

CHAPTER II

LITERATURE REVIEW

A. South China Sea

The South China Sea is a critical commercial gateway for a significant portion of the world's merchant shipping, and important economic and strategic sub-region of the Indo-Pacific. It is also the site of several complex territorial disputes that have been the cause of conflict and tension within the region and throughout the Indo-Pacific.⁸ The South China Sea also contains rich, though unregulated and over-exploited fishing grounds and is reported to hold significant reserves of undiscovered oil and gas, which is an aggravating factor in maritime and territorial disputes.⁹

The South China Sea is one of the largest waters in the world that stores potential conflicts because South China Sea has the potential of organic natural resources and mineral resources, petroleum and natural gas and the most important is that the south china sea will serve as the trade and international shipping lines. South China Sea according to the United Nation convention the law of the sea (UNCLOS) is included in the half closed type (semi-enclosed sea).¹⁰

⁸ Lowy Institute International Policy, "Shout China Sea", taken from, <https://www.lowyinstitute.org/issues/south-china-sea>, accessed on November 8, 2016 at 8.43 p.m.

⁹ US Energy Information and Administration, "Contested areas of South China Sea likely have few conventional oil and gas resources", taken from, <http://www.eia.gov/todayinenergy/detail.php?id=10651>, accessed on November 11, 2016 at 6.43 p.m.

¹⁰ Zou Keyuan, 2005, *Law of The Sea In East Asia*, New York, RoutledgeTaylor and Francis Group, p. 43.

Geographically, the South China Sea plays a significant role in the geopolitics of the Indo-Pacific. The South China Sea is bordered by Brunei, Cambodia, China, Indonesia, Malaysia, Philippines, Singapore, Taiwan, Thailand and Vietnam. Their recent economic growth has contributed to a large portion of the world's commercial merchant shipping passing through these waters.¹¹ Japan and South Korea rely heavily on the South China Sea for their supply of fuels and raw materials and as an export route, although the availability of diversionary sea lanes bypassing the South China Sea provides non-littoral states with some flexibility in this regard.¹²

B. The Permanent Court of Arbitration

Arbitration is a legal technique for the resolution of dispute outside the court, wherein the parties to a dispute refer it to one or more persons (the “arbitrators” or “arbitral tribunal”), by whose decision (the “award”) they agree to be bound. It is an effective method of resolving dispute.¹³ The court was allowed to stay the contract. Subsequently, Arbitration Act 1889 in England gave discretionary

¹¹ Thayer Carlyle A, “Chinese Assertiveness in the South China Sea and Southeast Asian Responses”, *Journal of Current Southeast Asian Affairs*, Vol. 30 No, 2, (2011)

¹² Ign Agung Setyawan, “Komunikasi Negosiasi China Terhadap Penyelesaian Sengketa Laut China Selatan”, *Jurnal Komunikasi Massa*, Vol. 3 No, 2, (2010).

¹³ Muhammad Naqib Ishan Jan, 2009, *Principles of Public International Law; A Modern Approach*, Malaysia, IIUM Press. p. 373.

powers to the court to stay court proceeding where a valid and binding arbitration clause was.¹⁴

Arbitration is one form of dispute settlement. Arbitration, in contrast to litigation in court, is a privatized mode employed for dispute settlement, where the parties by agreement select the arbitrator as well as the place and may agree to the procedures to be employed and the time frame for the process, as well as the decision or award, and be bound by the decision of the arbitrator, subject to the law of country. Such flexibility will not be available if a dispute is settled through the court process. That is to say one will not be able to choose the judge or procedure to be employed or the time frame if the dispute is to be settled through the court process.¹⁵

The Permanent Court of Arbitration (PCA) is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 121 Member States. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA International Bureau is currently administering 8 interstate disputes, 73 investor-State arbitrations, and 34 cases arising under contracts involving a State or other public

¹⁴ Hamid Sultan, 2016, *International Arbitration with Commentary to Malaysian Arbitration Act 2005*, Malaysia, Janab M SDN BHD, p. 1-2.

¹⁵ *Ibid.* p. 2.

entity. The PCA has administered 12 cases initiated by States under Annex VII to the United Nations Convention on the Law of the Sea.¹⁶

C. United Nation Convention on the Law of the Sea (UNCLOS)

On November 16, 1994, the United Nations Convention on the Law of the Sea of December 10, 1982,¹⁷ entered into force. Since its entry into force, the Convention has undoubtedly played a major role in bringing order to the oceans. In particular, the Convention establishes a clear and universal framework of coastal state maritime jurisdiction.¹⁸ The causes for many maritime disputes between states have thus been eliminated. At the same time, the Convention contains an innovative system for the settlement of such disputes. It has been observed that it is one of the most far-reaching and complex systems of dispute settlement found anywhere in international law. There can be no doubt that the underlying rationale for the creation of such a system was the wish to safeguard the many delicate compromises enshrined in the Convention and to secure its uniform interpretation and application.¹⁹

¹⁶ United Nations Conference on Trade and Development, *Dispute Settlement: Permanent Court of Arbitration*, Taken from, http://unctad.org/en/docs/edmmisc232add26_en.pdf, Accessed on April 21, 2017 at 16.33. p.m.

¹⁷ Malcolm N Shaw, 2014, *International Law Seventh Edition*, United Kingdom, Cambridge University Press. p. 458.

¹⁸ Ademola Abass, 2012, *International Law Text, Cases, and Material*, New York, Oxford University Press. p. 321-322.

¹⁹ R. Churchill, 2012, *Some Reflections on the Operation of the Dispute Settlement System of the United Nations Convention on the Law of the Sea During its First Decade*, Leiden, Martinus Nijhoff Publisher, p. 388.

Part XV of the Convention lays down a comprehensive system for the settlement of dispute that might arise with respect to the interpretations 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 Nation.²⁰ However, if parties to a dispute fail to reach a settlement by peaceful means of their own choice, they are obliged to resort to the compulsory dispute settlement procedures entailing binding decision,²¹ subject to limitations and exception contained in the Convention.²²

D. The Alternative Mechanism for the Settlement of Dispute on Convention

The mechanism established by the Convention provides four alternative means for the settlement of dispute:

1. The International Tribunal for the Law of the Sea;
2. The International Court of Justice;
3. An arbitral tribunal constituted in accordance with Annex VII to the Convention; and
4. A special arbitral tribunal constituted in accordance with Annex VIII to the Convention.²³

A State party is free to choose one or more of these means by a written declaration to be made under Article 287 of the Convention and deposited with the

²⁰ United Nation Convention on the Law of the Sea, 1982, Part XV, Section 1, Article. 279-280

²¹ *Ibid.* Section 2, article 286.

²² *Ibid.* Section 3, Article. 296-299.

²³ *Ibid.* Article 287, paragraph 1.

Secretary-General of the United Nation.²⁴ A State party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.²⁵ If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.²⁶

If the parties to a dispute have not accepted the same settlement procedure, the dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.²⁷ Of the above four alternative international courts and tribunal, the present paper deal with only the third mechanism, namely; Arbitral Tribunal Constituted under Annex VII to the 1982 United Nation Convention on the Law of the Sea.²⁸

²⁴ *Ibid.* Article 287, paragraph 1.

²⁵ *Ibid.* Article 287, paragraph 3.

²⁶ *Ibid.* Article 287, paragraph 4.

²⁷ Starke's, 1994, *International Law, Eleventh Edition*, London, Butterworth and Co Publisher. p. 234-235.

²⁸ *Ibid.* Article 287, paragraph 5.