A CRITICAL ANALYSIS OF MARITIME DISPUTES IN UNCLOS AND INDIA: THE LAW AND POWER EXERCISED BY COURTS AND ARBITRATION

S ABRAHAM [1]

INTRODUCTION

Disputes over maritime boundaries are a serious problem everywhere in the world. The international economy has shifted to ocean-based resources, known as the "Blue Economy," and governments are suddenly growing extremely worried about their marine resources. To order to explore and use its mineral and food resources, each coastal state is aware of its maritime boundary. The territorial sea, contiguous zone, and exclusive economic zone (EEZ) are all defined by the Law of the Sea Convention as measuring 12 nautical miles, 24 nautical miles, and 200 nautical miles, respectively, from the baseline (UNCLOS 1982, Art. 3, 33, and 57).However, practises indicate that there is a greater limit of the various marine zones among the states. Each state asserts its authority over its interests. As a result, maritime conflicts are developing between various coastal governments. When a disagreement becomes serious, the parties attempt to resolve it using a variety of approaches, but they typically are unable to agree[2]. They engage in numerous bilateral or multilateral negotiations, which delay the resolution. The United Nations Convention on the Law of the Sea refers to the peaceful manner of resolving marine disputes, but states must first agree to this Convention's authority. If not, they will not be eligible to get any Convention benefits[3].

To determine acceptable means and measures and to bring attention to some concepts that serve as recommendations for the countries that are in disagreement over shared coastlines, the goal of this study is to address the ongoing maritime border dispute and maritime laws.

[1]Abraham.S, LLM (Maritime Law) Dr.Ambedkar Law University Chennai

[2] Md. Monjur Hasan, Md. Arifuzzama *'A Comparative Study between Arbitration and Judicial Settlement' as Means of Maritime Boundary Dispute Settlement.*

[3]Law of the Sea Dispute Settlement Mechanism by Aceris Law, International Arbitration Attorney Network. 21/9/2015. https://www.international-arbitration-attorney.com/law-of-the-sea-dispute-settlement-mechanism/

PROCEDURE OF MARITIME BOUNDARY DISPUTES SETTLEMENT UNDER UNCLOS

Article 287 of the UN Convention on the Law of the Sea states that a state has the option of using one or more of the following methods to resolve disputes over how the Convention should be interpreted and applied[4]:

- the International Court of Justice (ICJ),
- the International Tribunal Law of the Sea (ITLOS),
- an arbitral tribunal established by Annex VII,
- a special arbitral tribunal established by Annex VIII is the first three institutions to be established.The LOS Convention gives the involved State Parties the option of resolving their maritime boundary dispute through direct negotiations or other forms of diplomatic action.

If there is no agreement between the parties, they may ask the court or tribunal with jurisdiction over their disputed matters to hear their case. The 1982 United Nations Convention on the Law of the Sea refers to two different types of maritime border dispute settlement processes. The dispute resolution system is split into two sections of the UNCLOS. The conflicts involving mining in the International Seabed Area are covered in Part XI, whereas all other disputes involving the interpretation and application of UNCLOS are covered in Part XV. Negotiation, mediation, and conciliation are the non-compulsory resolution methods described in Section 1 of Part XV. ITLOS is the mandatory settlement method described in Section 2 of Part XV[5].

International Tribunal for the Law of the Sea (ITLOS)

One of the notable innovations under the Law of the Sea treaty for addressing various kinds of maritime disputes is ITLOS. The Tribunal's headquarters are in Hamburg, Germany. It may hear a variety of cases involving maritime conflicts, whether they are contentious or not.The state parties chose the 21 judges now functioning on the Tribunal to serve terms of nine years. Up to two candidates may be nominated by each state party.

[4]United Nations Convention on the Law of the Sea 1982.
[5] Law of the Sea dispute settlement mechanism by Aceris Law, International Arbitration Attorney Network, 21/9/2015. Available at: https://www.international-arbitration-attorney.com/law-of-the-sea-dispute-settlement-mechanism/ [Accessed on 16 February 2022]

The terms of one-third of the judges expire every three years, and there is a procedure to ensure equitable allocation among them.

