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# ESSAYS

# Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea

*John Warren Kindt**

ABSTRACT

*This Essay discusses the merits of the dispute settlement provisions found in the 1982 United Nations Convention on the Law of the Sea, and calls for recognition and utilization of the provisions in all manner of disputes arising within the international legal community. Professor Kindt notes that despite the fact that the Convention's dispute settlement provisions represent the first time all major interest blocs of states have agreed upon a standard set of provisions for dispute settlement, the provisions have not received the attention they deserve. After analyzing the reasons for this lack of consideration, he urges that the dispute settlement provisions serve as quasi-boilerplate language in multilateral treaties, especially in the area of international environmental law. In part II of this Essay, Professor Kindt examines the application of these provisions in relation to particular law of the sea issues and argues that more extensive use of the dispute settlement provisions would better serve the goal of maintaining a favorable legal order. He cites specific recent examples in which the application of these provisions would have fostered the resolution of disputes. In part III, Professor Kindt analyzes the three major*

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*divisions of the dispute settlement provisions: 1) the general provisions; 2) the compulsory procedures leading to binding decisions; and 3) the limitations and exceptions to compulsory procedures. He then explains their application in a variety of situations and concludes that the provisions offer a stable and efficient means of handling international disputes, especially with regard to environmental issues. Since a large number of countries representing a wide array of political, economic, and ideological views agreed to the substance of the dispute settlement provisions, Professor Kindt argues that the provisions represent customary international law and should be utilized to the fullest extent possible.*

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## I. THE POTENTIAL FOR DEVELOPING AND UTILIZING "BOILERPLATE" DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL ENVIRONMENTAL TREATIES

Often lost amid the controversies involving the traditional piecemeal methodologies for resolving international disputes are the unique and workable dispute settlement provisions of the 1982 Convention on the Law of the Sea[1] (LOS Convention or Convention) negotiated during the Third United Nations Conference on the Law of the Sea (UNCLOS III). The dispute settlement provisions contained in part XV of the LOS Convention are unique, because for the first time, all of the major interest blocs of states, including the Soviet bloc, agreed on a standard set of

1. *Opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, U.N. Sales No. E.83.V.5 (1983) *and in* 21 I.L.M. 1261 (1982), U.N. Doc. A/CONF.62/122 (Oct. 7, 1982) [hereinafter LOS Convention]. The LOS Convention is also reprinted in 1 J. KINDT, MARINE POLLUTION AND THE LAW OF THE SEA 291 (1986), and in 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 206 (M. Nordquist ed. 1985).

provisions for dispute settlement.[2] Of equal importance is the fact that these states agreed to provisions that are "compulsory."[3] In the context of the United Nations Charter and its concomitant United Nations system,[4] states adhering to the LOS Convention are obligated to utilize the Convention's dispute settlement mechanisms regarding disputes that arise within the purview of the Convention.[5] Another unique aspect of the LOS Convention is that instead of being found in an annex as in all similar multilateral treaties of the modern era, the dispute settlement provisions constitute part of the Convention's main text.

The LOS Convention was the culmination of a vast international effort concerning the law of the sea. The eleven-year negotiation produced an extensive treaty document of 307 articles and eleven annexes.[6] The treaty was done by the largest gathering of nations ever assembled to

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2. Sohn, *The Law of the Sea Crisis*, 58 ST. JOHN'S L. REV. 237, 260-64 (1984) [hereinafter *Sea Crisis*]; Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 195, 196 n.5 (Spring 1983) [hereinafter *Peaceful Settlement*]; *see* Jaenicke, *Dispute Settlement Under the Convention on the Law of the Sea*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT 813, 815 (1983); Kindt, *The Environmental Aspects of Deep Seabed Mining*, 8 UCLA J. ENVTL. L. & POL'Y 125, 135 (1989).

3. 4 J. KINDT, *supra* note 1, at 2044, 2047; Jaenicke, *supra* note 2, at 813; Kindt, *supra* note 2, at 134. During the UNCLOS III negotiations, compulsory dispute settlement administered by impartial third parties was considered to constitute an essential element of any forthcoming treaty on the law of the sea. Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 A.J.I.L. 1, 31-32 (1974); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 A.J.I.L. 763, 795 (1975). For the historical rationales behind the formulation of the settlement provisions in the LOS Convention, see A. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY (1987); Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495 (1975). Unfortunately, the compulsory dispute settlement provisions involving the 200 mile economic zone retrogressed to the conciliation methodology that became the accepted dispute settlement mechanism for these types of disputes. A. ADEDE, *supra*, at 172-74, 242.

4. Under article 2 of the United Nations Charter, states are obligated to "settle their international disputes by peaceful means . . . ." U.N. CHARTER, art. 2, para. 3. Furthermore, states engaged in disputes that are "likely to endanger the maintenance of international peace and security" are obligated to resolve those disputes "by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, . . . or other peaceful means . . . ." *Id.* art. 33, para. 1. These obligations were specifically referenced in article 279 of the LOS Convention. LOS Convention, *supra* note 1, art. 279.

5. *See, e.g.*, LOS Convention, *supra* note 1, arts. 279 (Obligation to settle disputes by peaceful means), 286 (Application of procedures).

6. *See infra* note 61.

draft an international treaty.[7] The result was a flexible system of dispute resolution that would bind parties without planting seeds for future disputes.[8] "Given the notorious difficulty of securing agreement on procedures of this kind, [part XV] is a considerable achievement. . . ."[9]

Accordingly, the dispute settlement mechanisms of the LOS Convention should generally be utilized as *the* model for dispute settlement provisions in multilateral treaties.[10] These provisions should serve as the starting point in negotiations between various interest blocs of states,[11]

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7. A. ADEDE, *supra* note 3, at 3.

