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The panel of examiners declare that the thesis entitled “SIPADAN AND LIGITAN ISLAND DISPUTE: VICTORY GAINED BY MALAYSIA AGAINST INDONESIA IN THE INTERNATIONAL COURT OF JUSTICE IN THE PRINCIPLE OF EFFECTIVITIE (2002)” that was submitted by Dharma Satya majoring in International Relations from the Faculty of Humanities was assessed and approved to have passed the Oral Examinations on April 25th, 2018.

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ABSTRACT

Title: Sipadan And Ligitan Island Dispute: Victory Gained By Malaysia Against Indonesia In The International Court of Justice In The Matter Of Effectivité (2002)

The dispute between The Republic of Indonesia with The Republic of Malaysia for the Islands of Sipadan and Ligitan is one of the key cases that defined how territorial dispute settlements is studied in the world of International Relations. This research analyzes the decision by the International Court of Justice in determining the dispute for the Sipadan and Ligitan Islands. After all the key arguments brought by both states, the International Court of Justice decided the ruling to favor Malaysia by the principle of effectivité. This thesis will elaborate how Malaysia’s effectivité was the key to the decision. In addition, this thesis will analyze the interest of Malaysia to dispute the ownership of the islands, based on neorealism.

This research was conducted from September of 2017 until March of 2018. The research process was conducted by the qualitative analysis, supported by sources from books, journals, and news articles.

**Keywords:** Republic of Indonesia, Republic of Malaysia, Sipadan - Ligitan Islands, Territorial Dispute, Effectivité.
Title: Sipadan And Ligitan Island Dispute: Victory Gained By Malaysia Against Indonesia In The International Court of Justice In The Matter Of Effectivité (2002)


Kata Kunci: Republik Malaysia, Republik Indonesia, Sengketa Wilayah, Kepulauan Sipadan - Ligitan, Pendudukan Efektivite
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LIST OF ABBREVIATION

ASEAN  Association of Southeast Asian Nations
I qCJ  International Court of Justice
SEA   Southeast Asia
TAC   Treaty of Amity and Cooperation
UN    United Nation
US    The United States of America
CHAPTER I

INTRODUCTION

I.1 Background of Study

Malaysia's relation with Republic of Indonesia is quite interesting. Most of the time the dispute between these countries are in the area of culture; such as dance, food and art. Recently, the two countries relation are in tension over the upside-down Republic of Indonesia flag in SEA Games in Malaysia. Looking back to the history, Republic of Indonesia and Malaysia also have one of the most memorable disputes that once made the relationship between them hit the lowest point. The dispute is none other than the famous Sipadan and Ligitan islands dispute in Celebes sea, Borneo.

The dispute started back in the late 90's where Republic of Indonesia and Malaysia were not even fully aware of the presence of Sipadan and Ligitan island. Later in the negotiation of the Delimitation of the Continental Shelf boundaries between the Republic of Indonesia and Malaysia on the year of 1969, Republic of Indonesia did not consider these two islands.¹ The Republic of Indonesian map that attached to law number 4, 1960, a map where all of Republic of Indonesian archipelago was stated did not even include Sipadan and Ligitan Island as their territory. Republic of Indonesia later argued that the map was prepared "in haste" because of the preparation for the second UN Law of the Sea Conference in 1960, and because of it they might have "overlooked" some tiny islands that were generally far from the

On the other side of the map that belongs to Malaysia they included Sipadan and Ligitan island as part of Republic of Indonesian territory. Discovering this was rather an "awkward" situation, Malaysia then withdrew their map from regulation in reason to their map was outdated and was used in the oil and gas exploration, in the sense that Malaysian oil and gas did not go south beyond 4 degrees 10' North Latitude and insisted in using the map that created by Republic of Indonesia instead. 

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3 Ibid.
Figure I. 1 Map of Sipadan and Ligitan Islands

Realizing that this negotiation was going on technical difficulties, both parties then agreed to postpone this matter to a later time. They both considered that this matter was about who is in charge of these island. Republic of Indonesia then considered this matter to be put on "status quo", where both countries refrain any kind of activity on the island of Sipadan and Ligitan. Malaysia on the other hand was considering that there was no agreement on this. the problem where there was really a "status quo" understanding in Sipadan and Ligitan island later become a great issue between the two countries. Looking back at the exchange letter between two delegates at the end of the meeting in September 1969, did not mention anything about the "status quo" but they did agree that the negotiation was purely a "technical failure". 4

The dispute became one of the reasons to a bitter friendly relation between the two countries as ways of direct negotiation from 1969 to 1995, and attempt to find solution with the regional body, the Association of Southeast Asian Nations (ASEAN) mechanism did not meet the satisfaction of Republic of Indonesia and Malaysia. Finally, the two countries later decided that this matter should be brought into the International Court of Justice (International Court of Justice) after the visit of President Soeharto to Prime Minister Mahatir in Kuala Lumpur on October 1996 motivated by their will to have this problem solved in the most peaceful way so political stability and stronger bond of Southeast Asia would be strengthened. On 17 December 2002, the court decided by vote of sixteen to one that Sipadan and Ligitan Island belongs to Malaysia. 5

This is the judgement of judge Shigeru Oda from the International Court of Justice (International Court of Justice) that state that Sipadan and Ligitan Islands belong to Malaysia based on effectivité.

“I voted in favour of the Judgement, in which the Court finds that "sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia" (para. 150). The present case is a rather "weak" one in that neither Party has made a strong showing in support of its claim to title to the islands on any basis. While Malaysia has made a more persuasive case on the basis of "effectivités", its arguments are still not very strong in absolute terms. The Court, however, has been requested to choose between the two Parties in adjudging "whether sovereignty over [the two islands] belongs to . . . Republic of Indonesia or to Malaysia" (Special Agreement of 31 May 1997, Art. 2) and, given that choice, the Court has come to a reasonable decision. “ Declaration of Judge Shigeru Oda, 2002."

I.2 Problem Identification

As defined in International Law, a sovereign state is a nonphysical juridical entity that is represented by one centralized government that has sovereignty over a geographic area. International Law defines sovereign states as having a permanent population, defined territory, one government, and the capacity to enter into relations with other sovereign states. Taking that into account, the case of Sipadan and Ligitan islands dispute between Republic of Indonesia and Malaysia is one of the case studies that shows how the sovereignty of both states that claim the ownership of both islands are being challenged. In the sense that territorial dispute is not only a battle of area, but it is also a battle of national pride between the claimant states.

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Losing the area means losing the competition, as well as losing a part of their territory.

The case of Sipadan and Ligitan islands dispute arose in the 1960s, but it was never settled until both countries decided to take the case to International Court of Justice in 1998. The dispute indeed not only jeopardized both countries sovereignty, but also increased the existing tension between these neighboring countries. Republic of Indonesia as a country that liberated from Dutch colonialism believed that the 1891 convention between Great Britain and Netherlands that stated the area of where Sipadan and Ligitan islands are located belong to Dutch occupation, which as a successors Republic of Indonesia also take the area as theirs. Ironically, even though Republic of Indonesia believed that those islands were theirs, Republic of Indonesia instead is the one that is lacking in development effectiveness in the Sipadan and Ligitan islands. Malaysia on the other side is way more active in the development of both islands. Malaysia later won the case and gained sovereignty to both Sipadan and Ligitan islands because the International Court of Justice assessed Malaysia is way more active in developing the country deserve the islands more than Republic of Indonesia.

In light of the fact that Malaysia won in the dispute with Republic of Indonesia over Sipadan and Ligitan islands in the Borneo border because of the effectivité aspect, this research will seek further explanation about why Malaysia won in the effectivité aspect in the Sipadan – Ligitan islands dispute. This thesis will also use Structural Realism as a basis to see the dispute between Malaysia and Republic of Indonesia in

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9 Ibid.
11 Ibid
claiming Sipadan and Ligitan Islands, and to analyze how it results to the decision of International Court of Justice.

I.3 Statement of the Problem

Research Question: Why did Malaysia win the Sipadan - Ligitan Islands dispute by the decision of International Court of Justice by matter of effectivité in 2002?

I.4 Research Objectives

The purpose of this research is to analyze about issues surrounding disputes among states, specifically about Sipadan and Ligitan Islands by Republic of Indonesia and Malaysia, looking from Neorealism perspective. The author of this thesis will be using principles of effectivité, or effective occupation, as the principle of assessing the belongings of the disputed islands as used by the International Court of Justice in elaborating about reasons of the victory. The form of this thesis will be explanatory research, and the purpose of this research is to analyze why Malaysia win over Sipadan and Ligitan Islands from Indonesia in the International Court of Justice in the year of 1998 to 2002.

I.5 Significance of the Study

This research is a study about territorial dispute between states and how victory is gained by one of the claimant states, seen from Neorealism perspective. This research is expected to contribute in ways as follows:
1. To elaborate the dispute between Malaysia and Indonesia in the Sipadan - Ligitan dispute between 1998 - 2002.

2. To understand, explore, and explain the victory gained by Malaysia in the case of Sipadan and Ligitan islands dispute with Republic of Indonesia in International Court of Justice from the perspective of Neorealism.

3. To identify the effectivité factors that caused the winning of Malaysia in the Sipadan and Ligitan islands dispute with Malaysia.

The author also hopes that this research will contribute to the development of regional studies and the betterment of Republic of Indonesia in terms of protecting its territory and enhancing its sovereignty.

**1.6 Theoretical Framework**

This thesis is utilizing several theories and principles, with Neorealism as the main perspective in analyzing the case. The author believes that the existence of sovereignty within a state makes the exercise of effectivité. The means used by Malaysia in winning the islands of Sipadan and Ligitan using effectivité are heavily driven by their national interest gained after the victory. By not disregarding the International Court of Justice as an international body, yet using it to gain their goals, which is to win the disputed territory, this thesis believes that Neorealism suits best in analyzing the case.
This thesis will follow the framework above to support the analysis of the thesis. The relations between Malaysia and Indonesia in disputing the islands of Sipadan and Ligitan will be seen under the perspective of Neorealism. This thesis is taking a point of view from Malaysia, in which they are pursuing to be the rightful owner of the
disputed islands, and at the same time gaining their national interests. Although both claimant states agreed to bring the case to the International Court of Justice, Malaysia here will be illustrated to use the world court as a media in winning by considering principles of effectivité, to reach the ultimate goal: Winning the Sipadan and Ligitan Islands. Each pointer will be explained in this subchapter below.

I. 6. 1 Neorealism

This thesis is using Neorealism, as a means to analyze the subjects involved, paradigm, which purpose is for explaining and describing the events or occurrences in the subject of International Relations. Although it has risen different fronts of realism, there are definite assumptions in realism that is accepted by all scholars, which are: each state's behavior is represented by their interest, state puts an urgency over their survival. Neorealism also believe that the state is the unilateral actor, and no supranational power exist above the state, putting an emphasis that the structure of the international hegemony is anarchy.\(^\text{12}\)

This research is analyzing the study further using one of the within realism itself, that is Neorealism Neorealism is a perspective in the IR theory started by Kenneth Waltz, one of the greatest thinkers in International Relations. The idea explains that the world is established in the international structure following the principle of anarchy, and the distribution of power. The two principles identify the problems and concepts that arise in the study of international relations, realizing the balance of power, and sovereignty, which both concepts are essential for this research.

There are key assumptions of realism based on Hans Morgenthau:  

1. Anarchy
   Realism assumes that there are no higher power than states in the world. Meaning that states can only act based on their own interest, and no higher entity can influence their decision to do otherwise.

2. Power
   Realism believes that power is equal to capability. Mearsheimer (2001) believes that power is used as a currency, and that currency is one that determines the status of a state in the regional or even global level. This power increases the security and deters threat.

3. States are uncertain of another state’s intention
   This assumption follows that states can never be certain of another’s intention. Realism puts an emphasis on the distrust for others, that there are no guarantees for cooperation, and peace.

4. Survival
   States seek survival above any other interest. Due to the distrust, states pursue their survival, and it is driven by the uncertainty of the other’s states intention, and the risk of insecurity being exploited by others. Therefore, the state has to always increase its power to ensure its own security (survival).