When a coastal state has detained a foreign vessel and its crew in its maritime jurisdiction, ITLOS is qualified to consider "quick release" cases that are being heard on an accelerated basis. All disputes and petitions filed to the Tribunal by the Convention fall under its jurisdiction. Subject to the restrictions of article 297 and the declaration made by article 298[6] of the Convention, it has jurisdiction over any disputes involving the interpretation or application of the convention.

However, the declaration under article 298 and article 297 do not prevent parties from consenting to submit to the tribunal a matter that would otherwise be out of the tribunal's jurisdiction (UNCLOS 1982). On legal matters that arise within the context of the activities of the Assembly or Council of the International Seabed Authority, the tribunal is permitted to provide an advisory opinion through its Seabed Dispute chamber (UNCLOS 1982).

International Court of Justice (ICJ)

The International Court of Justice (ICJ) is the top court of the UN and is a fundamental pillar of the UN. The ICJ is the top forum for states looking for a legal resolution to a Law of the Sea dispute. The World Court is the biggest judicial body in the entire world.

The International Court of Justice (ICJ) has jurisdiction over maritime and sovereignty disputes in addition to Law of the Sea matters. Any issue presented to the ICJ under Articles 287 and 288 that involves the interpretation or application of the LOS Convention may be the subject of the ICJ's jurisdiction (UNCLOS 1982).

Following are some decisions related to maritime boundary disputes that the International Court of Justice (ICJ) made following the 1994 implementation of the LOS Convention. Spain v. Canada: Fisheries Jurisdiction (2001); Land and Maritime Boundary Cameroon v. Nigeria: 2002; Maritime Delimitation and Territorial Questions Qatar v. Bahrain, 1998;

[6]Ibid

ARBITRATIONON DISPUTE MECHANISM UNDER UNCLOS

Arbitration is defined as the neutral third party's resolution of a dispute between contracting parties without the need for legal action. Though it is mostly voluntary, laws do occasionally require it. Binding arbitration is one in which both parties consent to be bound by the arbitrator's ruling. According to article 287 of the Convention[7], arbitration is one of four ways to resolve disputes about the interpretation or implementation of maritime boundaries. For the resolution of disputes involving parties who have not made a declaration of choosing a procedure or who have not agreed to the same procedure for resolution, Annex VII Arbitration is employed. Therefore, it is the standard approach to resolving a maritime dispute.

Any party to the disagreement has the right to submit their case for arbitration by sending the other party a written notice that includes a statement of the claim and the basis for it. The list of arbitrators, which will be compiled and maintained by the Secretary General of the United Nations, will ideally be used to select the five members of the arbitration. The party who initiates the arbitration action must designate one arbitrator, preferably from the list, who may be from its own country. Within 30 days of receiving the notification from the party bringing the case, the other party, against whom the procedure is brought, names one member from among its nationals to the list. Unless the parties agree differently, the remaining three members shall be nominated jointly by the parties with the consent of the nationals of the third States. The head of the arbitral tribunal shall be chosen from among these three members. The International Tribunal for Law of the Sea (ITLOS) President will appoint the necessary arbitrator upon request and after consulting with the parties if the party against whom the case is brought fails to do so within the timeframe specified above or if the parties are unable to agree on the appointment of the arbitrator.According to article 5 of Annex VII of the LOS Convention, the arbitral tribunal determines its method, ensuring that each party has a fair chance to be heard and submit their position. The arbitral tribunal's rulings are determined by a majority vote of its members[8]. The President has a casting vote if there is a tie in the vote. The award identifies the dispute's subject matter, explains why it was decided that way, and lists the participants by name. Unless the parties to the dispute have agreed in advance to an appellate procedure, the award shall be final and binding upon the parties without the right of appeal.

[7] Ibid.
[8]Article 5, Annex VII, United Nations Conventions on the Law of the Sea 1982

Many coastal states resolved their long-standing maritime boundary disputes through arbitration. 2014 saw the end of Bangladesh and India's 40-year maritime boundary delimitation dispute, which had been ongoing since 1974. On October 8, 2009, Bangladesh filed a request for arbitration under the United Nations Convention on the Law of the Sea (UNCLOS) regarding the delineation of its maritime boundary. The dispute focused on severalissues, including the location of the land boundary terminus, the definition of the territorial sea, the exclusive economic zone, and the continental shelf within and beyond 200 nautical miles.

