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Assessing the Possibilities of PCA as a Legal Avenue to Seek Compensation in the Aftermath of the Montara Oil Spill

Alexander

Faculty of Law, Universitas Airlangga, Indonesia. Email: alexander-2020@fh.unair.ac.id

ABSTRACT
The 2009 Montara Oil Spill, caused by the caused by the blowout of an offshore oil well operated by PTT Exploration and Production Public Company (PTTEP) Australasia (Ashmore Cartier) Proprietary Limited, had severe environmental and economic consequences for Indonesia. This article assesses the possible legal proceedings available to Indonesia for seeking compensation against Australia and PTTE AA in international tribunals, specifically the Permanent Court of Arbitration (PCA). That is to take account of liability with respect to relevant international law principles, including those pertaining to state responsibility and liability for transboundary harm as well as infringement of Indonesia's sovereign rights over its exclusive economic zone. The discussion will analyse the legal merits, jurisdictional aspects, and potential challenges associated with pursuing these legal proceedings in PCA.

KEYWORDS: Montara Oil Spill, Permanent Court of Arbitration, International Environmental Law, Transboundary Harm, State Responsibility

1. Introduction

On 21 August 2009, crude oil from one of the wells at the Montara Wellhead Platform, located approximately 260 kilometers offshore from the northwest Australian coast, was uncontrollably released and entered Indonesia and Timor Leste waters to a 'significant degree.'[1] Such environmental catastrophe continued until 3 November 2009[2], with approximately 64 tonnes of crude oil being spilled per day as reported by PTT Exploration and Production Public Company (PTTEP) Australasia (Ashmore Cartier) Proprietary Limited (hereinafter, PTTEP AA), the operator of the Montara Platform.[3]

The maps requested by the Australian Lawyer Alliance under the Freedom of Information Act portray the oil spill seen just 69 Kilometres from Indonesian shores.[4] The oil pollution has severely impacted the livelihood of fishermen and seaweed farmers in the area of West Timor, East Nusa Tenggara province and ultimately caused an economic loss of approximately AUD 1.5 billion per year since 2009.[5] An NGO in West Timor claimed that the

1 The Montara Commission of Inquiry, *Report of the Montara Commission of Inquiry,* by David Borthwick AO PSM, https://www.industry.gov.au/sites/default/files/2018-11/montara-commission-of-inquiry-report-june-2010.pdf, (hereinafter "Report of the Montara Commission") p. 26.

2 Australian Maritime Safety Authority, Response to the Montara Wellhead Platform Incident: Report of the Incident Analysis Team March 2010 (2010), http://www.amsa.gov.au/forms-and-publications/publications/Montara_iat_report.pdf.

3 Sue Lannin, "Montara Oil Spill Compensation Case Launched In Federal Court By Maurice Blackburn," Australian Broadcasting Corporation News, published August 3, 2016, https://www.abc.net.au/news/2016-08-03/montara-oil-spill-compensation-case-launched-in-nsw/7685142.

4 "Montara Maps Push Case for More Study," Special Broadcasting Service News, published October 24, 2014 http://www.sbs.com.au/news/article/2014/10/24/Montara-maps-push-case-more-study.

5 George Roberts, "Australian Oil Disaster 'Costing Indonesians Billions'," Australian Broadcasting Corporation News, published July 26, 2012, http://www.abc.net.au/news/2012-07-26/australian-oil-disaster-'costing-indonesians-billions'/4155474.

negative impacts from this sea pollution further continued, causing thousands of fishermen to suffer significant losses due to declining fish catches and seaweed harvests.[6]

Following the incident, there were several measures taken by the Indonesian government. The government established an advocacy team to communicate with the operator of the Montara Platform. Likewise, the Indonesian government had also discussed with its Australian counterpart to find a way to hold PTTEP AA, its parent company – a Thailand-based company, liable for the damages caused by the oil spill.[7] The Indonesian government claimed that the company must pay USD 2.58 billion in compensation. Unfortunately, the company seemed reluctant to cooperate, and the Australian government remained passive.