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5. States are rational actors

Neorealism follows the assumption of that state are rational actors, therefore should be able to follow the logical decision making.

Waltz believes the condition that states have the ultimate pursuit for survival, and in order to survive in the systemic anarchy in the international politics, states tend to seek for balances, as a mean to survive, and merely a form of self-help. The balance realizes itself in the relationship between the states in the international structure, and maintaining the balance is the utmost importance of the states, in order to survive. Waltz also underline the concept of anarchy in the international system, that the system that is established lacks a supreme authority to be followed, and no state is obliged to follow another’s decision.

Waltz believes that the behavior of states to align themselves or interact to other states is a way to ensure their survival in the system. There is another key assumption of power gaining of states that there is an uncertainty of other states’ intention. Hence, no matter whether states want to use force or not, states cannot figure out what the intentions of other states are. Especially about the intentions that are nonmilitary, even if it is figured out in the present, the future is still uncertain.

As there is no higher authority above the states, state power became the only variable of interest. It is a key on how states defend themselves to survive. Power itself is defined by realism in a wide context; it can be military power, economic power, or

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even diplomatic power. As the currency of international politics, according to John J. Mearsheimer, powerful states have been aware about the importance of both economic and military power and how it is connected to each other. Not only power gaining is crucial, it is also necessary to avoid other states to have more power.\textsuperscript{16}

1.6.1.1. Sovereignty

According to David A. Lake, sovereignty is a type of authority relationship that is distinguished by orders by one party and is expected to be followed by the other party. There are two types of authority relationship, which are internally and externally. Internal sovereignty means that there is a highest authority in a state, external sovereignty means that the claimed territory is under an effective control by the state.\textsuperscript{17}

“For the part that has power to make law for everyone – that is, to command or forbid whatever it pleases without anyone being able to appeal from, or even oppose its commands – that part, I say, will forbid the others to make peace or war, to levy taxes, or to render fealty and homage without its leave; and he to whom fealty and to no one but himself. Hence it must always come to arms until such time as sovereignty resides in a prince, in a lesser part of the people, or in all the people.”\textsuperscript{18}

(Bodin 1992, p. 104)

The true meaning of sovereignty is "supreme authority within a territory"\textsuperscript{19}. It is a doctrine of exercise of states over all other authorities in the internal supremacy and


external independence of the authorities from outside.\textsuperscript{20} As seen in the quotation above, the practice of sovereignty is indicated with the appearance of command from the highest authority that no one can object. As an absolute principle, a state is not considered a state without sovereignty.

### 1.6.1.2 National Interest

The concept of national interest is dynamic, means that it is always ever-changing. States always seek to add their capabilities above other states. In other words, states will always ensure their territorial, economic, and military security for the sake of their national interest. According to the perspective of Neorealism, interests will grow as the relative power also grows, as Waltz delivered that the more power, the larger the interests are.

“To say that a policy or practice is in the interests of an individual or group is to assert both that the recipient would somehow benefit from it and that there is therefore a reason in support of enacting that policy ... as it is used in our society, ‘interest’ is one of those concepts that connects descriptive and explanatory statements to normative judgement.” (William Connolly, The Terms of Political Discourse)\textsuperscript{21}

In regards to neorealist perspective, it is stated by Waltz that defined national interest as more to the result of international system rather than a state’s leader responsibility on its country. So, basically according to Jackson and Sorensen, Kenneth Waltz hypothesized that neorealist sees national interest as an urgency that give signal to


direct the government of a state to take decision. In addition, Kenneth Waltz also added that national interest is shaped by anarchical system that must be possessed.²²

I.6.1.3 International Organization and International Law in the Perspective of Neorealism

According to Neorealism, states are in nature forced to seek power and security, however are cautious of international cooperation and organizations. As states act according to their self interests, they will do anything to achieve it, including using an international organization. Neorealist will see International Organization as a tool to achieve their goal and interest. Such behaviour can be seen in the case of Gulf War. The United States swear to protect Kuwait and gained approval from the United Nation, with that deal United State securing their Oil access.²³

The approach of Waltz in such neorealism stated that international law does not necessarily play any role.²⁴ Due to the anarchical condition of international system, there is no power above the state than can affect the decision making in the authorities. Rules are set by states who are powerful, and states are always suspicious of one another. Neorealism sees that states continuously abuse and manipulate international institutions and international law, strong states utilize institutions and laws are interpreted according to their adjustments.²⁵ Thus explaining that neorealism does not necessarily ignore the existence of international law, but believes that states selectively filter the aspects of international law, and only chooses the one that may

²² Ibid.
²³ Ibid.
support their national interest. Therefore, this thesis would like to proceed the analysis to use international law as a basis in the analysis by using a certain degree in international law, by the concept of how international law is used as a tool to be utilized to gain interest.

This research is focusing on the economic and political aspects of interests because it will suit best in the case of Sipadan and Ligitan Islands dispute between Malaysia and Republic of Indonesia.

### I.6.2 Key Elements of a State

There are 4 key elements of a state, which are population, territory, government, and sovereignty. This came from the Montevideo Convention on Rights and Duties of States, which was a treaty signed at Montevideo, Uruguay, on December 26th, 1933, where states was gathered for a codification of a fundamental theory about states. The declaration of theory is to be used as a part of customary international law about the definition and function of states.

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

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This research is using elements of a state, as this thesis sees the importance of it in the dispute of Sipadan and Ligitan Islands between Malaysia and Indonesia. The author believes that the elements are crucial in explaining about the territorial dispute and battle of sovereignty in the world court. Securing these elements are what makes a state, hence, the elements are important as well to the disputed states.

I.6.2.1 Population

The primary physical elements of a state is population itself. A state should have groups of human being living together and creating a society therefore an inhabited island cannot be called as a state. In the international law there is no minimum requirement of population in a state to make a state. An interesting fact that Vatican City is a country which has the lowest population among every other state with estimated 451 citizens.

Aristotle created a general principle that the population of a state should be big enough to make it sufficient and small enough to make good government possible to do. Nowadays, states differ greatly from the thousand citizens of Monaco to the greatly populated state of China or India. Having a great number of population can be said to have a great advantage from the point of military defense.

I.6.2.2 Territory

Another important physical element of a state is territory. Territory is a geographical area that is controlled and owned by a government of the state to do act of

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sovereignty\textsuperscript{30}. A state cannot be on the sky nor at sea. How big is the state territory can be big or small but it has to be a definite, well marked portion of territory. Of course the bigger the territory of a state will benefit more to the state itself in a matter of resources.

I.6.2.3 Government

Any group of people rather than casual crowd require a form of organization. If a state is a car then government is the driver that enforces, makes, implement, and administering law of that state. A state will do its sovereignty act and power through its government.

Each government has three organs\textsuperscript{31}:

Legislature : Plan the will of a state  
Executive : Implements the laws  
Judiciary : Applies the laws and settle a dispute

I.6.2.4 Sovereignty

Another important characteristic of the state is its sovereignty. It is the traits that differ the state from other associations.

In international relations, sovereignty is identified into two aspects, which are state and nation. State is identified as a fixed territory where an institutional structure governs over has been ascribed to two different types of entities: states, defined in terms of the territories over which institutional authority rules over. Nation is defined

\textsuperscript{30} Ibid  
as a patched group of community which has the same sentiment of identity, that the perception of the state over.\textsuperscript{32}

Sovereignty has two aspects, which are external and internal\textsuperscript{33}. Externally, the state is free from control of any other state as Republic of Indonesia was not a state when it was ruled by the Netherland. And internally the state has power above all in its area, as people within that state obey the laws and commands from the state.

Sovereignty complements as an attribute to a state. Therefore, some scholars also argue that state is the source of sovereignty itself. In other words, state is a fountain of its own power, hence produces its own sovereignty.\textsuperscript{34} Many scholars, such as Thomas Hobbes, John Locke, and J. J. Roesseau shared a similar idea, that sovereignty comes from the consent of its own people, including the authority of a state and its government. The government, the elected representatives, is the source of all political power.\textsuperscript{35}

Sovereignty can be defined as a doctrine that a state exercises both internal supremacy over all authorities in a set of territory, and external independence of outside territory.\textsuperscript{36} In other words, a state has full power that is exclusive within its jurisdiction and is subject to no other state. A state is single and unified one within a territory, possessing interests as a result of a collective social organizations.\textsuperscript{37} As a


\textsuperscript{33} Kumar, Arvind. What are the important elements of the State? Retrieved from: http://www.preservearticles.com/2011100414551/what-are-the-important-elements-of-the-state.html


legal term, sovereignty gives a de facto capacity for state to exercise actions as sovereign.

In conclusion, a self-governing state means that a state has a supreme power or authority inside their territory. Being a sovereign state makes a state can make and apply laws, collect taxes from its people, make agreement with other states.\(^{38}\) That being said, it is indeed important for state to have their sovereignty to exercise its affairs independently in a territory.

I. 6. 3 Effectivité

Effectivité is a way of a state to claim sovereignty of a territory. In definition, the act of occupation is a way to claim sovereignty where the territory is not under any sovereignty of any state. In other words, a territory that was left by the previous state (very unlikely to happen) or a free territory. To consider a state has occupied a territory based on the international law or not, there is a principle called effectiveness (effectivité) that should be implemented. In the Eastern Greenland Case, Permanent Court of International Justice decided that effective occupation needs to have two things; which are a will to act as a sovereignty on the territory, and practicing sovereignty act on the territory claimed.\(^{39}\)

A will to act as a sovereignty can be declared formally and legally to other states. The practice of sovereignty act can be achieved by making a legal proof of ownership or control over the territory, such as: Clear act or steps of legislative and executive that is following the law of the claimed territory, a treaty from other state that

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acknowledging the sovereignty of that state in that territory, and with a clear border of the territory.

Effectivité, or effective occupation, was also used in the Berlin Conference 1884, or Scramble for Africa. The conference is aimed to regulate the occupation area and trade of Europe in Africa in the era of Germany imperialism. Proposed by Portugal, the conference has an objective to create rational rules about the distribution and handing power over Africa by the Europeans. In Berlin Conference, effective occupation has become a crucial criteria in claiming African territory by the Europeans.

The conference also has an aim to reduce to possibilities of conflicts in the exploitation of resources among the Europeans. Its ultimate goal is to divide colonialism area, trade, and European industrialism. A principle of Effectivity was introduced to put an end to powers colonized merely based on names. The principle allows states to acquire their colonial lands if they have owned the area, or had "effective occupation". It is indicated by treaties with the leaders in the area, or if the states have ever flew their flags in the area, as well as the forming of administration exercise in the territory. The state could also claim the area based in their economic activities as a colony. Despite the clash between different opinions, it was eventually agreed that the even though some states came later than the others, they

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can claim the territory when the European power instituted base on the coast. From there, they can enlarge their power freely.\(^{43}\)

A General Act was produced from the Berlin Conference. The General Act produced stressed about four features. First is the obligation of giving same access to the powers in the territory, there will be no monopoly nor discrimination in the area. The second is the obligation of the powers to supervise the tribes and be responsible in their welfare both materially and morally. Third is the respect for neutrality the powers must have, and the willingness to defend in case of war. Forth is the announcement to others about the power claimed, as well as the necessity of establishing power within the territory.\(^{44}\)

Based on the principle of effectivité, or effective occupation, a power has the rights over an area when a legal and political framework has been made. It is concluded that a power can claim over a particular territory, even when the power came later than the other, as long as the power has done such action of the claiming. The principle and features from Berlin Conference is applicable in claiming over territory.

Based on the elaboration about sovereignty in the subchapter of I. 6. 2. 4, thia thesis believes that it only makes sense for a state to have full control over a territory, only when a state has the territory. This thesis argue that effectivité is not only acting as a way to claim a territory, but it is also acts as a foundation of sovereignty.

As the author has delivered in the definition of effectivité, the principle is used to claim over a territory, so that the state can exercise their sovereignty inside the territory. As what happened in Berlin Conference, the effective occupation principle became the basis of European states to get the territory in Africa, so that they can


\(^{44}\) Ibid
posses a rightful sovereignty within the territory. Having sovereignty over the area means that they can make and apply law, charge tax, control the people, as a governing state. That being said, effectivity can also be defined as a tool to reach a state’s interest, which is to become a rightful owner of a territory.

