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Role of International Arbitration in Resolving International Disputes and Analysis of Examples

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Abstract: The international community often uses international arbitration to resolve international disputes, and in arbitration, the parties often challenge the jurisdiction of the arbitration. This paper first discusses the three characteristics of international arbitration and four main types of international arbitration public organizations and then addresses the issues associated with the jurisdiction of international arbitration. In this part, it includes the definition as well as the scope of jurisdiction, and the factors considered in establishing it are mentioned, also the current problems of jurisdiction. In the second part, the paper discusses and analyzes today's jurisdictional disputes through four international arbitration cases related to territory and sea. These cases discuss the conditions for the use and scope of compulsory jurisdiction and the treatment of arbitrations traditionally outside the jurisdiction of the court by a particular court are addressed, and the cases also deal with the problem of who decides if the arbitral tribunal has jurisdiction. About final section, discusses by way of example, the gradual expansion of arbitration jurisdiction today and the many problems that may exist as a result of this trend, such as the pressures placed on arbitrators and arbitral tribunals and implications for the nature of arbitral tribunals.

Keywords: International Arbitration, Arbitration Jurisdiction, International Disputes

1. Introduction

In today's international community, countries are increasingly interacting with each other, and a large number of disputes arise between them, which, when intensified, can lead to international disputes. Among many dispute resolution mechanisms, arbitration is often considered to be one of the most effective means of achieving long-term solutions to international disputes. In international arbitration, the jurisdiction of the arbitral institution is the first consideration in the arbitration. There has been a great deal of academic research on international arbitration. However, the jurisdictional aspects of arbitration have yet to be further developed.

This paper examines jurisdiction in international dispute arbitrations and focuses on two categories: international territorial disputes and international maritime disputes. Recently, one of the most prevalent kinds of international disputes is international commercial disputes, and the two categories of international territorial disputes and international maritime disputes are chosen to provide more references for future researchers.

In this paper, it conducts a theoretical study followed by an analysis of selected arbitral decisions in territorial disputes and maritime disputes and concludes with a discussion of the benefits and drawbacks that exist in the field of international dispute arbitration jurisdiction.

2. International Arbitration and International Arbitration Jurisdiction

Nowadays, the international community is becoming more and more interconnected with different countries, and therefore more international disputes are arising. The traditional international law methods of non-coercive settlement of international disputes have been confirmed by modern international law and have been improved and developed on the basis of the previous ones. Depending on the nature of the disputes, they can be separated into political measures and legal measures. Among them, legal methods mainly include arbitration and judicial settlement.

2.1. International Arbitration

International arbitration is a very effective legal means of resolving international disputes. Compared with other kinds of bilateral and third-party dispute management mechanisms, arbitration is more likely to achieve successful and good results in the resolution of international maritime, territorial and river disputes [1]. What's more, the results of international arbitration awards are more binding than those produced through political methods. However, arbitral awards are not as binding as judicial decisions, for instance, the International Court of Justice (ICJ), which are relatively easier to enforce and comply with. As far as costs are concerned, arbitration is less expensive than court adjudication, which is one reason why parties to disputes prefer to submit to arbitration.

International arbitration has three distinctive features: First, arbitration is done through a third party, not both parties who have disputes, to determine the relevant settlement and the legal terms that should be used. Second, arbitration is final in that both parties to the arbitration agree which arbitral award is binding on them and cannot be appealed once it is rendered, unless arbitration rules that allow for review apply. Finally, as a solution to dispute settlement, arbitration can include international law principles that have not been consistently referred to in other sorts of negotiations [1].

As international arbitration has evolved, many different types of international organizations have emerged. Currently, there are two types of arbitration organizations in the international community, one is Private Organizations, and the other one is Public Organizations, which is the focus of this paper. Regarding Public Organizations, there are four main categories. They are the Permanent Court of Arbitration, the International Center for Settlement of Investment Disputes, U.N. Organizations and the International Arbitration Congresses, and Hong Kong Legislation [2].