In August 2016, more than 13.000 Indonesian seaweed farmers filed a class action lawsuit at the Australian Federal Court in Sydney against PTTEP AA, seeking compensation amounting to more than USD 200 million.[8] On 19 March 2021, the Federal Court of Australia accepted the class action lawsuit.[9] In the landmark decision, Judge David Yates obliged PTTEP AA to pay compensation of Rp. 252.997.200,000 (USD 17,533) to the seaweed farmer (Mr. Sanda) to redress the damages and loss inflicted on them from 2009 to 2014 as a consequence of the oil spill.[10] Although the amount of the compensation falls below the value expected and requested in the petition,[11] such judgment essentially provides clarity on the oil spill that had derived from Australia's exclusive economic zone (EEZ) and impacted Indonesia's territory. Additionally, it dismisses all the claims made by the PTTEP AA, the Australian government, and several research results which emphasized that the oil spill at the Montara field did not reach Indonesia's territorial sea.[12]

As it has now been proven that the oil spill due to PTTEP AA's activities had indeed entered the Indonesian waters,[13] Australia thus has prima facie contravened international law,

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6 Djemi Amnifu, "2009 Montara Oil Spill Still Reducing Catches and Inflicting Losses," The Jakarta Post, published June 15, 2016, http://www.thejakartapost.com/news/2016/06/15/2009-Montara-oil-spill-still-reducing-catches-and-inflicting-losses.html.

7 Lilian Budianto, "RI, Australia to Sue Thai Firm for Montara Oil Spill," The Jakarta Post, published July 16, 2010, http://www.thejakartapost.com/news/2010/07/16/ri-australia-sue-thai-firm-Montara-oil-spill.html.

8 Jewel Topsfield, "Indonesian Seaweed Farmers Launch Class Action over Montara Oil Spill," The Sydney Morning Herald Business, published August 2, 2016, http://www.smh.com.au/business/world-business/indonesian-seaweed-farmers-launch-class-action-over-Montara-oil-spill-20160801-gqitj0.

9 *Sanda v. PTTEP Australasia* (Ashmore Cartier Pty Ltd (No 7) FCA 237, NSD 1245 of 2016 (2021), https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0237 (hereinafter "Sanda v. PTTEP AA 2021").

10 *Sanda v. PTTEP AA* 2021, n.9, para. 1161.

11 Adianto P. Simamora, "RI to make formal claim in Timor spill," Jakarta Post, published August 24, 2010, https://www.thejakartapost.com/news/2010/08/24/ri-make-formal-claim-timor-spill.html; Regent Rote Ndao stated that PTTEP AA must provide compensation of 7 billion rupiah as well as compensation over the natural destruction, on the other hand, the Indonesian government aimed to receive compensation of USD 2.4 billion (in accordance to the currency value in 2010), while the claim for compensation made by the farmers in this case amounted to Rp 739.500.000,00.

12 Australian Embassy in Indonesia "Indonesia: Montara Oil Spill,", published November 2, 2009, https://indonesia.embassy.gov.au/jakt/MR09_086.html; Gabrielle Dunlevy and AAP Southeast Asia Correspondent, "Montara maps push case for more study," The Sydney Morning Herald, published October 24, 2014, https://www.smh.com.au/world/montara-maps-push-case-for-more-study-20141024-3ir8n.html?; "PTTEP AA accepts Montara penalty," PTTEP, published August 31 2012, https://www.au.pttep.com/?p=3002.

13 Aside from the UNCLOS 1982, Australia has further violated the principle of (a State is prohibited from using its territory or to allow activities therein that will impose losses to other States); it is recognized as a general principle of international law in the case of *United States v. Canada*, Trail

namely the provisions contained in the UNCLOS 1982. Article 194 paragraph (2) of the UNCLOS 1982 stipulates that every State Party shall take measures to ensure that activities under the jurisdiction or control are to be conducted in a way that does not ensue pollution that damages other States and their environment. Jurisdiction in this provision, underlines the authority of States to regulate and apply their law on activities of exploitation and exploration in the EEZ as well as to issue regulations and permits.[14] Such Article further obliges each State to prevent the transmission of pollution to other territories.

In *casu*, the activities exercised by PTTEP AA at the Montara field fall under the jurisdiction and control of Australia, considering that the activities were conducted in Australia's EEZ per Articles 56 and 60 of UNCLOS. Furthermore, PTTEP AA's ability to perform such conduct derives from the permit that was issued by the Australian government, which had further failed to take action to prevent the oil spill at the Montara field from entering Indonesia's territory. Ultimately, this reflects a violation of Indonesia's sovereign rights to exploit resources in the sea located near Rote Island as guaranteed in Articles 56 and 58 of the UNCLOS.

2. Methodology

This article intends to establish potential international legal proceedings that Indonesia can pursue to the key parties in this case, that comprise States, namely Indonesia and Australia as well as PTTEP AA as a private business. Specifically in these instances, the possibility for Indonesia to bring the case to the Permanent Court of Arbitration (hereinafter, PCA) is present. In this situation, UNCLOS 1982 is applicable as the legal basis, particularly in relation to Part XV and Annex VII of the convention concerning dispute resolutions. The discussion of the matters will be structured in order of preliminary issues concerning jurisdictions and the merits of the case. The specifics of the PCA's jurisdiction will be hypothetically evaluated in the context of disputes between *Indonesia v. Australia* and *Indonesia v. PTTEP AA*.

