republic of Philippines and The People of Republic China
- 2) United Nations Convention Law of the Sea 1982
- 3) Hague Convention for the Pacific Settlement Disputes 1907
- 4) Law Number 17 of 1985 on the Ratification of UNCLOS

b. Secondary Legal Materials

Secondary Legal Materials are legal materials which uses the rules to support and provide an explanation for the primary legal materials.⁴⁸ Within the research about

⁴⁷ Soerjono Soekanto, 1998, *Penelitian Hukum Normatif : Suatu Tinjauan Singkat*, Rajawali, Jakarta, page.10.

the South China Sea Arbitration: The Implication towards Indonesian Exclusive Economic Zone, the secondary legal materials which use are:

- 1) Books and Literature which comprises of the perspective from legal expert which dealing with the research of South China Sea Arbitration: The Implication towards Indonesian Exclusive Economic Zone
- 2) Law Journal, Article and the previous research which dealing with the research of South China Sea Arbitration: The Implication towards Indonesian Exclusive Economic Zone
- 3) Internet Sites in domestic or international scope whereby the sources are valid and dealing with the research of South China Sea Arbitration: The Implication towards Indonesian Exclusive Economic Zone

c. Tertiary Legal Materials

Tertiary legal materials are materials that can support the primary legal materials and secondary legal materials,⁴⁹ within this research the tertiary legal materials which are used:

- 1) Oxford and Blacks Law Dictionary
- 2) Encyclopaedias and lexicons that can help understand and analyse the issues examined in this study.

⁴⁸ *ibid*

⁴⁹ *ibid*, page.16

2. Methods of Data Collection

The methods to collect legal materials by literature study and with examine and review of existing legal materials which related to the research focus⁵⁰ on the Impact of Permanent Court Arbitration decision on South China Sea to Indonesian Sea territory

3. Methods of Approach

The approach methods which use are:

- a. Statute Approach, which means that the approach which use law or regulation.⁵¹
- b. Historical Approach, which means that to approach through the historical background from the issue which concerned upon this thesis.
- c. Conceptualize Approach, is to examine law concepts and legal expert perspective which relevant with this research.

4. Research Analysis

In the process of analysing data during the process of this research, it is applied the qualitative method of analysis. This is done by describing the already gained data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher's own argumen

⁵⁰ *ibid*

⁵¹ *ibid*, page.97

CHAPTER II

GENERAL OVERVIEW OF INTERNATIONAL ARBITRATION AND EXCLUSIVE ECONOMIC ZONE

A. General Overview of International Arbitration

Arbitration are one of the dispute settlement mechanism based on United Nation. It may also state that arbitration is a form of centralization or dispute settlement by some party or several judge based on their agreement to comply with an party or judge's decision that they appointed as a arbitrators.⁵² Arbitrators must be experts in the dispute field, previously the parties of the dispute were granted an arbitration clause which become the compromise point between both parties.

Although it has existed since the days of Ancient Greece, arbitration in the modern world finds its turning point in conjunction with the issuance of the Hague Convention for International Dispute Settlement in 1989. Therefore long before the Hague Convention, the arbitration decision already given a significant contribution to the international law development which can be seen from Clipperton Island Arbitration Case and Island Palmas Case in 1928.⁵³

The Arbitral Tribunal based on UNCLOS 1982 are distinguished into An arbitral Tribunal Constituted under annex VII of the Convention and a special arbitral tribunal constituted under Annex VIII.⁵⁴ Special arbitral tribunals under

⁵² Adolf, Huala. 2004. *Hukum Penyelesaian Sengketa Internasional*. Jakarta: Sinar Grafika. p.25

⁵³ Sefriani. 2016. *Peran Hukum Internasional Dalam Hubungan Internasional Kontemporer*. Jakarta: Rajawali pers, p. 371

⁵⁴ UNCLOS, art. 287

Annex VIII of the Law of The Sea Convention can only deal with disputes concerning fisheries, environmental protection, scientific research or navigation. States may nominate to expert to each of four lists, each dealing with one of these categories and maintained respectively by the FAO, UNEP, IOC, and IMO.⁵⁵

The Arbitral Tribunal Constituted under Annex VII of the Convention are composed by five members, one chosen by each of the parties and the other three chosen jointly by the parties. If the disputant cannot agree on three jointly chosen arbitrators, the President of the Law of the Sea Tribunal are taking control to appoint the arbitrators.⁵⁶ The Arbitrators appointed must have the some experience in maritime affairs. Whereas, Arbitration from the principal case in general are distinguished into commercial and non-commercial arbitration or public international arbitration.⁵⁷ The example is the Permanent Court of Arbitration (PCA), while the commercial arbitration for instance Arbitration Chamber of ICSID.⁵⁸

There are two main differences between public international arbitration bodies and international courts. First, the arbitration gives the parties freedom in choosing or determining the arbitration body. On the contrary, in the case of a court, the composition of the court is beyond the control or control of the parties. Second, the arbitration gives the parties the freedom to choose the law to be applied by the arbitration body. The most well-known differentiation between

⁵⁵ RR Churchil and AV Lowe. 1988. *The Law of The Sea*. Manchester University Press : Manchester. p. 336

⁵⁶ *Ibid*

⁵⁷ Sefriani, 2016, *Op.Cit*, pp. 373

Arbitration court and other International court can be seen from the parties themselves select the arbitrators. Another difference is that sessions of the Permanent Court of Arbitration are held in private and are confidential.⁵⁹ The Permanent Court of Arbitration also provides arbitration in disputes between international organisations and between states and international organisations⁶⁰. Thus, There are several legal instrument which applicable in the Permanent Court of Arbitration:⁶¹

- A. The Hague Convention for the Pacific settlement of the International Dispute (year 1899 and 1907).
- B. Article 13 of the Covenant of the League of Nations. Article 13 paragraph (1) Covenant among others require member states to submit their dispute to an arbitration body or an international tribunal in the event of their dispute cannot be resolved diplomatically.
- C. Article 33 of the UN Charter which contains several alternative dispute settlements, such as arbitration, which can be exploited by UN member states.
- D. The UN Model on Arbitration Procedure, endorsed by Assembly Resolution General UN 1962 (XIII) of 1958.

In arbitration, parties to the dispute refer their disputes to an arbitrator or an arbitral institute and the decisions rendered by them are binding on the parties.

⁵⁹ Quoted from official Website of Permanent Court of Arbitration accessed at <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/> on 7 January 2018

⁶⁰ *Ibid*

⁶¹ *Ibid*

Arbitration is distinct from litigation primarily because the parties to the dispute have the right to choose the arbitrator depending on the type of arbitration. There are two different well-known categories of arbitrations namely: Ad-hoc Arbitration and Institutional Arbitration⁶²

a) Ad-hoc Arbitration

Refers to a type of arbitration where the procedures or all aspects related to the arbitration like seat of arbitration, number of arbitrators, governing law, language of arbitration, etc. are determined by the parties themselves. Ad-hoc arbitration unlike the institutional arbitration is not administered by institutions like FICCI, ICC, but are agreed to and arranged by parties to the dispute themselves without resorting to any help from arbitral institutions. In this type of arbitration, if the parties to the dispute are unable to choose arbitrator(s) by ‘*consensus ad idem*’ or mutual consent, then the appointment of the arbitrator can be made by the Chief Justice of a High Court (if it involves domestic arbitration) and by the Hon’ble Apex Court (if it is an international arbitration). And, the charges/fees to be paid to the arbitrator are decided by the parties and the arbitrator. Here, the parties don’t have to resign themselves to or abide by the rules of the arbitral institutions, but they can stipulate their own arbitral clauses and be bound by them. However, the parties to the dispute are not barred from adopting the rules of any particular arbitral institution

⁶² *Ibid*, p. 47

even without submitting or referring their disputes to the said arbitral institution.⁶³

b) Institutional Arbitration

In institutional arbitration, an arbitral institute is appointed to administer the arbitration. Parties to the dispute refer their disputes to the arbitral institution and the parties are governed by the rules and procedures of the arbitral institute. Not all institutes provide arbitral services, they have a set of rules and procedures which they offer to the parties who submit their disputes to them. The arbitral institutes administer the arbitral process. Individual arbitral institutes have their own set of procedures and they provide a framework to the parties for the arbitration process. Some common institutions are the ICC, FICCI, DIFC, etc. most often than not, the arbitration clause contained in an arbitration agreement assign or designate a particular arbitral institute to administer the process of arbitration. Often the contract between two parties will contain an arbitration clause which will designate a particular institution as the arbitration administrator.⁶⁴

Amongst the available dispute resolution alternatives to the courts, arbitration is by far the most commonly used internationally. The reasons for this are clear. The ICC International Court of Arbitration observes that some of the

⁶³ *Ibid*, p.48-52

⁶⁴ *Ibid*, p. 59

advantages of using ADR procedures, such as under an arbitration agreement, include the following:⁶⁵

a) Final and binding decisions

While several mechanisms can help parties reach an amicable settlement - for example through conciliation under the ICC Rules of Conciliation - all of them depend, ultimately, on the goodwill and cooperation of the parties. A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. Because arbitral awards are not subject to appeal, they are much more likely to be final than the judgements of courts of first instance. Although arbitral awards may be subject to being challenged (usually in either the country where the arbitral award is rendered or where enforcement is sought), the grounds of challenge available against arbitral awards are limited.

b) International recognition of arbitral awards

Arbitral awards enjoy much greater international recognition than judgements of national courts. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention'. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral

⁶⁵ *Ibid*, p.60

and bilateral arbitration conventions that may also help enforcement.”⁶⁶

The ICC International Court of Arbitration observes further that:

a) Neutrality

In arbitral proceedings, parties can place themselves on an equal footing in five key respects:

1. Place of arbitration
2. Language used
3. Procedures or rules of law applied
4. Nationality
5. Legal representation

Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.”⁶⁷

Other advantages cited by the ICC International Court of Arbitration include the following,⁶⁸

b) Specialized competence of arbitrators

Judicial systems do not allow the parties to a dispute to choose their own judges. In contrast, arbitration offers the parties

⁶⁶ See ICC International Court of Arbitration, “*International Dispute Resolution Services: Introduction to Arbitration*,” at: <https://iccwbo.org/dispute-resolution-services/arbitration/> access on December 8, 2017

⁶⁷ *Ibid*

⁶⁸ *Ibid*

the unique opportunity to designate persons of their choice as arbitrators, provided they are independent. This enables the parties to have their disputes resolved by people who have specialized competence in the relevant field.

c) Speed and economy

Arbitration is faster and less expensive than litigation in the courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve, even by arbitration, the limited scope for challenge against arbitral awards, as compared with court judgements, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow. In this way, a multi-million dollar ICC arbitration was once completed in just over two months.

d) Confidentiality

Arbitration hearings are not public, and only the parties themselves receive copies of the awards.”

B. Permanent Court of Arbitration (PCA)

1. The Role, Function and Authority of the Permanent Court of Arbitration

The PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference. The Conference had been convened at the initiative of Czar Nicolas II of Russia “with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments.”⁶⁹ PCA is not a court in general but rather a service with an arbitration trial service to resolve any dispute or dispute between members of the United Nations and / or a Member State in the ratification of this Court of Arbitration.⁷⁰

Among the aims of the Conference had been the strengthening of systems of international dispute resolution—especially international arbitration. The delegates at the Conference were mindful that, during the previous 100 years, there had been a number of successful international arbitrations, starting with the “Jay Treaty” Mixed Commissions at the end of the 18th century, and reaching a pinnacle with the Alabama arbitration in 1871-1872. In addition, the Institut de Droit International had adopted a code of procedure for arbitration in 1875.⁷¹

This movement towards favouring arbitration as a means of international dispute resolution was continued in 1899, and the most concrete achievement of

⁶⁹ Quoted from Official Website of Permanent Court of arbitration accessed on <https://pca-cpa.org/en/services/> accessed on 19 September 2017

⁷⁰ *Ibid*

⁷¹ *Ibid*

the 1899 Conference was the establishment of the PCA as the first global mechanism for the settlement of disputes between states. Article 16 of the 1899 Convention recognized that “in questions of a legal nature, and especially in the interpretation or application of International Conventions” arbitration is the “most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle”⁷²

According to, Article 20 of the 1899 Convention formally established the PCA, stating:

“[w]ith the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.”

