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General Practices of International Arbitral Tribunals Vis-A-Vis the Jurisdictional Conundrum

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***Abstract*: Arbitration has been the most effective and preferred tool to solve the disputes amicably among the countries and has most success though not limited to while dealing with the problems of international boundaries both land and maritime in nature. Like any other method of dispute resolution it too has some shortcomings due to the tribunals not being able to establish their jurisdiction on these disputes or sometimes the part of it which render any award by the tribunal disputable thereby leaving a piece of the problem unresolved. The article attempts to identify these various issues which come into being and study the different outcomes and reasoning of the arbitral tribunals while denying or modifying their jurisdiction. The mentioned issues are being supported by the actual case laws detailing the stance and views of the members of the tribunal and their interpretation of the agreement which had led to the existence of the arbitral tribunal. Eventually the article would also draw specific attention to the commercial disputes between the countries and a private entity which are governed by the International Conventions and highlight practices on part of the parties which render a dispute outside the scope of the tribunals jurisdiction with a specific focus on ICSID Convention and its limitations which makes its very objective to be unattainable. The authors also try to provide suggestions as to what steps should be undertaken by the parties and the system to eradicate these shortcomings and lead to an award which could provide a capable solution to the dispute of the parties**

***Keywords*: Arbitartion, ICSID Convention, Treaty of Ghent, Rainbow warrior, Guinea Bissau, Channel islands.**

1. Introduction

Arbitration is a lucrative alternative to resolving disputes in various international courts and tribunals including but not limited to adjudicating upon issues concerning maritime delimitation and determining geographical boundaries . It has been used to resolve conflicts among the nations around the world since the 19th century when the United States and the United Kingdom agreed that certain disputes between them should be arbitrated by the national commissioners concerning a disinterested third party in the event of disagreement in regards to the 'Treaty of Ghent'. The end of the century marked the inclusion of arbitration into mainstream international law wherein neutral third party states would preside on such proceedings. The concept of arbitration under international law has developed ever since, to the framework that exists today. The paper primarily focuses on the jurisdictional issues faced by arbitral tribunals in passing awards in the context of Public International Law such as interpretation of the arbitration agreement and the third party interest along with the issues faced by the countries in state-personal entity arbitrations as per the ICSID Convention concerning trade disputes.

2. The Interpretation by Parties

The foundation of alternate dispute resolutions is based entirely on the consent of the nations and nothing else. It is the very idea behind these methods that the parties to a dispute should come together and consent to resolve their disputes outside the court. The motive is the sense of control the parties have in their disputes and that they can decide the specific issues in dispute which they want to refer to the tribunal. In the case of Genea Bissau vs. Senegal agreement between the parties failed due to the ambiguity of the tribunal's jurisdiction. Genea Bissau and Senegal in 1985 set up an arbitral tribunal to decide whether the agreement signed between Portugal (of which guinea Bissau was formerly a province) and France (of which Senegal was an autonomous province) had the force of law as they both had gained independence since1960 when the agreement was signed. Further, the arbitral tribunal was asked to demarcate the maritime boundaries of these two nations should the agreement made by their former countries be invalid. The tribunal gave its award in 1983 stating that the agreement between France and Portugal was in force and valid however the tribunal does not have jurisdiction to demarcate the maritime boundary between the two nations as the agreement of 1960 was limited to the territorial sea, contiguous zone and, the continental shelf. It did not have control over the Exclusive Economic zone which was a prerequisite to determine the boundary of a nation. The said award was appealed and upheld by the International Court of Justice and it was observed that Guinea Bissau misinterpreted the agreement, thus the issue

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vastly remained unresolved. Based on the above-mentioned case it can be easily concluded that when parties sign an arbitration agreement, the clauses and scope of disputes mentioned in the agreement must be an explicit representation of the parties intention to tide over jurisdictional issues which may restrict an arbitrator in adjudicating upon a case which can be in the interest of both parties but not evidenced through the agreement. This helps parties or nations to prevent the disputes from being unresolved.

It is a basic principle of international law that an international tribunal normally has the right to decide as to its jurisdiction and the power to interpret, for that purpose, the instruments which governed that jurisdiction. In the case of Eritrea vs. Yemen, the arbitration agreement between the countries asked the tribunal only for a decision on the sovereignty of the countries over the islands in dispute but the tribunal went on to determine also the traditional fishing rights of Eritrean fisherman even after having identified majority of islands to Yemen. The above judgment of the arbitral tribunal may appear to be exceeding its jurisdiction but can be justified on practical grounds as a realistic interpretation of the remit of the tribunal.