2.2. Jurisdiction in International Arbitration

Jurisdiction is a very important consideration in the process of arbitration. Under international law, jurisdiction is the regulatory power that a country has as a result of its sovereignty. It denotes the degree to each state's right to manage the consequences of an act or event [3]. Jurisdiction in international arbitration is the right of an arbitral institution or tribunal to hear and decide a specific dispute according to provisions of law when the parties have agreed to a certain situation.

Whether an international dispute settlement institution has the power to review the dispute, to direct interim measures, to review the award, etc., all fall within its jurisdiction. According to legislation and practice, the following three factors are taken into account by arbitral institutions or arbitrators and courts in determining arbitration jurisdiction: first of all, if there is an enforceable and valid arbitration agreement between both parties; what's more, given the nature of the dispute

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between them, is arbitration a viable solution that could be used between them; and third, if disputed matters brought to arbitration are within scopes of arbitral institution's or arbitrator's jurisdiction [4].

Since the structure of international law is decentralized and lacks a unified system, there is no supreme authority to regulate the allocation of jurisdiction. At the same time, there is a lack of reasonable and coordinated allocation of jurisdiction among international judicial bodies. Also, some international statutes and treaties are not very clearly interpreted, leading arbitral institutions to expand or narrow their interpretation on their own. These problems have led to a number of jurisdiction-related issues in the actual arbitration process, such as the scope of jurisdiction, who exercises jurisdiction and cross-over of jurisdiction.

3. Arbitration Jurisdiction in International Territorial and Maritime Disputes

The issue of jurisdiction in international dispute arbitration has long been one of the focal points of concern in the arbitration community. This part selects four cases, first discussing arbitration jurisdiction in international maritime disputes through two cases, and then using two more cases to discuss the existence of jurisdictional issues in international territorial dispute arbitration. The narrative and commentary on the cases also enable a more concrete understanding of international arbitration jurisdiction.

3.1. The South China Sea Arbitration Case

As a very typical case of international maritime disputes, the dispute over the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) is present in the South China Sea Arbitration case between China and the Philippines. In 2013, at request of the Philippines, an arbitral tribunal formed under United Nations Convention on the Law of the Sea (UNCLOS) was entrusted to resolve the South China Sea dispute [5]. One of the problems, in this case, is whether the compulsory jurisdiction provided for in UNCLOS may be applied in the case of non-acceptance of jurisdiction by a party. China declared in 2006 that disputes relating to maritime delimitation were not included in compulsory settlement under Article 298 of the UNCLOS [6]. This is why China argued in the arbitration case that arbitral tribunal, which is composed of Annex VII of UNCLOS, did not have jurisdiction to decide sovereignty claims over fishermen in the South China Sea or maritime boundary demarcation [7]. But the tribunal held a view that the disputes over the islands' status and the right to exist in the sea were fundamentally different in nature. Therefore, China did not lose the tribunal of jurisdiction altogether. As to the problem that if the tribunal has expanded its jurisdiction, scholars disagree, with more arguing that the tribunal has expanded its jurisdiction, a practice that does not seem to be the correct approach for UNCLOS to impose jurisdiction [8]. China has not recognized Arbitral Tribunal and has strongly opposed the outcome, which it has not accepted to date. The arbitral tribunal's ruling has also provoked strong reactions from the international community, with most countries not endorsing the outcome.