The 1899 Convention was revised at the second Hague Peace Conference in 1907. From the result of conference, I, The Hague Convention of 1899 until the end of 1906, there are 68 countries that have ratified it. As for The Hague II Convention in 1907, 64 countries have ratified it. Actually, the motive of holding the second peace conference is not separated from the interest of promoting arbitration. This peace conference was held, because it was driven in part by the widespread use of arbitration in the nineteenth century. In addition, the

⁷² *Ibid*

international community also expressed a desire at that time to make arbitration a permanent body.

The establishment of this arbitration body can be regarded as one of the remarkable achievements of the international community. This permanent arbitration body, at that time, was the first arbitration tribunal to settle disputes between nations but in its development PCA less popular. Thus, despite its name "Court" (Permanent Court), it is not actually "Court" in the true sense. It is only an arbitration body, not a judicial body in the true sense.⁷³ Besides the birth of the Permanent Court of International Justice (PCIJ) or the International Permanent Court by the UN considered to have extinguished the prestige of PCA in order to settle the dispute settlement.⁷⁴

In the update, The PCA provides administrative support in international arbitrations involving various combinations of states, state entities, international organizations and private parties.⁷⁵ The PCA's functions are not limited to arbitration and also include providing support in other forms of peaceful resolution of international disputes, including mediation, conciliation, request to

⁷³ Peter Malanczuk. 1997. *Modern Introduction to International Law*. London : Routledge 7th rev.ed., page.294

⁷⁴ Ibid

⁷⁵ PCA authorities toward parties and dispute object stated in:

- (1) *Optional Rules for Arbitrating Disputes between Two States* (20 October 1992);
- (2) *Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State* (6 July 1993);
- (3) *Optional Rules for Arbitration Involving International Organizations and States* (1 July 1996);
- (4) *Optional Rules and Arbitration between International Organizations and Private Parties* (1 July 1996);
- (5) *Optional Conciliation Rules for All Types of Disputes* (1 July 1996);
- (6) *The PCA Optional Rules of Procedure for Fact Finding Commission of Inquiry* (15 December 1997).

tribunals established under the rules of certain international arbitration institutions, or pursuant to rules agreed to ad hoc, the appointing authority, or to designate another appointing authority, for the appointment of arbitrators under the PCA's Rules of Procedure, the UNCITRAL Arbitration Rules, or other rules of procedure, and available to provide administrative support in fact-finding commissions of inquiry involving various combinations of states, state entities, international organizations and private parties.⁷⁶

The function of the Permanent Court of Arbitration briefly as a medium of international arbitration services, however the service of Permanent Court Of Arbitration includes 5 things: (1) Arbitration Services (2) Appointment of Authority, (3) Mediation / Conciliation, (4) Fact Finding , (5) Court of Guest.⁷⁷ For the arbitration process, PCA implemented the 1976 UNCITRAL Arbitration Rules, while for the conciliation process proceedings, PCA implemented the 1980 UNCITRAL Conciliation Rules. From 1899 to 2004, 94 countries ratified one or both of these conventions (1899 and 1907). he PCA has adopted its own Optional Conciliation Rules and Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, both of which are based primarily on the UNCITRAL Conciliation Rules. The PCA is also available to provide support in conciliations under the UNCITRAL Conciliation Rules, which make reference, in Article 4, to an “appropriate institution” for recommending names of suitable individuals or for directly appointing a conciliator and, in Article 8, to a “suitable

⁷⁶ Quoted from: <https://pca-cpa.org/en/services/> accessed on 19 September 2017

⁷⁷ *Ibid*

institution” for administrative assistance in the proceedings.⁷⁸ The PCA has experience in administering international conciliations under both its own Conciliation Rules and the UNCITRAL Conciliation Rules.⁷⁹

The PCA makes its facilities available upon request to tribunals established under the rules of certain international arbitration institutions, or pursuant to rules agreed to ad hoc.⁸⁰ The PCA also can provide incidental administrative support upon request. Since 1899, the PCA has administered five fact-finding commissions of inquiry. The first commission of inquiry involved the so-called Incident in the North Sea, or Dogger Bank Case (Great Britain/Russia).⁸¹ The commission was created by agreement on 15 November 1904, following an incident in which the Russian Baltic fleet mistook British vessels for Japanese war ships, resulting in British fatalities. The commission of inquiry, comprised of a committee of five, investigated the facts of the incident and indemnified the British in a report handed down on 26 February 1905.⁸²

The PCA most recently administered a commission of inquiry following the “Red Crusader” Incident (Great Britain/Denmark), which involved a British vessel that was arrested within the waters of the Faroe Islands. The commission was created by agreement on 15 November 1961, and rendered its decision a few months later, on 23 March 1962.⁸³ To facilitate the constitution and administration of fact-finding commissions of inquiry, the PCA has created the Permanent Court

⁷⁸ *Ibid*

⁷⁹ *Ibid*

⁸⁰ *Ibid*

⁸¹ *Ibid*

⁸² *Ibid*

⁸³ *Ibid*

of Arbitration Optional Rules for Fact-Finding Commissions of Inquiry.⁸⁴ The PCA is currently acting as registry in 5 inter-state proceedings, 76 investor-state arbitrations, and 45 cases under contracts involving a state or other public entity. In fact, it shows that PCA has gained a great welcome from world society to dispute a settlement.

2. Applicable Law

Arbitration is one of the four means for settlement of disputes concerning the interpretation or application as stated in article 287 of the UNCLOS. The Arbitration under Annex VII is used for the settlement of disputes between parties that have not made a declaration of choosing procedure or for parties that have not accepted the same procedure for settlement of the dispute. A party to the dispute may bring its case before Arbitration by written notification addressed to the other party. The notification shall be accompanied by a statement of the claim and the ground on which it is based.⁸⁵

Deeper, Part XV of the Convention lays down a comprehensive system for the settlement of disputes that might arise with respect to the interpretation and application of the Convention. It requires States Parties to settle their disputes concerning the interpretation or application of the Convention by peaceful means indicated in the Charter of the United Nations.⁸⁶ However, if parties of the dispute fail to reach a settlement by peaceful means of their own choice, they are obliged

⁸⁴ These Optional Rules can be downloaded from the *PCA Rules and Founding Conventions* section on <https://pca-cpa.org/en/services/fact-finding-commissions-of-inquiry/>

⁸⁵ UNCLOS, Annex VII. art 1.

⁸⁶ UNCLOS, Annex XV. Section.1, art 280

to resort to the compulsory dispute settlement procedures which give a binding decisions, subject to limitations and exceptions contained in the Convention.⁸⁷

The mechanism established by the Convention provides for four alternative means for the settlement of disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII to the Convention.

The Arbitration is composed of five members preferably chosen from the list of arbitrators. A list of arbitrators shall be drawn up and maintained by the Secretary General of the United Nations.⁸⁸ Every State Party shall be entitled to nominate four arbitrators to constitute the list.⁸⁹ The arbitrators, which the parties have nominated, shall have similar qualification to those nominated for member of the Tribunal.⁹⁰ When the case is brought before the Arbitration, the party instituting the proceedings shall appoints one member to be chosen preferably from the list of arbitrators, who may be its national.⁹¹

In accordance with article 5 of Annex VII of the Convention, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present the case. All decisions of the arbitral tribunal demand a majority vote of its members. In case there is an equality of

⁸⁷ The Convention and optional exceptions to applicability of Part X., art.287

⁸⁸ *Ibid.* art. 2.

⁸⁹ *Ibid*

⁹⁰ *Ibid*

⁹¹ *Ibid.* art. 3.

vote the President will have a casting vote.⁹² The award mentions the subject matter of the dispute and states the reasons on which it is based, and the name of the members who have participated. The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It will be binding upon the parties.⁹³

Thereby, there is another frequent question regarding that arbitration requires the consent of both parties. However, what many fail to understand is that this consent can be, and usually is, given *in advance*, in a binding contract or treaty.⁹⁴ In regular arbitration between private parties for example like between companies, this is typically done with an arbitration clause in a contract. An arbitration clause requires the parties to settle future disputes involving the contract in arbitration, rather than in national courts. Once the contract is signed it is too late for either party to change their mind. A party can't refuse to accept arbitration just because it realizes that it has a bad case or thinks it would be more advantageous to settle that particular dispute in a national court.⁹⁵ The arbitration could potentially take place years after the original contract was signed.

Basically, the Dispute settlement between states works in the same way. In states between states, the contract which usually called treaty can give their consent to compulsory binding dispute settlement *in advance*.⁹⁶ For Instance, The United Nations Convention on the Law of the Sea (UNCLOS) requires all parties

⁹² *Ibid.* art. 8.

⁹³ *Ibid*

⁹⁴ Kevin A Baumert. 2016. "The South China Sea Dispute and The Law of The Sea". *American Journal of International Law* Vol. 152, p.4

⁹⁵ *Ibid*

⁹⁶ *Ibid*, p.5

to the treaty to consent to compulsory dispute settlement for certain disputes “concerning the interpretation or application of [the] Convention”

For example, the UNCLOS Commentary Volume V says the following about article 286:

... any party to the dispute may submit it to the appropriate court or tribunal, without having to obtain consent from the other party (or parties). Unilateral action is sufficient to vest the court or tribunal with jurisdiction, and that court or tribunal may render a decision whether or not the other party participates in the process.

Modern procedural rules, such as the various PCA Rules (and the UNCITRAL Rules from which they are derived), leave a great deal of procedural flexibility in the hands of the parties and the arbitral tribunal. There are few mandatory provisions, meaning that the parties may, by mutual agreement, deviate from or modify the procedural rules.

All of the PCA Rules contain the general provision that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given a full opportunity of presenting its case.⁹⁷ In purely private commercial cases, and conceivably in certain other cases as well, the arbitral tribunal might be likely to apply, or in any event, have reference to, the arbitration law of the place of arbitration (*lex loci arbitrii*) to fill gaps in the applicable rules. In inter-State

⁹⁷ 1907 Convention, *Art. 15*. Recent annual reports are available on the PCA website: <http://www.pca-cpa.org/AR/annrep01.htm>. Access on 5 November 2017

arbitration, the arbitration agreement or ad hoc rules drawn up by the parties generally give the arbitral tribunal the express power to fill such gaps without reference to municipal law.⁹⁸

In several cases that involving international organizations, the tribunal is directed to take due account of the rules of the organization concerned and to the law of international organizations; and in cases involving private parties, the tribunal is directed to pay attention to the terms of the contracts or agreements in question and take into account the relevant trade usage.⁹⁹ Finally, only with the agreement of the parties may the tribunal decide the dispute *ex aequo et bono*.¹⁰⁰ Dispute Settlement The 1899 and 1907 Conventions contain a more general reference to settlement “on the basis of respect for law.”¹⁰¹

In Short, the law applicable to the proceedings is that chosen by the parties, in the first instance by agreeing to the application of a particular set of procedural rules. The various PCA rules provide that the arbitral tribunal shall apply the law chosen by the parties; in the absence of an agreement, the tribunal will apply either the applicable rules of general international or another body of law prescribed by choice of law rules.¹⁰² The Arbitration can be submit only by one party without consent by other party whether agree or not to bring the case to Arbitration, in a case both of parties already signed a contract or treaty which contains the arbitration in their dispute settlement terms.

⁹⁸ United Nation Conference on Trade and Development

⁹⁹ *Ibid*

¹⁰⁰ Art. 33(2).

¹⁰¹ 1899 Convention, Art.15; 1907 Convention, Art. 37.

