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MARITIME LEGISLATIONS: ARE DECISIONS OF THE TRIBUNALS ENFORCEABLE?

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Abstract

There is very famous maxim called *ubiius, ibiremedium,* which means where there is a right, there is a remedy. Whenever any right is infringed, or there is a dispute between the parties, the concerned parties may prefer a forum to solve the disputes or to get the required remedies for the damages it has suffered. Similarly, the 1982 Convention contains detailed and complex provisions stating the different forums available for the resolution of the sea disputes.

Keywords: MARITIME LEGISLATIONS, sea disputes, Tribunal

I. INTRODUCTION

The Convention states that whenever the disputes arise, the parties are to proceed immediately to an exchange of views regarding its settlement by negations or other peaceful means. And when the parties are unable to settle the disputes between them then the compulsory procedures laid down in Part XV Section 2 will become operative. According to Article 287 of the UNCLOS III the state may choose one of the following means of third-party dispute settlement system; The International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the International Court of Justice (ICJ), an arbitral tribunal under Annex VII or a special arbitral tribunal under Annex VIII for specific disputes. Due to this flexibility, the states were unable to agree on a single third party forum where they can approach when informal mechanisms failed to resolve a dispute.

The creation of the ITLOS was always considered to be controversial because it was notion that the ICJ has more expertise as well as experience in deciding matters related to the sea cases. The main object or the primary responsibility of the International tribunal is to interpret and apply one treat which is the 1982 Law of the Sea Convention. But along with the interpretation of the convention, the issues it may address and the ole it may fulfill vary tremendously. At the end the paper will also focus on the legal binding nature of the decisions delivered by the arbitral tribunal and the ITLOS and the effect when the parties fail to comply with the decisions of these tribunals.

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International Tribunal for the Law of the Sea (ITLOS)

A. Origin of the (ITLOS) due to the negotiation of the Law of the Sea Convention and the Dispute Settlement provisions

The ITLOS is considered to be the latest judicial institution which was established after the entry into force of the United Nations Convention on Law of the Sea in the year November 1994. The creation of the ITLOS was considered to be very controversial as states preferred informal way of negotiations for solving the disputes and did not want any third party dispute settlement system to interfere with their sovereignty. Also the question arose that why the states will mutually consent to the jurisdiction of the international tribunal before arising of a particular dispute. The possible answer for the question may the recent technological development which has increased the capacity to explore living and non- living ocean resources which may ultimately lead to create tensions over maritime boundaries. Moreover, agreeing to the third party dispute settlement will counterbalance political, economic, and military pressures from powerful states and will also help in maintaining the integrity of the Convention's package deal.

Hence, the Convention's provisions establishing the ITLOS and defining its jurisdiction were the product of difficult negotiations and political compromises. Hence it can be concluded that the negotiations at the UNCLOS III had led to the ITLOS.

B. Features or Characteristics of ITLOS

As Article 287 offers State Parties to choose among several third party tribunals, they state have an option to choose any of the third party tribunals. Some states favor ICJ because according to them it had successfully dealt with several laws of the sea cases and according to them a proliferation of tribunal might undercut the development of a uniform jurisprudence on law ofthe sea issues while other may prefer arbitration or any other form of dispute settlements options available.

Now due to such wide options available, some features of the ITLOS must be highlighted in order to set it apart from the other dispute settlements options which as a result will enable or rather attracts the State to prefer the newly created ITLOS over other dispute settlement options of the Convention.

Some important Features of the ITLOS are as follows-

1. **Judges of the Tribunal** -The tribunal is composed of 21 independent members have an expertise on the subject and are elected by the State Parties to the Convention. Also there is a President and Vice President of the Tribunal who are elected by a secret ballot by a majority of the member of the Tribunal.