I.7 Scope and limitation of the study

This research will analyze and elaborate the factors that decided Malaysia to win the effectivité aspects in the case of Sipadan and Ligitan islands dispute with Republic of Indonesia. This research will focus on the state level analysis based on the government of Malaysia, government of Republic of Indonesia as the state actors to be analyzed in the research. Furthermore, the International Court of Justice will be used as a key factor that influenced the dispute of the Sipadan and Ligitan islands between Republic of Indonesia and Malaysia.

Most of the arguments and ideas in this research related to the case study will be coming from International Court of Justice official reports, reports from both countries and previous research papers and journals related to the case study. Since this thesis focusing on explaining how Malaysia won the case concerning the effectivité aspect.

Furthermore, the this research will be limited on using the perspective of realism, specifically neorealism to allow focused yet extensive analysis in the study. The time frame used for the analysis in the research will start from 1998 when the case is first brought to the International Court of Justice until 2002 that marked as the year when the International Court of Justice released its official judgment regarding the case.
I.8 Research methodology

This research will be using qualitative approach as a way to analyze and study the case and theories that are relevant to this case. Qualitative research that is used in this method mainly uses the form of secondary data that are shown from the said source and will be analyzed in order to set up the foundation and as a way to understand this study.

The type of research that this thesis use in this thesis will be analytical research. As this research will involves critical thinking skills and evaluation of informations and facts that are already available, and analyze them to make evaluation of the materials. The instrument used in this research are not limited to printed version, but also helped by electronics finding, especially from the internet.

The author believes that the qualitative approach and analytical research would be best to understand and study the case of Sipadan and Ligitan Islands Dispute: Victory Gained by Malaysia against Indonesia in the International Court of Justice from Neorealism Perspective in the Matter of Effectivité.

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I. 9 Literature Review

In order to have better understanding and to support the case study of the winning of Malaysia in the Sipadan and Ligitan island dispute against Republic of Indonesia, this section will highlight the discussion from International Relations’ view in some literatures that this thesis used to have deeper understanding about the research. This refers to the definition of neorealism, effectivité, the proceeding of Malaysia and Republic of Indonesia in the International Court of Justice, and the judgement by the International Court of Justice. The author will also provide another literature that will be the fundamental source of this research and will help answering the research question.

The first literature review is from the journal that inspire this thesis to further study about this case which is a journal from Hasjim Djalal, the former Republic of Indonesia Ambassador to several states. In the Journal of Opini Juris. Volume 12, Januari 2013: Dispute Between Republic of Indonesia and Malaysia on the Sovereignty Over Sipadan and Ligitan Islands. In the journal Hasjim Djalal explained about the case of Sipadan and Ligitan island dispute between Malaysia and Republic of Indonesia not only from the data that he gathered but also from his own experience in being the ambassador to Republic of Indonesia which can be a valuable data to further research this thesis and giving this thesis insight point of view from the Republic of Indonesia government. In his journal he also sees the dispute from both sides not only from the defeat of Indonesia but also the winning of Malaysia.\(^\text{48}\)

Next is from a book called Theory of International Politics from one of the best scholars in International Relation, Kenneth Waltz. In the book Kenneth Waltz

\(^{48}\) Djalal, Hasjim. Opini Juris. Volume 12, Januari 2013: Dispute Between Republic of Indonesia and Malaysia on the Sovereignty Over Sipadan and Ligitan Islands
believes the condition that states have the ultimate pursuit for survival, and in order to survive in the systemic anarchy in the international politics, states tend to seek for balances, as a mean to survive, and merely a form of self-help. This later become a foundation to realism in this thesis.\footnote{Waltz, K. (1979). Theory of International Politics. Berkeley: Addison-Wesley Publishing Company.} This thesis proceed to use the literature by Kenneth Waltz as a basis to analyze the use of Neorealism as a perspective. The writer does acknowledge in the subject of the research, that the book Theory of International Politics by Kenneth Waltz does not acknowledge that International Law has any significance to be considered as a potent of authority. This is also due to the emphasis of the structure of the international system and the condition of anarchy by Kenneth Waltz. However this thesis believes that the concept puts forth in the terms of the international structure itself is a vital part in supporting the analysis in this thesis, and will seek literature in the use of international law in the perspective of realism in another source.

As a source to define the use of international law in neorealism this thesis takes the literature from the journal article by SV Scott in the Review of International Law, with the title "Is There Room For International Law In Realpolitik?: Accounting For The US 'attitude' Towards International Law". The article points out how international law is used as a basis to inspect the roles of international law, and how states selectively utilize international law in pursuing their national interest.\footnote{Scott, S. V. (2004). Is there room for international law in realpolitik?: accounting for the US 'attitude'towards international law. Review of International Studies, 30(1), 71-88.}

In the effectivité this thesis gather the information from the Journal by FHUI University of Indonesia International Law, Dr. Adijaya Yusuf titled Penerapan Pendudukan Efektif Dalam Perolehan Wilayah: Perspektif Hukum Internasional. In this Journal He state effectivité is a way of a state to claim sovereignty of a territory.
In definition the act of occupation is a way to claim sovereignty where the territory is not under any sovereignty of any state or in other words a territory that left by the previous state (very unlikely to happen) or a free territory. And effectivité can occur when government act of sovereignty are displayed on the territory.\(^5^1\)

The writer believes that Neorealism can be utilized best to analyze the dispute between Malaysia and Indonesia for the Sipadan - Ligitan Islands. Neorealism can provide the analysis on the interest of Malaysia to pursue their interest in the ownership of the islands, and the nature of the relationship between the states in the process. The previous chapters elaborated the occurrence of the dispute between Malaysia and Indonesia, and this thesis believes that the occurrences can be analyzed further based on the assumptions of Neorealism, based on the analysis of John Mearsheimer, in his book The Tragedy of Great Power Politics (2001).\(^5^2\)

In later discussing the proceeding of the International Court of Justice in the case of Sipadan and Ligitan island, this thesis will gather the information mostly from the International Court of Justice archives. The author does research about the arguments by the Malaysian government in the case of Sipadan and Ligitan are taken from the International Court of Justice archive of Memorial Of Malaysia: Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan 2 November 1999. In this archive of International Court of Justice, it is a memorial given by Malaysia to win the island of Sipadan and Ligitan.\(^5^3\)

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52 Mearsheimer, J.J. (2001). The tragedy of great power politics. New York: W.W.
In further researching the arguments by the government of Republic of Indonesia, this thesis studied the archive from International Court of Justice in the case of Sipadan and Ligitan, Memorial of the Government of Republic of Indonesia: Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan 2 November 1999 (Indonesia/Malaysia). In this archive made by the Republic of Indonesia government this thesis gathered all of the data required to study the arguments by the Republic of Indonesia to try winning the Sipadan and Ligitan island.  

The next literature are also taken from the archive of the International Court of Justice in the case of Sipadan and Ligitan island. This time this thesis gathered information for the judgement and the decision of the International Court of Justice, Sovereignty over Pulau Ligitan and Pulau Sipadan (Republic of Indonesia | Malaysia), 4," Judgment, I. C. J. Reports 2002. From this archive this thesis can further study the proceeding of Malaysia and Republic of Indonesia in the International Court of Justice and also the decision of International Court of Justice to use the means of effectivité to continue the case.  

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I. 10 Thesis Structure

I. 9. 1. Chapter I – Introduction

The first chapter of this thesis contains background of the territorial dispute of the Sipadan and Ligitan Islands by Malaysia and Indonesia. It also provides information about theories and concepts used to further explain the issue covered. It has an objective to give brief information as well as acts as the foundation of this whole research.

I. 9. 2. Chapter II - History Of Sipadan And Ligitan Islands Dispute By Malaysia And The Republic Of Indonesia

The second chapter of this thesis provides a history of the Sipadan and Ligitan Islands Dispute between Indonesia and Malaysia. It also gives details about the islands including its geographical position, characteristics, and potentials. This chapter also aims to give an overview about how the dispute started and how it was brought to the International Court of Justice.

I. 9. 3. Chapter III – The Proceedings Of The Dispute For The Sipadan - Ligitan Islands By The International Court Of Justice

This chapter gives the process of the dispute settlement of the Sipadan and Ligitan Islands by the International Court of Justice. A brief explanation about the International Court of Justice is given, as well as the mechanism of dispute settlement in the World Court. This thesis is aimed to give information about the process of the dispute settlement until the end, including arguments brought by both claimant states and the response to the decision by the International Court of Justice.
I. 9. 4. CHAPTER IV – ANALYZING THE CONTRIBUTING FACTORS IN THE VICTORY GAINED BY MALAYSIA IN THE SIPADAN - LIGITAN DISPUTE IN THE International Court of Justice FROM THE PERSPECTIVE OF NEOREALISM

This chapter provides the analysis of the whole thesis. Chapter four will elaborate the factors in effectivités that utilized by Malaysia that ruled overwhelmingly in favor by the International Court of Justice. In addition, this chapter will provide a further analysis on how Neorealism can be analyze the dispute case study further.

I. 9. 5. CHAPTER V – Conclusion

The fifth chapter concludes the whole research of this thesis, it has an aim on seeing how Malaysia won the Sipadan and Ligitan Islands using the principle of effectivités. The author of this thesis would elaborate about the arguments brought by Malaysia seen from the perspective of Neorealism.
CHAPTER II

HISTORY OF SIPADAN AND LIGITAN ISLANDS

DISPUTE BY MALAYSIA AND THE REPUBLIC OF INDONESIA

Being neighboring countries destined by its geographical location, Indonesia and Malaysia were never separated from conflicts and competitions. In consequence, this close geographical location has made territorial disputes rise between these two neighboring states, including the Sipadan and Ligitan Islands. Therefore, this thesis would like to provide a brief history of Sipadan and Ligitan Islands Dispute by Indonesia and Malaysia, and an overview of Malaysia with its bilateral relations with Indonesia.

II.1. Bilateral Relations between Malaysia and the Republic of Indonesia

Despite being in the same regional organization, ASEAN, the bilateral relations between Republic of Indonesia and Malaysia has never been so smooth. Not only geographical location, their similar culture and characteristics also has sparked their various conflict issues throughout centuries. Ever since the first president of Indonesia era, Soekarno, the slogan of Ganyang Malaysia has been made popular against the Federal State of Malaysia. Indonesia objects the idea of colonialism and imperialism, this had been a part of Indonesia-Malaysia confrontation.56

II.1.1. Malaysia Status Quo

Having ruled under the British Colonialism, the establishment of Malaysia as a state takes a long and complicated process. The British actually offered The Federation of Malaya independence in 1957, but it was not until 1963 that Malaysia was fully established, their Eastern part under the rule of British Colonial to be conjoined under the same flag. Malaysia was established from 8 Federal territories agreeing to collate into one Malaysia in 1963, combining the two territories that was collectively known as British Malaya, and British Borneo.

In the earlier stages of the country, Malaysia has had several conflicts that defined their status today, internally and externally. Malaysia endured an internal conflict in the earlier stages of their countryhood. In 1962, Malaysia endured the Konfrontasi in 1960s triggered by Indonesia’s Soekarno who played a major role in triggering the perception of Malays in Northern Borneo who were reluctant to join under one flag of Malaysia, this was resolved in 1996 after the fall of Soekarno. Malaysia also had to deal with the Brunei Revolt in 1962, and also Singapore’s secession in 1965.

Since its formation in 1963, Malaysia's economic performance has been one of Asia's best. Real gross domestic product (GDP) grew by an average of 6.5% per year from 1957 to 2005. Economy peaked in the early 1980s through the mid-1990s, as the economy experienced sustained rapid growth averaging almost 8% annually. High levels of foreign and domestic private investment played a significant role as the economy diversified and modernised. Once heavily dependent on primary products such as rubber and tin, Malaysia today is an upper middle-income country with a multi-sector economy based on services and manufacturing.  