3.2. Arbitration of Chagos Marine Protected Area

Another one of maritime dispute in international community is the Chagos marine protected area arbitration and the importance of the case is discussions which address scopes of compulsory jurisdiction. The UK had established a protected area of marine around the Archipelago called Chagos and Mauritius applied for arbitration under the UNCLOS in 2010, claiming that the UK did not have right to declare an area which was protected because it was not a coastal country [9]. Moreover, the establishment of the area which was protected was not in line with the obligations of the UK under the treaties as well as agreements it has signed. It was also claimed that the UK had given it rights as a "coastal state" in relation to the archipelago [10]. In this case, since neither the UK nor Mauritius

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declared its choice of arbitral institution under Art.287 of UNCLOS, the dispute was referred to arbitral tribunal arising out of Annex VII. After careful analysis, the tribunal found itself without jurisdiction with respect to three of the arbitration claims made by Mauritius and had jurisdiction over one claim. In the course of the arbitration, the Court focused on the analysis of compulsory jurisdiction in Part XV of the UNCLOS. Partial provisions were read, the meaning of terms was interpreted in an expanded manner and exceptions to jurisdiction were also limited. The award succeeds in clarifying the scope of the restrictions of Article 297 compulsory jurisdiction, in particular the particular paragraph (1) and a complexly structured part called paragraph (3). This is a very critical contribution which is made by the tribunal, due to the fact that Article 297 has long been ambiguous and confusing for arbitration [10].

3.3. The Dispute over the Rights of the Coastal State of the Black Sea, Sea of Azov and the Kerch Strait

Ukraine and Russia are parties to the arbitration case, which took place in 2016. In this case, the discussion centered on whether ITLOS has jurisdiction over the question of territorial sovereignty. Crimea joined Russia through a referendum and is administered by Russia, but Ukraine claims Crimea as part of its territory. In order to preserve its own legitimate rights around the Crimea as a coastal state, an arbitration was initiated by Ukraine [11]. One of the critical issues talked about in the arbitration is if and to what degree international tribunal has right to determine the law of the maritime disputes, including concurrent land sovereignty questions. The jurisdiction of the tribunal was determined by its characterization of the dispute. If the tribunal thought that it truly needed to determine the issue of territorial sovereignty, this would create at least three possible results. The tribunal could use the test set forth in the results of Chagos arbitration [9], providing that tribunal would have the jurisdiction only if “LOSC-related differences between two States are a major part of dispute between them”. The arbitral tribunal may also use the standard approved by the disagreeing opinion in that arbitration, which provided that jurisdiction only there was a connection between the sovereignty questions about disputes and Ukraine’s arguments about applications or interpretations of LOSC [12]. Territorial sovereignty of the land is a prerequisite for maritime power, as embodied in universally recognized principle that “the sea is governed by the land” [13]. Therefore, some kinds of international territorial disputes may lead to maritime disputes. And based on different analytical perspectives, different jurisdictional results can also be derived.

3.4. Arbitration Between the Republic of Croatia and the Republic of Slovenia

After dissolution of former Socialist Federal Republic of Yugoslavia, Slovenia and Croatia became sovereign states. Still, after their independence, they did not delineate their borders and had disputes over both land and sea. After years of repeated disputes, the two countries decided to sign the Arbitration Agreement in 2009. According to the agreement, one of the matters to be determined by tribunal was territorial boundaries between these two countries and ways in which the arbitral tribunal personnel are selected is also stipulated in arbitration agreement. In 2016, arbitral tribunal held that it truly had the legitimate authority over Croatia’s right to suspend Arbitration Agreement pursuant to Art.60 of the Convention on the Law of Treaties, based on Arbitration Agreement and some applicable procedural rules [14]. The tribunal cited the judgment of the United Nations International Criminal Tribunal for the Former Yugoslavia in the Tadić case and held that this competence of the arbitral tribunal was incidental or inherent and a necessary part of the arbitral function and did not necessarily require an explicit provision in the basic documents of the tribunal [15]. At the heart of the dispute is a question of who should decide “whether the arbitral tribunal has jurisdiction”, and the decision made by tribunal highlights an important principle in the jurisdiction of international arbitral institutions, which is the jurisdiction within jurisdiction, that is, the subject of determining whether jurisdiction exists in a dispute is not the person proposing or accepting the arbitration, but the tribunal itself [16].

