

Arbitration in the Law of the Sea Convention

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Background of dispute settlement system of UNCLOS (Part XV)

- Comprehensive scope of Convention (complex negotiations)
- Universal participation: if party to UNCLOS > bound by part XV, no reservations (art.309)
- Dispute settlement necessary to protect content and balance of UNCLOS, provides stability within the system
- Dispute settlement may be started unilaterally, prevents unilateral actions
- Provides authoritative interpretation of Convention

Article 287 - Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be **free to choose**, by means of a written declaration, **one or more of the following means** for the settlement of disputes concerning the interpretation or application of this Convention:
 - (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
 - (b) the International Court of Justice;
 - (c) an arbitral tribunal constituted in accordance with Annex VII;
 - (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. ...



**Welcome to the
cafeteria !!**

The 'cafeteria' approach: multiple choice, but compulsory!

ICJ (art.287(1)(b)): well-known, broad practice with respect to delimitation, for free and always available

- Other basis for ICJ jurisdiction may exist in individual cases ('mixed cases', such as combined land-maritime boundary) > ICJ Statute, Bogota Pact, bilateral agreement?

ITLOS (art.287(1)(a)): not so well-known, specialist, specific procedures (prompt release, provisional measures, Seabed Dispute Chamber), for free and always available

Arbitration (art.287(1)(c)): either choice or default option, costly (!) and always available but *needs starting-up period*

- Transfer of arbitration to ITLOS Chamber (because of costs)

Article 287 (contd.)

3. A State Party, which is a party to a dispute **not covered** by a declaration in force, shall be deemed to have accepted **arbitration** in accordance with Annex VII.

4.

5. If the parties to a dispute have **not accepted the *same* procedure** for the settlement of the dispute, it may be submitted only to **arbitration** in accordance with Annex VII, unless the parties otherwise agree.

Annex VII UNCLOS arbitration

Annex VII describes the procedure to be followed:

- Arbitration starts with written notification + statement of claim and grounds sent to the opponent (art.1)
- Constitution of tribunal: 5 persons, preferably from the list (> takes time)
 - List of arbitrators kept by UNSG: each SP may nominate (max.) 4 experts
- Parties share costs

Parties' perspective (*to-do list*)

1. Begin arbitration: draft notification and statement of claims
2. Decide on 'national' member of arbitral tribunal
3. Agree on applicable Rules of Procedure, agree on composition of national team, agree on location, agree on language, have meeting with arbitral tribunal etc.

If trouble with the appointment of arbitrators

- The arbitration process does not stop when the opposite side does not cooperate > default case
- Role of ITLOS President as Appointing Authority: article 3 (e) Ann. VII UNCLOS
- Arbitral tribunal is 5 persons > President will normally appoint arbitrators from 5 regional groups (often judges)

Work of ITLOS President is for free

Provisional measures - ITLOS



GOING TO ARBITRATION MAY MEAN GOING TO THE LAW OF THE SEA TRIBUNAL (ITLOS) IN HAMBURG

- > Provisional measures (if urgent)**
 - Article 290(5) UNCLOS**

Provisional measures - ITLOS

Aim of provisional measures: preservation of rights or prevention of serious harm to the marine environment while the main case has been submitted (art.290(1)), or when arbitral tribunal would have *prima facie* jurisdiction and the urgency of the situation so requires (art.290(5))

- Freeze the situation
- Do something now, and prevent prejudice to future outcome of the case
- No permanent steps (*provisional* solution)

Provisional measures > **two types**

- Art. 290 (1): during a case before a court or tribunal
 - Art. 290(1) - 3 cases
- Art. 290 (5): pending constitution of arbitral tribunal
 - Art. 290(5) - 10 cases