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II.1.2. Malaysia - Republic of Indonesia Bilateral Status Quo in the Dispute

Looking back to the time where Malaysia is being colonized by the Great Britain and the Republic of Indonesia was colonized by the Netherlands, both claimant states has made history as a basis of their arguments in claiming victory. There was an agreement or convention between the Great Britain (the former colonizer of Malaysia) and the Netherlands (former colonizer of Republic of Indonesia) in the year of 1981. Republic of Indonesia argued that in the text of Article IV of the 1891 Convention provided:

“From 4°10’ north latitude on the east coast (of the main island of Borneo), the boundary line shall be continued eastward along that parallel, across the Island of Sebatik (another major island of the east coast of Borneo).”

The boundary line shall be continued to the sea eastward from Sebatik, and since the two islands of Sipadan and Ligitan are situated South of the 4°10’ North Latitude, the two Islands are therefore belonged to the Netherlands. In Indonesia’s theory, it later in theory belonged to Republic of Indonesia.

Malaysia, on the other hand, argued that Article IV of 1891 Convention did not demarcate the sea, nor allocate the Islands beyond Sebatik, either to Great Britain or to the Netherlands. In fact, Malaysia took the position that the two Islands have

become part of Malaysia through the process of “succession” from the Sultan of Sulu to Spain. It was then a succession to the United States and later to Great Britain and on to Malaysia. 61

The two countries tried to do a diplomatic way of direct negotiation. But after many years and years of efforts, it did not reach a middle way. At the same time, public opinion has built up and the media began to make the pressure for both countries. 62

As a result of this deadlock, the two countries were later on willing to find solution through “third party” mechanism. But they disagreed on how to go about “third-party” mechanism. Republic of Indonesia suggested using the good offices of the ASEAN High Council as provided for in the ASEAN Treaty of Amity and Cooperation (TAC) of February 24, 1976. 63 Article 15 of the TAC stated that:

“In case a dispute cannot be solved by direct negotiations between the Parties, the High Council comprising a Representative at Ministerial level of each ASEAN members shall take cognizance of the dispute or the situation and shall recommend to the Parties in dispute appropriate means of settlement such as good offices, mediation, enquire or conciliation. The High Council may however offer its good offices or upon agreement of the Parties in dispute, constitute itself into a Committee of Mediation, Enquire or Conciliation. When deemed necessary, the High Council shall recommend appropriate measure for the prevention of deterioration of the dispute or the situation.” 64

The High Council mechanism in fact has never been invoked before, and therefore could and should be utilized in this case. 65 The High Council may not necessarily be a “Legal Institution” in the sense that they will settle the matter through “legal basis”.

62 Ibid.
63 Ibid.
64 Treaty of Amity and Cooperation in Southeast Asia Republic of Indonesia, 24 February 1976
The High Council could perhaps function by seeking “political” or “other solutions” that would be acceptable to both parties. Malaysia rejected the Republic of Indonesian proposal, in the cause of Malaysia had bilateral boundary problems with most of ASEAN countries. Therefore, Malaysia felt concerned that the High Council might be partial, thus prejudicial to Malaysia. Republic of Indonesia did not approve this to the Malaysian contention, because the fact that Republic of Indonesia also had some bilateral boundary problems with its neighbors from ASEAN countries, not only with Malaysia, but also with Singapore, the Philippines, Thailand, Vietnam, and others.66

II.2. The Sipadan and Ligitan Islands

The Islands of Sipadan and Ligitan are both located in the Celebes Sea, of the North-East coast of the Island of Borneo. It lies approximately 15.5 nautical miles apart. Ligitan is a very small island lying at the southern extremity of the reef south of Sabah, Malaysia. Its coordinates are 4° 09’ North Latitude and 118° 53’ East Longitude.

It is situated about 21 nautical miles from Tanjung Tutop on the Samporna Peninsula in Sabah and 57.6 nautical miles from Republic of Indonesian Island of Sebatik. The islands are permanently above sea level and mostly sandy. It is with low lying vegetation and some trees, and it is not permanently inhabited.

Figure II.1 Map of Sipadan-Ligitan


II.2.1 The Sipadan Island
Sipadan is larger than Ligitan, having an area of approximately 0.13 km² (10.4 hectare) and its coordinates are 4° 06’ North Latitude and 118° 37’ East Longitude. It is situated 15 nautical miles from Tanjung Tutop, Sabah, and 42 nautical miles from the land boundary between Malaysia and Republic of Indonesia. It is at the east coast of the Island of Sebatik (half of Sebatik Island belongs to Republic of Indonesia).

II.2.2 The Ligitan Island

Source: Sipadan Island Website http://www.sipadan.com/sipadan.php

Sipadan is wooded and it is volcanic in origin and the top of a submarine mountain some 600 to 700 in height from the seabed. It is not geographically/geologically part of Borneo mainland. Until 1980 it was not permanently inhabited. It has now developed into a major tourist centre for Malaysia.
Ligitan is a considered a very small island located in the east side of Borneo. This island is only 7.9 hectare in size. Both Sipadan and Ligitan are situated south of the 4°10’ North Latitude. Both islands were disputed by Malaysia and the Republic of Indonesia, which then was brought to International Court of Justice.

II.2.3 The Potentials of Sipadan and Ligitan Islands

Despite its very small size, both tiny islands indeed have tourism potentials. The Sipadan Island is a beautiful 600 metres island that created by living coral growing on top of volcanic cone.\(^67\) It is the center of one of the richest marine habitats in the world.\(^68\) There are more than 400 species of fish and hundreds of coral species that have been classified from this island.\(^69\) Sipadan island has been rated by many professional divers as one of the best diving sites in the world.

Figure II.4 Sipadan Island Dive Spots


\(^{67}\) Sipadan Island Website http://www.sipadan.com/sipadan.php.  
\(^{68}\) Ibid.  
\(^{69}\) Ibid.
Sipadan island is currently sitting in the number 2 of the best diving site in the world by DIVE.in a worldwide diving website where the first one is Raja Ampat in Republic of Indonesia. Not only the beauty of the underwater world the island has to offer, but above the water the island is covered in lush jungle and home to rare tropical birds such as Kingfisher, Sea-eagles, Sunbirds, Starling, and Wood Pigeons. There are also various species of fruit bats and monitor lizards. At night time sea turtles may come to land the eggs on the beach while coconut crabs are lurking.

The facts delivered above are indeed crucial for states to secure the territory of the island of Sipadan and Ligitan. Having full authority over the islands means having credits over the famous islands. Since it is famous for its diving site, the owner will have a contribution for their tourism, including from its domestic and international visitors. Hence, securing the islands means securing its tourism that contributes to their economic activities for the nation.

II.3 How the Dispute of Sipadan and Ligitan Islands Started

It started way back in the late 1960s when the two countries were not even fully aware of the existence of Sipadan and Ligitan islands. The dispute brought up to the lights when Malaysia and Republic of Indonesia met in the negotiation of the Delimitation of the Continental Shelf boundaries in 1969. This territorial dispute indeed was started out due to the wrong interpretations of both claimant states.

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72 More elaboration will be given in Chapter 4.1.2
The fact that Republic of Indonesian government did not even know the existence of Sipadan and Ligitan Islands are depicted in their map attached to its Law Number 4, 1960. Depicting the map of the Republic of Indonesian archipelagic baseline to mapping the whole Republic of Indonesian archipelago, where Sipadan and Ligitan Island are not included on the map. However, Republic of Indonesian government argued that the map of the Law Number 4, 1960, was prepared “in haste” in order to be prepared for the second United Nations (UN) Law of the Sea Conference in 1960, and said they might have “overlooked” the tiny details of the border islands.  

On the other side, Malaysian map that was being used at that time, which drew a line where the area of possession of Republic of Indonesia and Malaysia indicated that the Sipadan and Ligitan Island were shown as part of Republic of Indonesia. However, Malaysia argued that the map has been used as a “guideline” for Malaysia in issuing exploration license for oil and gas in the area, in the sense that the Malaysian oil and gas concession in the area did not go south beyond the 4°10’ North Latitude. Therefore, Malaysia withdrew the map immediately from the circulation. In the discovery of this “awkward” problem, Malaysia insisted to use the Republic of Indonesian map while on the other side Republic of Indonesia insisted on using the Malaysian map.

The two countries later agreed not to pursue the discussion of this strange matter at that time because they thought the negotiation was on “technical matters” of the delimitation of the continental shelf boundaries. They both considered that the issues

74 Ibid.
over the islands were “territorial” dispute in nature. Both countries then agreed not to pursue the discussion further and considering this to matter to be postponed.\textsuperscript{76}

Coming to this understanding, Republic of Indonesia considered that this matter was held on a “status quo”, in the sense that both sides agreed to hold any action on the islands. On the other hand, Malaysia considered that there were no such thing as agreeing to the “status quo”. This is a seed of a bitter fruit relations of both countries. The fact that in the exchange of letter after the meeting at that time, in September 1969, did not mention any word of “status quo”, although they did agree that the negotiation and the agreement were purely a “technical nature”.\textsuperscript{77}

\textsuperscript{77} Ibid.
II.4 Sipadan and Ligitan Islands Dispute brought to the International Court of Justice

After many years of direct negotiations (intermittently from 1969-1995) and attempts to find solutions through a regional organization (ASEAN) mechanism. It was then failed. The two Parties (Republic of Indonesian President Soeharto and Malaysian Prime Minister Mahatir), agreed to bring this matter into International Court of Justice.

“In view of the impasse, the two countries were thinking of negotiating “informally through special Envoys” in order to make suggestions how to overcome the conflict. After this mechanism was agreed upon, Republic of Indonesia appointed the Secretary of State, Mr. Murdiyono, assisted by the Director of Legal Affairs of the Foreign Ministry, and Malaysia appointed the Deputy Prime Minister, Mr. Anwar Ibrahim, also assisted by the Lawyer from the Foreign Ministry. Somehow, after several informal meetings between the two Envoys, who reported directly to their Head of Governments, President Soeharto in a visit to Kuala Lumpur in October 1996 finally agreed to settle the matter by legal means through the International Court of Justice in The Hague.” - Hasjim Djalal

As Hasjim Djalal said, the two countries entered a situation where it is impossible to reach an agreement on the case of Sipadan and Ligitan Island alone.

“As I understand it, the reasons for President Soeharto to finally agreed to go to the Court was motivated by his desire:

● To settle bilateral problems as much as possible peacefully so that political atmosphere and stability as well as cooperation in South East Asia would be strengthened;
● So that the two countries should not burden future generations by bequeathing problems and disputes to them;

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The two countries then decided after a long period of time of harsh failed direct negotiation, that it has come to the point where going to the International Court of Justice is the last resort the two country has. It is also considered as means in order to achieve peaceful bilateral relations and stability of the South East Asia would be strengthened. Malaysia and Republic of Indonesia then decided to submit the dispute to the International Court of Justice. Below are the excerpts of Instruments of Ratification by both claimant states:

On 30 September 1998 the two states created the special agreement ‘compromis’ signed by Minister for Foreign Affair of Republic of Indonesia Ali Alatas and Minister for Foreign Affairs of Malaysia, Dato’ Seri Abdullah Haji Ahmad Badawi.80

Figure II.5 Instrument of Ratification of Republic of Indonesia for the special agreement

80 International Court Of Justice (1998), Special Agreement; For Submission To The International Court Of Justice Of The Dispute Between Republic Of Indonesia And Malaysia Concerning Sovereignty Over Pulau Ligitan And Pulau Sipadan
Source: International Court of Justice (1998), SPECIAL AGREEMENT; FOR SUBMISSION TO THE International Court of Justice OF THE DISPUTE BETWEEN Republic of Indonesia AND MALAYSIA CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

Figure II.6 Instrument of Ratification of Malaysia for the special agreement
There were oppositions from the side of Indonesia to bring the case to International Court of Justice, and some suggested a possible way to compromise in managing the islands together. There was even an input to split the two islands to both claimant states. However, these suggestions were rejected by Malaysia. Option of using arbitration was also not executed, despite similar territorial disputes in other parts of the world were settled that way. In the end, the territorial dispute of the Sipadan and Ligitan Islands by Malaysia and the Republic of Indonesia was brought to the International Court of Justice, seeking of an exit from the deadlock, and objective settlement.
CHAPTER III

THE PROCEEDINGS OF THE DISPUTE
FOR THE SIPADAN - LIGITAN ISLANDS BY

THE International Court of Justice

III.1. The International Court of Justice

“The first meaning that suggests itself is that it is a court of and for the whole world. As such, it is expected to be universalist in its composition, outlook and vocation, truly representing and at the service of the international community in its entirety, and not dominated by the legal or social culture or special interests of any segment thereof. This in turn would ensure that the Court and its judgments command the confidence of all the nations of the world.”

