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Arbitration under UNCLOS: An Analysis of Arbitration in Law of the Sea

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ABSTRACT

In this article, the author will discuss a particular type of arbitration, i.e., "Arbitration in the Law of Sea Convention", which is formally addressed as "U.N Convention on the Law of the Sea (UNCLOS)". This convention was put into force in 1994 but was first adopted in 1982 at the Montego Bay. It is very evidently seen that UNCLOS is the source of most of the interstate Arbitration, as said by Brooks W. Daley (Deputy Secretary-General of the Permanent Court of Arbitration at the Hauge). The fact is not surprising as most of the world is covered by sea and the fact that a hundred and sixty-eight (168) states are party to the convention, as of the report published in November 2017 . When we talk about disputes in regard of the Law of the Sea, we usually think about maritime delimitations disagreements, but the ambit of the matter covered under UNCLOS is wide as it covers matters of fisheries, conservation of the maritime environment, shipping, piracy, pollution, in addition to maritime borders. The practical significance of the arbitration in this field is huge. For instance, a tribunal passing an arbitral award in the favour of a state in terms of entitlement to use the natural sea resources. Thus, arbitral awards passed in the matters of the law of the sea can have profound impacts on the communities concerned, the maritime environment, the maritime borders, etc.

I. MECHANISMS FOR SETTLEMENT UNDER UNCLOS

This sub-topic will focus on the architecture of the dispute resolution provided under UNCLOS, i.e., different mechanisms provided for the settlement of a dispute. It is essential to understand the full picture, that is all the procedures established under UNCLOS for dispute resolution before we focus on Arbitrational procedures under the convention.

UNCLOS is very complex when it comes to dispute resolution as it devotes hundred articles for the same, and provides various machinery for the same. The primary question that will be focused under this sub-topic is does UNCLOS covers all the procedures for the dispute resolution or is there any room for other mechanisms for the same purpose that exists out of

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the convention?

Part XV of the convention [3]deals with the various systems of dispute resolution. This becomes an integral part of the convention rather being an add on to the convention, that makes every state that indulges under UNCLOS consent to the detailed regulations of dispute settlement procedures. Further, there is no reservation to UNCLOS, that ensures that parties cannot opt. out, but at the same time the convention gives power to the parties to choose which procedure shall be applied for the purpose of the resolution, which makes the convention flexible.

II. PROCEDURES UNDER PART XV UNCLOS

The convention underlines both voluntary and compulsory procedures for the purpose of dispute settlement.

a. Voluntary Procedures (Section 1) [4]– 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, then voluntary procedures can initiate a dock arbitration, outside the framework of the convention.

b. Compulsory Procedures (Section 2) [5]– 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), andArbiter Tribunal constituted in accordance with Annex VII and special Arbiter Tribunal constituted in accordance with Annex VIII. The reason for having a compulsory procedure for settlement is to safeguard the text of the convention in majorly one way which is to ensure uniform interpretation of the convention.

Even many developing states hold the idea to have more binding effect of UNCLOS to safeguard their interest against powerful states. But history is evidence that UNCLOS treats parties to a dispute equally. For instance, the famous case brought by Mauritius against the United Kingdom in regards to the Chagos Archipelago [6]in front of the Intentional court of Justice.

[3] Part XV, UNCLOS, Pg. no. 127, see ~https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 19th July 2020).
[4] Section 1, Part XV, UNCLOS, Pg. no. 127, see ~https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 19th July 2020).
[5]Section 2, Part XV, UNCLOS, Pg. no. 129, see ~https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 19th July 2020).
[6] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, International Court of Justice, see ~ https://www.icj-cij.org/en/case/169 (visited on 19th July 2020).

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The compulsory settlement is subject to limitation and exclusion in Section 3 of Part XV[7]. These exclusions are a result of a dispute being too political in nature to be subject to compulsory adjudication or arbitration. There are also three categories of dispute, in which states can opt-out from compulsory settlement through the means of a written declaration, formally known as the "Optional Declaration" under of Art. 298 of UNCLOS[8]. These are disputes related to the subject matter of maritime delimitations, historic bay or titles, military or law enforcement activities, and disputes in regards to the Security Council under the UN Charter exercising its functions.

The relationship between voluntary and compulsory procedure is inter-connected. For instance,if two states in order to resolve a dispute through negotiation under section 1 of Part XV, but do not reach any concluding ground, they can initiate compulsory procedure under section 2 ofPart XV, only if the parties did not exclude any further procedure[9].