8. Sohn, *Peaceful Settlement of Disputes and International Security*, 3 NEGOTIATION J. 155, 157-58 (1987).

9. J. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 137 (1984); *see* 4 J. KINDT, *supra* note 1, at 2046. For analyses of the dispute settlement provisions of the LOS Convention while the negotiations were in progress, see Adede, *Settlement of Disputes Arising Under the Law of the Sea Convention*, 69 A.J.I.L. 798 (1975); Adede, *Law of the Sea: The Scope of the Third-Party, Compulsory Procedures for Settlement of Disputes*, 71 A.J.I.L. 305 (1977); Adede, *Law of the Sea—The Integration of the System of Settlement of Disputes Under the Draft Convention as a Whole*, 72 A.J.I.L. 84 (1978); Adede, *Streamlining the System for the Settlement of Disputes Under the Law of the Sea Convention*, 1 PACE L. REV. 15 (1980); Adede, *The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention*, 11 OCEAN DEV. & INT'L L. 125 (1982) [hereinafter *Basic Structure*]; Bernhardt, *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, 19 VA. J. INT'L L. 69 (1978); Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577 (1982); Oelofsen, *Some Comments on the Proposed Procedures for Dispute Settlement Under a New Law of the Sea Convention*, 2 S. AFR. Y.B. INT'L L. 192 (1976); Sohn, *supra* note 3, at 495; Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976); Sohn, *Settlement of Disputes Relating to the Law of the Sea Convention*, 3 ENVTL. POL'Y & L. 98 (1977).

10. Jaenicke, *supra* note 2, at 814 (but cautioning that each treaty is different); Kindt, *supra* note 2, at 134. While this proposal is directed at *all* multilateral treaty initiatives, the authoritative precedents established by part XV of the LOS Convention are already reflected in the *1982 Manila Declaration on the Peaceful Settlement of International Disputes*, 19 U.N. CHRON., Dec. 1982, at 80. The influence of part XV is exemplified by the comments to the "Draft General Treaty on the Peaceful Settlement of International Disputes" prepared under the auspices of the American Bar Association, *reprinted in* 20 INT'L LAW. 261, 264 (1986) [hereinafter Draft Treaty on International Disputes].

11. This proposition is not hindered by the 1986 United States withdrawal from the compulsory jurisdiction of the International Court of Justice (I.C.J.) triggered by the case of Nicaragua v. United States, 1986 I.C.J. 14 (Merits). For the text of the 1946 United States declaration that acceded to compulsory I.C.J. jurisdiction, see 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9. For the text of the United States notice canceling the 1946 declaration, see 24 I.L.M. 1742 (1985) (effective Apr. 7, 1986). In light of its withdrawal, the United States obviously would be sensitive to reestablishing a type of

particularly those involving the Soviet bloc.[12]

The milestones achieved by the negotiators of the Convention's dispute settlement provisions cannot be overemphasized. While the precedents established by part XV have obviously been considered in subsequent negotiations involving multilateral treaties,[13] these provisions should be highlighted by the international legal community when new multilateral treaties are being considered. Though the dispute settlement provisions of the LOS Convention do not need to be accepted verbatim, they provide a useful starting point.

The guidance offered by the LOS Convention is particularly applicable to multilateral treaties in the area of marine pollution—including this area's three traditional subcategories of vessel-source pollution,[14] ocean dumping, and land-based pollution (transboundary pollution involving acid rain).[15] The dispute settlement provisions of the LOS Convention can almost serve as "boilerplate" provisions while maintaining enough flexibility to adapt to most multilateral treaties involving marine pollution. The two unique elements provided by the Convention's dis-

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compulsory I.C.J. jurisdiction. *See* LOS Convention, *supra* note 1, art. 287, para. 1(b). Without judging the merits of the rationale or of the scenario in which the United States withdrew from the compulsory jurisdiction of the I.C.J., other states might display caution over use of the I.C.J. dispute settlement alternative in view of the experience of the United States.

Despite the failings of the I.C.J. in past disputes, a limited acceptance of compulsory jurisdiction by the United States could contribute to the stabilization of the world public order. The 1946 United States declaration accepting compulsory jurisdiction came 40 years prior to the *Nicaragua* decision, and was perhaps outdated in light of the I.C.J.'s structure, as constituted during the 1980s. A restructuring of the original United States commitment could be beneficial to both the United States and the international community. *See generally* Sohn, *Suggestions for the Limited Acceptance of Compulsory Jurisdiction of the International Court of Justice by the United States*, 18 GA. J. INT'L & COMP. L. 1 (1988).

12. Multilateral treaties involving military issues should generally be considered as a special category of treaties. However, the dispute settlement provisions of the LOS Convention and the environs in which they were negotiated should still provide guidance in this area—especially with regard to the insight the UNCLOS III negotiations provide into the historical Soviet positions involving dispute settlement.

13. *See* Jaenicke, *supra* note 2, at 815; *see, e.g.*, Draft Treaty on International Disputes, *supra* note 10 , arts. 1-3, 6, 9, 18, 31-32, annexes A & B.

14. The frequently utilized and effective dispute settlement provisions generally found in treaties negotiated under the auspices of the International Maritime Organization (I.M.O.) should be maintained. On the I.M.O. generally, see 1-2 S. MARKABADY, THE INTERNATIONAL MARITIME ORGANIZATION (1986).

15. *See* Kindt, *International Environmental Law and Policy: An Overview of Transboundary Pollution*, 23 SAN DIEGO L. REV. 583 (1986).

pute settlement mechanisms—their mandatory nature and their support by international consensus—would contribute to their usefulness and strength in this area.[16]

In the area of marine pollution, negotiators have not sufficiently considered previous suggestions for referencing and otherwise utilizing the dispute settlement provisions of the LOS Convention.[17] The dispute settlement provisions have not achieved the widespread attention they deserve[18] for two major reasons. First, in comparison with the rest of the LOS Convention, the basic principles governing the dispute settlement provisions were negotiated relatively quickly during the early years of the almost decade-long UNCLOS III negotiations.[19] Due to effective negotiations, the anticipated divisive debates over the dispute settlement provisions never fully materialized. Even so, several delicate issues arose, particularly involving articles 294, 297, and 298 of the LOS Convention,[20] that were resolved much later in the negotiation process.[21] Simi-

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16. *See supra* notes 2-3 and accompanying text.