¹⁰² Art. 33

C. State and Territory

1. State and Territory in General

The state, it is commonly agreed, is a political organisation that exercises ultimate sovereignty over a delimited territory and its inhabitants. In this respect, sovereignty means, at least in international law, the equality of all states.¹⁰³ This view of equal and sovereign states, however deceptive it may be, is still the view that currently underpins much of international law and international relations theory. A modern state has exclusive sovereignty over a specific territory which is regulated by international law. It is this territorial sovereignty that entitles states to be recognised as legally equal agents in the international arena.¹⁰⁴

Some articles deal with the concept of sovereignty in international law in great detail. First of all, it may be noted that ‘sovereignty’ as a concept which both easy and hard to define. Or, as Endicott puts it:

Sovereignty, it seems, are:

1. absolute power within a community, and
2. absolute independence externally, and
3. full power as a legal person in international law¹⁰⁵

¹⁰³ Aleksandar Pakovic and Peter Radan. 2013. “In Pursuit of Sovereignty and Self Determination: People, States, and Succession in International Law”. *Macquarie Law Journal*. Vol. 3. p. 3

¹⁰⁴ *Ibid.* p.4

¹⁰⁵ Timothy Endicott. 2010. “The Logic of Freedom and Power, in Samantha Besson & John Tasioulas (eds.)”. *The Philosophy of International Law (Oxford, Oxford University Press)*. p. 245.

In Jean Bodin's opinion, the very founder of the concept, the sovereignty acts as a supreme, absolute and independent of the state's laws power over his subjects, which is, however, limited by divine and natural law.¹⁰⁶ Sovereignty, as something peculiar to the bearer of the supreme state power, that is to say, the absolute monarchy, endowed them the features of absoluteness, universality, limitlessness and eternity. There are many definitions of the concepts which are studied in the theoretical works on international law. In Soviet and Russian international legal literature the most frequently cited definition of sovereignty is given by Professor G. Tunkin. He characterizes state sovereignty as "... the inherent supremacy of the State in its territory and independence in international relations."¹⁰⁷

Until the ninth century, the understanding of sovereignty by Jean Bodin has grown and developed into many direction and caused many kind of schools pertaining to sovereignty. However, no matter how far the difference of the understanding between sovereignty theories there is one general understanding which unchangeable that a state sovereignty is absolute, cannot be shared, and cannot be apart.¹⁰⁸

Article 1 of the Montevideo convention 1933 about right and obligation of the state stated that

¹⁰⁶ Sefriani. *Loc.cit.* p. 12

¹⁰⁷ Tunkin G.I. *Basics of Contemporary International Law*. Moscow/ 1956, p. 15. Quoted by Karen Gevorgyan. 2007. University Concept of the State Sovereignty: Modern Attitudes, Yerevan State University Press: Armenia p. 433

¹⁰⁸ Mahendra Putra Kurnia. *Op.cit.* p. 26

“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states”

The fourth clause of the article is considered out of date as a result of the current era development and replaced by the sovereignty as the fourth constitutional element of the formation of the state because it is considered to have more important and wider meaning.¹⁰⁹ However, it seems clear that, in establishing the principle of sovereignty and equality of states, Article 2(1) of the Charter of the United Nations¹¹⁰, not only highlights that some form of territoriality principle and some form of nationality principle are permitted under international law, it also emphasizes that limits are placed upon these principles.¹¹¹

In addition, According to Griffiths, in spite of the rapidly growing number of states, the mutual recognition of territorial sovereignty has led to a gradual degradation of legitimisation of territorial conquest and a decrease in inter-state conflict.¹¹²

2. State and Territory based on UNCLOS

Currently, the primary instrument of governance for the seas is the United Nations Convention on the Law of the Sea (UNCLOS), which was adopted in

¹⁰⁹ *Ibid*

¹¹⁰ Charter of the United Nations. adopted by the UN General Assembly of October 24. 1970.

¹¹¹ Svantesson D.J.B. 2014. “Sovereignty in International Law”. *Journal of Law and Technology*. vol. 8 no.1. p. 143

¹¹² Aleksander Pavkovic; Peter Radan, *Op.cit*, p.5

1982 as the outcome of the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹¹³ Various norms of customary international law supplement UNCLOS. The Convention is the most comprehensive international treaty ever concluded.¹¹⁴ It is based on the four Geneva Conventions on the Law of the Sea adopted in 1958: these are the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf.¹¹⁵

These treaties codified the unwritten customary law which had previously applied. For example, since the mid-17th century, countries had generally accepted that national rights applied to a specified belt of water, known as the territorial sea, extending from a nation's coastlines, usually for three nautical miles – roughly equivalent to the distance travelled by a cannon shot.¹¹⁶

From the mid-20th century, the seas became an increasing focus of interest as a source of natural resources such as oil and gas.¹¹⁷ Many coastal states therefore attempted to extend their national jurisdiction over ever-larger areas of the sea and the seabed. Some laid claim to a 200 nautical mile zone.¹¹⁸ The concept of “mare liberum” appeared to have been consigned to history. After an initial attempt to regulate the maximum permissible extent of the territorial sea in

¹¹³ Daniel Andreeff. 2015. “Legal Implication of China's Land Reclamation Project in Spratly Island”. *New York University Journal of International Law & Politics* Vol.47.p 6

¹¹⁴ <http://worldoceanreview.com/en/wor-1/law-of-the-sea/a-constitution-for-the-seas/> access on 8 November 2017

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ Daniel Andreeff. *Loc. Cit.* p.7

¹¹⁸ *Ibid*

an international treaty failed in 1930, the four Geneva Conventions were finally adopted under United Nations auspices in 1958.¹¹⁹

The aim of these international agreements was to prevent the sea from being divided up, once and for all, between various countries. However, this aim was not achieved in full. For example, the discovery of major deep seabed deposits of manganese nodules in the eastern and central Pacific Ocean, at considerable distance from the coast, in the 1960s sparked new ambitions among the industrial countries. At present, the key question being discussed is which nations can lay claim to the wealth of mineral resources located in the Arctic, which in future will become easier to access as the sea ice retreats.¹²⁰

UNCLOS divides the sea into various legal zones, with the state's sovereignty decreasing with increasing distance from the coast. Every state has the right to territorial sea, not exceeding 12 nautical miles, in addition to its internal waters. In the territorial sea, the sovereignty of the coastal state is already restricted under international law, as ships of all states enjoy the right of innocent passage through it. In the contiguous zone, which may not extend beyond 24 nautical miles from the relevant baselines, the coastal state may merely exercise rights of control, for example to prevent infringement of its customs regulations.¹²¹

In the Exclusive Economic Zone (EEZ), which extends for up to 200 nautical miles, the coastal state has sovereign rights for the purpose of exploring

¹¹⁹ *Ibid*

¹²⁰ *Ibid*

¹²¹ See UNCLOS

and exploiting the natural resources, whether living or non-living, of the waters. On the continental shelf, which may extend beyond the EEZ, the coastal state has sovereign rights for the purpose of exploring and exploiting the natural resources, whether living or non-living, on or under the seabed.¹²²

The international legal regimes for allocation of sovereign rights to land and water areas are fundamentally different, both substantively and procedurally.¹²³ Possession rights to maritime areas are acquired by operation of law in accordance with "equitable" rules. Procedurally, jurisdiction over disputes to land territory is available only with the consent of the disputing states, while jurisdiction over disputes to maritime areas is essentially mandatory.¹²⁴

The oceans were deemed *res communes* during the period of the early war and the development of the international law because of the sheer practical difficulties in, and lack of incentive for, the exercise of exclusive title.¹²⁵ By the time that the practical means for making exclusive use of maritime spaces developed, so had legal institutions for effective allocation. Furthermore, political support existed for distribution on criteria other than power politics. Water areas therefore are allocated by operation of law, through legal processes rather than by force, and in accordance with basic notions of fairness.¹²⁶

¹²² <http://worldoceanreview.com/en/wor-1/law-of-the-sea/a-constitution-for-the-seas/>
Access on 8 November 2017

¹²³ Brilmayer Lea. 2001. "Land and Sea: Two Sovereignty in Search o Common Determinator" *Norwegian Sea Journal* Vol.33, p.704.

¹²⁴ *Ibid*, p.705

¹²⁵ *Ibid*

¹²⁶ *Ibid*

3. Historic Right in the Law of the Sea

If we look back, there is a conception of historic right to draw a sovereignty. In studying the issue of historic rights, one inevitably encounters two major difficulties: (1) this issue has never been thoroughly researched in international law; and (2) there are a number of legal terms in the historical context, such as “right”, “title”, and “consolidation”¹²⁷ which may cause confusion. It is even more complicated when one tries to explore so-called historic rights in the maritime area, particularly when the term is used along with other related terms such as historic waters and historic bays.¹²⁸

Despite all these difficulties, such studies are important as a contribution to the development of international law. Meanwhile, one thing has to be pointed out: whereas the term *historic rights* refers not only to maritime but also to land areas, the present chapter limits it, to a large extent, to the maritime domain without any prejudicial consideration of its application to the land domain.¹²⁹

The United Nations International Law Commission (ILC) discussed the concept of historic waters in the 1950s, and in 1962 the UN Secretariat, upon the request of the ILC, prepared a study on the juridical regime of historic waters, including historic bays. The study examined the elements of title to historic waters, the issues of burden of proof, the legal status of waters regarded as historic waters, and the settlement of disputes.

¹²⁷ Sophia Kopela. 2017. *Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration*. Lancaster University Press. p.8

¹²⁸ *Ibid*

¹²⁹ *Ibid*

However, it did not give a conclusive concept of historic waters, nor criteria nor standards by which this concept could be applied.¹³⁰ So the theoretical controversy over the concept of historic waters has not yet been resolved. The Third UN Conference on the Law of the Sea (UNCLOS III) simply dropped it from the agenda because of the controversial nature of this issue, leaving only a few tantalizing references in the 1982 United Nations Convention on the Law of the Sea (LOS Convention). the term “historic rights’ is general in nature and can describe any rights which a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances.¹³¹

Generally speaking, there should be three conditions needed to be fulfilled to sustain an historic waters claim based on general principles and rules of international law: (1) the exercise of the coastal state authority over the area; (2) the continuity over time of this exercise of authority; and (3) the attitude of foreign states to the claim. There was a number of judicial awards support and elaborate the concept of historic waters. One historic claim was accepted in 1951 by the ICJ in the *Norwegian Fisheries* case.¹³²

The issue before the court was whether the Norwegian method of delimiting territorial waters was valid on the basis of historic title, even if the method violated international law.¹³³ After examining the past Norwegian practice, the court found that the Norwegian system of delimitation had been

¹³⁰ *Ibid*, p.10

¹³¹ M.S.Gau, in N. Hong, S.Wu & M.Valencia . *Case Study on the Application of Pt.XV of UNCLOS to the Annex VII in the Arbitration Case concerning the [SCS] Disputes between China and the Philippines.* p.335

¹³² *Ibid*, p.15

¹³³ *Ibid*

applied consistently and without interruption for some 60 years and that this practice had not been opposed by other states and instead tolerated by them.¹³⁴

Based on these facts, the court ruled that the Norwegian system was not contrary to international law, thus upholding the validity of the Norwegian claim to historic title.¹³⁵ The same court also accepted the Gulf of Fonseca as a historic bay and its waters as historic waters in the *Gulf of Fonseca* case in 1992.¹³⁶ It must be recognized that the notion of an historic bay is linked with a time element.

Furthermore, It is a time element which is reflected by both the exercise of sovereign rights over the bay by the coastal state and the acquiescence, or at least the toleration of third states. This premise based on time brings one closer to ascertaining whether the Gulf of Taranto meets with the criteria defining an historic bay which based on it is historic right.¹³⁷

Since the notion of an historic right is linked with the element of time, one must first ascertain whether Italy has effectively exercised exclusive rights over the Gulf of Taranto, without challenge by third states, for a considerable period of time. The length of time proposed for this discussion (in relation to both the exercise of sovereignty by the coastal state and the practice of interested states) is that from the proclamation of the Kingdom of Italy in 1861.¹³⁸

¹³⁴ *Ibid*, p.18

¹³⁵ *Ibid*

¹³⁶ *Ibid*

¹³⁷ C.R.Symmons. 2008 .*Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal*. Nijhoff eds. p. 191

¹³⁸ *Ibid*

Look back on April 26, 1977, Italy enacted a Decree causing straight baselines to be drawn along the coastline of the Italian Peninsula. A straight baseline, about sixty nautical miles long, was drawn along the entrance of the Gulf of Taranto between Cape Santa Maria di Leuca and Alice Point.¹³⁹ The 1977 Decree justified the drawing of such a line by proclaiming the Gulf of Taranto an historic bay based on their historic right. So, as based the case of Gulf of Fonseca it can be conclude that the most important aspect is the consistency of the parties on draw the line and uphold the historic right in the long time, without challenge by third state.