One of the major questions in the matter of architect of Dispute resolution under UNCLOS is that if two parties to a dispute concerning application or interpretation of UNCLOS are also party to an agreement that underlines its own dispute settlement machinery entailing binding decisions. The question that stands is does Part XV apply in these cases or does the other agreements overpowers Part XV of UNCLOS? In this matter, Art. 282 [10]of the convention underlines that the dispute settlement procedures under other agreements would apply insteadof the compulsory procedures. In case, if a dispute arises, the states have an obligation to exchange views in regard to the settlement to be adopted. This underlines the importance of negotiations. Thus, a state within the nexus of the dispute cannot resort to compulsory procedure without fulfilling their obligations to exchange views.

III. ARBITRATION UNDER UNCLOS

This sub-topic of the article will deal with the procedure of Arbitration under UNCLOS. The convention provides for two types of arbitration, one being an arbitral tribunal constituted as per Annex VII to the convention and other being special arbitral tribunal constituted as per Annex VIII of the convention. It is important to note that both procedures can be initiated

[7]Section 3, Part XV, UNCLOS, Pg. no. 132, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 19th July 2020).
[8] Art. 298, Section 3, Part XV, Pg. no. 134, see https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 20th July 2020).
[9] Art. 281, Section 1, Part XV, Pg. no. 127, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 20th July 2020).
[10] Art. 282, Section 1, Part XV, Pg. no. 127, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 20th July 2020).

unilaterally.

In this sub-topic of the article the author will discuss the jurisdiction of the tribunal and the procedural main aspects.

Understanding Special Arbitration under Annex VIII of the Convention[11]

The arbitral tribunal set up under Annex VIII of the convention is for the technical issues or disputes such as protection and preservation of the marine environment, navigation, pollution, marine scientific research and fisheries. Thus, this tribunal is consisting of experts and specialists in the filed of the stated matters. Another distinguishing and important feature of these arbitral tribunal is that their functions are not limited to just adjudication, but under its ambit it covers fact finding and conciliation. Article 287 [12]empowers state parties to UNCLOS to indicate their preferredmethod of dispute settlement. The special Arbitral tribunal is not very famousamong state parties to entertain a dispute through Annex VIII, as only 11 states have selected this mode of arbitration for dispute resolution[13]. Therefore, the chances of a dispute being referred to special arbitral tribunalare rather small.

Understanding Arbitration under Annex VII of the Convention[14]

Annex VII provides for the default choice of procedure, thus making it morepreferable by the state parties. By default, it means that when parties to a dispute choose different methods for dispute settlement or do not choose any method for the same, then the dispute will be subjected to Arbitral tribunal constituted under Annex VII of the convention. Unless the parties agree otherwise, the constitution of the tribunal shall be followed as per Annex VIIonly, which states the tribunal shall be composed of five members, in whichone member is appointed by each parties to dispute, while other three agreements are chosen by agreement.

[11] Annex VIII, UNCLOS, Pg. no. 189, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 20th July 2020).
[12]Article 287, Section 2, Part XV, UNCLOS, Pg. no. 129, see ~https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 20th July, 2020).
[13] Naomi Burke, UNCLOS Annex VII Arbitration, Cambridge International Law Journal, see ~ http://cilj.co.uk/2013/03/25/unclos-annex-vii-arbitration-who-what-where-when-2/ (visited on 20th July 2020).
[14] Annex VII, UNCLOS, Pg. no. 186, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (visited on 20th July 2020).

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In case if one party do not corporate in the constitution of the tribunal or if the parties can not reach an agreement on the appointment of the neutral members of the tribunal then a third stateis chosen by the parties or the president of ITLOS makes the necessary appointments.

The procedure of arbitration is determined by the tribunal but the parties are empowered to chose the procedural rules as per their choice in respect with the party autonomy in arbitration.

Failure of a party to make appearance before the tribunal or in presenting their case will not hinder the process of the tribunal, in other words tribunal even in absence of one of the parties will continue the proceedings. Further, the tribunal can deliver its award even if one is at default as long as the tribunal satisfies the jurisdiction and the claim is founded upon solid evidence.

Arbitral award is binding and that too without appeal. If one of the parties disagrees on the interpretation of the arbitral award, as per the procedures established under Annex VII, partiescan submit to the deciding tribunal for the interpretation.