17. *See, e.g.*, 4 J. KINDT, *supra* note 1, at 2044, 2046-47, 2399; Kindt, *supra* note 15, at 604. A more recent call for utilizing the dispute settlement mechanisms of the LOS Convention occurred during the 1988 Conference on Ocean Mining Development and American Industry, sponsored by the Center for Oceans Law and Policy, University of Virginia School of Law:

> An integral part of maintaining a favorable world public order consists of providing mechanisms for the pacific settlement of disputes. In this regard, the dispute settlement provisions of the LOS Convention are unique and should serve as a model for other pending treaties, particularly environmental treaties. Under the LOS Convention, the compulsory nature of the mechanisms for peacefully settling disputes is a major accomplishment. In addition, these provisions provide alternative methods for resolving disputes—for the first time creating a dispute settlement system acceptable to virtually all countries, including the Soviet bloc, the Third World (e.g., the Group of 77), and the Western bloc. Those diplomats negotiating pending treaties, particularly treaties dealing with international environmental issues, should look to the dispute settlement provisions in the LOS Convention.

Kindt, *supra* note 2, at 134-35 (footnotes omitted).

18. 4 J. KINDT, *supra* note 1, at 2399.

19. Jaenicke, *supra* note 2, at 815; Oda, *Some Reflections on the Dispute Settlement Clauses in the United Nations Convention on the Law of the Sea*, in ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS 645, 646 (J. Makarczyk ed. 1984); *see* Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 A.J.I.L. 211, 243 (1981).

20. Letter from Professor Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law, to Professor John Warren Kindt (Mar. 13, 1989) [hereinafter Sohn Letter]; *see* LOS Convention, *supra* note 1, arts. 294 (Preliminary proceedings), 297 (Limitations on applicability of section 2, compulsory section), 298 (Optional exception to applicability of section 2).

21. Sohn Letter, *supra* note 20. *See also* 5 UNITED NATIONS CONVENTION ON THE

larly, articles 186 to 191 were the subject of difficult and touchy negotiations that concluded only as the end of UNCLOS III approached.[22] In any event, negotiators achieved relatively quickly and efficiently the two essentials of consensus and a compulsory settlement mechanism; this situation allowed the UNCLOS III negotiators to concentrate on other issues—both within and outside the Drafting Committee.[23]

After the surprisingly quick agreement on many of the basics governing the dispute settlement provisions, a new and largely unanticipated storm arose during UNCLOS III that diverted attention to deep seabed exploitation. Unfortunately, the debates involving a multiplicity of deep seabed issues[24] were so divisive that many other important law of the sea issues did not receive the widespread attention they deserved either during or after UNCLOS III. This situation applied a fortiori to the dispute settlement provisions, because many substantial agreements were reached so early in the negotiations. Consequently, the dispute settlement milestones did not receive the credit they merited at the time they were negotiated.

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LAW OF THE SEA 1982: A COMMENTARY 75-78, 85-101, 107-41 (S. Rosenne & L. Sohn eds., M. Nordquist ed. in chief, 1989) [hereinafter Rosenne & Sohn].

22. Sohn Letter, *supra* note 20; LOS Convention, *supra* note 1, arts. 186-91 (Settlement of disputes and advisory opinions in the Area). At the very end of UNCLOS III, the Drafting Committee also tried to rewrite some of the dispute settlement provisions, but, due to the last-minute confusion, only a few minor corrections received the necessary approval. Sohn Letter, *supra* note 20. *See also* Rosenne & Sohn, *supra* note 21.

23. Jaenicke, *supra* note 2, at 813, 815; *see* Oda, *supra* note 19, at 646.

24. The deep seabed mining provisions appear in part XI of the LOS Convention. For general discussions of the problems involving part XI and concomitant acceptance of the entire LOS Convention, see, e.g., Alexander, Cameron, & Nixon, *The Costs of Failure at the Third Law of the Sea Conference*, 9 J. MAR. L. & COM. 1 (1977); Bandow, *UNCLOS III: A Flawed Treaty*, 19 SAN DIEGO L. REV. 475 (1982); Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 A.J.I.L. 324 (1981) (negotiating problems at UNCLOS III in general); D'Amato, *An Alternative to the Law of the Sea Convention*, 77 A.J.I.L. 281 (1983) (mini-treaty response to part XI negotiating difficulty); Finlay, *The Proposed New Convention on the Law of the Sea—A Candid Appraisal*, 7 SYRACUSE J. INT'L L. & COM. 135 (1979-1980); Gamble, *Post World War II Multilateral Treaty-Making: The Task of the Third United Nations Law of the Sea Conference in Perspective*, 17 SAN DIEGO L. REV. 527 (1980); Gamble, *Where Trends the Law of the Sea?*, 10 OCEAN DEV. & INT'L L. 61 (1981); Hazou, *Determining the Extent of Admissibility of Reservations: Some Considerations with Regard to the Third United Nations Conference on the Law of the Sea*, 9 DEN. J. INT'L L. & POL'Y 69 (1980) (discussing reservations); Hazou, *A Survey of Depositary Functions in Respect of the Caracas Convention on the Law of the Sea*, 12 J. MAR. L. & COM. 485 (1981); Jones, *The International Sea-Bed Authority Without U.S. Participation*, 12 OCEAN DEV. & INT'L L. 151 (1983).