D. Exclusive Economic Zone

According to the 1982 convention, each country's sovereign territorial waters extend to a maximum of 12 nautical miles (22 km) beyond its coast, but foreign vessels are granted the right of innocent passage through this zone. Passage is innocent as long as a ship refrains from engaging in certain prohibited activities, including weapons testing, spying, smuggling, serious pollution, fishing, or scientific research.¹⁴⁰

Where territorial waters comprise straits used for international navigation (e.g., the straits of Gibraltar, Mandeb, Hormuz, and Malacca), the navigational rights of foreign shipping are strengthened by the replacement of the regime of innocent passage by one of transit passage, which places fewer

¹³⁹ *Ibid*, p.121

¹⁴⁰ <https://www.britannica.com/topic/Law-of-the-Sea#ref913546> accessed on 24 October

restrictions on foreign ships. A similar regime exists in major sea-lanes through the waters of archipelagos (e.g., Indonesia).¹⁴¹

Beyond its territorial waters, every coastal country may establish an exclusive economic zone (EEZ) extending 200 nautical miles (370 km) from shore.¹⁴² Within the EEZ the coastal state has the right to exploit and regulate fisheries, construct artificial islands and installations, use the zone for other economic purposes (e.g., the generation of energy from waves), and regulate scientific research by foreign vessels. Otherwise, foreign vessels (and aircraft) are entitled to move freely through (and over) the zone.

In the Exclusive Economic Zone, Coastal State has:¹⁴³

- a. Sovereign rights for exploration and exploitation purposes, conservation and management of natural resources, both biological and non-biological, from the waters of the seabed and from the seabed and underlying land and in respect of other activities for the purpose of exploration and economic exploitation of such zones, as well as the production of energy from water, currents and wind .
- b. Jurisdiction as defined in the relevant provisions of the United Nations Convention on the Law of the Sea concerning the manufacture and use of artificial islands, installations and buildings, marine scientific research, the protection and preservation of the marine environment.

¹⁴¹ *Ibid*

¹⁴² UNCLOS, Chapter V about Economic Exclusive Zone, Article 57 about the Breadth of the Exclusive Economic Zone

¹⁴³ *Ibid*, Article 56 about Rights of Jurisdiction and Obligation of the Coastal state on Economic Exclusive Zone.

- c. Other rights and duties as defined in the United Nations Convention on the Law of the Sea.

E. Indonesian Sea Territory

Based on the United Convention of Law of the Sea, definition of archipelagic state are:¹⁴⁴

- a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;
- b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

In various conferences of the UNCLOS¹⁴⁵ Fiji, Indonesia, Papua New Guinea, the Bahamas, and the Philippines are the five sovereign states that obtained approval in the UN Convention on the Law of the Sea held in Montego Bay, Jamaica on December 10, 1982 and qualified as archipelagic states.¹⁴⁶

Archipelagic states are states that are composed of groups of islands forming a state as a single unit, with the islands and the waters within the baselines as internal waters. Under this concept ("archipelagic doctrine"), an

¹⁴⁴ See UNCLOS 1982, Part IV: Archipelagic States, Article. 46

¹⁴⁵ Preamble to the United Nations Convention on the Law of the Sea, Article 46

¹⁴⁶ Harry Purwanto; Mangku Dewa Gede, *Op.cit*

archipelago shall be regarded as a single unit, so that the waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the state, and are subject to its exclusive sovereignty. The approval of the United Nations for the five sovereign states as archipelagic states respect existing agreements with other countries and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring countries in certain areas falling within archipelagic waters.¹⁴⁷

The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the countries concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third countries or their nationals.¹⁴⁸ That the Republic of Indonesia as an archipelagic country has abundant natural resources which is mercy and grace of god almighty for the entire nation of Indonesia that must be managed in a sustainable manner to promote the general welfare, as mandated in the Constitution of the Republic of Indonesia Year 1945. That sea area as the largest part of the territory of Indonesia, which has a position and strategic value of the various aspects of life that includes political, economic, social, cultural, defence, and security is the basis of national development.¹⁴⁹

¹⁴⁷ *Ibid*

¹⁴⁸ UNCLOS, Part IV archipelagic states, Article 51

¹⁴⁹ Harry Purwanto and Mangku Dewa Gede, *Op.cit.*

Muhammad Yamin stated that Indonesian sovereignty is different with sovereignty understanding came from historic materialism school (Sovereignty from the occupation; or transfer of power from sovereign state to other sovereign state) also Indonesian Sovereignty not same with Sovereignty of American International Law version which based on Thomas Jefferson Opinion (Sovereignty which rise from struggle and fighting against the Anglo-Saxon by Anglo-Saxon itself), further Yamin stated Indonesian Sovereignty was built from the ashes and remains of the reign of other nation which have no authority to build a nation above Indonesian land (Colonialization).¹⁵⁰ The sovereignty based on Muhammad Yamin by Jazim Hamidi named “*Kedaulatan Tumpah Darah*” or Blood Sovereignty.¹⁵¹

The concept of Blood Sovereignty later connected with the theory from Friedrich Ratzel known as Space Conception, a concept that teach basically every nation have it is own space of conception or the idea about the line of power.¹⁵² Ratzel also stated that eventually the downfall of a state is a result of the decreasing the concept of the understanding of it is space.¹⁵³ Based on Wahyono Sk, Indonesia have a a broad and plenty of region, but Indonesian with all his strength must defend every inch of his land and every swallow of the sea.¹⁵⁴

The Sovereignty owned by the state eventually generates a responsibility of the state to it is region. State can govern its jurisdiction on society, properties,

¹⁵⁰ Mahendra Putra Kurnia, *Op.cit*, p.30

¹⁵¹ *Ibid*

¹⁵² *Ibid*

¹⁵³ *Ibid*

¹⁵⁴ Mahendra Putra Kurnia, *Op.cit*, p.31

and any kind of activity which occur in the state region. This kind of sovereignty is known as territorial sovereignty which the end of the sovereignty located on the outer boundaries of the territorial area, and if territorial jurisdiction of the state is the water or sea territorial, thus the outer boundary is the outer water or sea territorial.¹⁵⁵ Deeper, Jawahir Thantowi and Pranoto Iskandar in their book, stated that what is meant by Territorial sovereignty is an authority owned by the state to govern its authority in the territory that becomes a part of its power.¹⁵⁶

According to Indonesia's Law No. 43 of 2008 on Indonesian Territory¹⁵⁷ stated that the living space for Indonesia after the enactment of UNCLOS 1982 covers the region of Republic of Indonesia and the region of Indonesia's Territorial Jurisdiction with total area for its marine region of 5.8 million km², with details as followed: total area of Indonesia's archipelagic marine area and territorial seas: 3.1 million km², total area of EEZ: 2.7 million km², and 81290 km length of coastline.¹⁵⁸

Therefore, the most favourable circumstances for Indonesian Government is to determine its marine fisheries resources and determine the value of its Total Allowable Catch (TAC) and National Capacity to Harvest (NCH) within Indonesia's Exclusive Economic Zone.¹⁵⁹ Next, the government should seek to implement the Constitution of the Republic of Indonesia Article No. 33 (3) as

¹⁵⁵ *Ibid*, p.32

¹⁵⁶ *Ibid*

¹⁵⁷ Indonesian Law No. 43 of 2008 on Indonesian Territory, LNRI of 2008 No. 177, TLNRI No. 4925.

¹⁵⁸ Jawatan Hidro-Oseanografi TNI AL, 2006, *Pulau-Pulau Kecil Terluar Negara Kesatuan Republik Indonesia*, Markas Besar Angkatan Laut Jawatan Hidro-Oseanografi TNI AL, Jakarta, p. i.

¹⁵⁹ Ida Kurnia, *Op.cit*

mandated, by utilizing Indonesia's TAC to its full potential, especially considering the Indonesian people's needs for dependable nutritional source, as well as other national interests such as source of foreign exchange and income.¹⁶⁰

Indonesia, with its EEZ covering 2.7 million km², is classified as one of the nation with large EEZ, along with United States, Australia, New Zealand, Canada, Soviet Union, Japan, Brazil, Mexico, Chile, Norwegia, India, Philippines, Portugal and Republic of Malagasy¹⁶¹ and Indonesia has the sovereign rights for marine resources within its EEZ. Thus, Indonesia has the sovereign rights to perform exploration and exploitation, and carry out the management and conservation of marine natural resources within its EEZ region.¹⁶²

1. Delimitation of Indonesian Boundary

Indonesia has ratified the United Nations Convention on the Law of the Sea (UNCLOS) signed at 30 April 1982 by the Act No. 17 of 10 December 1985. UNCLOS is a significant agreement providing international conditions and limits concerning the use and exploitation of the earth's oceans. Included in UNCLOS are rules on how member states define their maritime jurisdictional boundaries.¹⁶³ As consequence, Indonesia has to give charts or lists of geographical coordinates to the Secretary General of the United Nations. The Territories of the Indonesian

¹⁶⁰ *Ibid*

¹⁶¹ See Kementerian Luar Negeri, 2010. "Sejarah Rejim Hukum Laut" *Tabloid Diplomasi Media Komunikasi dan Interaksi* No. 35 Tahun III, 15 September-14 October 2010 p. 15

¹⁶² Ida Kurnia, *Op.cit.*

¹⁶³ Harry Purwanto and Dewa Gede Sudika Mangku. 2016. "Legal Instrument of Republic Indonesia on Border Management Using the Perspective of Archipelagic State". *International Journal of Business, Economics and Law* Vol. 11, P.51

Waters comprise of the Indonesian territorial sea, the archipelago waters and the inland waters.¹⁶⁴

However, problems may arise if the territorial sea boundaries of Indonesia are not clearly delimited with the relevant neighbouring countries. The land boundaries of Indonesia are basically agreed by the Government of the Netherlands (Dutch East Indies), which colonized Indonesia, the British Government, which colonized Sarawak and North Borneo (Sabah) and Papua New Guinea, and Portugal, which colonized East Timor.¹⁶⁵

Although the stipulations in those agreements maybe clear on paper, it has not been easy to determine the exact locations of these boundary lines in the field, particularly in the middle of the deep jungle, such as in Papua, or in relation to the flow of rivers, either because of marsh and swamp areas, or because rivers may have changed their course over the years.¹⁶⁶ It is therefore essential to have effective cooperation between neighbouring states to jointly conduct survey for border mapping on land and for constructing markers in agreed areas and locations.¹⁶⁷

The maritime boundaries of Indonesia include the boundaries of (1) internal waters, (2) archipelagic waters, (3) territorial seas, (4) contiguous zones, (5) exclusive economic zones and (6) continental shelves. In addition, according to new legislation on autonomy and the devolution of power from central to local

¹⁶⁴ *Ibid*

¹⁶⁵ Puspitawati. 2007. "The East/West Archipelagic Sea Lanes Passage Through the Indonesian Archipelago". *Journal of Maritime Studies*. Vol. 140. P.15

¹⁶⁶ *Ibid*, p.16

¹⁶⁷ *Ibid*

governments, there are also maritime zones of the districts and provinces in Indonesia.¹⁶⁸

As a state party to UNCLOS 1982, Indonesia has the obligation to implement UNCLOS 1982 into its national law, including about the archipelagic states, the arrangement of state borders with neighbouring countries, and the boundaries of jurisdictions with high seas.¹⁶⁹ In line with the enactment of the Convention, a key priority in the implementation of the Convention is the establishment of maritime boundaries with neighbouring countries.¹⁷⁰ As one of the largest archipelago country in the world, Indonesia has maritime borders with 10 (ten) countries with India, Thailand, Malaysia, Singapore, Vietnam, Philippines, Palau, National Seminar Geospatial Role in Framing NKRI 2016: 03-214 Papua New Guinea (PNG), Australia, Timor Leste.¹⁷¹

The settlement of the maritime boundary settling diplomatically through border negotiations. After the validity of UNCLOS 1982, Indonesia had several maritime boundary agreements with neighbouring countries in 2003, with Indonesia agreeing to the LK boundary and having ratified the agreement with Law No. 18 year 2007.¹⁷² In 2009 - 2014 there were 3 (three) maritime boundary agreements in 2009, Indonesia and Singapore signed the Territorial Sea Boundary

¹⁶⁸ Harry Purwanto and Dewa Gede Sudika Mangku. 2016 ” Legal Instrument of Republic Indonesia on Border Management Using the Perspective of Archipelagic State” *International Journal of Business, Economics and Law*. Vol. 11. P.54

¹⁶⁹ *Ibid*

¹⁷⁰ *Ibid*

¹⁷¹ Leonard C Sebastian and Ristian Atriandi Supriyanto and I Made Andi Arsana. 2014. *Indonesia and the Law of the Sea: Beyond the archipelagic outlook*. National Security College Issue Brief No 9 May 2014.