To understand the jurisdiction of Arbitral Tribunal under Annex VII we have to briefly study "The Southern Bluefin Tuna Arbitration"[15], this is a landmark case as it illustrates the limits ofthe compulsory arbitration under UNCLOS. In this case, Japan challenged the jurisdiction of arbitral tribunal under UNCLOS. The arguments provided by Japan was:

a. The disputed subject matter is under "Commission for the Conservation of Southern Bluefin tuna"[16], and not under UNCLOS.

b. The CCSBT provides parties to dispute to resolve the dispute through a mechanism of their own choice[17]. According to Japan, this excluded the recourse to binding procedureof Part XV of UNCLOS.

Following this, the tribunal held that the disputed matter falls under CCSBT as well as UNCLOS. Leading, the parties were free to chose the mechanism they desire for the resolveof the dispute, as per Art. 281 of UNCLOS. The tribunal also held that the CCSBT excludedany further procedure under Part XV of UNCLOS. The tribunal's interpretation is controversial as under Art. 16 of CCSBT there is no express exclusion of procedures of UNCLOS. The tribunal further expressed that this exclusion is necessary and added that it's implicit in nature as well. The notable facet of this case is that the tribunal inferred fromthe text of one treaty,

[15] Southern Bluefin Tuna Arbitration, Award on Jurisdiction and Admissibility, 4 August 2000, esp. paras. 44-72, and Separate Opinion of Justice Sir Kenneth Keith, see ~ https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf (visited on 24th July 2020).
[16] CCSBT, see ~ https://www.ccsbt.org/ (visited on 24th July 2020).
[17] Art. 16, CCSBT, see ~ https://www.jus.uio.no/english/services/library/treaties/08/8-02/bluefin-tuna.xml (visited on 24th July 2020).

i.e., CCSBT with the intent to remove dispute arising under UNCLOS, which is another treaty. For the purpose of compulsory arbitration or adjudication.

IV. ARBITRATION OVER ADJUDICATION UNDER UNCLOS

Parties under UNCLOS have a choice between Arbitration and Adjudication for dispute resolution in front of International Tribunal for the law of the Sea or International Court of Justice. In this segment of the paper, the author will analyse the structure of ICJ and ITLOS,and provide the benefits of arbitration over adjudication.

Before we move on to the above-mentioned topics, it is important to understand the Judicial Structure that supports and resolves a dispute subject mattered to Law of the Sea. The firstone being the International Court of Justice, the primary judicial organ created under the UN Charter. The court has general competence and therefore can decide any case dispute involving the questions and interpretations of International Law including the law of the sea if the parties to a dispute conferred or consent to its jurisdiction. The second one beingThe International Tribunal for the Law of the Sea (ITLOS). ITLOS is composed of judgeswho are specialized in law of the sea. It is important to know that when diplomatic conferences took place, many developing states held critical views for ICJ, its jurisprudenceand its membership, therefore they opted to create new tribunal to safeguard their interest and thus ITLOS was created. It's seat is in Hamburg, Germany and holds jurisdiction overall disputes which falls under the nexus of UNCLOS, whether interpretation or applicationof it. Its jurisdiction is extended if the parties to dispute consent to the same. It is competentto give advisory opinions to sovereign states. It even has a specialized chamber for disputesconcerning international seabed area, i.e., the area comprising the sea bed, ocean floor andsubsoil beyond the limits of jurisdiction of sovereign states (national jurisdictions). Anotherremarkable thing about ITLOS is that it is open to non-state entities as well, unlike ICJ. It even has the power to provide for provisional measures, i.e., preserving the right of the parties pending resolution of the dispute. Even in the case of arbitration under UNCLOS, during the time of the constitution of the arbitral tribunal the parties can indicate to ITLOSto provide for provisional measures, but these requests must be motivated by considerations of urgency. The parties can even indicate provisional measures for the preservation of maritime environment, which is not supported by ICJ.

Furthermore, ITLOS holds a special procedure, that directs prompt release of vessels captured by costal states. This procedure is safeguard to the freedom of navigation on highseas. In certain circumstances UNLCOS allows the costal states to inspect and board vessels in their

Exclusive Economic Zone (EEZ) in order to arrest or detain them. The costal state have to release after posting of a bond, financial security by the flag's state, andif the costal state fails to comply with this, the flag state can initiate a proceedings against the costal state at ITLOS.