3. Dispute Settlement Under UNCLOS 1982: Why PCA

Indonesia and Australia signed the UNCLOS 1982 on 10 December 1982. Subsequently, Indonesia ratified the UNCLOS 1982 on 3 February 1986, while Australia on 5 October 1994. The 1982 UNCLOS, which became effective in 1994,[15] includes a comprehensive legal framework for sea and maritime regulations, including protection and preservation of the marine environment in Part XII as well as dispute resolution mechanisms for the State Parties enshrined in Part XV of the Convention; therefore the UNCLOS 1982 will be referred to as a primary legal basis for this discussion in addition to other applicable general and customary norms of international law governing the matter.

With respect to dispute settlement under Part XV of the Convention, it contains three sections: (1) general provisions, (2) compulsory procedures for dispute settlement, and (3) limitations and exceptions to the applicability of the compulsory procedures.

Smelter Arbitration, 3 R.I.A.A. 1907 (1941) (hereinafter "Trail Smelter"), https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

[14] Amy de Generes Berret, "UNCLOS III: Pollution Control in the Exclusive Economic Zone," Louisiana Law Review 55, 1995, page. 1173.

[15] UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, (hereinafter " UNCLOS 1982"), Chapter XII.

As a primary obligation, Part XV requires that States Parties to the Convention settle any dispute between them concerning the interpretation or application of the Convention by peaceful means of their mutual choice.[16] If the procedure chosen by the parties fails to resolve the dispute, then the compulsory settlement procedures in Section 2 – the key provisions of Part XV – are applicable at the request of any party to the dispute.

Under Article 287, any State party may declare, upon signing or ratifying the Convention, its choice of one or more of four different for a for compulsory dispute settlement under Part XV. These are:

(1) the International Tribunal for the Law of the Sea constituted under Annex VI;
(2) the International Court of Justice;
(3) an arbitral tribunal constituted under Annex VII;
(4) a special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes (particularly those involving fisheries, the protection and preservation of marine environment, marine scientific research and navigation, including pollution from vessels and by dumping).

If the parties to a dispute have not accepted the same procedure for settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree (Article 287(5)). If a State Party has failed to announce its choice of forum, it shall be deemed to have accepted arbitration in accordance with Annex VII. Arbitration is, therefore, the minimum compulsory dispute settlement mechanism, unless the dispute falls within the exceptions in Section 3 of Part XV.

It is also important to be noted that on 22nd March 2002, Australia had declared that "it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention, without specifying that one has precedence over the other:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI of the Convention; and
(b) the International Court of Justice."[17]

On the other hand, Indonesia did not make any reservations about those obligations under Article 287, equating to general acceptance of the treaty. Therefore, this paper will refer to the discussion of the possible legal proceedings of the alternative dispute resolution according to Article 287 (5) – that is, to arbitration. The specific reference to the Permanent Court of Arbitration was made primarily under the consideration of the tribunal's expertise in its previous awards discussing a variety of issues on the marine environment or sea-related issues, for instance, in the case of the South China Sea Arbitration.

4. Permanent Court of Arbitrations

4.1. PCA's Jurisdiction Over Disputes Between States

Part XV and Annex VII of the UNCLOS 1982 provide several dispute settlement mechanisms concerning the issue of interpretation and the implementation of the convention.[18] Alternatively, another solution provided by Part XV and Annex VII of the UNCLOS 1982 is to conduct the dispute settlement in the Arbitral Tribunal. As a result, legally speaking, it is possible for Indonesia to bring Australia to the PCA through the formulation of

[16] UNCLOS 1982, n. 15, Chapter XV.
[17] UNCLOS 1982, n.15, Ratifying States, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.
[18] UNCLOS 1982, n.15., Part XV and Annex VII.

the tribunal as consistent with Annex VII UNCLOS 1982, especially when the Australian government does not show the desire to cooperate in recovering the damages. In exercising such an option, the Indonesian government shall first ensure the jurisdiction of PCA over the present case. If it is then assessed that the PCA does not possess the jurisdiction, then the Indonesian government must inevitably take a different dispute settlement mechanism that is much more effective. Ultimately, the Indonesian government should consider the appropriate prayer for relief to be submitted to obtain satisfying results from the use of the PCA as a dispute settlement mechanism.

