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The Binding Nature of the Disputes Settlement Procedure in the Third U.N. Convention on the Law of the Sea: The International Seabed Authority

DR. MAHDI EL-BAGHDADI

Introduction

In 1982, the Third United Nations Conference on the Law of the Sea (UNCLOS III) adopted a comprehensive Convention governing all ocean usages. The Convention contains 15 parts, 320 articles and 9 annexes.[1] The subjects covered by the Convention include: territorial sea and contiguous zones, straits used for international navigation, continental shelves, archipelagic states, exclusive economic zones, high seas, regimes for islands, enclosed or semi-enclosed seas, rights of access of land-locked states to and from the sea and freedom of transit, seabed resource exploitation in an area beyond national jurisdiction, protection and preservation of the marine environment, scientific marine research, development and transfer of marine technology, and the settlement of disputes.

A most significant part of the Convention is Part XI, which deals with the establishment of a regime[2] for the International

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[1] *The Third U.N. Convention on the Law of the Sea*, U.N. Serial No.8355, U.N. Sales No. E.93N.5.

[2] A regime is a social institution comprising a set of principles, norms, rules and decision-making procedures around which actors' expectations converge in a given issue-area in international relations. For further elaboration of the meaning of regime, *see* INTERNATIONAL ORGANIZATION 36 (S. Krasner ed. 1982) and R. KEOPHANE and J. NYE, POWER AND INTERDEPENDENCE (1989).

Seabed Authority (ISA). The proposed Authority would be a unique international organization. Its activities would focus on the exploitation of the polymetallic manganese nodules. The nodules are mineral resources found in the area beyond the territorial jurisdiction of nation states. The polymetallic nodules are mineral resources primarily composed of manganese, copper, nickel, and cobalt, and other minerals in lesser amounts. Modern technology has made the exploitation of the nodules technically feasible.[3]

Natural resources in general, and seabed resources in particular, have certain economic structural properties that dominate their extraction and marketing. The lag of exploitive technologies behind discovery imbues exploitation of the seas' resources with a comparatively high level of uncertainty.[4] The ISA represents the first cooperative international endeavor to develop, manage, regulate, and exploit resources from a domain covering more than half the earth's surface. To be an effective coping mechanism reflective of the plurality of the values held by the actors, the ISA has been given authority never before granted to an

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[3] The nodules are located on the deep ocean floor that is sometimes called the abyssal plain. The abyssal plain includes mountain ranges, isolated sea mounts, and deep trenches. The depth of the oceans where manganese nodules are found falls between 15,000 and 20,000 feet. The nodules vary widely in their composition, physical shape, and chemical properties. Frequently, their size and shape resemble those of potatoes. Their total weight can only be speculative and the estimates vary widely. From 1958 to 1959, a group of U.S. scientists at the University of California estimated the total volume of nodules in the Pacific Ocean alone at 1,700 billion tons. *See* J. L. MERO, THE FINDING AND PROCESSING OF DEEP-SEA MANGANESE NODULES (1959). In 1961, two Soviet scientists published another estimate for the Pacific, which was only about a twentieth as large, though still enormous. E. LUARD, THE CONTROL OF THE SEA-BED 15 (1977). In 1965 Dr. John Mero, in his pioneering study, indicated that the Pacific Ocean contained over one trillion tons of the nodules. J. MERO, THE MINERAL RESOURCES OF THE SEA 121-124 (1965). "Manganese nodules are found in all ocean sediments formed under oxidizing conditions but they are not uniformly distributed." *Id.* at 127-129. "Manganese nodules have been found at a number of locations in the Atlantic and Indian Oceans. Deposits of the nodules in these oceans, however, do not seem to be widely spread as in the Pacific Ocean." *Id.* at 234. The important point is that the nodules are found almost everywhere, and the amount of individual metals contained in them include 16.4 billion tons of nickel, 8 billion tons of copper, and 8.8 billion tons of cobalt. Report of the U.N. Secretary General, *Marine Mineral Resources*, U.N. Doc. E/CM20DD5 (1971).