V. ARBITRATION V. ADJUDICATION

a. The first and the most important point is the flexibility provided under Annex VIIarbitration, compared to the fixed procedure of adjudication provided by ICJ or ITLOS;

b. Arbitration proceedings are more expeditious;

c. The structure of arbitration supports confidentiality which is appreciated by the partiesto dispute, this is missing in adjudication as they are public in nature;

d. Arbitration offers the parties to a dispute greater control overthe constitution/composition of the tribunal;

e. Arbitration prevents third party intervention.

VI. SOUTH CHINA SEA ARBITRATION[18]

The arbitral award in South China Sea case is a historical procurement in number of respects which will be discussed in this sub-topic. The award provides for the opportunity to discuss what can be expected from arbitration in settling a politically heated dispute in regard to law of the sea.

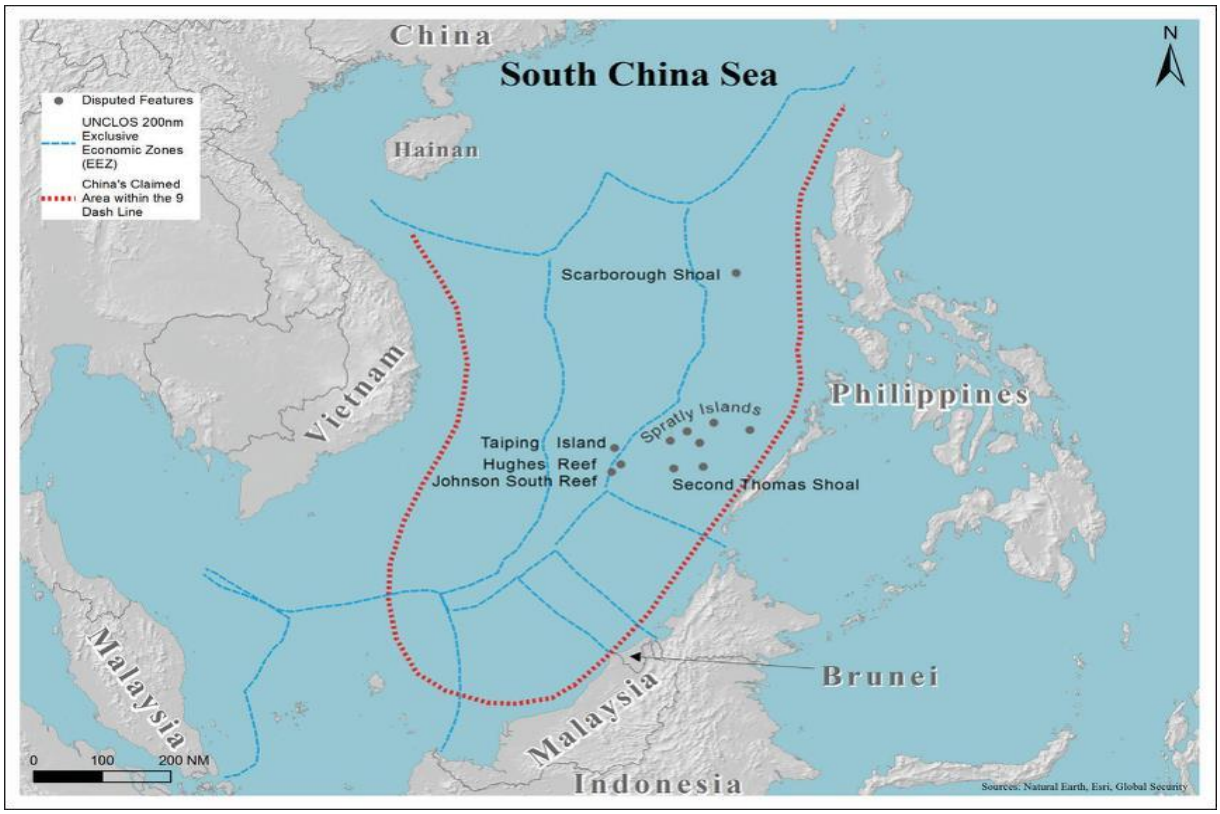
An arbitral tribunal constituted under annex VII of UNCLOS, on July 2016, rendered an awardin favour of Republic of Philippines against The People's Republic of China in regard to maritime entitlements in the South China Sea. The author will discuss the overview of the case,significant features of the award, and criticism of the award.