Also, a similar question emerged in the case of the United Kingdom of Great Britain and Northern Ireland vs.the French Republic which was decided on 30 June 1977. In the above-mentioned case Golfe Breton-Normand that is in the rectangular gulf formed by the coasts of Normandy and Brittany lies the Channel Islands archipelago, a dependency of the Crown of the United Kingdom. The principal islands are Jersey, Guernsey, Alderney, Sark, Herm, and Jethou and there is also a great number of rocks and islets some of which are inhabited. The total land area of the four groups is approximately 195 square kilometers and their total population about 130,000. The United Kingdom at that time had a claim only over a three-mile territorial sea around the Channel Islands while the French Republic has established a 12-mile territorial sea off all its coasts, including those of Normandy and Brittany. Again, the United Kingdom claimed the right to extend its three-mile territorial sea to one of 12 miles. The arbitral tribunal finally said that to delimit a sea bed boundary in the area between the Channel Islands and the coast of Normandy and Brittany, it would be necessary to decide several disputed issues concerning each party's territorial sea. Since this would go beyond the compromis which the United Kingdom and France were unwilling to extend, the tribunal decided that this was outside its competence and jurisdiction to decide and must be left for the parties themselves to resolve.

3. The Third-Party Interest

Third-party interest poses a major challenge to the jurisdiction of the arbitral tribunal in the circumstances where its decision or the subject matter on which it has been called upon to rule will be against a third party which has not given its consent to be adjudicated by the arbitral tribunal, in such cases the approach followed by the tribunal is in line with the International Court of Justice. Canada vs. France Maritime Boundary Case was a 1992 dispute between Canada and France. France sought a delimitation of the continental shelf appertaining to islands situated off the Canadian coast and also asked the tribunal to determine their entitlement beyond the 200-mile limit. However, the court held that this would involve determining France's right vis-a-vis the international community which is not a party to the arbitration. The tribunal finally decided that due to the above-mentioned reason it has no jurisdiction to extend its ruling in the way requested, thus in the above case the International Community acted as a third party against which the jurisdiction of the arbitral tribunal does not extend.

A. Restriction of the jurisdiction by the parties

Though commonly unprecedented and immaterial in the commercial aspects of the arbitration, the restriction of the jurisdiction of the arbitral tribunal by the parties themselves to the agreement is not entirely a practice which is unheard of in the arbitration between the countries. As mentioned several times above, arbitration is always guided by the parties and their choices so what if the parties while asking the tribunal to solve their problems puts certain restrictions on the tribunal itself, as to while making the awards the parties can bind the tribunal to give the award in a certain specific way, for example, in the 'Taba' dispute of Egypt vs. Israel which concerned the location of certain pillars marking the international boundary, Egypt and Israel gave their respective submissions in an appendix to the compromis and asked the tribunal to decide the location of the pillars. However, they stated that the tribunal should not decide the location of the boundary pillar other than a location that has been advanced by either Egypt or Israel. In conclusion, the tribunal had to choose between the places of the pillars provided by both these parties only and no other place, this becomes an issue when none of the parties can make a convincing argument regarding the problem.

B. Formulating issues for the arbitral proceedings

Before commencing the process of arbitration the parties decide mutually the issues amounting to the dispute between them. Issues are usually negotiated and determined by the parties however there is always ambiguity in defining the scope of these issues when it comes to their interpretation as they have a major bearing on the jurisdiction of the arbitrators and the scope of the dispute. The issues can be framed in both broad or narrow perspectives, for example, in a dispute related to the sea boundary, the parties can ask the tribunal to either draw a simple line on the map between them which will decide all the factors relating to exclusive economic zones as well as the seabed or the fisheries or they may want the tribunal to decide separately all these issues. If they choose to define the problems broadly then the jurisdiction of the tribunal has a chance of extending as the tribunal determines itself what the ambit of its jurisdiction will be as it did in Eritrea vs. Yemen case as mentioned before and went on to determine the rights of the fisheries separately. The defining of the issues holds a level of importance which can be easily understood by the Rainbow Warrior Case of France vs. New Zealand. In this case, an undercover operation conducted by the French military security service (DGSE) sank the Dutch-registered Greenpeace ship Rainbow Warrior

berthed in Auckland Harbor, killing a Dutch photographer, Fernando Pereira. The Greenpeace ship was planning to disrupt French nuclear tests on the islands of French Polynesia. New Zealand subsequently caught and convicted two members of the French secret forces. In this case, the questions which were asked were not whether France was justified in detaining the two agents but on finding a mutually acceptable solution to the problem.