[4] M. CLEMENT, *The Economic Milieu of the Ocean*, WHO PROTECTS THE OCEAN? 142 (J. Hargrove ed. 1975). For further information regarding the manganese nodules' geophysical characteristics and development of ocean knowledge, *see* J. MERO, THE MINERAL RESOURCES OF THE SEA (1965); E. LUARD, THE CONTROL OF THE SEA-BED (1977); R. OGLEY, INTERNATIONALIZING THE SEABED (1984); V. PRESCOTT, *The Deep Seabed*, MARITIME DIMENSION, (R. P. Barston and P. Birnie ed. 1980); 3 THE NEW DIRECTIONS IN THE LAW OF THE SEA (1973).

international organization and must be guided by the criteria of both efficiency and equity. This compromise arrangement has not satisfied all the participants. Developing countries view the creation of the ISA as part of their effort to establish the New International Economic Order (NIEO), among whose significant demands are: participation in the decision-making process concerning international economic issues, obtaining an equitable share in the benefits accruing from the management of global goods, and gaining access to technological know-how and scientific knowledge in order to aid in their economic development.[5] While some developed countries have sympathized with these demands, others, particularly the United States, have opposed them or expressed reservations.

The U.S. position concerning the ISA can be divided into three phases. In the initial phase, the U.S. favored the establishment of an agency of simple registry or licensing model that would provide licenses to qualified contractors and create rules for mining on the basis of first come, first registered. In that phase, the U.S. did not envisage the establishment of an ISA that would itself engage in mining activities. This position was expressed along with other positions contained in a number of proposals tabled before the Seabed Committee in 1970 and 1971 as a basis to negotiate a regime for the deep seabed and its resources.[6] The second phase of the U.S. position is characterized by flexibility and compromise. As a result of the impact of political socialization and evolutionary learning process, a shift occurred in the Geneva session of UNCLOS III in 1975. In that session the U.S. proposed what came to be known as the parallel

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[5] *See, e.g.*, P. N. AGARWALA, THE NEW INTERNATIONAL ECONOMIC ORDER, (1983); B. GONOWIC, UNCTAD CONFLICT AND COMPROMISE, 8-27 (1972); P. PREBISH, *Capitalism: The Second Crisis*, THIRD WORLD STRATEGY, (Gauhar ed. 1983); E. EVRIVIADES, *The Third World's Approach to the Deep Seabed*, 2 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 207 (1982); RESTATEMENT OF FOREIGN RELATIONS LAW 34-35, tent. draft no. 6 (1985); E. DEUTSCH, AN INTERNATIONAL RULE OF LAW 137 (1977).

[6] A/A 138/25 of August 3, 1970 (USA); A/AC 138/26 of August 3, 1970, and A/AC 138/46 of August 3, 1971 (the UK); A/AC 138/27 of August 4, 1970 (France); A/AC 138/44 of July 20, 1971 (Tanzania); A/AC 138/43 of July 22, 1971 (USSR); A/AC 138/44 of August 3, 1971 (Poland); A/AC 138/49 of August 10, 1971 (Chile, Columbia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay, and Venezuela); A/AC 138/53 of August, 1971 (Malta); A/AC 138/55 of August 20, 1971 (Afghanistan, Austria, Belgium, Hungary, Nepal, Netherlands, and Singapore); A/AC 138/59 of August 24, 1971 (Canada); and A/AC 138/63 of November 23, 1971 (Japan).

system.[7] The main thrust of the parallel system was to place seabed mining by states and private corporations on an equal footing with that of the ISA. This would be achieved by dividing the area into parts. States and private corporations would have the exclusive rights to exploit parts, and the ISA, through the Enterprise, would have the exclusive rights to other parts of equal value and size. Once a seabed area has been prospected, a potential mining state or company would present to the ISA two mine sites of estimated "equal commercial value." The ISA would choose one site to be mined by the Enterprise, or in association with developing countries, and enter into a contractual agreement with the miner for the other site. In its original form, the parallel system did not meet the satisfaction of the developing countries. A basic corollary of the developing countries position was the assured access to marine technology and the availability of financing for practical operation of the Enterprise. To allay their fears, the U.S. in 1976 put forth a package designed to win support for the parallel system.[8] However, a new third phase of U.S. decision-making began with the presidential election of 1980. When President Reagan came into office, he called for a suspension of further negotiations while his Administration conducted a thorough policy review of the proposed Convention on the Law of the Sea. The result of this process was inflexibility in the U.S. stance and unwillingness to accept the consensus that had emerged at the Third United Nations Conference on the Law of the Sea. Because the policy review was not completed until January, 1982, the U.S. did not effectively participate in the Tenth Resumed Session of UNCLOS III.