In addition to the widely publicized problems involving the deep seabed mining provisions (part XI of the LOS Convention), the subsequent decisions by the Federal Republic of Germany, the United Kingdom, and the United States not to become parties to the Convention[25] have tangentially hindered the practical acceptance and utilization in other treaties of the LOS Convention's noncontroversial provisions.[26] Consequently, part XI continues to haunt the dispute settlement provisions and taint their practical utilization by negotiators involved in drafting new multilateral treaties. This situation is unfortunate, because the ten-

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25. In 1982 the United States announced that it would neither accede to the LOS Convention nor participate in the Preparatory Commission (Prepcom). BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 416, LAW OF THE SEA AND OCEANS POLICY, 1, 3 (July-Aug. 1982). Other countries sympathized with the positions of the Federal Republic of Germany, the United Kingdom, and the United States and joined in a "Provisional Understanding." *See* Provisional Understanding Regarding Deep Seabed Matters, *done* Aug. 3, 1984, ___ U.S.T. ___, T.I.A.S. No. ___ (entered into force Sept. 2, 1984), *reprinted in* 23 I.L.M. 1354 (1984). The parties to the Provisional Understanding are Belgium, the Federal Republic of Germany, France, Italy, Japan, the Netherlands, the United Kingdom, and the United States, 23 I.L.M. at 1358. *See also* Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, *done* Sept. 2, 1982, ___ U.S.T. ___, T.I.A.S. No. 10,562 (entered into force Sept. 2, 1982). The parties to this agreement are France, the Federal Republic of Germany, the United Kingdom, and the United States.

The Council on Ocean Law believed that the United States should have taken part in the work of Prepcom for the LOS Convention. Arguably, Prepcom was the only viable forum that could resolve the problems of the LOS Convention's mining regime. Notably, the United States was the only country with a deep seabed mining industry that had invested in developing deep seabed resources that did not contribute to the Prepcom negotiations—even as an observer country. The other two major supporters of the United States position, the Federal Republic of Germany and the United Kingdom, participated as observers. *The United States and the 1982 Law of the Sea Convention: A Synopsis of the Status of the Treaty in 1987*, OCEAN POL'Y NEWS, Oct. 1987, at 1, 4 (Council on Ocean Law).

26. This conclusion should not be altered by the policy debate in the limited context of the proposal by the Panel on the Law of Ocean Uses, which generally urged the United States to accept and utilize part XV in "disputes regarding the interpretation and application of the [LOS Convention's] rules affecting navigation, overflight and pollution." Panel on the Law of Ocean Uses, *Statement by Expert Panel: U.S. Policy on the Settlement of Disputes in the Law of the Sea*, 81 A.J.I.L. 438 (1987) [hereinafter *Statement by Expert Panel*]. For critical responses to the Panel's proposal that the United States accept part XV, see Letter to the Editor in Chief from Luke W. Finlay, 81 A.J.I.L. 927 (1987); Letter to the Editor in Chief from Barbara Kwiatkowska, Assoc. Director, Netherlands Institute for the Law of the Sea, 82 A.J.I.L. 332 (1988). The criticisms of the Panel's proposal do not appear insurmountable; in fact, Professor Kwiatkowska readily affirms that by comparison with other debatable issues, marine pollution issues are "specifically" subject to part XV. *Id.* at 333.

dency thereby exists to ignore the laudable precedents established by part XV. It should be emphasized that, with perhaps the debatable exception of part XI, substantial authority exists that the LOS Convention constitutes customary international law.[27] Accordingly, the international legal community should feel confident in referencing and utilizing the dispute settlement provisions of the LOS Convention.

The peaceful resolution of disputes becomes increasingly important as conflicts continue to expand into the international realm. Effective "means for settling international disputes [have become] indispensable for the maintenance of international peace and security."[28] The Charter of the United Nations specifically imposes an obligation on its Member States to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or ar-

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27. For an analysis of part XV and concomitant provisions as constituting customary international law, see Sohn, *Dispute Settlement*, in THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY: OPPORTUNITIES AND COSTS 126, 129-31 (1983). For analyses of the LOS Convention as constituting customary international law, see *Sea Crisis*, *supra* note 2; Sohn, *The Law Of The Sea: Customary International Law Developments*, 34 AM. U.L. REV. 271 (1985) [hereinafter *Customary International Law*]. *See also* Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073 (1986) [hereinafter *International Rules*]; Sohn, *Unratified Treaties as a Source of Customary International Law*, in REALISM IN LAW-MAKING 231 (A. Bos & H. Siblesz eds. 1986).

The Group of 77 contends that a country must first become Party to the LOS Convention before it can claim the benefits of the Convention. *See* Koh, *A Constitution for the Oceans*, in UNITED NATIONS, *supra* note 1, at xxxiv (President of UNCLOS III). However, except for the dispute involving part XI on deep seabed mining, the LOS Convention appears to reflect generally pre-existing customary international law. *See Customary International Law*, *supra*, at 280. *See also Sea Crisis*, *supra* note 2, at 237. "[A]ll provisions of the LOS Convention, except for seabed mining, are customary international law." 3 J. KINDT, *supra* note 1, at 1577; Kindt, *Deep Seabed Exploitation*, 4 UCLA J. ENVTL. L. & POL'Y 1, 43 (1984) [hereinafter *Seabed Exploitation*]. "With the exception of the deep seabed mining provisions, the LOS Convention would seem to be 'the best evidence today of customary international law.'" 3 J. KINDT, *supra* note 1, at 1549 (citing and endorsing the position of Professor John Norton Moore); *Seabed Exploitation*, *supra*, at 16.

Regardless of the debate involving part XI or some of its provisions, part XII, which governs marine pollution, definitely reflects pre-existing customary international law. *See, e.g.*, 3 J. KINDT, *supra* note 1, at 1549, 1577. *See generally id.*

For a discussion of whether some other articles not in part XI of the LOS Convention reflect customary international law, see W. Burke, Customary law as reflected in the LOS Convention: A Slippery Formula (July 10, 1987) (draft paper presented at the Annual Meeting of the Law of the Sea Institute, Aug. 3-6, 1987); F. Vicuña, International Ocean Law Developments in the Southeast Pacific: The Case of Chile (paper presented at the Annual Meeting of the Law of the Sea Institute, Aug. 3-6, 1987).