The above problems and issues mainly deal with the arbitration tribunals set specifically to solve disputes between the countries which have arisen because of territories or harm to individual personnel's of the countries, but the issues which can be effectively solved by the arbitration has quite a wider scope and it has commonly been used to solve disputes which has a mixed nature, these disputes are very much different from the ones of the Public International law but still forms a part of it. These kinds of disputes are a mixed blend of Public as well as Private International Law because at least one of the parties is a state. The ICSID or the International Centre for Settlement of Investment Disputes is an institution that has been specifically set up for such purposes. To be processed under the ICSID Convention, a legal dispute has to exist between one of the contracting member states of the ICSID Convention and a national of another contracting member state and must relate directly to investment.

The jurisdiction of the ICSID arbitration tribunals depends upon the terms agreed by the parties. And the consent submitted .Also whenever in any dispute an arbitration clause concerning ICSID is added the private parties can unilaterally ask for the proceedings in all sorts of disputes that the states have not anticipated in advance. Thus unpredictability and vulnerability like those in ICJ Jurisdiction are also seen in ICSID Jurisdiction.

Initial jurisdiction issues can take years to determine. In the case of Pacific Rim v El Salvador in a decision by the International Centre for Settlement of Investment Dispute, the decision on jurisdiction is hundreds of pages long, broken up into seven sub-parts, each individually and separately numbered. The decision came after several days of hearings just on the aspects relating to whether the tribunal has the jurisdiction to try the following dispute.

El Salvador had argued that claims based on international law and the Salvadoran Constitution fell outside the scope of the consent to arbitrate contained in Article 15 of the Salvadorian Investment Law. The tribunal dismissed the objection and said that the applicable law was not specified in the Investment Law or any agreement between the parties, the tribunal invoked ICSID Convention Article 42(1) to decide that Salvadoran law (including the Constitution) and the applicable rules of international law applied to the arbitration.

According to El Salvador, the consent to international arbitration under Article 15 was trumped by other provisions of Salvadoran law, as the Investment Law specifically subjects subsoil-related investments to the Constitution and secondary laws, and the Mining Law refers disputes involving mining exploration licenses or exploitation concessions to the exclusive jurisdiction of Salvadoran courts. The tribunal, however, held that El Salvador's interpretation was not binding, and refused to "apply other legislative provisions that would override an expression of jurisdictional consent that is valid, clear and unambiguous as a matter of international law" El Salvador also invoked the Salvadoran Civil Code to argue that certain claims were time-barred. The tribunal rejected the objection by recalling: "the fact that a provision of Salvadoran legislation provides the consent to arbitration does not mean that the Tribunal's decisions on jurisdiction are governed by Salvadoran law". It also held that investment tribunals do not necessarily need to apply domestic statutes of limitations. The case strictly highlights the superior nature of the convention in relation with domestic laws of investment.

4. Nationality

In the arbitrations of this kind, the issue of nationality is always raised in one way or the other to challenge the jurisdiction of the tribunal. The most common of them is that the issue is a domestic one because the private entity is a national of the host state.

Thus a similar question was raised in the case of American Manufacturing and Trading Inc vs. Zaire. American Manufacturing and Trading Incorporation, AMT, a US company with a 94% share in SINZA a company established under the laws of Zaire (Currently the democratic republic of Congo). SINZA was engaged in commercial activities in Zaire including the sale of automotives and dry cell batteries. In 1991, certain members of Zairian Armed Forces destroyed Property of SINZA, and again in 1993, AMT requested arbitration by an ICSID Tribunal claiming violations by Zaire of its obligations. Zaire contended that its dispute is with SINZA and not AMT because it is SINZA which has been established in the territory of Zaire and since SINZA is a Zairian Company its dispute should be solved according to the normal law of Zaire rather than according to the procedure provided in the ICSID Convention.

Another issue similar to the previous one is that the claimant party is a national of a state which is not a party to the ICSID Convention or has not ratified a bilateral treaty. In the case of Banro American Resources and SAKIMA vs. the Democratic Republic of Congo, the objection of Congo derived from the fact that Canada, the country of nationality of Banro Resource Corp. had not ratified the ICSID Convention and nor is a party, the company, filed the proceedings through one of its American subsidiaries because America was a party to the convention. The arbitral tribunal after understanding the various factors of the case decided by a majority of votes that it does not have jurisdiction to render a decision in the case.