The main U.S. concerns on deep seabed mining, as explained in the working paper, "Approaches to Major Problems in Part XI of the Draft Convention on the Law of the Sea", included: decision-making by the ISA Council, the mining system, the status of the Enterprise, transfer of technology, the review conference, production limitations, grandfather rights, and the national liberation movements. The subsequent U.S. proposals for amendments to the Draft Convention on the Law of the Sea, as

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[7] *See Status Report on the Law of the Sea Conference: Hearings before the Sen. Subcomm. on Minerals, Materials, and Fuels*, 94th Cong., 1st Sess. (1975).

[8] Bureau of Public Affairs, U.S. Dept. of State, THE LAW OF THE SEA: A TEST OF INTERNATIONAL COOPERATION (1976).

presented in what came to be called the "Green Book" to the Eleventh Session, were considered by the group of the developing countries as a reversal of position and an attempt to rewrite the deep seabed provisions.[9] In a post-conference policy review, which was concluded on July 9, 1982, President Reagan announced that the U.S. would not sign the Convention and would limit its participation in the remaining conference process at the technical level and with regard to provisions that serve the U.S. interests.[10]

In spite of some changes to accommodate it, the U.S. could not be swayed and insisted on abandoning consensus when it called for a recorded vote and voted negatively on April 30, 1982, on the Draft Convention, together with the mentioned resolutions, which form an integral whole. Thereafter, the U.S. pushed for the signing of a Reciprocating States Agreement among like-minded industrial states. The U.S. has also refrained from participating in the work of the International Seabed Commission and for the International Seabed Authority for the Law of the Sea.[11] Where the main thrust of the developing countries' argument is "equity", the gist of the developed countries' argument focuses on "efficiency".[12]

To ensure the effective implementation of the provisions of the different regimes of the Convention, especially the ISA regime, the participants at UNCLOS III established a reasonably precise and concrete procedure for disputes resolution. The provisions of this procedure are intricately interwoven into the structure of the Convention. A distinguishing characteristic of the disputes settlement procedure of the ISA is the nature of its

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[9] *See* U.S. Dept. of State, Current Policy No. 371, LAW OF THE SEA, (1982).

[10] U.S. Dept. of State, Current Policy No. 416, LAW OF THE SEA AND OCEANS POLICY (1982).

[11] No change has taken place on the U.S. position concerning the ISA during the Bush Administration. It is hoped, however, that when the agenda in Washington becomes less crowded with hot political issues, the question of the ISA will be more favorably handled. This hope is based on the increasing interest recently expressed by the Administration to establish a new international order on the basis of enhancing the role of international organizations in international relations. *See generally*, J. BURKENBUS, DEEP SEABED RESOURCES: POLITICS AND TECHNOLOGY (1979); R. OGLEY, INTERNATIONALIZING THE SEABED (1984).

[12] E. J. MISHAN, WELFARE ECONOMICS 5 (1969); A. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 41 (1975); E. LUARD, THE CONTROL OF THE SEABED 15 (1977); J. BARKENBUS, DEEP SEABED RESOURCES: POLITICS AND TECHNOLOGY (1979); W. OSTRENG, NORWAY'S LAW OF THE SEA POLICY IN THE 1970'S (1982). R. OGLEY, INTERNATIONALIZING THE SEABED 144 (1984).

binding jurisdiction. This, of course, represents a departure from what has been traditionally accepted in international law.[13]

The purpose of this paper is to highlight the relevant provisions of the disputes settlement procedures of the Convention and to attempt to show how the dispute settlement procedures in Parts XI and XV of the Third United Nations Convention on the Law of the Sea are characterized by binding jurisdiction. It will also show that the disputes settlement mechanisms concerning the ISA activities as included in Part XI have binding jurisdiction and that Part XI gives the parties a choice between four different tribunals to settle disputes. If the parties fail to agree on a common choice, either party can submit the dispute to arbitration. The award of the tribunal is final and the parties must comply with it. Most disputes relating to navigation and environment are subject to binding decisions. However, there are exceptions. These exceptions relate to disputes concerning fishing and scientific research in the exclusive economic zone or continental shelf and disputes relating to boundaries, and military activities or disputes before the U.N. Security Council.