The International Court of Justice (International Court of Justice) or in French, Cour Internationale de Justice, is a court of and for the whole world based on The Hague, Netherlands. It is the principal judicial organ from the United Nations (UN). It is currently the only permanent court for a peaceful dispute settlement through adjudication. The International Court of Justice (International Court of Justice) was started back then in June 1945 by the Charter of The United Nation and actively

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The International Court of Justice has settled numerous types of dispute, which are:

- Land and maritime boundaries
- Use of force
- Genocide
- Use of nuclear weapons
- Protection of the environment
- Immunities of high level government officials and States

The court is an autonomous body that consisted of 15 judges, the judges are chosen based on their capability. They Cannot be composed by more than one person from the same country and nationality to ensure the variety and objectivity. The judges are chosen by the Security Council or the General Assembly of the United Nations. The main objective of the court is to produce judgment in disputes between states. Any state in the world can authorize a jurisdiction request by completing a declaration.

### III.1.1 The Role of International Court of Justice in Disputes between States

The International Court of Justice (International Court of Justice) has two functions:

1. To settle, in accordance with international law, legal disputes submitted by States, and

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83 Lecture by Rose, C. An Introduction to the International Court of Justice. International Legal Studies and Leiden Law School.
2. To give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies.\(^85\)

As matter of dispute getting longer and unsolvable by direct negotiation between two countries. It is most likely that they will seek a third party help, which in this case is the International Court of Justice (International Court of Justice). The states who seek settlement to the International Court of Justice need to be tied into the authority of International Law and to be treated equally. In other words, the International Court of Justice can be seen as a last effort of states in settling a dispute that the two states can no longer meet the solution by the means of adding a third party to the dispute. The objectivity and fairness are also taken into account in bringing disputes to the International Court of Justice.

### III.1.2 The Mechanism of Settling Disputes in International Court of Justice

The International Court of Justice (International Court of Justice) may deal with two types of cases; one is legal disputes between states that are submitted by themselves, which will be called contentious cases. The other is advisory opinions, a request for giving an advisory opinions on legal question given by the United Nations organs.\(^86\)

In order for International Court of Justice to accept the case, the approval or consent of both states involved are needed. International Court of Justice can not continue to entertain the case if they did not have the consent of both states involved in the

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dispute. The way of international court takes action is different than domestic court, where they can proceed the matter even there is no consent from both of the parties. This is due to lack of enforcing power that International Court of Justice has unlike the domestic court that can enforce police force. The International Court of Justice has no power of enforcement, however, according to the Charter of the United Nations article 94:

“If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

States can express their consent for their case to be brought to International Court of Justice in various ways. One of them is that they can make special agreement ‘compromis’. This agreement gives the International Court of Justice jurisdiction on one time basis of an existing dispute, which means that the dispute has arisen before the special agreement. The states can have some control of how the International Court of Justice control the dispute for example the states want International Court of Justice to just settle part of the dispute.

III.2. The Proceeding of the International Court of Justice in Sipadan and Ligitan Islands Dispute

Both claimant states then formulated agreement and decided to bring the matter to the world court for the dispute to be settled legally. The agreement signed in Kuala

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87 Charter of The United Nation article 94
88 Lecture by Rose, C. The International Court of Justice’s Contentious Jurisdiction. International Legal Studies and Leiden Law School
Lumpur includes a request for International Court of Justice to decide to whom the disputed islands belong to, by holding on to various forms of evidence for the sovereignty over the islands. The International Court of Justice proceeded at first by reminiscing historical backgrounds of the islands and how both claimant states refers it.

The written pleadings are agreed by both Indonesia and Malaysia to consist of a Memorial, Counter-Memorial, and a Reply. These are to be submitted concurrently in the given time constraints. There was a request of intervention by the Philippines for the reason of maintaining their sovereignty over the territory of North Borneo, where it is located near to the disputed islands. The Philippines also claimed that their legal rights would be affected by the case. Nevertheless, it was formally rejected by both claimant states, and was approved by the judges that their request to be disregarded.

III.2.1. Arguments Brought by Malaysia

“As will be seen in more detail in Chapter 5, the islands of Ligitan and Sipadan have during the last two centuries been under the sovereignty, first, of the Sultan of Sulu, then of Spain, then of the United States, then of Great Britain and now of Malaysia. From 1878 onwards, the only polity to exercise actual jurisdiction or control over the two islands was North Borneo and its successors in title. At no time during that period was any adverse claim made to the now-disputed islands by Indonesia or its predecessor in title, the Netherlands or the Sultan of Bulungan. No public governmental act or act of sovereignty was carried out on or in relation to the islands by the Netherlands or Indonesia. No native

ruler on the east Coast of Borneo, other than the Sultan of Sulu, ever laid claim to Ligitan or Sipadan as part of his possessions."

For its part, Malaysia contends that it acquired sovereignty over the islands of Ligitan and Sipadan following a series of alleged transmissions of the title originally held by the former sovereign, the Sultan of Sulu. Malaysia claims that the title subsequently passed, in succession, to Spain, to the United States, to Great Britain on behalf of the State of North Borneo, to the United Kingdom of Great Britain and Northern Ireland, and finally to Malaysia itself. It argues that its title, based on this series of legal instruments, is confirmed by a certain number of British and Malaysian effectivités over the islands.

III.2.2. Arguments Brought by the Republic of Indonesia

"Indonesia's claim to sovereignty over the islands of Ligitan and Sipadan rests primarily on the 1891 Convention between Great Britain and the Netherlands. It also relies on a series of effectivités, both Dutch and Indonesian, which it claims confirm its conventional title. At the oral proceedings Indonesia further contended, by way of alternative argument, that if the Court were to reject its title based on the 1891 Convention, it could still claim sovereignty over the disputed islands as successor to the Sultan of Bulungan, because he had possessed authority over the islands."

In the memorial submitted by the Republic of Indonesia, the two islands are in their belief to be inherited by the former colonialism, the Netherlands. Based on the Convention, it only makes sense to them if the ownership of the islands are succeeded from the rights of the Netherlands to Indonesia. In which Sultan

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Boloengan has been given the rights to erase the doubts of to whom the islands really belong to.

There are three crucial facts delivered in the memorial submitted by the side of Indonesia that cover about naval survey, submitted bill, and the contract. Naval survey was done in June 1891 by British and Dutch vessels to surrounding islands, the area also covers the islands of Sigitan and Lipadan. The submitted bill to the Dutch Government seeks to secure the ratification of the convention, it went along with an “Explanatory Memorandum”, in which the submitted map did not cause any objection from the authorities of British. In the Contract of 1878, there is an indication that the islands mentioned belongs to the rightful owner, Sultan Boeloengan.

**III.2.3. International Court of Justice Effectivité Judgment**

Figure III.1 International Court of Justice decision of Malaysian argument


Figure III.2 International Court of Justice decision of Republic of Indonesian argument
As the figure shown above, the International Court of Justice later on claimed that the use of rather complicated history claim of the Sipadan and Ligitan island by Malaysia. It is because the possession of the Island of Sipadan and Ligitan did not have certainty whether it really belongs to the Sultan of Sulu with the uninterrupted chain of transfer of title from its predecessors. Nor Malaysia did not have the
treaty-based title to the Sipadan and Ligitan island from the United Kingdom of Great Britain.

On the other side of the argument presented by Republic of Indonesia the International Court of Justice (International Court of Justice), it was found that the 1891 Convention also did not provide the Republic of Indonesia with the treaty-based title. The need of legitimate treaty-based title are needed in order the parties to claim the island especially when Republic of Indonesia claimed in the 1891 convention between Great Britain and the Netherland. Therefore, the claim of Republic of Indonesia to the island of Sipadan and Ligitan cannot be held accountable from its previous predecessor the Netherlands.

In the light of these lack of legitimate treaty-based title that both of the state have (Malaysia and Republic of Indonesia), the International Court of Justice (International Court of Justice) decided the way to settle the dispute with the respect of effectivité. The need of International Court of Justice (International Court of Justice) to use the means of effectivité in order to decide which of the two states (Republic of Indonesia and Malaysia) are the rightful owner of the Sipadan and Ligitan island are the wise decision, since there was no evidence of treaty-based title from the both states (Republic of Indonesia and Malaysia) from their predecessor (Netherland and Great Britain).

III.2.4. Arguments Brought by Malaysia Post-effectivité Judgement by International Court of Justice
III.2.4.1 Turtle Egg Collection in 1914 by the Great Britain in the area of Sipadan and Ligitan Islands

“As regards its effectivités on the islands of Ligitan and Sipadan, Malaysia mentions control over the taking of turtles and the collection of turtle eggs; it states that collecting turtle eggs was the most important economic activity on Sipadan for many years. As early as 1914, Great Britain took steps to regulate and control the collection of turtle eggs on Ligitan and Sipadan.” 93

In their first argument upon the International Court of Justice decision to further use the effectivité into the case is the Turtle Egg Collection in 1914 by the Great Britain in the area of Sipadan and Ligitan Islands. Furthermore they claimed that the activity of collecting turtle eggs is an important economic activity that is considered one of the most important economic activity that carried by the Great Britain in the early year of 1914. This argument by Malaysia is a strong one if we are regarding the effectivité element in the Turtle Eggs Collection because it is a government regulated activity. As the license of collecting turtle eggs were long held by their side, and it is an important commodity from the islands.

III.2.4.2 Bird Sanctuary in Sipadan in 1930

“On 19 December 1932 the Conservator of Forests at Sandakan forwarded to the Government Secretary, Sandakan, a proposal under section 28 of the Land Ordinance, 1930 for a megapode preserve on The proposal was implemented in the form of a notification in the Official Gazette of 1 February 1933.” 94

Besides the Turtle Egg Collection in 1914 by the Great Britain in the area of Sipadan and Ligitan Islands, there are other government carried activity in the Sipadan island. It is the government-initiated project by the Sabah Forestry Department in 1932. It is a bird sanctuary to protect the endangered bird species called megapode. This argument also indicates a strong element of effectivité in it since it is government activity that presenting an act of sovereignty.

III.2.4.3 Lighthouse Built by Colony of North Borneo in Sipadan in 1962 and in Ligitan in 1963

“A letter of 2 August 1973 on behalf of the Director of Marine (in Malay, Pengarah Laut) to the Director, Lands and Surveys (Pengarah Tanah dan Ukur) at Kota Kinabalu, States:

"It is confirmed Light Towers are established on the above islands, Sipadan constructed and completed in July 1962 and Ligitan in July 1963. Correspondence with Resident, Tawau and District Officer, Sempoma dating back to 1961 on their proposal was all copied to you at the time. These are unwatched Light Towers (in other words, no lightkeepers) serviced at six monthly intervals (April/October yearly) and in continuous operation for coastal navigation."

These lights exist to this day. They are regularly maintained and fall within the administrative responsibility of the Sabah Marine Department.”

Malaysia further invokes the fact that the authorities of the colony of North Borneo constructed a lighthouse on Sipadan in 1962 and another on Ligitan in 1963, that those lighthouses exist to this day and that they have been maintained by Malaysian authorities since its independence. It contends that the construction and maintenance

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of such lighthouses is part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved.

Figure III.4 Sipadan Lighthouse


Figure III.5 Ligitan Lighthouse
Above are the pictures of lighthouses built and operated by Malaysia in the Sipadan and Ligitan Islands. Both lighthouses were granted navigational aids and facilities, it is fully functional and operating under the administration and responsibility of the Sabah and Marine Department. It is reported from the Memorial of Malaysia submitted to the International Court of Justice that Indonesia did not protest nor object when the lighthouses were built.

III.2.5. Arguments Brought by the Republic of Indonesia Post-effectivité Judgement by International Court of Justice

III.2.5.1 Sipadan and Ligitan as Dutch Royal Army Patrol Area

“In support of its arguments relating to effectivités, Republic of Indonesia cites patrols in the area by vessels of the Dutch Royal Navy. It refers to a list of Dutch ships present in the area between 1895 and 1928,
prepared on the basis of the reports on the colonies presented each year to Parliament by the Dutch Government ("Koloniale Verslagen"). Indonesia relies in particular on the presence in the area of the Dutch destroyer Lynx in November and December 1921.

