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Arbitrating Law of the Sea Disputes: With special reference to the Arctic Sunrise Arbitration

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ABSTRACT

The United Nations Convention on the Law of the Sea (UNCLOS) was first established in Montego Bay in 1982, but it was not brought into force until 1994. Undoubtedly, the preponderance of interstate arbitration stems from UNCLOS. Given that the majority of the planet is covered by water and that 168 states have ratified the agreement, the fact is hardly surprising. The objective of this article is to study arbitration as a way of resolving disputes, with particular emphasis on the judgement of one of the most major cases - The Arctic Sunrise Arbitration, referred to under Part XV and Annex VII of the Convention.

Keywords: *Arbitration, UNCLOS, Arctic Sunrise Case.*

I. INTRODUCTION

International arbitration has generally been on the periphery of international dispute resolution mechanisms. International arbitration has traditionally played a secondary role in international dispute resolution mechanisms. The law of the sea is just a component of international law and, despite the existence of a distinct international tribunal for maritime disputes, resolution of these disputes still follows the framework of general international law dispute settlement. Arbitration conducted under the Law of the Sea Convention is technically known as the "United Nations Convention on the Law of the Sea" (referred to as UNCLOS hereafter). This convention was established in 1982 in Montego Bay and took effect in 1994. According to Brooks W., "UNCLOS is the source of most of the Interstate Arbitration." The fact is hardly surprising considering that the majority of the Earth is covered by the sea and 168 governments have signed the convention.

The UNCLOS provides specific guidelines for addressing maritime legal matters. One notable achievement of the convention is the establishment of a comprehensive system for resolving disputes. Part XV of the Convention[2] outlines the procedures and principles for interpreting and implementing these dispute resolution methods. It emphasises both voluntary and compulsory

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[2] Part XV, UNCLOS.

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procedures for conflict resolution –

1. Voluntary Procedures – "These procedures are traditional consent-based procedures, such as reconciliation, settlement through a separate agreement, or negotiation. If parties to a dispute consent to it, ad-hoc arbitration, outside the framework of the convention, can also be initiated."[3]
2. Compulsory Procedures – "These procedures entail a binding third-party settlement with the purpose of dispute resolution. These consist of International Tribunal for the Law of the Sea (ITLOS), The International Court of Justice (ICJ), and an Arbiter Tribunal constituted in accordance with Annex VII and Special Arbiter Tribunal with Annex VIII."[4]

Section 3[5] of the UNCLOS deals with the limitations and exceptions to compulsory settlement procedures. These exceptions arise when a dispute is deemed too politically sensitive to be resolved through compulsory adjudication or arbitration. Governments have the option to opt out of compulsory settlement for three specific types of disputes by submitting a written statement, known as the Optional Declaration under Article 298 of UNCLOS.[6] These types of disputes include conflicts related to marine boundary delimitations, historic bays or titles, and military or law enforcement activities. Additionally, disagreements concerning the exercise of responsibilities by the United Nations Security Council under the UN Charter also fall within the scope of these exceptions.

The relationship between voluntary and compulsory procedures is interconnected within the framework of the UNCLOS. If two nations attempt to resolve a dispute through negotiation under section 1 of Part XV[7], but are unable to reach an agreement, they can then proceed to the compulsory procedure outlined in Section 2 of Part XV[8], as long as they have not excluded any further procedures.

While maritime delimitation disputes are commonly associated with the Law of the Sea, the scope of topics covered by UNCLOS is broad. It encompasses fisheries, protection of the marine environment, shipping, piracy, pollution, and more, in addition to maritime boundaries. Arbitration holds significant practical value in this field. As a result, arbitral awards in the Law of the Sea can have far-reaching impacts on the involved parties, the maritime environment,

[3] Section 1, Part XV, UNCLOS.
[4] Section 2, Part XV, UNCLOS.
[5] Section 3, Part XV, UNCLOS.
[6] Art. 298, Section 3, Part XV, UNCLOS.
[7] *Id*. at 3.
[8] *Id.* at 4.

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maritime borders, and other aspects.