The outcome of the disputes settlement procedures in Parts XV and XI of the Convention is a compromise serving the interests of the proponents of efficiency and equity. To support this thesis, an attempt is made to make a textual analysis of the relevant provisions of the Convention and to draw on U.N. documents and secondary sources concerning the subject.

EVALUATION OF THE RELEVANT ARTICLES OF DISPUTES SETTLEMENT PROVISIONS OF THE CONVENTION

Parts XV and XI of the Convention deal with disputes settlement procedures. Part XV contains Articles 279-296 and focuses on resolution of general disputes that emanate from the different usages of the oceans except the seabed. Part XI embodies Articles 186-191 and concentrates on settling disputes arising from seabed activities. The general disputes settlement provisions in Part XV provide the states that are part of the Convention with three options from which they can choose a

[13] The traditional norms and practices of international law require the acquiescence of a party to a dispute before any recourse to adjudication is made. In Article 287(2) of the Convention of UNCLOS III, however, there is emphasis on the "obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber."

dispute settlement method. The first option is provided in Articles 279, 280 and 281. According to these Articles, states can seek a method to settle disputes by negotiation, arbitration, judicial means, or other "peaceful means of their own choice" when the dispute arises.[14] The second option is provided in Article 282. It stipulates that if states which are parties to a dispute have agreed to a general, regional or bilateral agreement in a disputes settlement procedure that entails a binding decision, then that procedure shall apply unless the parties to the dispute otherwise agree. It is evident that this Article allows parties to a dispute to have some kind of agreement as to compulsory jurisdiction before a dispute in fact arises. The third option is provided by Article 286. This Article allows states who have not selected a method for dispute settlement under the previous options to submit "at the request of the party to the dispute to the court or tribunal having jurisdiction under" the compulsory jurisdiction section. Under Article 287 a state acceding to the Convention may declare as applicable to the disputes settlement one of the following four procedures:

(a) the International Tribunal for the Law of the Sea,
(b) the International Court of Justice,
(c) the arbitral tribunal constituted in accordance with Annex VII,
(d) a special arbitral tribunal constituted in accordance with Annex VIII of the Convention.

While provided with different options from which they can choose a method to resolve disputes, states that are parties to the Convention are obligated under Article 283 to proceed expeditiously to an exchange of views when a dispute arises between them so as to agree "on the manner of implementing the settlement." If no agreement is reached, any party to the dispute may submit it to arbitration under Article 287(5). Meanwhile, Annex VII in Article II makes it clear that the tribunal's award is final and that the parties must comply with it. All disputes relating to navigation and environment are thus subject to binding decision-making. However, Article 297 provides exceptions concerning some disputes relating to fishing and scientific research in the exclusive economic zone or continental shelf, and

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[14] *See* Articles 279, 280 and 281 of *Third U.N. Convention on the Law of the Sea.*

Article 298(1)(c) provides exceptions for disputes before the U.N. Security Council.

Regarding the relevant provisions of disputes settlement within Part XI of the Convention, the language is very clear. The Convention requires that any disputes settlement procedure provide a binding decision. In fact, Article 287(2) of the Convention takes the ISA out of the general dispute settlement provisions of Part XV. Perhaps a significant aspect in the dispute resolution procedure of the Convention is the binding nature of jurisdiction concerning settlement of disputes arising from activities in the area. A state is not free to choose a method for settlement of disputes where they relate to activities in the area. The Seabed Disputes Chamber is given jurisdiction over disputes arising out of the activities of the area in accordance with Article 287(2) which requires the separateness of the "obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, Section 5." In other words, the reference is to binding jurisdiction under the Seabed dispute resolution provisions of Articles 186-196. In this regard, Article 187 specifically stipulates, "the Seabed Disputes Chamber shall have jurisdiction . . . with respect to activities in the Area," over conflicts involving states, conflicts involving states and the ISA, and any other parties to a "contract relating to activities in the Area." It should be noted, however, that states involved in a dispute are also permitted under Part XI, Section 5, Article 188(1)(a) to submit such disputes to a special chamber of the full International Tribunal for the Law of the Sea.