2. **Chamber of the Tribunal**–There are specialized chambers available in case of these tribunals which might prove attractive to some states. Moreover, these chambers are composed of expert judges. There are two standing special chambers to address problems that require specific expertise. Also, ITLOS has established a Chamber of Summary Procedure, which at the request of parties to a dispute can deal on any matter. Availability of these tribunals allows parties to choose a forum for either its efficiencies or its particular expertise.

3. **Annex VI of the Convention –** The related provisions related to the tribunal and its jurisdiction suggested that ITLOS may receive more use than the ICJ or other tribunals in several cases like the cases under Article 292 which deals with prompt release cases, cases involving provisional measures, cases in which advisory opinions are sought, and Part XI sea-bed mining cases in which Convention provide the ITLOS a particularly significant role.

Moreover, Article 292 as well as cases involving provisional measures grants residual compulsory jurisdiction to the ITLOS, rather than an arbitral tribunal, when parties are unable to agree on a tribunal. The reason is that the time taken in constituting an arbitral tribunal might frustrate the quick time frame allotted for prompt release cases.

4. **Access and Jurisdiction of the ITLOS –** States who are not the parties to the Convention may also obtain access to the ITLOS if they have so agreed in any other treaty or agreement and hence, the ITLOS will have jurisdiction over the disputes specified in that treaty or agreement. Also unlike ICJ, not only states but also other entities like the natural and juridical persons may become parties.

5. **Risk of Inconsistent Jurisprudence –** Also the risk of inconsistent decisions is minimal when the ITLOS has exclusive or residuary compulsory jurisdiction. Cases under Article 292, provisional measures cases etc. are some of its examples.

C. Functions of the ITLOS

The ITLOS is a recent addition to the number of the available specialized international tribunals. And in order to understand the relationships with different entities, the functions of the ITLOS has to be taken into consideration for which it is designed to serve. And in order to gain legitimacy, ITLOS ability to develop its decision making techniques according to different suitable situations has to be taken into consideration.

When a coastal state detains a flag state's vessel and crew, the flag state may ask the ITLOS to order their prompt release under Article 292 of the Law of the Convention as it was done in the 1st case in front of the ITLOS

which was ***The M/V Saiga case***[2]**.** Article 292[3] allows applications "by or on behalf of' the flag state of a vessel, when the detaining state allegedly "has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. Moreover, in interpreting and construing Article 292, the ITLOS must balance the rights and interest of the entities as this article place the ITLOS in a web of relationships involving individuals, states, and national courts.

It can be said that ITLOS though being a recent addition, is an institution within the field of law of the sea, exercises positive norm-reinforcing, legislative, equitable, and constitutional functions. Along with the State parties, the ITLOS also different audiences such as political branches of two states, sometimes multiple states, individuals, national courts and other international institutions.

II. Arbitral Tribunal

Like ITLOS, Arbitral Tribunal is one of the third party dispute settlement mechanism provided under the Convention. This Arbitral Tribunal is specified under the Annex VII of the UNCLOS III. This Tribunal is used for the settlement of disputes between parties that have not made a declaration of choosing procedure or for parties where one parties choose a different forum whereas the other disputed parties chooses another forum. A dispute may be brought before the Arbitral tribunal by written notification addressed to the other party. The notification should be accompanied by a statement of the claim and the ground on which it is based[4].

Composition of the Arbitral Tribunal

The Arbitration is composed of five members preferably chosen from the list of arbitrators. A list of arbitrators shall be drawn up and maintained by the Secretary General of the United Nations[5]. Every State Party shall be entitled to nominate four arbitrators to constitute the list[6]. The arbitrators, which the parties have nominated, shall have similar qualification to those nominated for member of the Tribunal. When the case is brought before the Arbitration, the party instituting the proceedings shall appoints one member to be chosen preferably from the list of arbitrators, who may be its national[7]. The other party against which the case is made, within 30 days of receipt of the notification addressed by the party that brings the case, also appoints one member among its nationals in the list. The other three members shall be appointed by agreement between the parties and they shall be chosen preferably from the list and shall be nationals of the third States unless the parties otherwise agree. The parties will choose one among the three members as a President.