Republic of Indonesia refers to the fact that a patrol team of the Lynx went ashore on Sipadan and that the plane carried aboard the Lynx traversed the air space of Ligitan and its waters, whereas the 3-mile zones of Si Amil and other islands under British authority were respected. Republic of Indonesia considers that the report submitted by the commander of the Lynx to the Commander Naval Forces Netherlands Indies after the voyage shows that the Dutch authorities regarded Ligitan and Sipadan Islands as being under Dutch sovereignty, whereas other islands situated to the north of the 1891 line were considered to be British. Republic of Indonesia also mentions the hydrographic surveys carried out by the Dutch, in particular the surveying activities of the vessel Macassar throughout the region, including the area around Ligitan and Sipadan, in October and November 1903.'

Since the first memorial submitted by the Republic of Indonesia, it was stated that the Dutch had been actively exercising its sovereignty in both islands. The Lynx, a Dutch Vessel, sent troops with equipped with weapons to seek information about the area. Specifically, the vessel’s activities were directed to explore about pirate activities in the area. In which result stated that there was indeed a collaboration between Dutch and British authorities in securing the area from piracies. Indonesia refers to a list of ships by the Dutch that did its activities in the area, the Dutch referred the area to be under their sovereignty

III.2.5.2 The Activity of the Republic of Indonesia’s Navy in Sipadan and Ligitan Islands Area

“Prior to the emergence of the dispute in 1969, the Indonesian Navy was also active in the area, visiting Sipadan on several occasions. Attached as Annexes D, F, G and H are four affidavits prepared by Indonesian


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naval personnel who participated in a number of visits to the islands between 1965 and 1968. These visits are significant in three respects. First, they demonstrate that Indonesia considered the islands to fall under its sovereignty. At no time were any Indonesian naval patrols authorised to visit any islands lying north of the 4° 10' N latitude belonging to Malaysia. The patrols were limited to Sipadan and Ligitan and other Indonesian islands lying in the vicinity of Sebatik. Second, it is clear from each of the reports that, at the time, both Sipadan and Ligitan were uninhabited. Third, at least one of the patrols was prompted by a report that foreign fishermen had been spotted poaching sea resources from the islands. In response to these reports, an Indonesian naval unit was sent to Sipadan in December 1967, but reported "there was no sign or indication that there was any person living on that island."97

In regards to its own activities, Republic of Indonesia notes that the Republic of Indonesian Navy was also active in the area, visiting Sipadan island on several occasions before the dispute broke down. They assumed that this patrol activities that is held by the Republic of Indonesia Navy should be considered as an effectivité aspect. For the reasons of significance or the visits by Indonesian Naval Patrols.

The Indonesian Naval Patrols, according to Indonesia, should be considered important in regards to rightful ownership of the islands. As the Naval activities indicate their sovereign area. Indonesia also stated that during the patrol time, the islands were uninhabited. There was also no protests from Malaysia to this Indonesian Naval Patrols visits, especially when one of the patrols were sent to catch foreign fishermen in the area.

III.2.5.3 Sipadan and Ligitan Island as Fishing Area for Traditional Fishermen of the Republic of Indonesia

“Indonesian fishermen have also traditionally pled their trade around the islands of Sipadan and Ligitan. In Annexes 1, J, K, L and M, the Court will find a series of five affidavits which provide examples of the kinds of traditional fishing activities that Indonesian fishermen carried out on and around the islands. These statements record visits to the islands dating back to the late 1950s and early 1960s. They also show that Indonesian fishermen continued to fish around the islands, sometimes staying overnight on Sipadan, in the early 1970s after the dispute had emerged.”

In regards fishing activities, Republic of Indonesia states that Republic of Indonesian fishermen have traditionally pled their trade around the islands of Ligitan and Sipadan. It has submitted a series of affidavits. which provide a record of occasional visits to the islands dating back to the 1950s and early 1960s and even to the early 1970s after the dispute between the Parties had emerged. Although Republic of Indonesia was hoping that this is considered as an activity indicating effectivité of the islands of Sipadan and Ligitan it is clearly not.

According to United Nations Convention on the Law of the Sea in Article 51, indeed that traditional fishing rights need to be recognized. However, it does not apply in the arguments brought by Indonesia. In UNCLOS, the traditional fishing rights and other legitimate activities need to be respected according to the bilateral agreement as requested by the States concerned. In the dispute of Sipadan and Ligitan Islands, there were no agreements regarding the traditional fishing rights between Indonesia and Malaysia. More importantly, according to the Judgement of the International Court of Justice, the activities by the Indonesian fishermen is not to be seen as effectivité. The reason is that effectivité should be an activity carried by the state to

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show the sovereignty of the island, not by private carried activities such as local fishermen fishing.

III.3. The Response of International Court of Justice to the Claimant States

III.3.1 The Decision of International Court of Justice in the Republic of Indonesia’s Effectivité Arguments

The International Court of Justice produced Reports of Judgments in regards to the disputed islands case in December 2002. It re-addresses the historical background and geographical context of the Sipadan and Ligitan Islands as a foundation of the claiming. Indonesia argued that the islands was given to the Sultan of Bulungan as a successor, however, no mentioning of international legal instruments were cited. Below is the excerpt of the judgments by the International Court of Justice:

“Turning now to the effectivités relied on by Indonesia, the Court will begin by pointing out that none of them is of a legislative or regulatory character.”

Based on the judgment, the effectivités by Indonesia, indeed was stated that does not really show the intention of exercising a function of a state. In other words, are not legit and not enough to be given ownership to the islands, compared to what Malaysia had delivered. In addition, the fact that there was no mentioning of the disputed islands in Indonesia’s archipelagic baseline also has made the decision


stronger. Below is the arguments delivered by Indonesia that has been through judgment by the International Court of Justice, elaborated by this thesis.

III.3.1.1 Regarding the Sipadan and Ligitan as Dutch Royal Army Patrol Area

“In the opinion of the Court, it cannot be deduced either from the report of the commanding officer of the Lynx or from any other document presented by Republic of Indonesia in connection with Dutch or Republic of Indonesian naval surveillance and patrol activities that the naval authorities concerned considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Republic of Indonesia)”

Indeed, there was a report by the Lynx commander officer about the naval surveillance and activities. However, in the judgment, the International Court of Justice explicitly stated about the redundancy of the report and other presented documents. The judgment stated that it does not necessarily indicate the ownership by neither the Dutch nor Indonesian. This is due to the consideration of the court about the necessity of authority solely in the matter of naval surveillance activities. The court believes that naval activities only do not necessarily mean that the area is under the sovereignty of the ones who do the surveillance, which in this case are the Netherlands and Indonesia.

III.3.2.1 Regarding the Republic of Indonesian Navy Activity on Sipadan and Ligitan Islands Area on Several Occasions

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103 Ibid.
"The Court concludes that the activities relied upon by Republic of Indonesia do not constitute acts Li titre de souverain reflecting the intention and will to act in that capacity." \(^{104}\)

Indonesia did mention in the Memorial that the visit indicated the belonging of sovereignty from the visit. The visit mentioned includes the details, such as year and the people. It is stated that the visit was done regularly by Indonesian civilians and military. Nevertheless, the court does not see it as a real act of sovereignty of the area.

Deriving from the Reply of Malaysia, one of the claimant states delivered that there must be no confusion between a survey and an exercise of territorial sovereignty. The response was supported by the judgment of the International Court of Justice by reminiscing the case of Denmark against Norway in the dispute of Eastern Greenland. It was stated that there are two crucial elements that have to be displayed in claiming a sovereignty over an area, which are “... the intention and will to act as sovereign, and some actual exercises or display of such authority...” The court stated in the judgement that there is nothing taken into an account in the matter of effective delivered by Indonesia, that are a legislative or regulatory character. That being said, the Indonesian Navy Activity on Sipadan and Ligitan Islands, according to the International Court of Justice, is not enough to be said as an intention and exercise to display authority to sovereign, as it does not have the characters of legislative and regulatory.

III.3.3.1 Regarding the Sipadan and Ligitan Island as Fishing Area for Traditional Fishermen of the Republic of Indonesia

“Finally, Republic of Indonesia States that the waters around Ligitan and Sipadan have traditionally been used by Republic of Indonesian fishermen. The Court observes, however, that activities by private persons cannot be seen as effectivités if they do not take place on the basis of official regulations or under governmental authority.”

Statement from Indonesia delivered that the area of the water surrounding the disputed islands have been used by Indonesian fishermen. However, the court again decided that it was not enough to be considered as an effectivité aspect. Only by using the water by private parties does not indicate the willingness of a state governing the area, as it does not include legal activities by a government.

III.3.2 The International Court of Justice Decision of International Court of Justice in Malaysia’s Effectivité Arguments

III.3.2.1 Regarding the Turtle egg collection in 1914 by the Great Britain in the area of Sipadan and Ligitan Islands

As evidence of such effective administration over the islands, Malaysia cites the measures taken by the North Borneo authorities to regulate and control the collecting of turtle eggs on Ligitan and Sipadan, an activity of some economic significance in the area at the time. It refers in particular to the Turtle Preservation Ordinance of 1917, the purpose of which was to limit the capture of turtles and the collection of turtle eggs "within the State of North Borneo or the territorial waters there”. The Court notes that the Ordinance provided in this respect for a licensing system and for the creation of native reserves for the collection of turtle eggs and listed Sipadan among the islands included in one of those reserves.

Malaysia adduces several documents showing that the 1917 Turtle Preservation Ordinance was applied until the 1950s at least. In this regard, it cites, for example, the licence issued on 28 April 1954 by the District Officer of Tawau permitting the capture of turtles pursuant to Section 2 of the Ordinance. The Court observes that this licence covered an area including "the islands of Sipadan, Ligitan, Kapalat, Mabul, Dinawan and Si-Amil". Further, Malaysia mentions certain cases both before and after 1930 in which it has been shown that administrative authorities settled disputes about the collection of turtle eggs on Sipadan.

III.3.2.2 Regarding the Bird Sanctuary in Sipadan 1930

"Malaysia also refers to the fact that in 1933 Sipadan, under Section 28 of the Land Ordinance, 1930, was declared to be "a reserve for the purpose of bird sanctuaries". The Court is of the opinion that both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory which is specified by name."

To Malaysia, bird, besides being an important commodity in trade, is also crucial in being a part of the islands as a sanctuary. It was stated by Malaysia that when the islands were still inhabited, Malaysia visited the area periodically, and that the islands had become a part of its marine economy. The officials later decided to establish a bird sanctuary in the area. For this activity, the International Court of Justice decided that this is included in the effectivité aspect, as it is a form of

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regulation and administration of an authority that Malaysia did in the disputed islands.

III.3.2.3 Regarding the Lighthouses Built by Colony of North Borneo on the Islands of Sipadan in 1962 and in Ligitan in 1963

Malaysia then cites the fact that the authorities of the colony of North Borneo in 1962 had built a lighthouse on Sipadan. In addition, a lighthouse was also built in 1963 in Ligitan. The existence of the lighthouses had been there since the mentioned time, and it is currently standing still, maintained by Malaysia since its national independence. The Court decided that the construction and maintenance of such lighthouses is "part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved".

The Court views that the building and operation of lighthouses and aid of navigations are not usually considered to be an exhibition of an authority of a State (Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953, p. 71). However, the International Court of Justice reminisces that in its Judgment in the Maritime Delimitation and Territorial Questions between Qatar and Bahrain case (Qatar v. Bahrain), it stated as follows:

"Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed a titre de souverain. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it." (Judgment, Merits, I.C.J. Reports 2001, pp. 99-100, para. 197.)

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The Court has a view that the same considerations apply in the present case.

III.3.3 Ending Statement of International Court of Justice

III.3.3.1 Malaysia ending statement

The Court notes that the activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.