In this instance, there might also be a possibility of non-appearance of parties, such practice happened in The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China) when China refused to attend the proceedings,[19] other practice also can be found in the case of United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) where the latter party opted to not come to the proceedings.[20]

In the case of the South Sea Arbitration, China made public a *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*[21] one of which stating that as the Tribunal lacked jurisdiction because the case will be dealing with territorial sovereignty over several maritime disputes, matters which does not concern the interpretation and application of UNCLOS 1982,[22] China decided to not participate in the proceedings. To that instance, the tribunal mentioned Article 9 of Annex VII (an annexation made specifically to be referred to and in accordance with Article 287) where it explained explicitly that “absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.”[23]

“Thus the non-participation of China did not bar this tribunal from proceeding with the arbitration”[24] and rather emphasized that the burden of proof rested with the Philippines to establish its claims, which it found to be satisfactorily fulfilled.[25]

Therefore, in the event of non-appearance of Australia in the constituted proceeding, that will not bar the PCA to hear and rule the case presentations.

Generally, for the PCA to acquire jurisdiction over a particular dispute the following elements shall be fulfilled: (1) ratione personae (the status of the parties) and (2) ratione materiae (the subject matter of the dispute).[26] To dissect whether these elements are fulfilled in the present case, the provisions regulating PCA’s jurisdiction which established in the 1907 Convention for the Pacific Settlement of International Disputes (also known as the founding

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19 The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility, 2015, (hereinafter "South China Sea").

20 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 12 May 1981, Judgement on Questions of Jurisdictions and/or Admissibility, International Court of Justice.

21 Government of the People’s Republic of China, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014 https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201412/t20141207_679387.html (hereinafter "Position Paper of China").

22 *Ibid*., para. 76.

23 UNCLOS 1982, n. 15. Annex VII. Art. 9.

24 South China Sea, n.104, para 11.

25 The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award, 2016, (hereinafter "South China Sea Merits"), para. 131

26 Stephen Hockman, *An International Court for the Environment*, Environmental Law Review 11, No. 1 (2009).

convention)[27] and relevant provisions regarding dispute settlement reflected in the UNCLOS 1982 (as the dispute emanates from such Convention), shall be assessed.[28]

4.1.1. Jurisdiction *Ratione Personae* of the PCA

In the South China Sea (Philippines v. China) Arbitral Award, the PCA evaluated its jurisdiction by referring to the UNCLOS 1982 and evaluating: (a) the relationship of both parties with the UNCLOS 1982; and (b) declaration and exceptions that were formulated by each party concerning the provisions on dispute settlement mechanism in the UNCLOS 1982.[29]

First, the relationship or status of both parties to the UNCLOS 1982 constitutes a significant element, remembering that a State not party to a certain convention is not bound to the provisions and obligations therein.[30] Indonesia and Australia, along with 113 other States, signed the UNCLOS 1982 on 10 December 1982. Subsequently, Indonesia ratified the UNCLOS 1982 on 3 February 1986, followed by Australia who proceeded with its ratification on 5 October 1994.[31] As a result, Indonesia and Australia are bound to the UNCLOS 1982, including provisions regarding dispute settlement mechanisms and are able to refer to them for disputes arising from violations of the UNCLOS 1982.

Second, Article 287 paragraph (1) of the UNCLOS 1982 provides that each State Party, through a written declaration, is able to choose a dispute settlement mechanism that is provided by the UNCLOS 1982. Article 287 paragraph (3) of the UNCLOS 1982 further regulates that if a State does not exercise such an option, then it will be automatically deemed to have accepted the jurisdiction of the arbitration. In light of this, Indonesia has yet provided a written declaration, thus it can be inferred that it has accepted the jurisdiction of arbitration. On the contrary, Australia has provided a declaration that states, *"...[Australia] chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention, … the International Tribunal for the Law of the Sea … and the International Court of Justice …*"[32] Hence, there exists a contradicting choice of dispute settlement mechanism between Indonesia and Australia.

Article 287 paragraph (5) details that "*if the parties to a dispute have not accepted the same procedure for the settlement of the dispute, such dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree*." The same circumstance had occurred in the case of *Chagos Marine Protected Areas (Mauritius v. United Kingdom)* settled in the PCA, wherein, on one hand, Mauritius had yet provided a declaration on the procedure for the settlement of the dispute, while on the other, the United Kingdom had declared that it accepts ICJ's jurisdiction for all disputes arising from the UNCLOS 1982 as

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27 Article 91 of the 1907 Convention for the Pacific Settlement of International Disputes states that such convention replaces the 1899 Convention for the Pacific Settlement of International Disputes.

28 South China Sea, n. 104.

29 *Ibid*., para.106.

