ROGER H. HULL*

Much Ado About Something— Dispute Settlement and the Law of the Sea Convention

For years, diplomats from many lands have been talking—sometimes eloquently, sometimes not—about the need for a new and equitable convention for the oceans. In general, the talk has focused on substantive matters such as navigation, the exploration and exploitation of the resources of the deep seabed, the breadth and content of the economic zone, and the rights of landlocked and geographically disadvantaged states. Recently, however, attention has begun to focus on an ostensibly procedural question—the settlement of disputes arising out of the proposed Law of the Sea Convention. As the negotiations continue, it is becoming increasingly evident that the dispute settlement issue is indeed both substantive and crucial, for without adequate dispute settlement provisions, the Law of the Sea Convention will be virtually meaningless.

To many, if not most, of the diplomats who have labored so long for a Law of the Sea Convention, such an assertion might seem blasphemous. But is it in fact so outrageous? Obviously, a new set of legal norms will provide the basis for a more ordered and structured approach to oceans problems; obviously, too, the worth of such norms will be greatly reduced or even nullified if each state may make a unilateral determination of what the Law of the Sea Convention means.

When the subject of dispute settlement was first raised in the Law of the Sea negotiations, it was not warmly embraced. Although there were a few delegations that proclaimed the virtues of a judicial system to resolve disputes arising from the application or interpretation of the Convention, the vast majority of states were far more concerned with extending their jurisdiction than in dealing with causes of potential disputes. Ironically, despite the fact that

*B.A. Cum Laude, Dartmouth College; LL.B. Yale Law School; LL.M., S.J.D. University of Virginia. Dr. Hull is currently a Deputy Staff Director and Special Assistant to the Chairman of the National Security Council Interagency Task Force on the Law of the Sea.

one of the main reasons for the convening of a United Nations Conference on the Law of the Sea was to avoid possible future conflicts (such as the United States-Ecuadorean "tuna war" and the British-Icelandic "cod war"), little time was spent in debating the merits of a law of the sea chapter on the settlement of disputes. And, perhaps even more ironically, as some states began to obtain their objectives in the course of the negotiations, more and more of them came to recognize that, without dispute settlement provisions, the compromises which they had made and the rights they had been granted would be undermined.

While the trend in the Law of the Sea negotiations has clearly shifted in favor of dispute settlement provisions, there remain—aside from the specific dispute settlement articles themselves—problems which must be resolved. Of cardinal significance are the relationship of the chapter to the rest of the Law of the Sea Convention and the reluctance of some states to submit disputes to an international forum for resolution.

With regard to the first impediment, it must be recognized that supporters of dispute settlement are in agreement that the chapter on dispute settlement must be an integral part of the Law of the Sea Convention. Apparent, too, is the fact that those delegations which are either opposed to or less supportive of dispute settlement are willing to accept an optional protocol or, alternatively, compulsory conciliation. In both cases, the result would be the undermining of dispute settlement and, accordingly, the Law of the Sea Convention. If dispute settlement is relegated to an optional protocol, many states will obviously not sign it; and if compulsory conciliation is the sole method for resolving disputes (there already are provisions for conciliation if *both* parties agree), there will not be an assurance that the dispute will be resolved since compulsory conciliation does not result in a binding decision.

A second obstacle to be overcome is the reluctance of some states to have disputes in which they are involved resolved by a third party. In this country, for instance, the Connally amendment (which provides that any matter within the domestic jurisdiction of the United States—as determined by the United States—will be excluded from the jurisdiction of the International Court of Justice) is still very much a part of our domestic law. Aside from the fact that it places United States negotiators who urge the adoption of dispute settlement provisions in an embarrassing position and is the source of constant amusement to foreign diplomats, the Connally amendment forces the United States delegation into the unfortunate and nearly untenable position of having, at once, to negotiate with other delegations and to educate its own government. Even though the United States has accepted arbitration and jurisdiction of the International Court of Justice in many multilateral treaties and has stated that it will examine every treaty with a view to accepting, wherever appropriate, the jurisdiction of the International Court of Justice with respect to disputes arising under the treaty, there obviously is at least potential resistance in the United States to third-party resolution of disputes. Equally obviously, there is stiff

opposition to third-party dispute settlement in a number—a rapidly declining number—of other states.