On July 7, the Permanent Court of Attribution (PCA) in The Hague granted Bangladesh a portion of the 25,602 sq km disputed maritime boundary with India, or 19,467 sq km, in a precedent-setting decision. Given the geo-strategic/political importance of the larger Indian Ocean, the verdict has been broadly welcomed by both countries as a positive development for the further integration of friendly relations.

A CRITICAL EXAMINATION OF INDIA'S MARITIME BOUNDARY DISPUTE RESOLUTION AND COURT PROCEDURE

A key source of income for India, maritime trade is expanding daily. Due to the variety of activities involved in maritime trade, including the financing, building, selling, and acquiring of ships as well as the deployment of vessels and other contractual arrangements involving ships, disputes may develop. Parties can initiate a lawsuit under admiralty law or seek arbitration under maritime law, either domestically in India or abroad.The Singapore-based consultant Jonathan Wood explained how courts and arbitration vary from one another: "Courts can exist without arbitration, while arbitration cannot exist without the courts. Due to its simplicity and the internationally interconnected nature of our world, arbitration is increasingly preferred by parties as a method of dispute resolution. As a result, problems may arise when the laws of admiralty and arbitration interact.

Before the Admiralty Law's codification

The foundation for India's codified statutes was laid by the marine trader community's conventions and practises, which served as the primary basis for maritime law in India. The Supreme Court cited the International Convention Relating to the Seizure of Sea-Going Ships, 1952, and the International Convention on the Arrest of Ships (ICAS), 1999, in cases involving the arrest of ships when there is foreign-seated arbitration.

India courts have limited powers:

Indian courts' role in cases involving international arbitration and to send a dispute to foreign arbitration as authorised under Section 45[9] and to intervene in matters of foreign arbitration within the limits of the Indian courts' jurisdiction. When the award is being enforced as per Section 48[10].

However, as determined in the case of Bhatia International v. Bulk Trading SA, the Supreme Court increased the scope of intervention by Indian courts in foreign arbitrations, and as a result, the power of courts has now increased as Part I of the Act (which helps determine the seat of arbitration) was made applicable to both foreign arbitrations and foreign awards unless there is any provision that expressly bars the jurisdiction (2002).

But in the case law of Bharat Aluminium Co v. Kaiser Aluminium Technical Service, Inc (BALCO)[11], this ruling was overturned (2012). According to the BALCO ruling, Indian courts are prohibited from granting interim relief in matters involving foreign-seated arbitrations, hence they are unable to seize ships as security for maritime claims.

In the 2014 the important case law of Rushab Ship International LLC v. M.V. Eagle, the Honorable Bombay High Court cited the precedent established by the BALCO decision and determined that Indian courts lack the authority to issue interim orders in cases involving foreign-seated arbitration, and as a result, no order of ship arrest can be issued in this situation.

Now in India legislation of Admiralty Jurisdiction and Settlement of Maritime Claims Act of 2017 has been passed.The Bombay High Court provided an answer to this query in the Altus Uber appeal case.

In the aforementioned case, a request for arbitration procedures was made in London, and the plaintiff also brought a bareboat charter claim in Indian admiralty court proceedings. According to the Court, the Admiralty Act of 2017 [12]does not invalidate the rules established in the Golden Progress Case. It only establishes a test that, if passed, enables a party to arrest a ship.

[9]Section 45 of the arbitration and conciliation act,1996
[10] Section 48 of the arbitration and conciliation act,1996
[11]Bharat Aluminium Co v. Kaiser Aluminium Technical Service, Inc (BALCO) 2012
[12]Samareshwar Mahanty, '*maritime jurisdiction and admiralty law in India'*, Universal Law publication, 5th edition (2015).

The learned judge dealt that the Admiralty Act is silent in situations where an arbitration process may also be brought, and as a result, the Act does not provide a procedure for the arrest of ships whether an arbitration hearing is currently underway or has not yet started. Therefore, the Court cited the Golden Progress decision, which gave the Admiralty Courts authority to seize a ship for security.