¹⁷² Harry Purwanto and Dewa Gede Mangku, *Op.cit.*

Agreement between Indonesia and Singapore in the Strait Western Segment of Singapore and have ratified the agreement with Law No.4 in 2010. In 2014, Indonesia and Singapore re-agreed the sea boundary area in the eastern segment of the Strait of Singapore on September 3, 2014¹⁷³. In addition, other with Singapore in 2014, Indonesia also agreed on the ZEE boundary with the Philippines on May 23, 2014.¹⁷⁴

Indonesia is an archipelagic country extending 5,120 kilometres (3,181 mi) from east to west and 1,760 kilometres (1,094 mi) from north to south. According to a geospatial survey conducted between 2007 and 2010 by National Coordinating Agency for Survey and Mapping, Indonesia has 13,466 islands. However, according to earlier survey conducted in 2002 by National Institute of Aeronautics and Space (LAPAN), the Indonesian archipelago has 18,307 islands. According to the CIA factbook, there are 17,508 islands. The discrepancy of the numbers of islands in Indonesia was caused by the earlier survey includes "tidal islands"; sandy cays and rocky reefs that are appeared during low tide and submerged during high tide.

There are 8,844 islands have been named according to estimates made by the government of Indonesia, with 922 of those permanently inhabited. It comprises five main islands: Sumatra, Java, Borneo (known as "Kalimantan" in Indonesia), Sulawesi, and New Guinea; two major archipelagos (Nusa Tenggara and the Maluku Islands); and sixty smaller archipelagoes. Four of the islands are

¹⁷³ *Ibid*, p. 56

¹⁷⁴ *Ibid*

shared with other nations: Borneo is shared with Malaysia and Brunei, Sebatik, located off the eastern coast of Kalimantan, shared with Malaysia, Timor is shared with East Timor, and the newly divided provinces of Papua and West Papua share the island of New Guinea with Papua New Guinea. Indonesia's total land area is 1,919,317 square kilometres (741,052 sq mi).

Included in Indonesia's total territory is another 93,000 square kilometres (35,908 sq mi) of inland seas (straits, bays, and other bodies of water). The additional surrounding sea areas bring Indonesia's generally recognised territory (land and sea) to about 5 million square kilometres. The government, however, also claims an exclusive economic zone, which brings the total to about 7.9 million square kilometres. Latitude = 5.00 S & Longitude = 120.00 E. Because part of New Guinea is Indonesian territory, the country can be said to straddle two continents, Asia and Oceania (or, by another definition, Asia and Sahul). This of course is an arbitrary definition by culture and language on the Asian side, since Indonesia has no territory on the Asian mainland.

F. The Concept Arrangement of the International Law in Islamic Law

1. The Horizontal (Muamalah) Relationship based on Islam

Basically sphere of human life in this world rests on two kinds of relationship, that is vertical to Allah and Horizontal (Muamalah) , this article discusses the Tenets of the emphasis on the three systems of the Agreement: Customary law , Civil Law (KUHP) and Islamic Law . As

know, in international law sphere is set regulation regarding the relationship between states which consist of relationship between humans

Basically Islamic International law, or *siyar*, does not talk about the means of regulating relations between states. Instead, *siyar* refers to the rules of one (meaning The one) Islamic community with respect to its conduct toward outsiders.¹⁷⁵ When it comes to territorial sovereignty there known a Jihadi and Ijtihadi Islamists. The key characteristic of Jihadi Islamists is a literal and strict adherence to the fundamentals of Islam in the Qur'an and Sunna.¹⁷⁶ What this view means for their perspective on territorial sovereignty is that it is highly monolithic, seeing little to no separation between religion and politics.¹⁷⁷ They believe that there is only one way for God's government to exist on earth and that this way was prescribed in the Qur'an and followed by the Prophet Muhammad in his life.¹⁷⁸

To Jihadi Islamists, the only kind of sovereignty in existence is that of God.¹⁷⁹ The sovereignty of Allah always comes before any earthly power. As sovereignty is used to describe the power over which there is no higher power, clearly Allah is the highest authority, with no power above him and no one to share power with him. This belief is derived from their understanding of the central Islamic principle of Tawhid, which refers to the unity of God, whereby

¹⁷⁵ Zachary Karabatak. *Op.cit.*

¹⁷⁶ *Ibid*

¹⁷⁷ *Ibid*

¹⁷⁸ *Ibid, p.14*

¹⁷⁹ Amin Saikal. 2008. "Westphalian and Islamic Concepts of Sovereignty" in Trudy Jacobsen, C.J.G. Sampford, Ramesh Thakur. *Re-envisioning Sovereignty: the end of Westphalia?* Aldershot: Ashgate. p. 73-81

there is one God who created all and owns everything.¹⁸⁰ Thus, Jihadis do not recognize the legitimacy of territorial or political divisions, seeing the only legitimate authority on Earth as being divinely based.¹⁸¹

The role of man on earth is to maintain exclusive Islamic sovereignty within the ummah (world-wide community of believers), expanding to wherever Muslims may live.¹⁸² Due to the wide geographic distribution of Muslims today, this ideology can be used, as some have claimed, to advocate never-ending global Jihad to strengthen the Jihadi version of Islam.¹⁸³ The Jihadi view of the world is a borderless domain of worshippers, with no legitimacy for any sort of political institution, other than the concept of the Islamic Khilafat (the divinely legitimated ruler ship of successors to the prophet).¹⁸⁴ The key implication for this view is that Jihadi Islam is opposed to territorial sovereignty and nation-states, seeing no boundaries to the defense and expansion of the Islamic faith, especially within the Islamic world.¹⁸⁵

A key distinguishing factor between the Jihadi Islamists and the Ijtihadi Islamist is the Jihadi conviction that a Muslim must sacrifice to bring a new Islamic world order about, laying down one's life. The ideal world order of Islam, which Jihadi Islamists see as their obligation to bring about, would abolish what we understand as territorial borders between states. They believe Islam seeks to

¹⁸⁰ Zachary Karabatak. *Op.cit*, p.15-16

¹⁸¹ *Ibid*

¹⁸² Stuart Elden. 2009. *Terror and Territory*. Minneapolis: University of Minnesota Press, p. 48-49

¹⁸³ Daniel Benjamin and Steven Simon. 2005. *The Next Attack: The Globalization of Jihad*. London: Hodder and Stoughton.

¹⁸⁴ Zachary Karabatak. *Op.cit*, p.17

¹⁸⁵ *Ibid*

build a world order in which God's, "human creatures are free to seek his bounty," unrestricted in the movements and "free to settle wherever they choose."¹⁸⁶

jtihadi Islamists also use custom based on the prophet's deeds (called Sunna) to justify pragmatism and widely varying positions on ideas. One example occurred in 628 A.D. when the Meccans, who were non-Muslim and at odds with Muhammad at the time, prevented Muhammad and his followers from making the Hajj (the annual pilgrimage to the Ka'bah in Mecca).

Instead of fighting to go through with this divinely ordained pilgrimage, Muhammad compromised with the Meccans by agreeing to wait a year before attempting to enter the city. During the year delay, Muhammad built his forces for a battle with the Meccan defenders.¹⁸⁷ This and other historical examples show that there is simply a huge amount of flexibility in the practice of the Prophet, which has supported the idea in Islamic jurisprudence that "whatever is 'necessary' (daruri) and in 'the public interest' (maslaha) must be deemed to be Islamic..."

The truth is that it is very difficult to definitively say just about anything in Islam, disproving the myth of some sort of Islamic monolith or singular faith. Most of the concepts in Islam are really debates, with the many Islamic scholars falling on one side or the other. Far from a singular and undifferentiated religion,

¹⁸⁶ Sayyid Qutb. 2000. *War, Peace, and Islamic Jihad*. New York: Palgrave Macmillan. p.225-226

¹⁸⁷ Piscatori. *Islam in a World of Nation-States*. p.3

Islam is an incredibly diverse.¹⁸⁸ Religion with a great deal of pluralism. It remains close to impossible to come up with a single opinion or view of Islam.¹⁸⁹ The religion encompasses 1.25 billion people who encompass hundreds of individual ethnic, linguistic, and national groups. At the same time, there is a core part.

2. The explanation of Bilateral Agreement in Islamic Law

The basic and fundamental principle behind every international treaty is that it must be respected and obeyed. Hence, the traditional Western maxim in conventional international law, 'pacta sunt servanda' which means every pact must be fulfilled. In the same vein, Islamic international law requires that once a Muslim State enters into a treaty arrangement with any other State, be it a Muslim State or a non-Muslim State, it is legally required that all the terms of the treaty must be fulfilled.

The basis of its fulfilment, just as pacta sunt servanda in conventional international law, is also found in the old Arabic adage 'Al-'aqd shari'at al-muta'aqideen', meaning that 'the contract is the Shari'ah of the parties'.¹⁹⁰ The obligation to fulfil all contractual agreements when entered into is unequivocal in the Qur'anic provisions. For example, Qur'an 5:1 states that 'O you who have believed, fulfil all contracts.'¹⁹¹ Likewise, Qur'an 16:91 stipulates thus 'And fulfil

¹⁸⁸ Zachary Karabatak, *Op.cit*, p.42

¹⁸⁹ *Ibid*

¹⁹⁰ S Habachy. 1962. "Property, Right and Contract in Muslim Law" *Columbia Law Review* Vol.62 No.3 p.463

¹⁹¹ Qur'an 5:1

the covenant of Allah when you have taken it, O believers, and do not break oaths after their confirmation while you have made Allah, over you, a witness. Indeed, Allah knows what you do.’¹⁹²

Surah al Maidah first verse was revealed to suit the requirements of the changed conditions which were now different from those prevailing at the time of the revelation of Al-i-’Imran and An- Nisa. Then the shock of the set-back at Uhd had made the very surroundings of Al-Madinah dangerous for the Muslims, but now Islam had become an invulnerable power and the Islamic State had extended to Najd on the east, to the Red Sea on the west, to Syria on the north and to Makkah on the south. This set-back which the Muslims had suffered at Uhd had not broken their determination. It had rather spurred them to action. As a result of their continuous struggle and unparalleled sacrifices, the power of the surrounding clans, within a radius of 200 miles or so, had been broken.

The Jewish menace which was always threatening Al-Madinah had been totally removed and the Jews in the other parts of Hijaz had-become tributaries of the State of Al-Madinah. The last effort of the Quraish to suppress Islam had been thwarted in the Battle of the Ditch. After this, it had become quite obvious to the Arabs that no power could suppress the Islamic movement. Now Islam was not merely a creed which ruled over the minds and hearts of the people but had also become a State which dominated over every aspect of the life of the people who lived within its boundaries. This had enabled the Muslims to live their lives without let or hindrance, in accordance with their beliefs.

¹⁹² Qur’an 16:91

Even for the non-Muslims, Allah stresses that the term of the treaty must be completed once they have not compromised their position by giving support to an adversary party thus: ‘Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [hasended]. Indeed, Allah loves the righteous [who fear Him].’¹⁹³ Allah states further that ‘So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him].’¹⁹⁴

The unequivocal statement of Prophet Muhammad SAW to Abu Jandal ibn Suhayl when the latter became a Muslim and sought to defect from the Makkan camp to join the Muslims immediately after the Treaty of Hudaibiyyah was that: ‘O Abu Jandal have patience and be disciplined; for God will soon provide for you and your other persecuted colleagues a way out of your suffering. We have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other.’¹⁹⁵ With this statement, Prophet Muhammad SAW understood the importance of fulfilling the terms of a treaty and, as such, stressed the importance and implication of violating a treaty once it has been entered into.