[2](1998) 37 ILM 360.
[3]United Nations Convention of the Law of the Sea.
[4]Annex VII, Article 1 of the UNCLOS III.
[5]Annex VII, Article 2 of the UNCLOS III.
[6]Annex VII, Article 2 of the UNCLOS III.
[7]Annex VII, Article 3 of the UNCLOS III. The case is brought does not do so within that period or the parties are not able to reach an agreement on the appointment, the President of the International Tribunal for Law of the Sea, upon request and in consultation with the parties, shall make the necessary appointment.

All decisions of the arbitral tribunal demand a majority vote of its members. In case there is an equality of vote the President will have a casting vote. The award mentions the subject matter of the dispute and states the reasons on which it is based, and the name of the members who have participated. The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. The decisions made by the tribunal will be binding upon the parties.

Legal Enforceability of the Decisions of the above mentioned Tribunals

Thissectionwill deal with the legal enforceability of the decisions delivered by the ITLOS and the arbitral tribunal which has residual compulsory jurisdiction in the case. It will specially focus on the award given in the South China Sea case and other cases.

The decisions made by the tribunals become binding due to the obligatory nature of jurisdiction. Moreover, the Convention provisions disallow techniques that disputing parties historically have used to avoid the arbitrations. Also, a state's failure to appear before an arbitral tribunal will not will not nullify the jurisdiction of the tribunal.

The country which has accepted or rather ratified the UNCLOS III document cannot claim that the decisions of the tribunal are not binding on them as they haven't given consent for the interference of the third party dispute settlement mechanism. The reason is that according to the consent theory principle, if a State has agreed to a Convention, it means that they have agreed and rendered their consent to all the provisions mentioned in the Convention unless a reservation has been accepted. But the obligatory dispute settlements provisions are found either in the main body of the Convention or in the Annexures that form an integral part of the Convention. And hence, States cannot avoid them by making reservations[8].

But talking about the ITLOS, not many cases have come before to this tribunal due to the availability of different choices in deciding the third party dispute settlement forum. Talking about the cases, only 25 cases till date have been brought before the International tribunal of the law of the sea and all the decisions made by it were positively respected by the parties involved in the disputes.

But talking about the Arbitral tribunal made under Annex VII, which has the residual compulsory jurisdiction, there are many cases which have been entertained by this tribunal. The decisions made by the tribunal is also binding, but looking at the previous instances, there are many instances in which parties have refused to follow or respect the decisions of the court.

One such famous case which has attracted worldwide attention is ***South China Sea dispute case***.

South China Sea: Philippines v. China

In this case, China being the defendant party rejected to participate in the proceedings of the arbitration. The non- appearance of a party before an international court or tribunal is not uncommon. In this particular case,

[8]The Law of the Sea Convention only refers to reservations in Article 309, the Article that provides reservations are generally prohibited. Article 298 of the Convention, however, authorizes States Parties to make limited exceptions to the applicability of the provisions for obligatory third-party dispute settlement.

Article 9 of Annex VII UNCLOS, Default of appearance, and Article 25 of the Rule of Procedure of the Arbitral Tribunal envision a situation in which one of the parties fails to appear before the tribunal. However, both of these articles state that the non-appearance of one party will not constitute a bar to the proceedings and at the same time require the tribunal to "satisfy itself that it has jurisdiction and that claim is well founded in fact and in law."

The use of the argument by the China that the arbitral tribunal does not have any jurisdiction as they have not participated in the proceedings is baseless and because of their absence from the proceedings will not negate their consent which they have given to the compulsory jurisdiction of the arbitral tribunal while ratifying and becoming a party to the UNCLOS III. The China inspite of its absence will continue to remain a party to the dispute unless and until the Tribunal finds that there is no jurisdiction to deal with the matter. The same contention was also rejected by the tribunal in the case of ***Artic Sunrise case*** which was against Russia.