The purpose of this article is to analyse arbitration as a method of dispute settlement with special reference to the recent decision of one of the most significant cases – The Arctic Sunrise Arbitration[9], referred to under Part XV[10] and Annex VII[11] of the Convention, in the Permanent Court of Arbitration (PCA).

II. ARBITRATION UNDER THE UNCLOS

The UN Treaty on the Law of the Sea (UNCLOS) provides for two forms of arbitration: an arbitral tribunal established in accordance with Annex VII[12] of the convention and a special arbitral tribunal established in accordance with Annex VIII[13] of the convention.

Annex VII Arbitration:

Annex VII arbitration process is the default choice for dispute settlement if the parties involved do not select any alternative procedures. This makes it a more favourable option for the state parties. Under this, unless the parties agree otherwise, an Arbitral Tribunal consisting of five members is established to handle the case. Each party appoints one member, and the remaining three are chosen through mutual agreement. However, if one party refuses to cooperate in constituting the tribunal or if the parties cannot agree on the appointment of the neutral members, a third state chosen by the parties or the president of ITLOS takes on the responsibility of making the necessary appointments.

The tribunal has the authority to determine the arbitration procedure, although the parties have the freedom to establish their own procedural rules based on party autonomy in arbitration.

If one of the parties fails to appear before the tribunal or submit their case, it will not hinder the tribunal's proceedings. In other words, the tribunal will continue with the arbitration even if one party is absent. Additionally, the tribunal has the power to issue an award even if the claimant is in default, as long as the tribunal has jurisdiction and there is sufficient evidence to support the claim.

The arbitral award is final and cannot be appealed. If there is a dispute regarding the interpretation of the arbitral decision, the parties can submit the interpretation to the determining tribunal following the procedures outlined in Annex VII.

[9] Arctic Sunrise (Netherlands v. Russia) case, Order of 22 November 2013.
[10] *Id*. at 2.
[11] Annex VII, UNCLOS.
[12] *Id*. at 10.
[13] Annex VIII, UNCLOS.

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It's important to note that the Law of the Sea Convention does not aim to resolve issues of territorial sovereignty on its own. When examining Annex VII arbitrations, it is crucial to consider that if jurisdictional disputes arise, the tribunals are tasked with determining which state has authority over a specific region.

Annex VIII Arbitration:

The Annex VIII arbitration process is designed to address technical issues and disputes related to various aspects such as marine environment conservation, navigation, pollution, maritime scientific research, and fisheries. This tribunal consists of experts and professionals with expertise in these specific fields. One important feature of these arbitral tribunals is that they have the responsibility of not only adjudication but also fact-finding and conciliation.

According to Article 287[14] of UNCLOS, state parties have the option to specify their preferred method of dispute resolution. However, it is worth noting that only 11 nations have chosen to utilize this arbitration method under Annex VIII. As a result, the special Arbitral Tribunal established for Annex VIII arbitration is not widely recognized among state parties and is less well-known compared to other dispute settlement mechanisms.

III. NETHERLANDS V. RUSSIA (ARCTIC SUNRISE CASE)

Facts:

On September 18, 2013, the Dutch icebreaker Arctic Sunrise, operated by Greenpeace International, attempted to stage a protest at the Prirazlomnaya offshore oil platform located in the Pechora Sea off the north-western coast of Russia. The protest took place within Russia's Exclusive Economic Zone (EEZ). During the protest, five boats launched from the icebreaker, and the protestors onboard attempted to climb onto the platform using climbing equipment. In response, water cannons were used against them, and they were subsequently detained by Russian border guards. The patrol ship "Ladoga" intervened and demanded that the icebreaker halt and allow an inspection team on board. However, the icebreaker refused and demanded the return of the activists. On September 19, Ladoga once again insisted that the icebreaker stop and allow inspectors to board. In a subsequent event, 15-16 armed men from a Russian helicopter landed on the icebreaker. They surrounded the crew, destroyed their radio equipment, and confiscated telephones, computers, and cameras. Following this, the icebreaker was towed to Murmansk, and the crew members were taken into custody.

Procedural Background:

[14] Article 287, Section 2, Part XV, UNCLOS.