¹⁹³ Qur’an 9:4

¹⁹⁴ Qur’an 9:7

¹⁹⁵ MH Haykal. 1980. *The Life of Muhammad*. North American Trust Publications. p.

The legal position of treaty under Islamic law has been well articulated in the famous case of Saudi Arabia v. ARAMCO¹⁹⁶ where it was carefully stated that:

Muslim law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil or commercial law. All these types are viewed by Muslim jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into by individuals or collectivities; under Muslim law, any valid contract is obligatory, in accordance with the principles of Islam and the Law of God, as expressed in the Koran: “Be faithful to your pledge to God, when you enter into a pact”

An overwhelming majority of the Muslim jurists are of the view that a Muslim State can validly enter into a binding treaty with a non-Muslim State for an indefinite period of time or for a specified period to be determined by the Islamic leader.¹⁹⁷ The view canvassed by Khadduri that a peace treaty cannot be entered for more than ten years with the non-Muslim¹⁹⁸ has been said to represent the extreme views of al-Shafi’i.¹⁹⁹ There are authoritative views, according to Ibn Rushd (1198 AD), attributed to Abu Hanifah, Malik Ibn Anas and Ibn Hanbal that a peace treaty can be for an indefinite period as long as it serves the interest of the

¹⁹⁶ Saudi Arabia v. Arabian American Oil Company (ARAMCO) (1963) 27 I.L.R. p. 117

¹⁹⁷ M Munir, ‘Public International Law and Islamic International Law: Identical Expression of World Order’ ,Islamabad, 2003, p.428

¹⁹⁸ M Khadduri, *The Islamic Law of Nations Shaybani’s Siyar*, The Johns Hopkins Press, Maryland, 1966, p.16-17

¹⁹⁹ SH Hashmi, *Islamic Political Ethics: Civil Society, Pluralism and Conflict*, Princeton University Press, New Jersey, 2002, p. 94

Muslim State.²⁰⁰ The important thing is that such treaty must subsist for the interest of the Muslims.

It is to be noted, however, that a treaty that contains some terms that are repugnant to Islam may still be executed under Islamic international law, although with some reservations and provided it is for the overall interest of the Muslims.²⁰¹ The historical basis for this assertion could be found in the Treaty of Hudaibiyyah 628 AD which Prophet Muhammad signed with the non-Muslims of Makkah even though some of the terms of the treaty appeared unfavourable to the Muslims. But the Treaty of Hudaibiyyah later turned out, as expected by Prophet Muhammad, to be “a manifest victory” (fathaan mubeenan).²⁰² This may probably be the reason why almost all of the Muslim States are parties to the 1961 VCDR and 1963 VCCR which regulate the immunities and activities of the diplomatic and consular personnel which are to the benefit of the generality of the Muslim community (ummah)

²⁰⁰ A Sulayman. *Islamic Theory of International Relations*. International Institute of Islamic Thought. Virginia. 1987, p. 18

²⁰¹ Munir. *op.cit.* p.429

²⁰² LA B soul. *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law)*. 2003. PhD Thesis. McGill University. Montreal. p. 191.

CHAPTER III

THE SOUTH CHINA SEA ARBITRATION: IMPLICATION TOWARDS INDONESIAN EXCLUSIVE ECONOMIC ZONE

A. Implication of the South China Sea Arbitration Decision towards Indonesian Exclusive Economic Zone

1. The Case Decision by Permanent Court of Arbitration

The Jurisdiction basis for the arbitration on South China Sea is the 1982 United Nations Convention on the Law of the Sea (the “Convention” or “UNCLOS”).²⁰³ As known that both the Philippines and China are parties to the Convention, the Philippines have ratified UNCLOS on 8 May 1984, and China on 7 June 1996.²⁰⁴ Deeper, The arbitration concerned on the role of historic rights and the source of maritime entitlements in the South China Sea, the status of certain maritime features in the South China Sea, and the lawfulness of certain actions by China in the South China Sea that the Philippines alleged to be in violation of the Convention. China has consider their position as non-acceptance and non-participation in the proceedings.²⁰⁵ Therefore, as known that the Permanent Court of Arbitration served as Registry in this arbitration.

Accordingly, the decision came after the Philippines sued China's claim since 2013 over what they call the West Philippines Sea. To this point, the

²⁰³ United Nations Convention on the Law of the Sea. 10 December 1982

²⁰⁴ Permanent Court of Arbitration “ Decision PCA Case N° 2013-19 In Matter of The South China Sea Arbitration between The Republic of Phillipines and The People of Republic China” Chapter I, p.1

²⁰⁵ *Ibid.* Chapter VI. p.84

Philippines says China's claims to these areas are having no basis in fact because they are contrary to the UNCLOS. On these PCA results, China can no longer use their historical claims.²⁰⁶ In addition, 9 lines belonging to China is also certainly no longer be used as a base. Previously, China denied that they "broke through", because the territory is their territory. These claims are based on nine dash lines, or "dotted 9 territory territories", which have existed since the Kuomintang regime in 1947.²⁰⁷

In light of limitations on compulsory dispute settlement under the Convention, the Tribunal has emphasized that it does not rule on any question of sovereignty over land territory and does not delimit any boundary between the Parties.²⁰⁸ On historic right and nine dash line which this whole time claim by china, The Tribunal found that it has jurisdiction to consider the Parties' dispute concerning historic rights and the source of maritime entitlements in the South China Sea. On the merits, the Tribunal concluded that the Convention comprehensively allocates rights to maritime areas and that protections for pre-existing rights to resources were considered, but not adopted in the Convention.²⁰⁹ Accordingly, the Tribunal concluded that, to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent they were incompatible with the exclusive economic zones provided for in the Convention.²¹⁰

²⁰⁶ *Ibid.* p.86

²⁰⁷ *Ibid*

²⁰⁸ *Ibid.* Chapter IV. p.46

²⁰⁹ *Ibid*

²¹⁰ *Ibid*

The Tribunal also noted that, although Chinese navigators and fishermen, as well as those of other States, had historically made use of the islands in the South China Sea, there was no evidence that China had historically exercised exclusive control over the waters or their resources.²¹¹ The Tribunal concluded that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the ‘nine-dash line’²¹². As mentioned in Chapter II, there are three conditions that should be fulfilled: (1) the exercise of the coastal state authority over the area; (2) the continuity over time of this exercise of authority; and (3) the attitude of foreign states to the claim.²¹³ China fails to comply with any of these three conditions. China was officially notified of the world the nine-dash-line claim in 2009, and not a single state recognizes its claim.

2. The Reaction of the Parties

China has repeatedly stated that “it will neither accept nor participate in the arbitration unilaterally initiated by the Philippines.” Annex VII, however, provides that the “Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.” Annex VII also provides that, in the event that a party does not participate in the proceedings, a tribunal “must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”²¹⁴

²¹¹ *Ibid*

²¹² *Ibid*

²¹³ Sophia Kopela. *Op.cit.*

²¹⁴ *Ibid. p.51*

Accordingly, throughout these proceedings, the Tribunal has taken steps to test the accuracy of the Philippines' claims, including by requesting further written submissions from the Philippines, by questioning the Philippines both prior to and during two hearings, by appointing independent experts to report to the Tribunal on technical matters, and by obtaining historical evidence concerning features in the South China Sea and providing it to the Parties for comment.²¹⁵

China has also made clear—through the publication of a Position Paper in December 2014 and in other official statements—that, in its view, the Tribunal lacks jurisdiction in this matter. The Director-General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs gave the following remarks in response to questions about why China did not participate and whether, having renounced the opportunity to appear before the Tribunal to contest jurisdiction, China should “bear the consequences”.²¹⁶

First, not accepting or participating in arbitral proceedings is a right enjoyed by a sovereign State. That is fully in conformity with international law. And certainly, China is not the first State to do so. For such a proceeding that is deliberately provocative, China has neither the obligation nor the necessity to accept or participate in it. The Philippines' initiation of the Arbitration lacks basic grounds in international law. Such an act can neither generate any validity in international law, nor create any obligation on China.

²¹⁵ *Ibid*

²¹⁶ *Ibid* p.49

Second, by not accepting or participating in the arbitral proceedings, we aim to safeguard the solemnity and integrity of international law, including the UNCLOS, to oppose the abuse of the compulsory arbitration procedures, and to fulfill our commitments with the Philippines to settle relevant disputes through negotiations. The commitments were breached by the Philippines, but China remains committed to them.

Third, the actual objective of the Philippines to initiate the Arbitration and that of some other States to fuel the fire are not to genuinely resolve disputes. The Philippines was fully aware that the Arbitral Tribunal has no jurisdiction over disputes concerning territorial sovereignty and maritime delimitation between the two States; it was fully aware that it was absolutely not possible that China would accept the compulsory arbitration; and it was also fully aware that such a means would not help resolve the problem. With full awareness of the above, the Philippines still decided to abuse the provisions of the UNCLOS by unilaterally initiating and then pushing forward the arbitral proceedings. Some other States, who were making every effort to echo it, apparently have their ulterior motives. For such a game, there is no point for China to humour it.

Fourth, whether or not China accepts and participates in the arbitral proceedings, the Arbitral Tribunal has the obligation under international law to establish that it does have jurisdiction over the disputes. But from

what we have seen, it apparently has failed to fulfill the obligation and the ruling would certainly be invalid. So there is no such thing of China's taking the consequence of the arbitration. If anything, it is the Philippines that should bear all the consequences of abusing the UNCLOS.²¹⁷

Article 288 of the Convention provides that: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."

The Tribunal convened a hearing on jurisdiction and admissibility in July 2015 and rendered an Award on Jurisdiction and Admissibility on 29 October 2015, deciding some issues of jurisdiction and deferring others for further consideration. The Tribunal then convened a hearing on the merits from 24 to 30 November 2015. The Award of today's date addresses the issues of jurisdiction not decided in the Award on Jurisdiction and Admissibility and the merits of the Philippines' claims over which the Tribunal has jurisdiction. The Award is final and binding, as set out in Article 296 of the Convention and Article 11 of Annex VII.

In response of the Award, Beijing has been using soft and hard diplomacy to intimidate anyone who dares to challenge its position. Such as threatening the Philippines with war should it try to enforce the international ruling and telling Vietnam and India to stop searching for oil in the region, or else it will attack the

²¹⁷ See Ministry of Foreign Affairs, People's Republic of China, Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines (12 May 2016)

oil and gas bases.²¹⁸ It has also told America's close Asian ally, Japan, to stay away from its "own" South China Sea. Reminding China as party who considered as a loss party, it is understandable that China gave the most response.²¹⁹ But it is still need to be questioned whether or not the reaction is proper and does not pass the goodwill and peace maintenance value, and also most importantly, does not violate the international law.

3. The Validity of South China Sea Arbitration Decision and Steps Taken to Ensure Procedural Fairness to Both Parties In

Article 9 of Annex VII seeks to balance the risks of prejudice that could be suffered by either party in a situation of non-participation.²²⁰ First, it protects the participating party by ensuring that proceedings will not be frustrated by the decision of the other party not to participate. Second, it protects the rights of the non-participating party by ensuring that a tribunal will not simply accept the evidence and claims of the participating party by default.²²¹ The respective procedural rights of the parties are further articulated in Article 5 of Annex VII,

²¹⁸ John Lee, What Now for China's 'Historic Rights' in the South China Sea?, 02 August 2016, The Diplomat News.