28. Sohn, *supra* note 8, at 155.

rangements, or other peaceful means . . . ."[29] when an international dispute arises.[30] Dispute settlement mechanisms within the international community are crucial to the stability of world peace and security.[31]

In general, the United Nations Charter requires that no specific method of dispute settlement be favored.[32] Nonetheless, the exigencies of international politics suggest that certain elements must be present within any dispute settlement methodology to assuage the needs of the affected parties. Traditionally, these elements have included not only flexibility and free choice in the selection of a method, but also the absence of forced settlements in the final determination of conflicts.[33] If either of these prerequisites is missing, the apparently peaceful resolution of a dispute is often only temporary.[34]

Given the broad international predisposition to engage in disputes and given the stimuli to focus on the peaceful settlement of disputes, the application of these principles in a specific subject area provides a premier illustration of the importance and complexity of dispute settlement in the international realm. Having developed and changed rapidly since the First United Nations Conference on the Law of the Sea concluded in 1958, the law of the sea represents a classic area in which advances in technology and the altered economic positions of states have demanded

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29. U.N. CHARTER, art. 33, para. 1.

30. J. MERRILLS, *supra* note 9, at 1.

31. For examples of regional agreements embodying different mechanisms for the pacific settlement of international disputes, see Diaconu, *Peaceful Settlement of Disputes Between States: History and Prospects*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE, AND THEORY 1095, 1098 (R. Macdonald & D. Johnston eds. 1983). *See also Report of the International Law Commission on the Work of its Fortieth Session*, 43 U.N. GAOR Supp. (No. 10), at 102-03, U.N. Doc. A/43/10 (1988) (example of cooperation clause relating to a waterway).

32. Sohn, *supra* note 8, at 155-56. International scholars and diplomats have traditionally shied away from the use of one method for dispute settlement. The array of disputes and the dichotomies of disputing parties have demanded a multiplicity of resources and alternatives for reaching a solution agreeable to all disputing parties. For an overview of the various mechanisms used to settle international disputes, see Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DISPUTE RESOLUTION 1, 19-26 (1986) [hereinafter *Overview*]. For a discussion of the role of international adjudication in dispute settlement, see Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISPUTE RESOLUTION 131, 133-73 (1987). For analyses of the merits of non-adjudicative methods of dispute settlement, see generally Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1 (1982).

33. *See* Sohn, *supra* note 8, at 157.

34. *Id.* at 157-58.

the formulation of specialized provisions for dispute settlement.[35]

## II. The Examples Provided by Issue Areas in the Law of the Sea

The overall goal of traditional ocean foreign policy consists of the "maintenance of a favorable legal order."[36] Stemming from this overarching purpose are five more specific goals that function as mainstays of the larger policy.[37] These specific goals include: (1) security; (2) management (i.e., avoidance, reduction, and settlement) of conflict; (3) promotion of efficiency and fair access in ocean use; (4) protection of the environment; and (5) promotion of ocean knowledge.[38] Technological developments and a changing international focus have contributed to circumstances suggesting that these goals are not being fully met.[39] Thus, action needs to be taken to enhance the attainment of these goals throughout the global community. The utilization of the dispute settlement mechanisms of the LOS Convention as quasi-boilerplate provisions for multilateral treaties involving environmental issues would do much to further these essential goals for maintaining a favorable legal order.

The need for a model for dispute settlement may be specifically illustrated by reference to developments during the 1980s in international environmental issues. Policies regarding the environmental aspects of transboundary pollution raise the potential for conflicts that could effectively be resolved through the use of a standard mechanism. For example, in the context of the law of the sea or of international environmental law in general, the medium transporting the pollution can be either water (water-borne pollution) or air (air-borne pollution such as acid rain). Either situation can give rise to serious disputes between the states involved. The disputes that have and will continue to develop regarding acid rain issues in particular serve as a prime example where reference to part XV, as a model, would be beneficial.

The development of ocean resources is another area in which part XV provides a helpful example. As part of the realization that the ocean does not possess an unlimited assimilative capacity for pollution,[40] individual states have sought to promulgate standards on various levels to govern

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35. *See generally Sea Crisis*, *supra* note 2, at 237.

36. Moore, *A Foreign Policy for the Oceans*, in The Oceans and U.S. Foreign Policy 1, 2 (Center for Oceans Law & Pol'y, Apr. 1978).

37. *Id.*

38. *Id.*

39. *See generally* Kindt, *supra* note 2.

40. Kindt, *supra* note 15, at 584, 602-04.

developmental activities in the ocean. Historically, concern has arisen over the environmental implications of developing ocean resources, particularly the resources of the continental shelf areas and the deep ocean; environmental groups have called for international standards for conserving the environment.[41] In addition to the well-publicized concerns involving the offshore development of oil and gas resources, concerns have manifested regarding the potential development of the lesser-known, but potentially valuable, resources of the deep seabed areas. Prior to 1980, however, no formal regulatory standards existed for deep seabed mining. An overview of some of these issues demonstrates the historical context in which part XV was negotiated and highlights the traditional necessity to prevent a twentieth century race for the resources of the ocean (and the inevitable disputes that would stem from such a race)—similar to the nineteenth century race for the resources of the continents that resulted in colonial conflicts between the major powers.

The traditional focus of developing deep seabed resources was usually on the deep seabed mining of manganese nodules. As in any developmental enterprise, the recovery of these nodules had the potential for harming the marine environment.[42] The basic methods of manganese nodule mining include: (1) airlift pumping; (2) hydraulic or hydrolift dredging; and (3) continuous line bucket dredging. Although some have argued that these procedures cause minimal harm to the environmental balance in the deep ocean, environmental assessments during the 1980s raised concerns over the consequences of these activities even within the confines of mere "exploration."[43] In addition to the impact caused by mining, the processing of the manganese nodules on board recovery ships presented potential environmental problems due to the discarding of trace metals[44] and highly pollutive processing chemicals.[45] Overall, the potential for disruption of the environmental balance created a situation in which a variety of conservation groups begged for action.

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41. *See, e.g.*, Note, *A New Combination to Davy Jones' Locker: Melee Over Marine Minerals*, 9 LOY. U. CHI. L.J. 935, 952-54 (1978).