The characteristic of binding jurisdiction is reiterated in Article 188(2)(a) when it is stipulated that disputes relating to contracts in regard to activities in the area, "shall be submitted at the request of any party to the dispute to binding commercial arbitration, unless the parties otherwise agree." Moreover, "when the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling."

While the provisions of Part XI relating to disputes settlement contain explicit and precise language of binding jurisdiction, they do not contain clear language providing for binding decisions. Nevertheless, when reading Part XI in conjunction

with Part XV it would seem that Article 296 would apply. Paragraph I of Article 296 stipulates that "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute." While the reference is made in Article 287(2) to the "obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber," the Seabed Disputes Chamber is provided with jurisdiction under Article 186. Since the value of binding jurisdiction is minimized in the absence of binding decisions, Article 39 of Annex VI (which is incorporated as part of the dispute settlement mechanism under Part XI through Article 186) has made it clear that "the decisions of the Seabed Disputes Chamber shall be enforceable in the territories of the States. Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."

This explicit and concrete procedure with binding jurisdiction to settle disputes within the ISA is a departure from the customary procedure to settle international disputes. According to the current procedure, disputes are often allowed to drag on and become inflamed so that they are very difficult to resolve. The absence of adequate jurisdictional arrangements for execution and reporting have contributed to the ineffectiveness of the current procedure.[15] However, the Seabed Disputes Chamber procedure has been strengthened by granting authority to the Legal and Technical Commission which under Article 165(j) is made responsible to monitor and "make recommendations to the Council with respect to measures to be taken upon a decision by the Seabed Chamber."

CONCLUSION

Participants in UNCLOS III "pursued codification and development of international law because they sought greater precision in the norms devised to regulate particular types of behavior."[16] Proponents of efficiency wanted to establish order, stability, predictability, and certainty to protect their investments

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[15] L. SOHN, *The Security Council's Role in the Settlement of International Disputes*, 18 AM. J. OF INT'L LAW 403 (1984). *See also*, L. SOHN, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW AND CONTEMPORARY PROBLEMS 200 (1983).

[16] E. MILES, *Law of the Sea Institute Annual Conference* 1 (1980).

in deep seabed mining. Proponents of equity, however, wanted to establish fairness, justice, and reasonableness so as to gain power and status in the decision-making processes of international economic relationships, to obtain wealth and income from the distribution of global commons, and to acquire technological know-how to help them in the developmental processes of their economies. The outcome is neither "Pareto Optimality" nor an ideal type of equity. It is a compromise between efficiency and equity involving trade-offs, accommodations and balances. This was made possible by agreement to accept various means for settling disputes. The compulsory disputes settlement procedure is envisaged to serve both efficiency and equity. Those interested in efficiency will have protection for "the overall security, economic and environmental interests in accordance with the requirements of the Convention regarding navigation, overflight, pollution," and against occasional temptation on the part of the United States to set adverse precedents by doing otherwise.[17] The compromise serves the collective interests of the developed countries in economic efficiency and also meets the equity objectives of the developing countries by providing universally applicable rules in accordance with Article 293 of the Convention.

The disputes settlement procedure in Part XI provides for binding jurisdiction. However, Part XV also gives the states a choice between four different tribunals. Either party to a dispute can submit it to arbitration and the decision will be final and obligatory. Disputes relating to navigation and environment are subject to binding decision-making. But some exceptions are provided. These exceptions relate to disputes concerning fishing and scientific research in the exclusive economic zone or continental shelf and disputes related to boundaries, and military activities or disputes before the U.N. Security Council. Both Parts XI and XV of the Convention have binding character to settle disputes. The difference between them, however, is that XV applies to the states only, while XI also applies to international organizations, corporations and even individuals.

The binding character of the disputes settlement procedures of the Third United Nations Convention on the Law of the Sea represents a significant departure from the traditional pattern of solving international disputes. This will induce greater self-re-

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[17] *Panel on the Law of Ocean Uses, International Ocean Law and U.S. Oceans Policy* 15 (1988).

straint, encourage states to seek legal advice before acting, and compel international lawyers to be cautious in their advice.[18] This procedure will also provide a state with a graceful retreat. If it acts in violation of the rules, it need not yield to pressure from another state, but only the binding judgment of a disinterested tribunal. Likewise a state that is confident it is acting within its rights may seek a judgment vindicating its actions.[19]

[18] *Id.*
[19] *Id.*