30 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, vol. 1155, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

31 UNCLOS 1982, n.15, Chapter XII.

32 UNCLOS 1982, n. 15, Ratifying States, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec. "[Australia] chose the following ways to settle disputes regarding the interpretation and implementation of the [UNCLOS], … *International Tribunal for the Law of the Sea* and *International Court of Justice* …"

well as ITLOS' for certain cases.[33] The option to submit the dispute to the PCA was not a predicament for both parties, however, there were still issues on jurisdiction over the subject matter of the dispute. In relation to the Montara situation, it shall be highlighted that Australia has yet rejected submissions of a dispute relating to the protection of the marine environment in UNCLOS 1982 to the Arbitral Tribunal.[34] Hence, it is highly plausible that the PCA is able to adjudicate the dispute regarding the Montara oil spill between Indonesia and Australia.

4.1.2. Jurisdiction *Ratione Materiae* of the PCA

Article 288 of the UNCLOS 1982 governs that the PCA along with other dispute settlement mechanisms set forth in Article 287 of the UNCLOS 1982 are granted jurisdiction over each dispute between states concerning the interpretation or application of the UNCLOS 1982, except if such State has declared to not involve itself in the procedure of dispute settlement mechanism on several kinds of disputes as stipulated in Section 3 Part XV of the UNCLOS 1982.[35] It shall also be proven that the dispute had arisen from the UNCLOS 1982, and not from other international conventions, treaties, or other sources of international law.[36] PCA has consistently defined a dispute as a disagreement over law or fact, including conflicts concerning legal perspective or the interests between two parties or more as stated in *the Permanent Court of International Justice* in the *Mavrommatis Palestine Concessions Case.*[37] Furthermore, Article 288 paragraph (4) of the UNCLOS 1982 also dictates the jurisdiction of the PCA or other dispute settlement mechanisms that hold the discretion to select its jurisdiction in accordance with the *kompetenz-kompetenz* doctrine.

In this particular case, the essential issue that may arise is the contrasting views between Indonesia and Australia in relation to the oil spill in the Montara field that have reached the Indonesian territorial waters. The Indonesian government might argue that the Australian government should take responsibility for its failure to prevent the spread of oil spill from its EEZ to Indonesia; ergo, Australia should provide reparations. Australia, however, would submit otherwise. In other words, this different perspective correlates with the implementation of Article 194 paragraph (2) of the UNCLOS 1982. This is of utmost importance as in the event that the dispute is concerned with a violation against another Convention, the PCA would not have the jurisdiction as provided in Article 287 UNCLOS 1982.[38] Consequently, it can be concluded that the PCA has jurisdiction over the subject matter of the dispute, namely the oil spill in the Montara field which are linked to the provisions and obligations enshrined in the UNCLOS 1982.

4.1.3. Request for Reparation by the Indonesian Government

The possibility for Indonesia to file a case against the Australian government in the PCA sparks the question of which form of reparation would be best requested. Article 304 of

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[33] *Chagos Marine Protected Area Arbitration, (Mauritius v. United Kingdom),* Awards, 2015 (hereinafter "Chagos Marine Protected Area").

[34] UNCLOS 1982, n.15, Ratifying States, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec. Australia only rejects the use of dispute settlement mechanisms under Article 287 over disputes that are related to the delimiation of territorial sea, military activities, and the execution of the functions of the UNSC;

[35] Chagos Marine Protected Area, n.118, para. 204-205.

[36] South China Sea Arbitration. n.104, para. 110.

[37] *Ibid.*, *para.*149; *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, PCIJ Series A, No. 2 (1924): page. 6.

[38] Chagos Marine Protected Area Arbitration, n.118, para. 206.

the UNCLOS 1982 permits a State to request responsibility and liability to the State for the damages caused. This request shall be done consistently with the existing rules of State responsibility under international law and their development. Such a provision correlates with the general principle of international law which governs that every State whose violation of international law has resulted in losses or injury, must provide reparation to the injured State.[39] The nexus between the injury and the internationally wrongful act shall be direct, closely related, and able to be valued.[40]

Consequently, if Australia is proven to have violated the provisions in the UNCLOS 1982, it shall provide reparation to Indonesia as the injured State due to the oil spill in Montara. However, Indonesia should first prove the losses indeed incurred due to such spill. If Indonesia can successfully do so, then it must correctly select one of the three types of reparation recognized under international law. Subsequently, the PCA possesses the discretion to decide the choice of reparation by considering, *inter alia*, any relevant customary practices and judgments of the International Court of Justice that are then codified in the *Articles on Responsibility of States for Internationally Wrongful Acts.*[41]