42. Frank, *Environmental Aspects of Deepsea Mining*, 15 VA. J. INT'L L. 815, 818 (1975). Environmentalists were concerned, for example, that the discharge of red clay sediments during the recovery process could alter the nature of the euphotic zone in the region, and that the blending of benthic ocean water and sediment could alter the organic makeup of ocean areas. *Id.*

43. *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN. [N.O.A.A.], U.S. DEP'T COM., DEEP SEABED MINING 30 (Jan. 1989) (Updated Environmental Assessment). The report cited basket sampling as the "worst case" potential for environmental impact. *Id.*

44. Frank, *supra* note 42, at 819.

45. *Id.*

Though these environmental problems were generally associated only with deep seabed mining issues, they nevertheless had international implications. First, the fact that less technical knowledge existed of conserving the deep seabed than of utilizing and developing it[46] suggested that actions by well-meaning organizations could be the product of misinformation. Second, it appeared that several institutional and political considerations could negate or reduce support for effective environmental regulation[47] and that the presence of multinational representatives could allow the potential conflict of interests within an international regulatory organization to dictate that organization's actions.[48] It became obvious that the development of a deep seabed mining regime required the maintenance of a firm legal order that included stability of expectations based on the establishment of firm economic and environmental guidelines. Accordingly, the LOS Convention included not only standard provisions for the pacific settlement of disputes involving general law of the sea issues, but also specialized provisions for resolving disputes in particularly sensitive issue areas, such as deep seabed mining.[49]

During the mid-1980s it became apparent that several of the original motivating factors for implementing portions of the LOS Convention were perhaps dissipating and that certain aspects of the Convention were stalled, including the development of environmental standards relating to deep seabed mining.[50] Therefore, the United States and other countries began to develop unilateral standards. Although the United States no longer stood as the undisputed leader in deep seabed mining technology, the United States attempted to harness the potential adverse effects of deep seabed mining and became a leader in concomitant environmental regulation. Pursuant to the Deep Seabed Hard Minerals Resources Act of 1980 (Seabed Resources Act),[51] the United States developed the environmental principle of establishing "stable reference areas" (SRAs)[52] to monitor environmental impacts once United States deep seabed mining

46. Nyhart, *The Interplay of Law and Technology in Deep Seabed Mining Issues*, 15 VA. J. INT'L L. 827, 857 (1975).

47. *Id.*

48. *Id.*

49. LOS Convention, *supra* note 1, arts. 186-91.

50. The collapse of the market for manganese nodules has dissipated the economic force driving the Group of 77, which maintained a monopoly over manganese nodules, to implement the Convention's deep seabed mining provisions. *See, e.g.*, Welling, *Mining of the Deep Seabed in the Year 2010*, 45 LA. L. REV. 1249, 1258-59 (1985).

51. 30 U.S.C. §§ 1401-1473 (1982 & Supp. V 1987).

52. 30 U.S.C. § 1419(f); *see* BOARD ON OCEAN SCIENCE AND POL'Y, NAT'L RESEARCH COUNCIL, DEEP SEABED STABLE REFERENCE AREAS (1984).

actually commenced. The National Oceanic and Atmospheric Administration (N.O.A.A.), as administrator of the provisions, recognized that close environmental monitoring was necessary.[53] Concerns stemming from the lack of available scientific data prompted the N.O.A.A. to promulgate ten environmental factors to gauge "significant adverse environmental effect."[54]

The N.O.A.A. also elaborated on the concept of stable reference areas[55] to incorporate impact reference areas (IRAs) and preservational

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53. *See* Deep Seabed Mining; Proposed Regulations for Commercial Recovery and Revision of Regulations for Exploration, 51 Fed. Reg. 26,794, 26,799-800 (1986) (proposed July 25, 1986).

54. Deep Seabed Mining; Regulations for Commercial Recovery and Revision of Regulations for Exploration, 52 Fed. Reg. 34,748, 34,749 (1987) (supplemental proposed rule of Sept. 14, 1987). The applicant's degree of compliance with the following criteria was designed to aid the N.O.A.A. in making decisions throughout the permit granting process:

(1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;

(2) The potential transport of such pollutants by biological, physical or chemical processes;

(3) The composition and vulnerability of the biological communities which may be exposed to such pollutants including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act or the presence of those species critical to the structure or function of the ecosystem such as those important for the food chain;

(4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism;

(5) The existence of special aquatic sites including but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;

(6) The potential impacts on human health through direct and indirect pathways;

(7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;

(8) Any applicable requirements of an approved Coastal Zone Management plan;

(9) Such other factors relating to the effects of the discharge as may be appropriate; and

(10) Marine water quality criteria developed pursuant to section 304(a)(1) of the Clean Water Act.

*Id.* These factors were geared both to assess the grant of an initial permit and to monitor the project for "significant adverse environmental effect." *Id.*

55. 30 U.S.C. § 1419(f). *See also* Deep Seabed Mining; Final Regulations for Com-

reference areas (PRAs).[56] Stable reference areas were to function as a reference zone "for purposes of resource evaluation and environmental assessment of deep seabed mining in which no mining will occur."[57] IRAs were zones located within permit areas to be used to evaluate the precise benthic impacts as well as the general environmental impacts of deep seabed mining while the mining was in progress.[58] In contrast, PRAs were to remain as "non-mineable" reference areas located specifically within the permit zone. As the overall goal was to allow a comparison of relatively undisturbed areas with mined areas, the IRAs and PRAs were to be designated prior to the issuance of mining permits.[59]

Of course, this unilateral legislation that theoretically would also apply to territory not strictly within the maritime boundaries of the United States further enhanced the possibilities for international disputes. Being technically outside the treaty system of the LOS Convention, the United States was naturally faced with more impetus to avoid potential disputes. Therefore, the United States sought to remedy this problem by anticipating the possibilities of disputes with specific countries and then entering into bilateral arrangements to accommodate those potential disputes.[60]

## III. The Dispute Settlement Provisions of the LOS Convention

In contrast, the LOS Convention is a well-recognized and widely acceptable mechanism for settling disputes between a multitude of countries. The very size and scope of the Convention argues its authoritativeness in this regard. It stands as the culmination of a vast international effort regarding the law of the sea. As the product of an eleven-year negotiating process, this extensive treaty document includes 307 articles and eleven annexes.[61] In fact, UNCLOS III constituted the largest convocation of nations in history that had as its premise the drafting of an international treaty.[62] The resulting document reflects the foresight of its authors as illustrated by the stated purposes and goals of the diplomats

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mercial Recovery and Revision of Regulations for Exploration, 54 Fed. Reg. 514, 522 (1989) (agency discussion of final regulation to be codified at 15 C.F.R. §§ 970, 971).