VII. THE CASE

The case is concerned with the parties (Philippines and China) maritime entitlement in the South China Sea. The dispute, however was much border than that, it encompasses questions of territorial sovereignty and maritime delimitation. The tribunal observed that it lacked jurisdiction to determine claims concerning to lands (Islands) in the South China Sea, howeverthe tribunal was competent to settle the issue of China's alleged historic rights in the South China Sea and the lawfulness of China's certain activities in the region (South

[18] PCA Case no. 2013-19, The Republic of the Philippines v. The People's Republic of China, Registry: PermanentCourt of Arbitration, see ~ https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf (visited on 28th July,2020).

China Sea). China proclaimed rights by himself over the living and non-living resources of the ocean withinthe so called "nine-dash line". For a better understanding, the world map is given in Figure 1. to show "9-Dash Line".



(Fig 1: Nine Dash Line)[19]

This line appears in the Chinese Maps but extends beyond the limits of China's Exclusive Economic Zone (EEZ), as well as continental shelf under UNCLOS.

The tribunal found that China's claim to historic rights was incompatible under UNCLOS, therefore the activities of China in this area such as construction of artificial islands, maritime surveillance vessels operation as well as fishing activities stands unlawful. The tribunal also found that the activity of fishing, land reclamation activities, and the construction of artificial islands had caused various severe harm to the maritime environment.

VIII. SIGNIFICANT FEATURES OF THE ARBITRAL AWARD

a. Substantive Law - The first and the most important significant feature is the clear standard set by the arbitral tribunal to define when a maritime feature can be considered

[19] Source of the Figure: Chapter 10, The South China Sea tribunal, Law of the Sea – A policy primer, see https://sites.tufts.edu/lawofthesea/chapter-ten/ (visited on 28th July 2020)

island, which further generates entitlement to the maritime zones beyond the territorialseas. In contrast to Islands, it was observed and held by the tribunal that rocks cannot sustain human or economic life of their own and only generate an entitlement to a territorial sea but no Exclusive Economic Zone / Special Economic Zone (EEZ/SEZ) or continental shelf. The tribunal held that the status of a feature has to be determined on the basis of the natural capacity it has to sustain human habitation or economic life.The notable point here is that human intervention doesn't change the status of a feature.

(Fig 2: China's Artificial Island in South China Sea)[20]

Here is an example (Figure: 2) of China's land reclamation activities on coral reefs which are low tide elevation to form artificial islands. The tribunal held that these activities could not turn low tide elevations into a proper island. This is just an example of the role of the arbitral tribunals can play in developing, clarifying or interpretation of the law of the sea.

b. Jurisdictional Issues – Procedurally, the people's Republic of China did not participatein the proceedings of arbitral tribunal stating the Republic of Philippines

[20] Source of the Figure: Why the US Navy sails past disputed artificial islands claimed by China, ABC News, see ~ https://abcnews.go.com/Politics/us-navy-sails-past-disputed-artificial-islands-claimed/story?id=60993256 (visited on 28th July 2020).

had agreed to resolve maritime dispute in South china Sea solely through the mechanism of bilateralnegotiations. Therefore, the tribunal examined the possible objections related to jurisdiction before passing arbitral award in favour of Philippines. The key highlights of the examination are as follow:

i. China declared in 2006[21] under Art. 298[22] of UNCLOS to exclude disputes related to maritime delimitation from compulsory settlement. This is the sole reason why the tribunal lacked jurisdiction to determine any claims to sovereignty over maritime fishers in South China Sea, or delimitation of any maritime boundary. However, the tribunal held that disputes in relation to statusof maritime features and the existence of entitlements to maritime zones are distinct in nature from those in relation/concerning delimitation. Therefore, China's deceleration of 2006 didn't deprive the tribunal of jurisdiction entirely.

ii. The award also clarified the scope of the optional exception under Article 298(1)A of UNCLOS in relation to historic titles. It provided a distinction between historic rights and historic titles.

Finally, the tribunal held its jurisdiction even when China argued that the tribunal lacked jurisdiction as per Article 281 of UNCLOS because the parties to dispute had agreed to other means of settlement which implicitly excluded any recourse to an arbitration procedure. Unlike the tribunal in the Southern Bluefin Tuna Arbitration Case, the tribunal in this case held Art. 281 requires clear statement of exclusion by the parties in regard to further procedures. In thecase of absence of a clear exclusion under Art. 281 the procedure in Part XV applies which includes compulsory arbitration.