The Investigative Committee initially opened a case under Part 3 of Article 227 of the Criminal Code of the Russian Federation[15] (piracy), accusing the Arctic Sunrise of piracy. However, they later changed the charges to Part 2 of Article 213[16] (hooliganism), because the Prirazlomnaya was not considered a vessel. The Netherlands initiated the case on October 4, 2013, by submitting a statement of claim requesting arbitration under Article 287 and Annex VII of UNCLOS. Prior to the constitution of the Annex VII arbitral tribunal, the Netherlands sought provisional measures from ITLOS on October 21, 2013. In response to the application, Russia conveyed via note verbale on October 22, 2013, that it neither accepted nor intended to participate in the arbitral proceedings. Nonetheless, ITLOS issued an order on November 22, 2013, granting provisional measures. These measures required the release of the Arctic Sunrise vessel and its crew members. Additionally, the Netherlands was asked to provide a bank guarantee amounting to 3.6 million euros. Subsequently, the crew of the icebreaker was released under an amnesty, and the arrest from the vessel was lifted.

Judgment:

On August 14, 2015, the tribunal issued its judgment on the merits of the case. In its ruling, the tribunal referred to Article 58[17] and 87[18] of the convention, emphasizing that all states within the Exclusive Economic Zone (EEZ) have the right to freedom of navigation and the associated right to conduct protests at sea, as specified in Sections 227-228 of the convention. Additionally, Article 60 of the Convention establishes the coastal state's jurisdiction over artificial installations and grants them the right to take measures in the security zones around these installations to ensure safety for ships, income, and themselves. However, the tribunal asserted that allegations of hooliganism or illegal entry into the security zone do not serve as a legal basis for boarding a foreign vessel within the EEZ without the consent of the flag state. Disembarkation and detention of a foreign vessel are only permissible under the right of hot pursuit, as outlined in Article 111 of the convention. This right of hot pursuit is subject to specific conditions, which include –

1. The violation of the laws of the coastal state
2. The issuance of a preliminary signal to stop
3. The presence of the ship within the relevant zone, and,

[15] Part 3, Article 227, The Criminal Code Of The Russian Federation No. 63-Fz Of June 13, 1996.
[16] Part 2, Artcile 213, The Criminal Code Of The Russian Federation No. 63-Fz Of June 13, 1996.
[17] Article 58, Part V, UNCLOS.
[18] Article 87, Part VII, UNCLOS.

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4. The continuity of the pursuit.[19]

The tribunal's ruling clarified that these conditions must be met for the boarding, disembarkation, and detention of a foreign vessel in the EEZ to be legally justified.

Regarding the first condition, the tribunal acknowledged that Russian authorities may have perceived the launching of the boats into the 500-meter security zone around Prirazlomnaya as a violation of their laws, justifying the pursuit under Section 250.

As for the second and third conditions, the tribunal ruled that the prosecution should only have commenced after the signal was given and when at least one of the boats was within the 500-meter security zone around Prirazlomnaya, as stated in Section 253. After reviewing video and other evidence, the tribunal concluded that the requirements for initiating the prosecution had been met under Section 267.

Regarding the fourth condition, the tribunal highlighted that the pursuit, which began in the 500-meter zone, should not have been interrupted until the moment of arrest. However, this condition was not fulfilled. After three hours from the initial order to stop, Ladoga attempted to detain the icebreaker, but for the next 33 hours, it merely followed without attempting to stop it. Moreover, Ladoga allowed the icebreaker to provide clothing, food, and medicine to the detained activists. These actions were deemed inconsistent with the continuity of pursuit. The presence of the helicopter near the icebreaker suggested an intention to prevent further actions against the platform and await further instructions, indicating that the right to hot pursuit could not be used to justify actions against the icebreaker. The tribunal also rejected other grounds for suspicion, such as terrorism, protection of resources, environmental protection, and dangerous maneuvering. Consequently, the tribunal concluded that Russia had violated Article 56(2),[20] 58(1),[21] 58(2),[22] 87(1a)[23] and 92(1)[24] of the Convention.