56. 52 Fed. Reg. 34,750.

57. 30 U.S.C. § 1419(f)(4).

58. Kindt, *supra* note 2, at 133.

59. 52 Fed. Reg. 34,750; 54 Fed. Reg. 522.

60. *See, e.g., supra* note 25.

61. J. Merrills, *supra* note 9, at 117. *See also id.* at 117-40 (the LOS Convention's dispute settlement provisions). *See generally supra* notes 1-6 and accompanying text.

62. A. Adede, *supra* note 3, at 3.

in the drafting committees, coupled with the compromises and negotiations that comprised the amendment process. The authors realized that a definite yet agreeable system was necessary; if no mechanism existed to offer a "balanced protection of the competing rights and interests" of all of the countries involved, the effort would be moot.[63] The result was a system of international dispute resolution that, although binding upon the parties, exhibited none of the coercive Austinian problem areas that could impede permanent dispute resolution.[64] Since the substantive parts of the Convention are the result of "painstakingly" negotiated compromises,[65] the final rules have been widely accepted among states belonging to various regional groups and representing different political, economic, and ideological approaches. Of course, this type of "general acceptance" constitutes one of the major attributes of customary international law[66] and consequently serves to further the acceptance of part XV as binding international settlement procedure.

A recurrent theme throughout the drafting sessions reflected a common view of the need consistently to maintain "flexibility" in the choice of the dispute settlement mechanisms to be employed by the parties to a dispute,[67] while preemptively providing for an effective method of settling future disputes involving questions of interpretation.[68] The need for flexibility arose from the many variables inherent in dispute settlement. Variables that may differ greatly from one dispute to another include: (1) the subject matter and character of the disputes; (2) the nature of the relations between or among the parties; (3) the importance of the dispute to the parties; (4) the effect of the dispute on other members of the international community; and (5) the types of relief sought.[69] Accordingly, the drafters recognized the need for a dispute settlement system that could effectively adapt to such variations. Adequate methods of providing for interpretation and dispute settlement were deemed necessary to protect the sovereign equality of states without subjecting the Convention to destabilizing unilateral interpretation.[70] Within this overarching premise,

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63. *Id.* at 9. The drafters allowed for both adjudicative and nonadjudicative procedures because they realized the merits of the various types of dispute settlement mechanisms and the variety of disputes that would arise. *Id.*

64. *See generally* Sohn, *supra* note 8, at 157-58.

65. A. ADEDE, *supra* note 3, at 241.

66. *See generally International Rules, supra* note 27, at 1073.

67. A. ADEDE, *supra* note 3, at 43.

68. *See Peaceful Settlement, supra* note 2, at 195. *See also* Sohn, *supra* note 8, at 158.

69. *Overview, supra* note 32, at 13-15.

70. *Peaceful Settlement, supra* note 2, at 195. *See also* A. ADEDE, *supra* note 3, at

members of the initial Drafting Committee, known as the Working Group, stated four "fundamental points" that facilitated their efforts. These fundamental themes, as the foundations of the dispute settlement system, were introduced upon the presentation of the initial draft and were as follows:

1. An effective method for the settlement of disputes on the basis of law [was] needed in order to avoid political and economic pressures. Law [constituted] the more appropriate method for regulating international relations and for preserving the equality of States, regardless of their political, economic and military might.
2. It [was] desirable to achieve the greatest possible uniformity in the interpretation of the [LOS] Convention.
3. In view of the advantages of obligatory settlement of disputes, any exceptions [were] to be determined with great care.
4. The system of dispute settlement must constitute an integral part of the [LOS] Convention.[71]

Although disputes between divergent groups altered these principles to some degree, they survived the amendment process relatively unscathed and were reflected in the final document.[72]

The negotiation and compromise processes of UNCLOS III were unique and deserve mention. The bulk of the substantive discussions and compromises of the LOS Convention were conducted informally by the Conference Committees and special Negotiating Groups; no formal records of the meetings were kept or released.[73] Many believed that this informal, undocumented approach encouraged genuine participatory effort among the delegates and resulted in a document that was the product of true problem-solving.[74] The document might be characterized, therefore, as a reflection of the true wishes of the parties. This attitude of good-faith compromise was particularly evident in the drafting history of article 287. In order to resolve disagreement between the negotiating states as to the necessary number of compulsory settlement forums, and to accommodate differing state preference among these forums, article

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71. A. ADEDE, *supra* note 3, at 39. These "four fundamental points" were put forth by the Ambassador from El Salvador, R. Galindo Pohl. *Id. See also* Sohn, *supra* note 8, at 158.

72. *See generally* A. ADEDE, *supra* note 3.

73. *Id.* at 4.