The first form of reparation that can be demanded by Indonesia is *restitution*. The Permanent Court of International Justice in its *Factory at Chorzow* judgment observed that in accordance with general principles and customary international law, the first type of reparation that should be examined is restitution. Through restitution, a State responsible for an internationally wrongful act is obliged to attempt to remove the consequences that have resulted and to then re-establish the situation which existed before the wrongful act was conducted.[42] Contextually, in the case of the oil spill that damaged the marine environment surrounding Rote Island, Australia should make an effort to return to the condition therein, such as the quality of the water, land, and other elements that shape its ecosystem, in accordance to how it was previously prior to the injury. As explained above, this therefore indicates that Indonesia should exhibit the initial condition of the marine environment and how it has yet optimally recovered after it was tampered with by the oil spill. If it is then scientifically proven that the ecosystem has recovered naturally, then it would be difficult to demand Australia for restitution.

Theoretically, if restitution is not a plausible option due to the lack of material damage, then alternatively, an injured State may request compensation. Material damage in relation to the demand of restitution refers to circumstances where the object that is to be restituted has disappeared, destroyed permanently, or worsened to the extent that it has lost its value.[43] Compensation thus can be given instead if the act of restitution is too burdensome, exceeding the benefits that ensue if restitution is exercised.[44] With respect to this, compensation refers to monetary or financial payment to redress the injury incurred by an injured State, including the profits or benefits that were lost.[45] Compensation in this context is aimed to only replace the losses that are suffered by the injured State and not to severely punish the responsible

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[39] *The Factory at Chorzow (Germany v. Poland*), (Merits) PCIJ Ser. A, No. 17 (1927), (hereinafter "Factory at Chorzow") p. 24.

[40] Trail Smelter, n.13.

[41] *Arctic Sunrise (The Netherlands v. The Russian Federation)*, Award on Compensation (2017): 190, https://pcacases.com/web/sendAttach/2214.

[42] Factory at Chorzow, n.124, p. 47.

[43] ARSIWA Commentary, n.41, p. 98.

[44] *Ibid.*

[45] Factory at Chorzow, n.124; *Norwegian Shipowners' Claims (Norway v. USA)*, UNRIAA, Vol. I, Sales No. 1949.V.2 (1922), https://legal.un.org/riaa/cases/vol_I/307-346.pdf**.**

State.[46] In the case of *Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* for instance, the ICJ had instructed Nicaragua to proffer compensation to Costa Rica for its constant dredging and canalization activities which had impaired the environment. In relation to the Montara oil spill, Indonesia should evince that there still remain damages that are of a significant value in the sea ecosystem in order to receive compensation from Australia.

In the case that both restitution and compensation cannot be exercised, an injured State can request for responsibility in the form of satisfaction, such as "*acknowledgment of a breach, an expression of regret, a formal apology, another appropriate modality*."[47] Satisfaction is usually done by the responsible State if the injury cannot be enumerated financially, such as insults made to another State,[48] a breach of sovereignty,[49] and others.

4.2. PCA's Jurisdiction Over Disputes Between State and Private Entity

The PCA, functioning as a repository for various types of cases including inter-state proceedings, investor-state arbitrations, and those involving state or other public entities falling under "other arbitration cases," plays a significant role.[50] Consequently, the PCA Rules of Procedure for Arbitrating Disputes Involving Natural Resources and/or Environment, as well as the Optional Rules for Conciliation, offer flexibility by not imposing a requirement that one party must be a state or a consortium of states. This means that non-state actors are also permitted to participate in these proceedings.[51]

With the increased social and economic power held by multinational companies in the global economy, their capacity to abuse and impact human, labor, and environmental rights has grown. However, regulating the activities of these companies to ensure compliance with international standards in these areas remains challenging.[52] The complexity arises from the fact that companies are separate legal entities incorporated in different states, resulting in intricate corporate supply chains. Consequently, addressing concerns regarding access to remedies for victims of corporate abuses becomes more difficult due to these barriers.

In light of the Montara oil spill that were caused by the PTTEP AA, it shall be assessed whether a dispute between a State *versus* a private entity can also be brought to the PCA. The main legal basis that regulates this process is the PCA Rules 2012 which integrates four procedural rules of the PCA namely the Optional Rules for Arbitrating Disputes between Two States 1992, Optional Rules for Arbitrating Disputes between Two Parties Which Only One is a State 1993, Optional Rules for Arbitrating Disputes between International Organizations and States 1996, and Optional Rules for Arbitrating Disputes between International Organizations and Private Parties 1996, in which they still remain valid and applicable.