III.3.3.2 Republic of Indonesia ending statement

The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Republic of Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that in 1962 and 1963 the Republic of Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses at those times had taken place on territory which they considered Republic of Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual.
After receiving memorials and counter-memorials as well as reply and counter-reply followed by oral proceedings by the Parties, the Court finally decided by a vote of 16 to 1 that the sovereignty of Sipadan and Ligitan effectively belonged to Malaysia.

Figure III.6 The decision of International Court of Justice.
Source: Sovereignty over Pulau Ligitan and Pulau Sipadan (Republic of Indonesia l Malaysia), 4,
Judgment, I. C. J. Reports 2002. Article 147. retrieved from
Sovereignty over Pulau Ligitan and Pulau Sipadan (Republic of Indonesia l Malaysia), 4,
Judgment, I. C. J. Reports 2002. Article 148. retrieved from
Sovereignty over Pulau Ligitan and Pulau Sipadan (Republic of Indonesia l Malaysia), 4,
Judgment, I. C. J. Reports 2002. Article 149. retrieved from
Figure III.7 The final judgement of International Court of Justice 2002.

CHAPTER IV

ANALYZING THE CONTRIBUTING FACTORS IN THE VICTORY GAINED BY MALAYSIA IN THE SIPADAN - LIGITAN DISPUTE IN THE International Court of Justice FROM THE PERSPECTIVE OF NEOREALISM

In the previous chapter, this thesis has explained the chronology of Sipadan and Ligitan Island dispute between Malaysia and Republic of Indonesia in the International Court of Justice 1998-2002. Both parties (Malaysia and Republic of Indonesia) has presented their argument from their history who is the rightful owner of the Sipadan and Ligitan island. The International Court of Justice (International Court of Justice) later agreed to continue seeing their judgement on this dispute using the effectivité.

Republic of Indonesia showed lack of proof of their effectivité on the island of Sipadan and Ligitan. While effectivité is clearly important in claiming ownership of a no man’s land. On the other hand, Malaysia has proven their effectivité on the island of Sipadan and Ligitan with clear and legitimate document. Therefore, the International Court of Justice decided that Malaysia is the rightful owner of the Sipadan and Ligitan island through effectivité.

Now in this chapter, this thesis would like to elaborate more about the aftermath and the impact of Malaysia from winning the case of Sipadan and Ligitan island against Republic of Indonesia. The author will also apply the theory shown on the first chapter of this thesis (Neorealism, Effectivité,, and Elements of State) to further understand the case better. This chapter will be the core of this whole research, aims to deliver elements of Neorealism applied by Malaysia to win the islands of Sipadan and Ligitan in the dispute against the Republic of Indonesia. This chapter will explain and elaborate on how Malaysia actually won the dispute.

IV.1. Explaining the Effectivité Factors: How Malaysia Won the Sipadan - Ligitan Dispute

The International Court of Justice did not really find the basis of the ownership to the disputes islands based on a formal treaty as the foundation. Hence, the International Court of Justice decided to look into the case based on the effectivité, which is real and consistent exercises over authority of the islands. In other words, the deliberateness or intention as a sovereign act. Deriving from Berlin Conference, the means to give ownership of an area to a party is by looking at their activities in the area. Even when a party came later than the others, they can still claim over an area based on their practices there. Indonesia, who expressed the effectivité based on the existence of the navies and activities of fishermen in the waters, did not really satisfy the world court.

On the other hand, Malaysia, considered by the International Court of Justice to have covered the existence of official regulations and exercise of authority in the area. From regulating the collection of turtle eggs, lighthouse construction, and bird sanctuary in the disputed islands. The court decided that those activities had shown a
legislative, administrative, and quasi-judicial act. Indeed, it has proven to show a willingness to have a function of a state in governing an area.

Based on those reasons, the International Court of Justice decided to give Malaysia the rights of the Sipadan and Ligitan Islands. It is indeed understandable that an area should belong to a party who exercises power and authority over the area. It is based on the elements of territory and sovereignty of a state. The decision of the International Court of Justice in deciding the owner of the islands to Malaysia based on the effectivités will be explained and elaborated by this thesis of this thesis as below:

Figure IV.1 Malaysia Implementation of effectivité diagram

Source: The author of this thesis visualizes the implementation of Malaysia in claiming the disputed islands based on effectivité

Above is a diagram that illustrates on how Malaysia has effectively practiced their means of gaining a territory over Sipadan and Ligitan islands using crucial and
impactful moves that made them won the dispute. In effectivité, a state should perform a will to act sovereign. In becoming the owner of a territory, a party needs to show their administrative authority and sovereignty act. A will to act as a sovereignty should also be declared formally and legally to other states as legal proof of ownership or control over the territory.

In which in this case, Malaysia has done these steps and resulted to their victory in winning the the Sipadan and Ligitan islands case against Republic of Indonesia. Where at first, the territory is not under any sovereignty recognized by any party except the claimant states. Below are the elaborations of the 3 effectivité acts that makes the International Court of Justice decided that Malaysia should be the rightful owner of the Sipadan and Ligitan islands.

**IV.3.1 Turtle Egg Collection in 1914 by the Great Britain in the area of Sipadan and Ligitan Islands**

Malaysia mentions the control of turtles and turtle eggs collection was one of the important economic activity in the Sipadan island in the early 1914 by the Great Britain. Great Britain took steps to regulate and control the collection of turtle eggs on Sipadan and Ligitan. To prove this, Malaysia also cites the measure taken by the North Borneo government to regulate and control the collecting of turtle eggs on Sipadan and Ligitan.

It refers in particular to the Turtle Preservation Ordinance of 1917. In the document of Turtle Preservation Ordinance, it was applied from 1917 until 1950s. The licence issued on 28 April 1954 by the District Officer of Tawau permitting the capture of turtles pursuant to Section 2 of the Ordinance. The Court observes that this licence covered an area including "the islands of Sipadan, Ligitan, Kapalat, Mabul, Dinawan
and Si-Amil". The right of collecting and controlling turtle eggs collection in the island has proven a legit authority of Malaysia of the island. The fact that no other party was entitled to do the same thing, except Britain who took the steps in 1914, makes Malaysia alone has exercised the authority of controlling it.

Indonesia may have claimed the same thing in doing the activity of collecting turtle eggs, however, was not supported by evidence. In contrast, Malaysia has delivered the granted authority of collecting turtle eggs and had to pay for its fee. The right was also regulated by customary law and was inherited from person to person. In doing so, Malaysia has proven the activity of a legal governance who has the authority in exercising its sovereignty over the Sipadan and Ligitan Islands.

**IV.3.2 Bird Sanctuary in Sipadan in 1930**

Malaysia refers to the fact that in 1933 in Sipadan, under Section 28 of the Land Ordinance, 1930, was declared to be “a reserve for the purpose of bird sanctuary”. It has been implemented in a notification form, and it is shown in the map of bird sanctuary submitted to the International Court of Justice. Once again, Malaysia has a legal written proof of how the effectivité is implemented in the Sipadan island. The measures of establishing, controlling, and regulating a bird sanctuary is indeed an act of sovereignty.

**IV.3.3 Lighthouse Built by Colony of North Borneo in Sipadan in 1962 and in Ligitan in 1963**

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The Colony of North Borneo constructed a lighthouse on Sipadan in 1962 and another in the later year 1963 on Ligitan. The lighthouses existed to this day and have been maintained by Malaysian authorities since its independence. In the counter memorial of Malaysia to Indonesia, it was stated that Indonesia indeed did not object to the lighthouse construction, means that Indonesia indeed agreed about its silence and absence of objection.

Malaysia also has stated in the counter memorial that there was an absence of question whether Indonesia might build the lighthouse instead of Malaysia. The fact that Malaysia built it, with the consent and awareness of other states, has given à titre de souverain, or in English a title of the sovereignty, in the location of the lighthouse construction. The lighthouses being maintained by the authorities of Malaysia is considered as a sovereignty act as a state and therefore counted as effectivité.

Based on the effectivité aspects above, the International Court of Justice has decided to take into considerations that indeed those activities are crucial parts of economic activities. Those are an act of effective administration in Sipadan and Ligitan Islands. Malaysia covered an important time period and demonstrated a clear flow in showing the claim to exercise its function as a State over the disputed islands. The International Court of Justice also recognized the absence of protest nor disagreement when Malaysia exercised the crucial administration in the area. In this regards, the International Court of Justice has granted Malaysia the rightful owner of the Sipadan and Ligitan Islands in the final judgment.
IV.2. Neorealism in the Sipadan - Ligitan Dispute between Malaysia and Republic of Indonesia

IV.2.1 Assumptions of Neorealism in the case of Sipadan and Ligitan Islands Exercised by Malaysia

The writer believes that Neorealism can be utilized best to analyze the dispute between Malaysia and Indonesia for the Sipadan - Ligitan Islands. Neorealism can provide the analysis on the interest of Malaysia to pursue their interest in the ownership of the islands, and the nature of the relationship between the states in the process. The previous chapters elaborated the occurrence of the dispute between Malaysia and Indonesia, and this thesis believes that the occurrences can be analyzed further based on the assumptions of Neorealism, based on the analysis of John Mearsheimer, in his book The Tragedy of Great Power Politics (2001).

Following the assumptions above, this thesis believes that analyzing occurrences of the dispute can be rationalized. The writer believes that insecurity is one of the key contributors in determining the process that the dispute of the Sipadan - Ligitan. The Sipadan and Ligitan dispute was triggered due to the uncertainty of the the intention of another state, as described in the chapters before. The dispute began after uncertainties between how both Malaysia and Indonesia defined the mapping near the Sipadan - Ligitan Islands. That confusion is also used as a basis for Malaysia to continue their development in the Sipadan - Ligitan Islands, unknowingly to their counterpart. Malaysia’s attention to pursue their interest in developing the Islands is what resulted in the key factor that caused the decision by the International Court of Justice to overwhelmingly favor Malaysia in the ruling. By this rationality, Malaysia won their dispute.
IV.2.2 National Interest based on Neorealism Perspective in the Case of the Sipadan and Ligitan Islands Dispute

In line with the perspective of neorealism, this thesis perceive that national interest plays a part in the determination of Malaysia in the dispute for the Islands. In his book *The Theory of International Politics*, Kenneth Waltz believed that national interest are derived by the situation surrounding of the state, and avoiding any sort of threat to their own existence.\(^{110}\) In addition, Waltz believes that Neorealism is influenced by the international structure produced into the perception by the state itself. For that reason, states decide what are achievable, and what is not.\(^ {111}\) The same concept can be used as a factor to analyze why Malaysia took their decision to dispute with the sovereignty of the islands against Indonesia. The ambiguity of the status of the islands surrounding enables the interest of Malaysia further, alongside with how Indonesia responded initially to the dispute. By using the status quo of the islands, Malaysia’s pursue of their national interest gained them their advantage.

IV.2.3. International Organization and International Law as a Tool/Medium to Reach Interest

By its structure, Neorealism believes that neither international law, or international organizations are not viable to be considered as actors in the world of international relations, since realism believes that there are no higher entity than a state. But in thesis this thesis would like to proceed to use the International Court of Justice, a form of International Organization, as a means to be support the analysis for the research. In this matter the International Court of Justice is not analyzed as an actor, but as a medium for the state, to achieve their interest. This is explained further by the assumption of neorealism that states will use any means to achieve its interest,\(^{110}\)\(^ {111}\)

\(^{110}\) *Kenneth Waltz, Theory of International Politics (Addison- Wesley Publishing Company, 1979), 88-105*

\(^{111}\) *Ibid.*
one of that ways is by using the power of international organization to its own benefits, as elaborated by Bordner.112

In the case of Sipadan and Ligitan Islands dispute between Malaysia and Indonesia one of them is clearly using International Organization in order to achieve both of the islands. Malaysia has been using the International Court of Justice (International Court of Justice) to gain the sovereignty of the island can be seen when they decline Republic of Indonesia offer to settle the dispute using the ASEAN High Council because they knew that they will lose the case since Malaysia has other dispute with other ASEAN countries and considering the judgement that will be held upon them will be biased.113 In the other hand when they decided to bring the case to International Court of Justice Malaysia then agree because they have prepared a way to win the dispute.114 This can be seen by the way Malaysia brought their argument that is spot on in the effectivité aspect that the International Court of Justice accept while on the other side the Republic of Indonesia argument is lack of effectivité aspect that resulting in their losing of Sipadan and Ligitan islands.115

IV.3. Malaysia’s National Interests in Gaining Sipadan and Ligitan Islands throughout the International Court of Justice

Gaining the sovereignty of the Sipadan and Ligitan islands is a boost to the Malaysia economy, as it can gain benefit from the islands revenue of tourism, which Sipadan

113 Djalal, Hasjim. Opinio Juris. Volume 12, Januari 2013: Dispute Between Republic of Indonesia and Malaysia on the Sovereignty Over Sipadan and Ligitan Islands
island is very great tourist attraction. Referring to the interest of Malaysia to claim the Sipadan and Ligitan islands as theirs, some of the 5 elements of states can be mentioned. Namely, territory and sovereignty.