The Ld. Single Judge court's ruling was upheld by the Honourable Division Bench, which also provided some clarifications:

1. Even though the claims in both circumstances are similar, the maritime and arbitration claims are two distinct issues. This is because of how drastically varied the redressal approaches used in each are.
2. The courts should distinguish between "action in rem" and "action in personam" when making such decisions; doing so will be by Section 5 of the Admiralty Act, 2017 since the party will not be subject.
3. All requirements outlined in Admiralty Act, 2017 must be met if the claim is to be submitted under the Arbitration Act.

As a result, the Honourable Division Bench in this instance determined that the detention of the ship as security is legitimate and permissible when there are ongoing or pending foreign-seated arbitrations, provided that all requirements of the Admiralty Act, 2017 are met.

The Admiralty Act of 2017[13] contains no compensation clause and only addresses vessel claims. Another major issue was that the law commission of India had drafted the admiralty act of 1990 and also, in the admiralty bill of 2005[14], added a clause of reference to arbitration (Notwithstanding anything contained in the provisions of any other law, it shall be open to the court in admiralty proceedings to refer, with the written consent of the parties, the entire dispute before it or such questions of law or fact raised thereby, as the court may consider necessary, to arbitration and dispose of the dispute or the questions, as the case may be, in conformity with the award unless modified by the court for reasons to be recorded in writing.)[15] This clause has enhanced the power of arbitration in an admiralty proceeding. This provision was removed by the Admiralty Jurisdiction Act of 2017.

[13]The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017
[14]Admiralty bill of 2005
[15] Section 17 of law commission Drafted admiralty act 1990 and admiralty bill 2005

The UNCITRAL (The United Nations Commission on International Trade Legislation) Model of law served as the foundation for the 1996 Arbitration and Conciliation Act. It was implemented to accomplish the following goals[16]:

1. Reduce the amount of control that the courts have over the arbitration procedure.

2. Ensure that any arbitral award is final and that it is carried out as if it were a court order.

States and companies choose to resolve maritime disputes by arbitration process rather than judicial settlement

It is a method of resolving the issue outside of court when a neutral third party or panel of impartial third parties known as Arbitrator(s) is employed to mediate the dispute between parties in conflict. The arbitrators hear the disputing parties' argumentsand then base their impartial judgement on that information in a way that benefits both parties.In general, people favour arbitration over litigation because it is more convenient, less time-consuming, secure, and gives the parties greater privacy. The cost and time effectiveness of arbitration over litigation is the most notable benefit among its other advantages.Due to their reputation and goodwill in the market, arbitration is favoured as a dispute resolution method by many business owners and state agencies. In international matters where the parties are unable to agree on the proper jurisdiction, arbitration is also applicable.

Additionally, it is chosen when one or both of the parties want a decisive ruling with no chance of an appeal. However, arbitration shouldn't have been chosen as a tool to seek a settlement in some situations if the issue is too complex to be settled in a single meeting or if there are more than one or two parties involved.

[16]Arbitration and Conciliation Act,1996

CONCLUSION

The hierarchy of courts for resolving maritime boundary disputes. No authority may initiate any proceedings against any of the disputed parties without the consent of the parties in dispute. This is the primary shortcoming or flaw in international law.

Arbitration and judicial settlement are not exceptions to this rule. Both systems have certain advantages and disadvantages, as well as some limitations in dispute resolution, despite some distinctions. The most dependable ways to resolve maritime border disputes are arbitration and the judicial settlement process. Following these procedures, many of the long-standing maritime conflicts between various coastal governments have been resolved.

The present paper tries to address the comparative study in brief between processes. So, according to me, the best process for the peaceful settlement of maritime boundary disputes is arbitration because it is less complicated and, in a trial, arbitration leads to a private resolution, so the information brought up in the maritime dispute and resolution can be kept confidential because of trade between different states.

Due to inconsistency in the Admiralty Jurisdiction Act 2017, If the case involves perishable goods, the court process can be lengthy, and the goods cannot reach their destination on time. So, the majority of cases brought by companies or individuals are resolved through arbitration rather than judicial settlement.

My recommendation is that the central government revise the admiralty jurisdiction act in the future to include the compensation provision, as well as the rights and obligations of seafarers. Arbitration's participation in this situation was minimal. Additional changes should be made to arbitration that could aid in the timely resolution of disputes. As a result, maritime disputed parties may benefit from this.