Article 1 PCA Rules 2012 opens the opportunity for the PCA to handle disputes arising between a State and a private entity.[53] Under the same Article, the PCA Rules 2012 is declared to be applicable if a State, entity that is controlled by a State, or an intergovernmental

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46 ARSIWA Commentaries, n.41, p. 98.
47 ARSIWA Commentaries, *n.41*, Art. 37(2).
48 M. M. Whiteman, *Damages in International Law,* United States Government Printing Office, 1937, page. 64.
49 *Rainbow Warrior Affair (New Zealand v. France)*, UNRIAA, Vol. XX (Sales No. E/F.93/V/3) (1990), https://legal.un.org/riaa/cases/vol_XX/215-284.pdf.
50 Bharat H Desai and Moumita Mandal, *Permanent Court of Arbitrations*, Oxford University Press, Yearbook of International Environmental Law, Volume 29, 2018, 10 January 2020, https://academic.oup.com/yielaw/article-abstract/doi/10.1093/yiel/yvz033/5700411 p. 1.
51 *Ibid.*
52 Juan Jose Alvarez Rubio and Katerinna Yiannibas, *Human Rights In Business: Removal Of Barriers To Access To Justice In The European Union*, New York: Routledge, Taylor and Francis, 2017.
53 Permanent Court of Arbitration, *Permanent Court of Arbitration Rules 2012*, 17th December 2012, https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf (hereinafter "PCA Rules 2012").

organization has agreed with one or more States, intergovernmental organizations, or other private parties that disputes between them over a legal relationship, whether contractual, treaty-based, or otherwise shall be regulated by the PCA Rules 2012.[54] Consequently, the use of the provisions in the PCA Rules 2012 between a State and a private entity can only be regarded if the intrinsic elements namely, an agreement between both parties on the use of such rules and the existence of a legal relationship, are satisfied.

The PCA Rules 2012 does not regulate the form of the agreement between the parties. However, an agreement that a certain dispute is to be settled through the PCA can be expressed by adding an arbitration clause, or a submission agreement (*acte de compromis*) if a separate agreement is made. It shall be noted that no model clause for a submission agreement is provided in the Annex PCA Rules 2012, unlike the arbitration clause. Subsequently, Article 3 of the PCA Rules 2012 mandates the Claimant to communicate to the Respondent and the International Bureau notice of arbitration when it initiates recourse to arbitration and also provide the identifications of the arbitration agreement and rules, decision, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation, to which the dispute arises.[55]

As briefly mentioned, the possibility to bring an issue between a State and a private entity to the PCA is further reflected in the Optional Rules of the PCA Rules and additionally, can be further found in the UNCITRAL Arbitration Rules. For instance, Article 1 of the Optional Rules For Arbitrating Disputes Between Two Parties of Which Only One is A State (hereinafter, Optional Rules 1993) states that such regulation is valid for parties in a written agreement declaring that disputes concerning such agreement shall be in accordance with the Optional Rules 1993.[56] It also explicitly provides that such regulation can be modified consistent with what has been agreed by the parties. Parties in this context can be in the form of a State and an entity, such as a company. The Optional Rules 1993 can only be executed if both parties are settled to recognize the jurisdiction of the PCA as regulated in Article 1. Similar to the PCA Rules 2021, the consensus between the parties to settle the dispute with the Optional Rules 1993[57] can be based on an arbitration clause detailed in an agreement or through a separate agreement. Article 3 of the Optional Rules 1993 further provides clarity on such a matter in which it specifies that "*the notice of arbitration shall include the following, … (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked*…"[58] Thus, the approval by both parties to use the Optional Rules 2021 can be reflected through a separate arbitration agreement from the initial agreement. In regards to notice of arbitration, Article 3 also stipulates that it must feature the contract from which the dispute derives.

Similarly, Article 1 of the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (hereinafter, Optional Rules 2001) states that such regulation can be used by intending parties that have made a written agreement declaring that disputes between them must be settled in accordance to the Optional Rules 2001 and its modification shall also be agreed upon by the parties. Such settlement can be in the form of an agreement, contract, convention, international treaties, instruments of international

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54 *Ibid.,* Art. 1.
55 *Ibid.,* Art. 3.
56 Permanent Court of Arbitration, *Optional Rules For Arbitrating Disputes Between Two Parties of Which Only One is A State*, 1993, https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf (hereinafter "PCA Optional Rules 1993").
57 *Ibid., Art. 1.*
58 *Ibid., Art. 3.*

organizations, as well as court decisions.[59] The introduction of the Optional Rules 2001 also asserts that this regulation applies to States, international organizations, and private entities, such as companies. The decision to utilize the Optional Rules 2001 can also be based on an arbitration clause in an agreement or through a separate one. This is envisaged in Article 3 of the Optional Rules 2001 which stipulates that "*The notice of arbitration shall include the following: … (d) the pertinent arbitration clause or separate arbitration agreement…*"[60] The possibility to use a separate agreement is further reflected in Article 21 of the Optional Rules 2001 which governs regarding *kompetenz-kompetenz*.[61] In regards to the notice of arbitration, Article 3 regulates that regulation, decision, agreement, contract, convention, international treaty, and organizational instruments that ensue the dispute must be stated and expressed.