Assuming that these two hurdles are overcome, the remaining question concerns the proposed provisions themselves. Precisely how those provisions will be worded is still unclear. What is clear, however, is that the dispute settlement procedure will, in all likelihood, provide that:

- parties may choose the means which they wish to employ to resolve disputes;
- obligations, established pursuant to a special agreement, to settle disputes by resort to arbitration or judicial settlement will be controlling;
- parties may submit the dispute to conciliation if they *both* agree to do so;
- parties, when ratifying or otherwise consenting to the Convention, will choose among the Law of the Sea Tribunal, the International Court of Justice, an arbitral tribunal, or special procedures (which would apply in areas of fisheries, pollution, scientific research, or navigation disputes), although if the special procedures are selected, the party must also select one of the other procedures for disputes not covered by the special procedures;
- disputes may only be submitted to the forum chosen by the party against which the proceedings are instituted;
- forums will have the power to indicate or prescribe provisional measures to preserve the rights of the parties;
- access, except in the case of contractual disputes in the deep seabed area, will be restricted to contracting parties;
- owners, operators, or masters of detained vessels will have the right to sue for release of those vessels upon posting of a bond;
- disputes concerning the exercise of the sovereign rights, exclusive rights, or domestic jurisdiction of a coastal state will not be subject to the dispute settlement procedures, unless it is claimed that a coastal state has interfered with the freedom of navigation or overflight, failed to give due regard to substantive rights established by the Convention, or violated international environmental standards or criteria set forth in or established pursuant to the Convention; and
- parties may, when ratifying the Convention, exclude boundary disputes where another third-party procedure is accepted, disputes where the United Nations Security Council determines that proceedings would interfere with its functions, and disputes concerning military activities.

These provisions represent a compromise. As is invariably the case with compromises, the results of the negotiation will not entirely please any, much less all, of the parties or observers. In particular, those environmentally inclined will decry the fact that only contracting parties can bring suits; ardent internationalists and "one-worlders" will argue that there should be no exceptions—especially one for military activities—from the dispute settlement procedures; and some industrialized states will undoubtedly contend that the Law of the Sea

Tribunal will preclude a fair hearing, since developing countries will control a majority of the seats. But these claims, if not spurious, fail to take account of political realities.

In the first place, as the debate at each session of the Conference demonstrated, not only is there little support for the bringing of actions by nonparties, but there also is violent opposition to extending the right to sue to individuals, corporations, organizations, or nonparty states. In order to make the concept of dispute settlement acceptable to the greatest number of delegations, the President of the Conference—the draftsman of the text—wisely decided to fall back on existing practice and limit access to the dispute settlement procedures to contracting parties.

Secondly, while the procedures would ideally apply to all disputes, they must be subject to certain *limited* exceptions. In the case of military activities, for example, the exception is of vital importance to avoid placing states in the impossible position of either having to reveal militarily sensitive information or being unable to defend themselves (against what may well be frivolous claims) without producing such information. To avoid this situation, a narrowly prescribed military exception has gained general support. Unlike some dangerously broad exceptions which have been advanced—such as a blanket exception for the economic zone—the military exception is limited in both scope and effect.

Finally, the proposed Law of the Sea Tribunal, as part of a system which allows the defending state to choose the forum in which it will be sued, will enable more delegations to embrace dispute settlement. Although the International Court of Justice would appear to be a logical forum, developing counties simply and flatly reject it as too industrially oriented; and although arbitration would seem acceptable, it is neither appealing to developing countries nor free, at least in theory, from undesirable delays, since a party acting in bad faith may postpone the proceedings indefinitely by having its arbitrator continually "resign." For these reasons, the Law of the Sea Tribunal is being viewed with increasing favor. And, despite the fact that developing-country members of the tribunal *may* at first be inclined to side with developing-world plaintiffs or defendants, the stability that the tribunal will provide and the certainty that, as time passes, all tribunal members will act as impartial judges (and not advocates) should lead even developed states to recognize that the tribunal, as part of a system of choice, warrants their support.

At this point, the Law of the Sea Conference is not assured success. If the Conference is to be successful, all delegations must continue to work towards a convention which balances the rights and the duties of all states in a just and equitable manner. And if the Convention itself is to be a success and if conflicts resulting from its misapplication or misinterpretation are to be avoided, a meaningful chapter on dispute settlement must be made an integral part of the Law of the Sea Convention.