Provisional measures procedure follows **practice of ICJ**

- art.41 ICJ St., art. 73-78 ICJ Rules and caselaw

Provisional measures - ITLOS

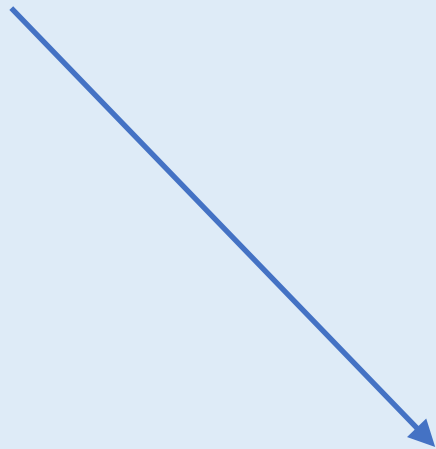
- Art.290(5) builds on *arbitration as default procedure*
 - Art.287 (3) - ... a dispute **not covered by a declaration** in force, shall be deemed to have accepted arbitration
 - Art.287 (5) - ... have **not accepted the same procedure** for the settlement of the dispute ..may be submitted only to arbitration, unless parties agree otherwise
- Constitution of arbitral tribunal takes time (\pm 4 months at least), during that period protection of interests may be necessary
- Self-contained procedure: once arbitral tribunal is established, it may modify, revoke or affirm order on provisional measures (art.290(5))

Arbitration in the Law of the Sea

How it looks procedurally

Arbitration.....>>>..... Arbitration

(UNCLOS Annex VII)



Provisional measures
(art.290(5) UNCLOS)
Incidental procedure



Arbitration in the Law of the Sea

How it looks for a party with an urgent problem



PROVISIONAL MEASURES **Start arbitration**
ITLOS (art.290) (necessary to access provisional measures)

Procedure

- Provisional measures take *priority* in work of the Tribunal (if it is busy) - art.90(1) Rules
- Request from a party to a dispute: *dispute must already have been started*
- TIMING - Art.290(5): **any time after two weeks after the notification to the other party of a request for provisional measures**, thus:
 1. Institution of arbitral proceedings
 2. Request for provisional measures
 3. Two weeks ends: Tribunal starts work on request for prescription of provisional measures

NB - this implies a State must:

- 1) *formally start arbitration procedure (first), and*
- 2) *(at the same time) prepare for the request for provisional measures! (= lot of work in same period)*
- 3) *different submissions!*

Provisional measures - ITLOS

Procedure

- Claimant submits written Statement, respondent is not obliged to do so
- Submission must contain (art.89 Rules):
 - Measures requested
 - Reasons for request
 - Consequences if provisional measures not granted
 - Art.290(5) additional requirements:
 - Grounds for jurisdiction of arbitral tribunal (*prima facie* test)
 - Urgency
 - (+ submit documents on instituting arbitration procedure)
- Tribunal *must* hold hearings - art.290(3)
- Request of President to act in such a way that any Order of Tribunal will have intended effects ('do not make the situation more complicated') - art.90(4) Rules

Provisional measures - ITLOS

Requirements

Article 290(5)

- *Prima facie* jurisdiction: is it plausible that (Annex VII) arbitral tribunal will have jurisdiction?
 - Are both States parties to UNCLOS?
 - Article 287(3) or (5) situation?
 - Is this likely a case relating to UNCLOS?
- Are the rights claimed *plausible*? Is there a right to be protected?
- Preservation of rights: is there a risk of *irreparable harm*? What is irreparable harm?
- *Urgency* - article 290(5)
- No need for exhaustion of local remedies (*Enrica Lexie* PM)

Provisional measures - ITLOS

- Art.290 -

- ITLOS may order *different* measures than those requested - article 89(5) Rules
- *New request* for provisional measures is possible, if *new facts* – article 92 Rules
 - Also > request for modification or revocation of provisional measures: specify change in situation – article 290(2,3), articles 92, 93 Rules
- Orders of provisional measures are *binding*: parties must comply promptly: article 290(6)
- Parties must *report* on the implementation of the Order, Tribunal sets time-limits for reporting – article 95 Rules

Provisional measures - ITLOS

Examples of provisional measures

Construction works

- *Land reclamation* (Malaysia v Singapore, 2003) - art. 290(5)

Release of ship and crew, payment of bond/financial guarantee

- *Arctic Sunrise* (Netherlands v Russian Federation, 2013)
- *San Padre Pio* (Switzerland v Nigeria, 2019)
- *ARA Libertad* (Argentina v Ghana, 2012)
- *Enrica Lexie* (Italy v India, 2015)
- *3 Ukrainian Naval Vessels* (Ukraine v Russian Federation, 2019)

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