Consequences of China's non appearance

When a party does not appear in the proceedings of the Tribunal, according to Article 9 Annex VII and rule 25, the non- appearing party will still be considered a party and the decision of the court will remain binding on the party even if it does not agrees.

In the present case, the tribunal has awarded decision in favour of the Philippines and this was rejected by China stating that the tribunal does not have the jurisdiction also they haven't agreed to the third party dispute settlement mechanism and also did not participated in the proceedings. Hence, the China did not accept the decisions made by the tribunal. And therefore, it can be very well established that although China refuse to comply with the decisions of the court, there cant be any legal sanctions against such non- compliance.

III. Need of an Enforcement Mechanism

The provisions of the dispute settlement mechanism states that the decisions made by these tribunals are binding but unfortunately, when the parties fail to comply with the decisions or refuse to comply with the same, there is no enforcement mechanism available as compared as that of the ICJ with the Security Council, at least in theory. When at the end, the decisions of the arbitration are not complied with,and then does that means that the whole arbitration process is futile. The point of initiating the whole long procedure which is both costly as well as time consuming becomes useless when the eventual award is destined to be ignored. Various enforcement mechanisms must be introduced in order to make the parties comply with the decisions of the tribunals.

Taking into consideration the China case, The Philippines in this case has stated that it regards the case not as the end to the South China Sea disputes, but as the beginning. This shows that the Philippine is fully aware of the extent to which the arbitral award may resolve all of the disputes. What the Philippines seem to be seeking is for China to have to clarify its claims and bring them into conformity with international law. This in itself is only the first step in untangling the South China Sea disputes and enabling the parties to settle the disputes on a fairer and equal footing. In dealing with a neighboring country that is stronger in all aspects, the arbitration is also a way to

draw public attention to China's claims and actions and to create international pressure on China to reconsider its position.In short, China's non-appearance before the Annex VII arbitral tribunal has in practice not stopped the arbitration from moving forward. China's official position of rejecting arbitration does, however, seem rather rhetorical. The various other means by which China has advanced its arguments concerning the case have in effect created more of a quasi-appearance. Even if international law and precedence do not prohibit such a move, it does show a serious lack of good faith in efforts to achieve a peaceful resolution to highly complex disputes. This inconsistent stance has undoubtedly also made the arbitral proceedings more difficult than they already are.

Hence, in order to avoid this situations, various enforcement mechanism must be initiated so that such practice may be decreased and the parties due to the enforcement mechanism available, starts complying to the decisions made by the court which are legally binding on them.

IV. Conclusion

When coming to the disputes among states of a nation, and the decisions made by the apex court are binding as enforcement mechanism is available and no question can be raised against it. But, in the case of international law, where the parties are nations having contesting claims, the present dispute resolution mechanisms often lack teeth. Such is the case in the maritime matters, where the legal decisions of the ITLOS and other arbitral tribunals lack enforcement mechanisms. The decisions are said to be binding in nature, but the laws lack enforcement mechanisms. As seen clearly in the South China Sea case, the arbitral award could not be enforced by Philippines.

With the rise in maritime and territorial disputes in the political scenarios, it becomes imperative that the nation's party to the UNCLOS mutually devise an enforcement mechanism for the decisions of the tribunals. A judgment or award is of no use unless it can be enforced at the world forum. As is evident from South China Sea case which related to territorial dispute, an important treaty like that of UNCLOS is lacking enforcement mechanisms. But the process of amendment in the treaties is a tedious one and not all nations may support it. Enforcement mechanisms become important to maintain the sanctity of the UNCLOS. Many treaties provide enforcement mechanisms and some even involve UN. But, there have been instance like in the case of Nicaragua vs. United States of America where the decision was against USA and could not be enforced because of USA being a permanent member of the United Nations Security Council. It is necessary that enforcement mechanism so developed remain independent of the stature of the parties involved. Equality among the member of the UN needs to be maintained and the powerful states cannot be allowed to coerce the smaller and less powerful ones.