4. Benefits and Problems with the Trend of Expanding Arbitration Jurisdiction

In the past international dispute arbitration, because of the problem of jurisdiction, the dispute could not be effectively resolved, and eventually a bigger dispute broke out between the parties or the parties were stuck in a long-term deadlock. This not only fails to protect the legitimate interests of both parties to arbitration, but also is not conducive to the peace and stability of the international community.

Today, contemporary international tribunals have enriched and strengthened international law, all kinds of laws are also increasingly able to meet different requirements of whole international community, and even the whole humanity, to achieve justice. The expansion of international jurisdiction by international tribunals also reflects the way international law has evolved, reflecting the goal of achieving justice for the international community [17]. As the jurisdiction of the tribunal expands to a certain extent, this may also avoid some of the jurisdictional disputes in the cases analyzed in the previous section.

4.1. Expansion of International Arbitration Jurisdiction

There is a clear trend toward expanded jurisdiction in international maritime dispute arbitration today. In an ITLOS arbitration, its jurisdiction can be extended if the consent of the parties to the arbitration is obtained. ITLOS even has the power to establish some needful provisional measures through which the rights of both parties can be upheld pending the settlement of the dispute. For example, in a case such as arbitration under UNCLOS, both parties may submit requests to tribunal for the prescription of temporary rules during constitution of arbitral tribunal, provided that these requests are motivated by considerations of urgency [7].

And, in the course of the Tribunal’s deliberations, ITLOS has expanded some relevant elements of Part XV of UNCLOS regarding the settlement of disputes before tribunals and courts. For instance, the expanded interpretation of Article 281, which “requires an express declaration excluding arbitration proceedings”. This is completely different from the previous arbitration results of the tribunal for the same provision, and to some extent reflects the change of the tribunal’s attitude towards jurisdiction and special treatments of specific cases [7]. In addition, the tribunal has also broadened this section of Article 283 in the trial of cases. The definition of “any controversy about application or interpretation of this Convention” is explained to cover related, incidental and sometimes even the disputes which are a little irrelevant [18]. Compared with the jurisdiction of ICJ, ITLOS has also made a great breakthrough in the field of its personal jurisdiction, which has also adapted to the diversity of parties to maritime disputes, thus enabling better resolution of international disputes [19].

4.2. Potential Problems Associated with Expanded Jurisdiction

But if jurisdiction expands indefinitely, it may also pose some problems. For example, if arbitration jurisdiction continues to expand, then it also places a higher demand on arbitrators to be more professional. They will need to be skilled and understand more of the law so that they can better handle different types of arbitration cases [18]. And, because of the expansion of jurisdiction, it may also lead to a rise in the number of arbitration cases, which can have an impact on the speed of arbitration and place a greater workload on arbitrators. Uncontrolled jurisdiction over external matters or the application of external norms may also lead to the transformation of tribunals or arbitral

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tribunals into general dispute resolution bodies, which also runs counter to the basic requirement of the whole international community to have limited jurisdiction over specific types of dispute resolution bodies [20].

Therefore, although some problems of the jurisdiction in arbitration can be solved through the expansion of jurisdiction, it can only be moderately expanded, otherwise, it will also bring adverse consequences.

5. Conclusion

The issue of jurisdiction in international dispute arbitration has existed since the birth of arbitration. Therefore, after a theoretical introduction to international arbitration and jurisdiction, this paper presents the current problems of jurisdiction. Various problems and disputes of jurisdiction are then presented in detail through arbitration cases concerning international territorial and maritime disputes. Finally, the advantages and disadvantages of the gradually expanding jurisdiction are analyzed in light of the current international situation. As the international community places increasing emphasis on the use of legal means for dispute resolution, arbitration will be increasingly used as a better alternative. However, there is currently no comprehensive and effective international arbitration institution, the Permanent Court of Arbitration is playing a diminishing role, and other institutions can only deal with certain types of arbitration issues, all of which need to be resolved as soon as possible. With increasing international attention and research on arbitration jurisdiction, these problems may be properly addressed in the future.

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