²¹⁹ *Ibid*

²²⁰ Permanent Court of Arbitration " Decision PCA Case N° 2013-19 In Matter of The South China Sea Arbitration between The Republic of Phillipines and The People of Republic China"p.43

²²¹ *Ibid* p.46

which provides that “the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.”²²²

The Tribunal has taken a number of measures to safeguard the procedural rights of China. For example, it has:²²³

- a) ensured that all communications and materials in the arbitration have been promptly delivered, both electronically and physically, to the Ambassador of China to the Kingdom of the Netherlands in The Hague;
- b) granted China adequate and equal time to submit written responses to the pleadings submitted by the Philippines;
- c) invited China (as with the Philippines) to comment on procedural steps taken throughout the proceedings;
- d) provided China (as with the Philippines) with adequate notice of hearings and multiple opportunities to comment on the setting and scheduling of both the Hearing on Jurisdiction and Hearing on the Merits, as described at paragraphs 47 to 53, 54 to 59 and 61 to 76 above;
- e) promptly provided to China (as with the Philippines) copies of transcripts of the Hearing on Jurisdiction and Hearing on the Merits;
- f) invited China to comment on anything said during the Hearing on Jurisdiction and Hearing on the Merits;

²²² *Ibid*

²²³ *Ibid*, p.47-48

- g) invited China (as with the Philippines) to comment on the proposed candidates and terms of reference for independent experts appointed by the Tribunal;
- h) invited China (as with the Philippines) to comment on certain materials in the public domain, but not already in the case record;
- i) made the Registry staff available to Chinese Embassy personnel to answer informal questions of an administrative or procedural nature;
- j) had the Registry convey written communications from the Chinese Embassy to the individual members of the Tribunal; and
- k) Reiterated that it remains open to China to participate in the proceedings at any stage.

China's non-participation imposes a special responsibility on the Tribunal. There is no system of default judgment under the Convention.²²⁴ As will be apparent in the course of this Award, the Tribunal does not simply adopt the Philippines' arguments or accept its assertions untested. Rather, under the terms of Article 9 of Annex VII, the Tribunal "must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law" before making any award.²²⁵

As a practical matter, Article 9 has led the Tribunal to take steps to test the evidence provided by the Philippines and to augment the record by seeking additional evidence, expert input, and Party submissions relevant to questions

²²⁴ *Ibid.* p.50

²²⁵ *Ibid*

arising in this merits phase, including as to the status of features in the South China Sea, the allegations concerning violations of maritime safety obligations, and claims about damage to the marine environment.²²⁶

4. The Implication of the Permanent Court Arbitration Decision to Indonesia

Actually there is no directly impact, but the Decision of the South China Sea Arbitration put Indonesia in stronger position if there is a case which involve Indonesian ZEE with China in future.²²⁷ If we look back, like many other territorial disputes in the South China Sea, the origin of the contemporary dispute between China and Indonesia can be found in the infamous 1947 map drawn by Nationalist Chinese diplomats featuring a dashed line encircling much of the South China Sea. The geography of the dashed line on Chinese maps varies; however, in every version, one of the dashes intersects the northern boundary of Indonesia's declared EEZ north of the Natunas, around 1400 kilometres from the Chinese mainland.²²⁸ The waters in the disputed area are an important fishery and the seabed below is home to large natural gas reserves.²²⁹

Beijing has never offered a clear explanation of the nature of the claim implied by the dashed line. Chinese statements at their most expansive have implied that it outlines a claim to a territorial sea, or to an EEZ; other statements

²²⁶ *Ibid.* p.51

²²⁷ Guifang Julia Xue. 2016. "Deep Danger: Intensified In the South China Sea and Implication for China" *Ocean and Coastal Law Journal* Vol. 17, p. 2

²²⁸ See Euan Graham, "China's New Map: Just Another Dash?", *The Strategist*, Australian Strategic Policy Institute, 17 September 2013, <http://www.aspistrategist.org.au/chinas-new-map-just-another-dash/> access on 5 November 2017

²²⁹ Raras Cahyafitri, "East Natuna Development Faces Possible Negotiation Delay", *The Jakarta Post*, 27 November 2015, <http://www.thejakartapost.com/news/2015/11/27/east-natuna-development-faces-possible-negotiation-delay.html>. Access on 5 November 2017

have implied that the line is merely a guideline illustrating Chinese claims to fishing rights within the line, or to islands and rocks within it but not to any separate maritime entitlements.²³⁰ Unlike other countries in the region affected by China's dashed line, China and Indonesia do not dispute sovereignty over any land features. For Indonesia, therefore, China's maritime claims within the dashed line are the primary concern.²³¹

Indonesian officials have repeatedly asked China to clarify the nature of the dashed line claim since first becoming aware in 1993 that it encompassed part of Indonesia's EEZ.²³² In July 2010, Indonesia wrote in a *note verbal* to the UN Secretary General that the line "clearly lacks international legal basis", and that it risks upending the United Nations Convention on the Law of Sea (UNCLOS).²³³ For the most part, however, Indonesia has taken the view that, because under international law any claim to maritime entitlements such as a territorial sea, an EEZ, or fishing rights cannot be legitimized without some reference to land features, and because there are no disputes between China and Indonesia over the sovereignty of land features, the line's existence is best

²³⁰ Marina Tsirbas, "What Does the Nine-Dash Line Actually Mean?", *The Diplomat*, 2 June 2016, <http://thediplomat.com/2016/06/what-does-the-nine-dash-line-actually-mean/>. Access on 5 November 2017

²³¹ Guifang Julia Xue. 2016. "Deep Danger: Intensified In the South China Sea and Implication for China". *Ocean and Coastal Law Journal* Vol. 17. p. 2

²³² Douglas Johnson. 1994 "Drawn into the Fray: Indonesia's Natuna Islands Meet China's Long Gaze South", *Asian Affairs* 42, No 3, p.154–155.

²³³ Indonesia. *Note Verbale*, No 480/POL-703/VII/10, New York, 8 July 2010, para 4, http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf. Access on 5 November 2017

ignored. There has been a consensus in Jakarta that disputing it would offer it a legitimacy that it does not deserve.²³⁴

Indonesian officials have long said allows it to play the role of an “honest broker” in negotiations over those disputes, for example by hosting informal “workshops” on the issue from 1990 to 2014.²³⁵ However, after more than a quarter of a century, it is not clear what results Indonesia’s services in these negotiations have delivered. Even tough, some argue it has served a useful tension management function in the disputes. Scepticism regarding Indonesia’s ‘honest broker’ role should not be construed as a criticism of Indonesia’s efforts or abilities in these negotiations, which under Ali Alatas, Hasjim Djalal, Marty Natalegawa and others have been persistent, patient, and creative. Rather, it is a function of China’s efforts to block progress in most areas.²³⁶

In 2010 and 2013 there are at least 3 occasion marks, Indonesian vessels attempting to arrest Chinese fishing boats in the South China Sea were ordered by Chinese law enforcement vessels to let the Chinese boats in Indonesian custody go free. In response to threatening behavior by their Chinese counterparts, the Indonesian vessels complied.²³⁷ Chinese vessels have continued to fish in Indonesia’s EEZ around the Natuna, and in recent months they have been

²³⁴ Aaron L Connelly. *Op.cit*

²³⁵ On the workshops. see Hasjim Djalal. 2003. *Preventative Diplomacy in Southeast Asia: Lessons Learned* (Jakarta: Habibie Center).

²³⁶ Bill Hayton. 2014. *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale), p.256–259.

²³⁷ Scott Bentley. “Mapping the Nine-Dash Line: Recent Incidents Involving Indonesia in the South China Sea” *The Strategist*,. Australian Strategic Policy Institute, 29 October 2013, <http://www.aspistrategist.org.au/mapping-the-nine-dash-line-recent-incidents-involving-indonesia-in-the-south-china-sea/> accesson 5 November 2017

shadowed by Chinese Coast Guard vessels, as they were in the incidents in 2010 and 2013. Three encounters between Indonesian and Chinese vessels in 2016 are worth noting.

First, on 19 March 2016, an Indonesian Ministry of Marine Affairs and Fisheries vessel caught a Chinese trawler fishing in its EEZ. The vessel gave chase, firing warning shots, and seized the boat, towing it back to port. As the two boats approached Indonesia's territorial sea nearly 12 hours later, a large Chinese Coast Guard vessel appeared on the horizon, demanding the fishing boat's release. When the Indonesian vessel did not comply, the Chinese Coast Guard vessel rammed the Chinese boat under tow, forcing the Indonesian authorities to release it.²³⁸

Chinese diplomats phoned their counterparts in Jakarta to urge Indonesia to keep the incident quiet; however, before her counterparts from the Foreign Ministry could stop her, Indonesia's Minister for Marine Affairs and Fisheries Susi Pudjiastuti held a press conference to detail the incident.²³⁹ This was a departure from the earlier incidents in 2010 and 2013, when Indonesia chose not

²³⁸ Ristian A Supriyanto, Shahrman Lockman and Koh Swee Lean Collin. "China's Rift with Indonesia in the Natunas: Harbinger of Worse to Come?". *The Diplomat*. 25 March 2016, <http://thediplomat.com/2016/03/chinas-rift-with-indonesia-in-the-natunas-harbinger-of-worse-to-come/> access on 5 November 2017

²³⁹ Chris Brummitt "Frantic Phone Call Failed to Halt China-Indonesia Sea Spat" *Bloomberg*. 23 March 2016, <http://www.bloomberg.com/news/articles/2016-03-22/frantic-phone-call-failed-to-contain-china-indonesia-sea-spat>. Interviews with Indonesian officials access on 5 November 2017

to publicize the encounters. Going public introduced domestic political pressure to take a stronger stand against Chinese illegal fishing.²⁴⁰

In response, Defense Minister Ryamizard Ryacudu announced plans to deploy three frigates, five F-16 fighter jets, and an army battalion to Ranai, telling reporters: “Natuna is a door; if the door is not guarded, then thieves will come in.”²⁴¹ Indonesia also launched a vigorous if poorly coordinated diplomatic protest, as the fisheries minister, foreign minister, and defense minister all announced that they would summon the Chinese ambassador. For its part, China argued that the area was a “traditional Chinese fishing zone”, a claim that elicited further protests from Jakarta.²⁴²

Luhut Panjahitan sought to discourage notions of a breach, telling reporters that Indonesia would seek to cooperate with China in the fisheries around Natuna.²⁴³ Only a few weeks after Luhut’s return, on 27 May, the Indonesian Navy frigate KRI *Oswald Siahaan* found a Chinese trawler in a similar

²⁴⁰ Zhiguo Gao and Bing Bing Jia. 2013. “The Nine Dash Line In the South China Sea: History status and Implication” *The American Journal of International Law* Vol. 107. p. 20

²⁴¹ Chris Brummitt, “Indonesia Will Defend South China Sea Territory with F-16 Fighter Jets”, Bloomberg, 1 April 2016, <http://www.bloomberg.com/news/articles/2016-03-31/indonesia-to-deploy-f-16s-to-guard-its-south-china-sea-territory>.access on 5 November 2017.

²⁴² Brummitt. “Frantic Phone Call Failed to Halt China-Indonesia Sea Spat”. See: Aaron L. Connelly. 2016. *Indonesia In South China Sea : Going it Alone*. Case Analysis; Lowy Institute, <https://www.lowyinstitute.org/publications/indonesia-south-china-sea-going-it-alone> access on 5 November 2017.

²⁴³ Yohannes Paskalis. “Luhut: Indonesia, China to Step Up Security Partnership”, *Tempo*, 29 April 2016, <http://en.tempo.co/read/news/2016/04/29/055767157/Luhut-Indonesia-China-to-Step-Up-Strategic-Security-Partnership>. Access on 5 November 2017

location, again giving chase and firing warning shots before arresting eight fishermen and seizing the boat just east of Indonesia's EEZ boundary.²⁴⁴

The Decision of the Permanent court of Arbitration without a doubt will give impact on the relations between China and ASEAN members, particularly the bilateral relations between China and those members who have territorial disputes with China including Indonesia.²⁴⁵ Even though Indonesia is not included as one of the states who disputed the South China Sea but Indonesian territorial sovereignty that is located near the disputes has brought Indonesia into the whirlpool of the problems. Moreover, China and Indonesia obviously has many other relations in other sectors not only limited to politic.²⁴⁶ Thus, the Decision of the Permanent court of Arbitration to decide that the Chinese claim on nine dash line not according with UNCLOS which eventually lead to the Indonesian action, being able to affect other sectors.²⁴⁷

Although Chinese minister of commerce, Mr. Gao Hucheng, asserted in early August 2016 that the SCS would not impact China's trade and investment cooperation with the Philippines, it looked more like a gesture of Beijing. In fact, Chinese investors and consumers' words carry more weight. Their nationalist sentiment, rising highly during the past months due to the SCS arbitration case initiated by the Philippines, will take a while to disappear. Many potential Chinese

²⁴⁴ *Ibid*

²⁴⁵ Guifang Julia Xue. *Loc.cit*, p.6

²⁴⁶ *Ibid*

²⁴⁷

tourists cancelled their trips to the ASEAN states especially to Philippines in consideration of the unstable political relations between two sides.²⁴⁸

At present, China is the largest trading partner of ASEAN while ASEAN is the third largest partner of China. Bilateral trade volume got up to \$472 billion in 2015. Besides, ASEAN is one of the main overseas investment destinations of Chinese enterprises. As of the end of May 2016, China and ASEAN conducted two-way investment over \$160 billion. It is foreseen that China will invest more in ASEAN, particularly in infrastructure construction, when implementing the Belt and Road Initiative.