5. Absence of Prior Consultations and Negotiations

Most bilateral treaties in the sectors of complete or partial Public International Law which provide settlement of disputes between the states or between the state and the private parties often provide that in case the disputes arise and "it cannot be resolved through consultation and negotiation...." or "if the dispute cannot be settled amicably" then the parties shall resort

to the arbitration. These types of clauses often pose a serious issue to jurisdiction i.e. Whether the dispute could primarily be submitted to the arbitration if the conditions precedent have-not been followed in the first place. These types of problems often arise because the people who have drafting powers of these bilateral treaties are mainly diplomats who though are very learned in their arts but have insufficient knowledge about the procedures relating to intricacies of law and arbitration. But luckily such difficulties don't always pose a threat to the jurisdiction of arbitration as in the case of Tradex v. Albania which had a similar issue, the arbitral tribunal examined 5 letters sent by the investor to the Government and concluded that these letters were "a sufficient good faith effort to reach an amicable settlement within the meaning of" the applicable law.

6. Suggestions

The problems faced by arbitral tribunals relating to jurisdictional issues can be resolved through various considerations as listed below:

1. The first and foremost element that the drafters of the arbitration agreement should keep in mind is regarding the drafting of the arbitration document itself which acts as a guide for any further proceedings and is the determiner of the powers of the jurisdiction. It should be of utmost importance that the agreement drafted should be in all means representative of the aspirations and understanding of the parties. It should be capable of resolving most of the prospective problems which could arise in the further course and should capture the true intention of the parties to avoid arriving at a deadlock during the arbitration.
2. The parties should take a realistic stance towards the solutions to their problems while taking into account the interest which any third party could have in their dispute so that the dispute could be appropriately resolved without any further question as to the validity of the arbitral awards based on the jurisdiction of the arbitrator concerning third party interests. Similarly, issues involving third party interests must be presented before the correct adjudicating forum or the same must be made a party to the disputed record and safeguard their rights.
3. The bedrock of any ADR proceeding is the willingness and consent of the parties to refer the disputes to a private adjudicating forum. However, stringent clauses in agreements or colloquially the ‘if’s’ and ‘buts’ guiding the course of an arbitrator’s award may leave less room for authoritative autonomy which in turn increases the chances of overstepping a tribunal’s jurisdiction. This not only fails the mandate of the parties but also provides no resolution to the dispute at hand.
4. In cases where the dispute is between a private entity and a state, it often is resolved by International treaties like ICSID, since every country is a sovereign state and has a vested choice of whether to ratify a convention or not. However, this poses a major challenge in practice as the structures of the companies are much complex and are often widespread, if the countries to which these companies belong to have not rectified these International Conventions they are incapacitated from making use of their institutions and thus it becomes a common practice for either party to challenge the jurisdiction of the tribunal set up under the conventions. To curb this practice, the arbitral institutions set up under these treaties must be qualitative and the rules must be specified such that they are all capable in resolving these issues and their awards have little scope of being challenged.
5. It is often the practice in International Conventions not only limited to ICSID Convention but also extending to other treaties as they put stringent rules as to who can make use of their institutions, these stringent rules form the determinant of the jurisdiction in the long run for the arbitral tribunals set up under these institutions, such rules need to be simplified so that the main objective of the resolution of disputes can be achieved.

7. Conclusion

Thus arbitration like traditional courts of justices is not completely untouched by the problems related to the exercise of the tribunal's jurisdiction on the issues referred to it that arise because of the poor interpretation of the arbitration agreement and its drafting which lacks in a variety of aspects. These issues render it difficult for the tribunals to give an award that can handle the scrutiny of the law. These problems can be rectified by taking care of the demands of the parties which cannot be realistically addressed and also by the proper interpretation of the statutes of the law which forms the basis of the arbitration agreement.

The arbitration is a growing field which is in the final stages of its evolution, today almost all the major issues, especially in the international arena and those where all the traditional methods have been proven ineffective for several years, are being resolved by the tribunals because the states and the parties try to have as much control over the proceeding as possible not to leave the fast redressal of disputes it provides. A failure of the jurisdiction of the tribunal can go a long way in rendering the disputes unsolved and further frustration on part of the parties.

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