Malaysia’s national interest in winning the islands is projected in the economic aspect, due to the reason of having better economy in a state means more fuel for them to make a stronger state in other aspects. One of them is political aspect of the Malaysia state itself, more money to fuel their power to govern and maintain a strong state. However, it is believed that the effort of claiming the disputed islands is not merely about economic advantages, but it is about a battle of pride.\textsuperscript{116}

This subchapter serves as a point of elaboration in analyzing the purposes of Malaysia in pursuing the sovereignty over the islands, that is as their interest. In the elaboration of this chapter, this research follows the outcome of the decision of the international court of justice to be inline with the notion of how the sovereignty aspect over a territory is a vital part of a state's interest, as their interest for the elements of the state the Malaysia sought to control. The interests elaborated in this subchapter can be summarized to why Malaysia wanted to pursue their sovereignty over the two islands. But it is not exclusive to the question of why. This research is also based on the fact that the reason why they want the islands, drove Malaysia to implement their policy ahead of Indonesia, and resulting them to win the Island.

\textbf{IV.3.1 Political Interest}

The winning of Malaysia in the case of Sipadan and Ligitan against Republic of Indonesia would give more advantages in the political aspect. Based on the perspective of neorealism, power is to be sought by states, and the strong wins. Hence, it is best to decrease the power of the enemies. In the case of Sipadan and

\textsuperscript{116} Hendrapati, M. Implication of the International Court of Justice Decision Respecting Sipadan–Ligitan Case towards Base points and Maritime Delimitation.
Ligitan islands dispute, despite of the unclear belonging of the area at the beginning, the two states compete for ownership of the disputed islands. Winning the case has given political gain to Malaysia as a reflection of their stability and governmental system, as well as given them proven legitimacy.

The legitimacy gained by Malaysia has also given them the conformity to rule the area. This is also a matter or territory. A state that has more territory will have better advantages rather than states that lack of territory. A state that has vast territory could have a better military and political advantages, because they can cover large area and also various resources, in term of natural resources such as oil and gas. In this case, the Sipadan Island as their newly claimed territory has a great economical value in term of tourism. Winning the dispute and gaining ownership of both disputed islands has gained Malaysia additional power to rule the area as a part of their territory.

The significance of the importance of territory is reflected in international relations, as well as international law, that having a sovereignty over a territory defines the composition of a state. As one of the contributors of realism perspective, Niccolo Machiavelli, stated that acquiring territory is one of the goals of most of the states. Territorial disputes not only give obvious state’s borders, but also contributes to international competition in claiming territory.

Based on Neorealism perspective, territorial dispute is more than just gaining ownership of the area, it is indeed more than that. This is due to the competition from states to pursue their own security. State, being rational actors, would seek to gain over territory, and take advantage of the status quo over any form of uncertainties.

119 Ibid
In becoming the advantageous side in this dispute, state would gain advantage in setting themselves in the structure of the relationship against another. In order to Winning the Sipadan and Ligitan Islands in the International Court of Justice is surely giving Malaysia the pride of being a better country in many aspects rather than Republic of Indonesia. Territorial dispute is a battle of pride. Moreover, having the two islands that are now considered as the top diving site in the world will bring Malaysia name as a state to be a well known state in the world for the beauty of its nature, as well as making them the rightful ownership given by legal decision from the world court.

IV.3.2 Economic Interest

The winning of Malaysia in the case of Sipadan and Ligitan islands against Republic of Indonesia is giving Malaysia a great advantage in economic value to the state. Sipadan island is considered one of the top diving site in the world thus making Malaysia as a must visit destination for divers and giving them economic boost through tourism. Having ownership of the island means having full control of the resources and its values and benefits gained.

The economic justifications of territorial claims mostly deals with the development of the state. For instance; transportations routes, raw materials exploitation, as well as foreign investment. The economic interests of Malaysia are regarding to having all access to resources, finance, and markets. Political interest is closely related to economic sector, in terms of how it adds values and budgets to the state. A stable economic equals to other achievable stable sectors of a nation state. The economic interest also deals with the access of resources. State power is achieved by welfare

120 Territorial Disputes at the International Court of Justice, Brian Taylor Sumner
brought by finance and market. In the case of Sipadan and Ligitan Islands, Malaysia has gained full access to the resources of both disputed islands when rightful ownership is officially given.

IV.4. Impact to Malaysia - Republic of Indonesia Bilateral Relations

Victory was gained by Malaysia in claiming the territory over Sipadan and Ligitan islands against Indonesia in the International Court of Justice. With the world court’s decision, both parties need to accept it. As it is a final decision that has a binding force under the international court.

IV.4.1 How the Dispute Became a Continuation of Malaysia's Claim over Territory between the Malaysia and Indonesia

Apparently, the Sipadan and Ligitan Islands Dispute is not the first time for the International Court of Justice to decide a rightful ownership over territorial disputes based on the principles of effectivité. Prior to this, Palmas Island and Eastern Greenland showed a similar pattern in the result of a dispute from the principles of occupation. Namely, Palmas Island dispute between the US and the Netherlands, and the dispute of Clipperton Island by French and Mexico. Deciding a rightful owner over territorial disputes has been seen by the International Court of Justice through effective occupation principle, in which a party exercised its sovereignty and authority over the disputed territory.

The decision of the International Court of Justice to give ownership of the disputed islands to Malaysia needs to be respected by Indonesia, the losing party. Not long after, Ambalat island was again disputed by both neighboring states. In this instance,

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the claim of Ambalat is seen to be a continuation of the gained victory over Sipadan and Ligitan Islands. It is believed that the determination of Malaysia in claiming its territory does not just ended there, and it is a form of “creeping jurisdiction”. As written in the International Journal of Sciences: Basic and Applied Research, Malaysia had the ambition to broaden the jurisdiction over Celebes Sea around Sabah and Sarawak.

“The state had ambition to extend gradually the jurisdiction over a part of Celebes Sea measured from baselines around Sabah and Sarawak and also the two islands which were obtained through the International Court of Justice decision so that this condition led to maritime delimitation dispute.”

The impact of the ruling by Malaysia in the Sipadan and Ligitan Islands has become a foundation on how Malaysia has the urge to claim Ambalat Island after winning the Sipadan and Ligitan Islands in the International Court of Justice. In 1997, Malaysia began their dispute with Indonesia for the territory of Ambalat, which is located in the eastern part of Borneo, between the borders of the two countries. Until the time of research, the dispute of Ambalat is still yet to be resolved, despite having numerous of negotiations over the years.

IV.4.2 How Indonesia Responded to the Decision by the International Court of Justice

The International Court of Justice disregarded both arguments from the claimant states with the era of colonial maps and treaties as the basis. Instead, the International Court

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123Hendrapati, M. Implication of the International Court of Justice Decision Respecting Sipadan–Ligitan Case towards Base points and Maritime Delimitation.
124Ibid
Court of Justice brought into favor the claims of Malaysia in the usage of the area before the dispute was even started. In response to the decision, the Foreign Minister of Indonesia, Hassan Wirayuda stated that:

"It is almost unavoidable not to be deeply disappointed by knowing that maximum efforts by four Indonesian governments since 1997 did not bear fruit as we had expected". "

Nevertheless, he also stated that the state has the obligation to respect and follow the decision of the World Court. He believed that the court has come up with a transparent and objective decision. In a press conference in his office, he also delivered about the bilateral relations of Indonesia with Malaysia in regards to the dispute:

“The government of Indonesia accept the decision by the International Court of Justice, and I really hope with this decision by International Court of Justice also close this phase of bilateral relation of Indonesia and Malaysia”

In the press conference, he also expressed his disappointment that the continuous effort of the previous state authorities meant nothing. He further delivered his statement about the impact to the policy of Indonesia to prevent similar cases of losing its territory happen again, Hasan Wirajuda also adds:

“"It becomes an important policy in the ruling of Megawati at this moment which is mapping the outer region of our territory so 17,508 islands did not scattered”

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127 Ibid
Wirajuda states that the losing of Sipadan and Ligitan island are the result of blur lines between the boundaries of Republic of Indonesia map on the outer region. And it is in dire need of attention the outer region really needs. The defeat of Indonesia in the Sipadan and Ligitan Islands dispute is a real projection of the negligence about its islands, as the effectivité aspect sees the exercise of a government’s activities in an administration form that shows a desire to have sovereignty over a territory.

“The Ministry of Foreign Affair itself sees the case, we don't need to feel losing the island. It it because Sipadan and Ligitan Island were never a part of Indonesia in the beginning. Based on law No. 4/Prp/1960 about waters that implemented in 18 February 1960, Indonesia never put the island of Sipadan and Ligitan in the map of Indonesia.”

The response by Republic of Indonesia Ministry of Affair was underwhelming, as it is said above that based on Republic of Indonesia law No. 4/Prp/1960 about the maritime that implemented in 18 February 1960 stated Republic of Indonesia never put the island of Sipadan and Ligitan into the Republic of Indonesia boundaries. Therefore, the islands of Sipadan and Ligitan were never theirs after all. The statement above indicates the bearing of defeat, and respect to the decision by the International Court of Justice about the disputed islands.
CHAPTER V

CONCLUSION

The start of the case of Sipadan and Ligitan Island between Malaysia and Republic of Indonesia is rather unique, as it is brought to the surface by “accident” by both countries. After that, things went snowballing to a jumbled strings that is really hard to solve. Many direct negotiation has been tried by both countries to solve this problem, so that peace can be achieved. But they however never did achieve any agreement. Eventually, the case never found a middleground, and both countries decided to bring in third parties to solve this case. Thus, the International Court of Justice are invited to settle this dispute once and for all.

The islands of Sipadan and Ligitan itself are a miraculous wonder of the world. Despite of the size, it holds tourism potentials as known to have many breathtaking diving spots that are famous in the world.. Not only that, the islands also are a home
to many species of birds that are now living in a bird sanctuary. Other species like turtles have also added the value of both the disputed islands.

Republic of Indonesia and Malaysia both presented their arguments in the International Court of Justice with their complicated history as the foundations. The arguments presented by both country later become very deep and complicated chain of inheritance from elder predecessor the sultanate and former colonizer Netherland and Great Britain. In which the International Court of Justice did not think that it was enough to be an argument brought to the World Court to claim a territory.

The International Court of Justice later found that the argument by both country inheritance was not valid because of the lack of treaty-based title that it has. The International Court of Justice later announced that the case will be carried based on the matter of effectivité that is done to the islands. Both claimant states then delivered their arguments in the memorials based on the principles of effectivité.

As the result, Malaysia was the one who won the case of Sipadan and Ligitan island in the International Court of Justice, year of 2002. The International Court of Justice determined that the effective claim by Malaysia brought the most convincing argument. Based on the aspects of administrative and sovereignty aspect, with their development and involvement in the islands being a key part in the decision. Malaysia gained their right to rule over the Sipadan - Ligitan Islands, and Indonesia conceded to accept the decision by the International Court of Justice.

Finally, this thesis believes that the government of Indonesia needs to take a more proactive approach in protecting the sovereignty of their territory. As an Indonesian, losing the territory of Indonesia to a neighboring state is a great shame, especially
when the decision was so overwhelmingly ruled against. The defeat of Indonesia in claiming Sipadan and Ligitan Islands in the World Court is a lesson to learn, as it is crucial for an archipelagic nation like Indonesia for the state to defend its territory better in the future.

APPENDICES
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