Meanwhile, in Indonesia itself in the fourth quarter of 2014, China held the 4th position as the largest investor in Indonesia with an investment of 471 million USD.²⁴⁹ According to data from the Investment Coordinating Board (BKPM), in the last five years since 2010, China's average investment realization grew 66 percent annually, from 174 million USD in 2010 to more than 800 million USD last year. Meanwhile, in terms of investment plans, the total pending since 2010 usage of 36 billion USD. From the cumulative BKPM data from January to September 2015, China's investment realization reached US \$ 406 million with the number of projects²⁵⁰.

So far, financial markets in the region have been discounting these developments as “noise,” rather than something more serious, focusing instead on

²⁴⁸ Mercy A. Quo. “After the South China Sea Ruling: Impact on ASEAN-China Relations” *The Diplomat*. 01 September 2016, <https://thediplomat.com/2016/09/after-the-south-china-sea-ruling-impact-on-asean-china-relations/> access on 5 November 2017

²⁴⁹ *Ibid*

²⁵⁰ *Ibid*

the economic fundamentals of each country. Except the Bitcoin market, which has emerged as the new hedge against global uncertainties.²⁵¹

Indonesia steadfastly adheres to its position that it is not a claimant in the SCS territorial disputes and has never recognized the validity of China's Nine-Dash Line. As such, Indonesia does not recognize China's proclamation of parts of the Natuna Island's EEZ as Chinese "traditional fishing grounds", nor has there ever been any agreement between Jakarta and Beijing that Indonesia would allow Chinese fishermen using traditional ways to fish in these waters.²⁵² (Indonesia and Australia signed an agreement which allows traditional fishermen from Indonesia to fish in Australian waters.) Indonesia views all illegal, unregulated and unregistered (IUU) fishing activities by Chinese or fishermen of other nationalities in Indonesia territorial seas and EEZ simply as transnational crimes that they must be firmly dealt with in accordance with Indonesian laws.²⁵³

Hikmahanto Juwana, looked upon the Court's decision. The decision is in accordance with the position of the Government of Indonesia that does not recognize China's claim to the fishing grounds of traditional Chinese fishermen. According to Hikmahanto, Indonesia can be more confident in enforcing the law on Chinese-flagged fishing boats operating in ZEE Indonesia.²⁵⁴ Moreover, Etty Agoes said China's historical claim to the Natuna region, if it later becomes an

²⁵¹ *Ibid*

²⁵² *Ibid*

²⁵³ *Ibid*

²⁵⁴ Hikmahanto Juwana. "Setelah Putusan Arbitrase Filipina Vs Tiongkok". *Kompas*. 14 Juli 2016. p. 6

open dispute with Indonesia, could be undermined by the decision of the Arbitration Court.²⁵⁵

Basically, Etty also stated that the ruling is giving a benefit to Indonesia because the court's decision is a source of international law and the court decision is known in international law, which is one of the sources of international law. In addition, the decision of the Court of Arbitration that rejected China's historical claim to the South China Sea could be used by Indonesia for problems in Natuna waters. The Decision are able to make Indonesian position stronger and more confident if there are cases related with China and Indonesian Exclusive Economic Zone in Natuna Sea.²⁵⁶

B. The Proper action should be taken by Indonesian Government

Indonesia will likely issue a response after an upcoming verdict on the Philippines' arbitration case against China on the South China Sea, the country's deputy coordinating minister for maritime affairs told a forum in Washington, D.C.²⁵⁷ The early respond toward the Permanent court of arbitration decision is

²⁵⁵ Agoes, Etty R. 2011. "Indonesia : Problem Encountered in Some Unresolved Boundaries and Outermost Island Issues" *Journal Hukum Internasional*, Volume 9 Number 1, Universitas Padjadjaran, Bandung. p.54

²⁵⁶ *Ibid.*

²⁵⁷ Prasanth Prameswaran. "Indonesia To respond after South China Sea Case". *The Diplomat*. 31 March 2016 <https://thediplomat.com/2016/03/indonesia-to-respond-after-south-china-sea-case-minister/> access on 7 November 2017

Indonesia urged all parties to continue to uphold the shared commitment in the region to maintain peace, as well as show friendship and cooperation.²⁵⁸

Indonesia will continue to encourage the creation of a zone of peace, which is free and neutral in the region to strengthen the ASEAN political community and regional security. Further, the country, which is not a claimant in the dispute, urged all claimant states to continue peaceful negotiations on the overlapping claims in accordance with international law.²⁵⁹

Later, the latest respond of the Indonesian Government is Indonesia and America drew their own "red lines" for Beijing in the South China Sea. Indonesia decided to rename its maritime region in the southwest part of the South China Sea as the "North Natuna Sea," asserting its own sovereignty in the area. After China reaction on using both soft and strong diplomacy to intimidate anyone who dares to challenge its position.²⁶⁰

I Made Andi Arsana, said the renaming carried no legal force but was a political and diplomatic statement.²⁶¹ The named of the South China Sea into North Natuna Sea is such a big step taken by Indonesian Government, and will give a clear message to both Indonesian and international society that Indonesia is serious on defend it is sovereignty. Furthermore, the Indonesian government had announced a plan to construct a new border defend and supervisory base to

²⁵⁸ Menkopulham, *Op.cit*

²⁵⁹ Prasanth Prameswaran, *Op.cit*

²⁶⁰ Menkopulham. *Op.cit*

²⁶¹ Tom Allard and Bernadette Christina Munthe. "Asserting sovereignty, Indonesia renames part of South China Sea" *The Reuters* 14 July 2017. <https://www.reuters.com/article/us-indonesia-politics-map/asserting-sovereignty-indonesia-renames-part-of-south-china-sea-idUSKBN19Z0YQ> access on 8 November 2017

guard border areas near the South China Sea.²⁶² While the plan is still in its early stages, it is important to keep in mind a few things about what it does mean, to avoid misunderstanding what Indonesia may be trying to accomplish.

The plan to construct a defent and supervisory base is actually is a part of Indonesian President Joko “Jokowi” Widodo’s increasing focus on safeguarding the country’s sovereignty as part of the country’s foreign policy rather than a new departure or hardening of Indonesia’s South China Sea position.²⁶³ While defending Indonesia’s borders is hardly a new goal, the Jokowi administration has made it one of its top foreign policy priorities. Indeed, in Indonesian Foreign Minister Retno Marsudi’s first annual policy statement in Jakarta in January, she indicated that protecting Indonesia’s sovereignty would be accomplished by responding firmly to any intrusions into Indonesian territory and by settling maritime borders

Therefore, Indonesia — by virtue of recognition, should consider calling for an ASEAN special session to be held at the ASEAN Secretariat Jakarta, should regional tension heighten following the Permanent Court of Arbitration ruling. ASEAN must stand united vis-a-vis an ill-conceived reaction to the court ruling by any claimant state that has potential to affect regional stability.

Other Action that might should be taken by Indonesian Government to avoid the conflict with other state and to ensure the Indonesian territory is secure also peaceful is that Indonesian Government urgently register and submitted all

²⁶² Prasanth Prameswaan. “New Indonesian Military base near South China Sea?”. *The Diplomat*, 12 July 2016.

²⁶³ *Ibid*

Indonesian territory to United Nation. Even though that Indonesia already made many agreement with neighbourhood state regarding the border and Indonesia Features, and UN already recognized many island but there is still many more like an area between Pedra Branca and Bintan islands, which involves Indonesia, Singapore and Malaysia.²⁶⁴

In additions, the names and locations of 16,056 islands in the archipelago are registered with the UN. Indonesia has listed 17,504 islands under its sovereignty, said Arif Havas Oegroseno, the assistant for maritime sovereignty at the Office of the Coordinating Maritime Affairs Minister.²⁶⁵ There are still 1,448 islands left that need to be validated and verified. The verification of islands in Indonesia needed to be conducted regularly because climate change and natural anomalies, such as abrasions, had led to the emergence and disappearance of islands. Registering islands with the UN was also important to prevent duplicate names.²⁶⁶

²⁶⁴ Geospatial Information Agency (BIG) head Zaenal Abidin, the Indonesian delegation at the 11th UNCSTGN on 16 August 2017, consisted of officials from the BIG, the Office of the Coordinating Maritime Affairs Minister, the Office of the Coordinating Political, Legal and Security Affairs Minister, the Home Ministry, the Maritime Affairs and Fisheries Ministry and the University of Indonesia.

²⁶⁵ *Ibid*

²⁶⁶ *Ibid*

CHAPTER IV

CLOSURE

A. Conclusions

1. The Implication of the South China Sea Arbitration Decision towards Indonesian Exclusive Economic Zone

Arbitration is a dispute settlement in which the parties are not limited only to the disputing state. Therefore, arbitration is considered more popular amongst the private sector, especially trade. However, it does not mean that the arbitration procedure cannot be used within the framework of public law enforcement, the arbitration used in the public framework is called the public law arbitral body or better known as the Arbitral Tribunal. The arbitral bodies Judiciary will still final and binding verdicts even though they are formed in an ad hoc or permanent format.

The ruling has awarded the Philippines most of the claims it brought against China regarding the South China Sea dispute. The ruling has ruled that China's claim to most of the South China Sea as bounded by the Nine-Dash Line has no legal basis. The single most significant outcome of the ruling is that it has

clarified once and for all that claims to the waters in the South China Sea can only be recognized in accordance to the stipulations laid out in the UNCLOS 1982. Adherence to international law, including UNCLOS 1982, should be the primary basis of international relations.

The ruling has reaffirmed Indonesia's position in the South China Sea. In accordance with UNCLOS, Indonesia only shares maritime boundaries with Malaysia and Vietnam; and Indonesia is not a party to any of the territorial disputes in the South China Sea. China's intrusion into Indonesia's EEZ around the Natuna Island based on the former's Nine Dash Line claim clearly violates UNCLOS. Even if China were to own all of the maritime features in the SCS, none of which are recognized as islands with rights to EEZ, there is no potential entitlement for China's maritime claim to overlap with Indonesia's EEZ in the South China Sea.

2. The Proper response that should be taken by the Indonesian Government

The Indonesian Government Has done several action as a reaction toward the Decision of the Permanent Court of Arbitration in matter of South China Sea between Republic of Philippines and The People of Republic China. First Strong Action is rename of the South China Sea into North Natuna Sea which consider as a big step taken by Indonesian Government, and will give a clear message to both Indonesian and international society that Indonesia is serious on defend it is sovereignty. Second the plan to build the defending and supervisory base in Batam near Natuna Sea as a symbol of the Indonesian strength in order to protect

any kind of attack possibility. The last, the step of Indonesian government to urgently registered the border and all the territory to the United Nation. As known Indonesia as archipelagic state have many feature and island that have to be protected.

B. Recommendations

1. Government hoped to settle the dispute over the continental shelf boundary that occurs in the South China Sea between China and the Philippines, and countries affected by claims of nine dash lines immediately, because the problems that occur may affect bilateral and multilateral relations. Although Indonesia does not involved directly but Indonesia has been regarded as a mediator in solving the problems in the South China Sea.

2. In addition, the Indonesian measures to strive to change the name of South China Sea into the Natuna Sea is considered very good. Though, the consistency effort and action is needed in order to finished for the process until the name of the South China Sea really changed into what Indonesian Government meant to name as a form of seriousness of the Indonesian government in declaring and maintaining the sovereignty of the Republic of Indonesia.

3. Indonesian Government should register the most recent border and island to the United Nation, to assert the ownership of the Indonesian Government over the territory. Even though Indonesia have registered more than 16.000 island and

renew the bilateral agreement regarding the border with several states but there is still more than 1.000 island need to be done as well, and several border which need to be renew.

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