Furthermore, the Optional Rules for Conciliation of Disputes relating to Natural Resources and/or the Environment (hereinafter, Optional Rules 2002) further provides direction for dispute settlement between States and private entities. It is based on the PCA Conciliation Rules and UNCITRAL Conciliation Rules with a few added changes, namely to conform to elements in public international law that can enhance the participation of States as well as address dispute characteristics regarding conservation and protection of the natural environment. Article 1 of the Optional Rules 2002 states that it is applicable for conciliation disputes concerning natural resources and/or environment that have been agreed upon by the parties involved.[62] Article 2 further explains that to initiate a conciliation, one of the parties shall inform and state the agreement which caused the need for conciliation to the other relevant parties and the Bureau of the PCA.[63] Optional Rules 2002 provides a model clause that can be used by the parties, asserting that if within 90 days of filing an invitation to conciliate the dispute has yet been settled, the parties will settle the dispute in the PCA. Subsequently, the introduction of the Optional Rules 2002 further emphasizes that such regulation applies to private and other entities in national and international law, international organizations, and States.

Alternatively, the UNCITRAL Arbitration Rules can also be referred to with regard to disputes between States and private entities. Article 1 of the UNCITRAL Arbitration Rules 2013 affirms that it applies to parties that possess a legal relation, whether contractually or not, as long as they have agreed to exercise such Rules and their modifications.[64] The UNICTRAL Arbitration Rules are not necessarily limited to disputes between a State and private entity, however, it tends to be used in commercial disputes. Unlike the PCA Rules and its Optional Protocols, UNCITRAL Arbitration Rules does not explicitly manage submission agreement and instead only covers arbitration agreements in general. Furthermore, the Annex of the UNCITRAL Arbitration Rules 2013 only provides an arbitration model clause in a contract, and not in a separate agreement.

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[59] Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, 2001, Art. 1.

[60] *Ibid.,* Art. 3.

[61] *Ibid.,* Art. 21.

[62] Permanent Court of Arbitration Optional Rules for Conciliation of Disputes relating to Natural Resources and/or the Environment, 2002, https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf, Art. 2.

[63] *Ibid.*

[64] "United Nations Commission on International Trade Law Arbitration Rules," United Nations Commission on International Trade Law (2013): 1, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf/.

Therefore, it is indeed possible for Indonesia to file the dispute against the PTTEP AA as international law provides several rules that clearly recognize the conduct of dispute settlement between a State and a private entity. The involvement of a private entity as a party in a dispute settlement is no longer a conundrum under international law as the regulations are clear in recognizing them as a subject that can be brought to the PCA. However, as reflected in the three afore mentioned Optional Rules, the main essence for such dispute settlement to be executable is the existence of an agreement between the parties. Furthermore, such an agreement should be reflected in the arbitration clause that is enshrined in an agreement between the parties. Hence, both Indonesia and the PTTEP AA should consent to exercising the Rules and bringing the dispute to the PCA.

5. Conclusion

The judgment of the Federal Australian Court supports Indonesia's claim that the Montara oil spill caused losses to its seaweed farmers and the marine ecosystem within its territorial sea. This provides Indonesia with a basis to pursue legal proceedings against Australia in international tribunals, namely the PCA, under the jurisdiction provisions of Article 287 and Annex VII of the UNCLOS 1982.

Regarding the PCA, the jurisdiction of the tribunal is evident due to the dispute arising from the implementation of specific provisions in the UNCLOS 1982 between Indonesia and Australia, such as Articles 194 and 304. Both Indonesia and Australia have not rejected the jurisdiction of arbitration tribunals under the UNCLOS 1982, as per Article 287(5), implying their acceptance of the PCA's jurisdiction. If the PCA determines that Australia violated the UNCLOS 1982, Indonesia can seek reparations or compensation if it can demonstrate that the damages persist. If the marine ecosystem has naturally recovered, Indonesia can still seek satisfaction in the form of an official apology and reassurances from Australia to prevent future violations.

Alternatively, Indonesia can bring the case to the PCA against PTTEP AA, the private entity operating the Montara Platform. The PCA Rules and Optional Rules recognize the possibility of settling disputes between a state and a private entity. Given the significant damage caused by the Montara oil spill, Indonesia can utilize the procedural rules in the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment to engage in arbitration with PTTEP AA.

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