Criticism of the award

Many scholars hold the view that the award is one sided in perspective in favour of Philippines and the tribunals failure to take proper cognizance of China's position. Commentators even critiqued the composition of the tribunal and the assertion of the tribunal's jurisdiction over

[21] China's deceleration, Declaration and Reservations, UN, dated 25th August 2006, see ~ https://treaties.un.org/Pages/Declarations.aspx?index=China&lang=_en&chapter=21&treaty=463 (visited on 28 July 2020).

[22] Article 298, Section 3, Part XV, Pg. no. 134, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Visited on 28th July 2020).

thedispute.[23]

In particular, the tribunal has been criticised for disentangling the question of or providing distinction between maritime entitlements and maritime delimitation without the basis of muchreasoning. The tribunal's award is also has been criticised for boarding the scope of compulsory arbitration under UNCLOS through the interpretation of Art. 281 of the convention[24].

Author's Critic of the award

The authors critic of the award will be based on the analysis by the author himself, and will bebased on the jurisdiction of the tribunal with respect to the non-ultra petita, Article 10 of the Annex VII [25]and principle of excess of authority.

The Tribunal made conclusions or verdicts in the dispositive and in other parts of the Award of 12 July 2016 that go outside what the Philippines submitted in its Final Submissions. In theentire Award, the Tribunal hand over no trace of either deliberation or even notice of the issuewhether it has the authority to do so. The well-established non-ultra petita rule on judicial or arbitral decision-making and/or Article 10 of Annex VII prohibits the Tribunal from doing what it has done, on pain of having its awards measured as invalid for "exces de pouvoir", or as made without jurisdiction.

The non-ultra petita rule is commonly used in interstate dispute settlement at the world court by PCIJ and ICJ since the very beginning. This rule was stated concisely by ICJ in Asylum case and it reads as follow: *It is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included inthose submissions*[26]. That case presented an subject as to whether a particular question was decided in an earlier judgment to be interpreted in a following/subsequent case. The ICJ said, "*The Court can only refer to what it declared in its Judgment in perfectly definite terms: this question was completely left external to the submissions of the Parties. The Judgment in no way decided it, nor could do so. It was for the Parties to submit their respective claims on*

[23] Cinease Society of International Law, The South China Sea Arbitration Awards: A Critical Study, OxfordUniversity Press.
[24] Jianjun Gao (2016) The Obligation to Negotiate in the *Philippines v. China Case*: A Critique of the Award on Jurisdiction, Ocean Development & International Law, 47:3, 272-288, DOI: 10.1080/00908320.2016.1194095
[25]Article 10, Annex VII, Unclos, Pg. no. 188, see ~ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited on 13th August 2020)
[26] Request for interpretation of the Judgment of November 20th, 1950 in the Asylum Case, Judgment of November 27th, 1950, I.C.J. Reports 1950, p.395, at 402.

thispoint. The Court discovers that they did nothing of such.[27]"

In addition to that, in terms of Article 10 of Annex VII are border than that of traditional non ultra petita rule. To understand the rule, the author will present the view of the learned editors of the Virginia Commentary comment on the article which states the following, "*The award is to be confined to the subject matter of the dispute. As a formal statement in a title of jurisdiction,this may be regarded as innovation, and it is not clear whether it applies to the whole text of the decision or only to its operative clauses. It was inserted after the discussion in the InformalPlenary in 1976, but its bearing on the validity of an award containing apparent obiter dicta cannot be assessed*[28]". Thus, this confinement requirement may introduce substantive requirements that will result as an open way to a possible challenge to the validity of the award.

The non-ultra petita rule and Art. 10 of Annex VII has been violated multiple times The most obvious violation that the Tribunal evidently committed in the discussion part of the Award of

12 July, with respect to the status of the features not named in the Philippines' Final Submissions. However, the Philippines in their final submission nowhere submitted to rule onthe status of the features, yet the tribunal devoted many paragraphs for presenting reasoning ofits award to the matter (paras. 577-626).

IX. AUTHORS' REMARK

The paper provided the evolving view of the arbitral tribunal on the subject matter of its jurisdiction through providing an analytical study of Southern Bluefin Tuna, South China Sea Arbitration case. It is true that most of the interstate arbitration is initiated under UNCLOS, and with the coming time, and with the new interpretation of Art. 281 of the UNCLOS the number of arbitrational cases will only rise.

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[27] Ibid., at 403.
[28] Shabtai Rosenne & Louis B. Sohn (eds.), Virginia Commentary, Vol. V (1989), p.434.

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