IV. WHY STATES CHOOSE ARBITRATION OVER ADJUDICATION UNDER THE UNCLOS?

As previously stated, under the UNCLOS, parties can choose between arbitration and adjudication for dispute resolution before the ITLOS or the ICJ. The (ICJ) is the primary judicial organ established by the UN Charter. If the parties to a dispute conferred or consented to the

[19] Article 111, Part VII, UNCLOS.
[20] Article 56(2), Part V, UNCLOS.
[21] Article 58(1), Part V, UNCLOS.
[22] Article 58(2), Part V, UNCLOS.
[23] Article 87(1a), Part VII, UNCLOS.
[24] Article 92(1), Part VII, UNCLOS.

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court's jurisdiction, it can determine any legal dispute involving questions and interpretations of International Law, including the law of the sea.

ITLOS, on the other hand, is composed of judges specialized in the law of the sea. It was created in response to concerns expressed by several developing countries during diplomatic conferences about the ICJ's jurisprudence and membership. These countries established ITLOS to safeguard their interests. Its headquarters are located in Hamburg, Germany, and it has jurisdiction over all matters related to the UN Convention on the Law of the Sea, covering issues of interpretation and application. Its jurisdiction can be expanded if the parties agree, and it can provide advice to sovereign states. ITLOS also has a specific chamber for cases related to the international seabed region, which includes the seabed, ocean floor, and subsoil beyond the national jurisdictions of sovereign nations.

A significant distinction between ITLOS and the ICJ is that ITLOS is accessible to non-state entities. Additionally, ITLOS has the authority to issue interim measures, which serve to protect the parties' rights during the resolution of the dispute. Even in cases of UNCLOS arbitration, the parties may seek interim measures from ITLOS during the formation of the arbitral panel, provided there are reasons of urgency. ITLOS can also address requests for interim measures related to the protection of the marine environment, which the ICJ does not support.

Furthermore, ITLOS has a specific procedure that obliges coastal states to release detained vessels as promptly as possible, ensuring freedom of passage on the high seas. The UNCLOS authorizes coastal governments to inspect and board boats in their Exclusive Economic Zone (EEZ) under certain conditions to arrest or detain them. If such a detention occurs, the coastal state must release financial security to the flag state by posting a bond. If the coastal state fails to comply, the flag state can initiate actions against the coastal state at ITLOS. This mechanism helps to maintain the balance between coastal state rights and freedom of navigation.

Based on the above discussion, we can draw the following conclusions:

1. Annex VII Arbitration offers more flexibility compared to the established adjudication methods provided by the ICJ or ITLOS.
2. Arbitration processes are generally simpler and more streamlined.
3. The arbitration framework prioritizes confidentiality, which is often preferred by the parties involved in the dispute. In contrast, adjudication proceedings are public in nature.
4. Arbitration grants the disputing parties greater control over the composition of the tribunal handling their case.

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5. Arbitration excludes third-party participation, providing a more direct involvement of the parties.

As a result of these factors, parties to a dispute under the UNCLOS often opt for arbitration over adjudication.

V. Analysis

Arbitration remains the dominant and favoured method for resolving international disputes in the field of law of the sea. There is a significant body of jurisprudence related to the UNCLOS, with Part XV of the Convention being particularly noteworthy. While Annex VII tribunals have issued many crucial decisions, both the ITLOS and the ICJ have also made substantial contributions. The advantages of arbitration over adjudication have led to a majority of interstate arbitrations being initiated under UNCLOS, and it is expected that the number of arbitration cases will continue to increase in the future, along with new interpretations of Part XV of the Convention.

VI. Conclusion

The increasing availability of comprehensive regulations, along with the growing interest in marine resources and their conservation, has led to a rise in dispute settlement cases under the law of the sea. Additionally, the threat of compulsory dispute resolution has also contributed to this trend. New types of conflicts are emerging due to global climate change, which is causing disputes related to rising sea levels resulting from melting glaciers, arctic ice, and water expansion. These conflicts involve issues concerning safety, navigation, environmental protection, resource conservation, scientific research, and civil and criminal jurisdiction.

Moreover, disputes are arising between states and private entities over maritime zone delimitations, with oil companies expressing concerns, and fishing fleets asserting their rights and duties within the Exclusive Economic Zone (EEZ). Such private activities often become the catalyst for disputes between states concerning maritime rights and responsibilities. In response to these conflicts, arbitration is being increasingly utilized as a peaceful method of resolving disputes.

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