74. *Id.* It was believed that "[t]his procedure . . . ha[d] the advantage of encouraging the negotiators to focus attention more closely to the problem under discussion and to take the floor only in the genuine effort to contribute towards the solution of that problem . . . ." *Id.*

287 adopted the so-called Montreaux Formula.[75] This ingenious compromise gives each State Party the right to choose not only one of four forums to which it would submit for compulsory adjudication, but also the forum or forums it finds unacceptable.[76]

Part XV of the LOS Convention provides for dispute settlement under the Convention as a whole and is divided into three sections: (1) general provisions; (2) compulsory procedures entailing binding decisions; and (3) limitations and exceptions to compulsory procedures.[77] Of course, each section represents a compromise reached during the negotiation process. Section 1 contains seven articles and provides for the noncompulsory procedures that are part of the system,[78] making extensive use of the peaceful dispute settlement principles of article 33 of the United Nations Charter.[79] Although these procedures are theoretically noncompulsory, the provisions contain a binding obligation to settle peacefully all disputes in accord with the prescriptions of the United Nations Charter. The mechanisms of the United Nations Charter are incorporated into the LOS Convention via article 279, the "Obligation to settle disputes by peaceful means," while article 283, the "Obligation to exchange views," requires parties to meet and confer regarding peaceful settlement mechanisms and the manner of implementing the settlement. Pursuant to article 280, disputing parties are explicitly given the freedom to choose by mutual agreement their means of dispute settlement, but under article 282 the parties are discouraged from using the provisions of section 1 when outside agreements made by the parties provide for a binding decision. This injunction allows the parties to choose initially a method of

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75. *Basic Structure*, *supra* note 9, at 131.

76. *Id.* at 131-32.

77. *See generally* A. ADEDE, *supra* note 3, at 248-50 (for a brief discussion of the structure of part XV); LOS Convention, *supra* note 1, arts. 279-99 (settlement of disputes).

78. *See* LOS Convention, *supra* note 1, arts. 279-85 (General provisions). Section 1 provides two important initial obligations: the obligation to settle disputes peacefully and the obligation to "proceed expeditiously to an exchange of views." *Id.* art. 283. The safety valve of part XV of the LOS Convention is found in article 281, the "Procedure where no settlement has been reached by the parties." This provision invokes part XV jurisdiction when no settlement has been reached by the mutually agreed upon method and when the agreement of the parties has not prohibited the utilization of any further procedure. The final provision of section 1, article 285, applies the foregoing provisions to disputes arising under part XI, section 5, of the LOS Convention, relating to deep seabed exploitation. LOS Convention, *supra* note 1, arts. 279-85 & annex V (General provisions; Conciliation).

79. U.N. CHARTER, art. 33, para. 1.

dispute settlement that will best serve their needs,[80] or utilize special or regional agreements or executed instruments in force outside of the LOS system.[81] Conciliation procedures are also subject to mutual agreement and are considered terminated if the invitations to conciliate, including the LOS Convention's own conciliation procedures under annex V, are rejected or if the parties do not otherwise agree on the conciliation procedure. Article 284, "Conciliation," stipulates that once initiated and agreed upon, the mutually agreed upon conciliation procedures are the only ones to be given effect. Thus, freedom of choice is codified into a binding system.[82]

Section 2 of part XV provides for compulsory procedures necessitating binding decisions when the voluntary settlement provisions of section 1 do not lead to a binding decision, or when the parties fail to resolve the dispute by negotiations or conciliation and cannot agree upon another means of settlement.[83] Section 2, containing eleven articles, is more extensive than section 1 and although it is compulsory, this section also provides options for different forums for the settlement of disputes concerning interpretation or application of the Convention.[84] These compulsory provisions are the first of their kind; they were premised on the notion that these disputes require a forum for compromising and encouraging pacific settlement.[85] The drafters at UNCLOS III recognized early

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80. LOS Convention, *supra* note 1, arts. 279-83.

81. *Id.*; *Peaceful Settlement*, *supra* note 2, at 196-97.

82. A. ADEDE, *supra* note 3, at 248.

83. *Peaceful Settlement*, *supra* note 2, at 196.

84. *See* LOS Convention, *supra* note 1, arts. 286-96 (Compulsory procedures entailing binding decisions). The provisions of section 2 are broad in nature, yet specific in detail. They provide not only for the choice of procedure (art. 287), the determination of jurisdiction (art. 288), and the use of experts for disputes involving scientific or technical matters (art. 289), but also the justiciability of the claim (art. 294), the exhaustion of other potential remedies (art. 295), and the res judicata nature of decisions (art. 296). Due to the high probability of irreparable or egregious harm pending a final decision, a type of injunctive relief is made possible under article 290, and affirmative duties to utilize expeditious mechanisms for releasing vessels and crews are imposed upon disputing parties pursuant to article 292. Of course, all of the dispute settlement procedures in part XV are available to States Party to the Convention, but there is some ambiguity over their availability to states that are not Party. LOS Convention, *supra* note 1, arts. 286-96.

85. 4 J. KINDT, *supra* note 1, at 2047. The advent of compulsory judicial settlement is unique in the international sphere of dispute resolution. The acceptance of these provisions was attributed, in part, to the fact that the compulsory procedures are limited to the interpretation of the written LOS Convention per se. Furthermore, the coastal states reserved much authority to maintain their own coastal regimes. Regulation of international seabed areas was vested in a third party agency (the International Sea-Bed Au-

that if the parties to the Convention were allowed to interpret its provisions unilaterally, the text would lack stability and certainty.[86] Section 2 provides an effective solution to this problem of sovereign equality of interpretation by providing a specific method of settling future interpretation disputes.

Finally, section 3 places limitations on section 2.[87] Section 3 reflects the view that while many potential disputes might be subject to obligatory settlement, other disputes demand a fully nonadjudicative dispute settlement mechanism.[88] These provisions substantiated the crux of the compromise within the process. While some delegates favored a strong compulsory method of dispute settlement, others believed a limitation on forced settlement was necessary in certain circumstances. Fundamentally, the exclusions reflect a recognition of the delicate issues involving military activity and territorial sovereignty, as well as the unique circumstances of the developing states (the Group of 77).[89] The exclusions of section 3 were "an attempt to balance the desire to be a judge in one's own cause against the principle of binding third party settlement."[90] In sum, part XV was a concerted attempt to ensure that international disputes in the law of the sea are removed from the possibility of settlement by the use of force.[91]

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thority) rather than subjected to the full discretion of an international court or tribunal. Jaenicke, *supra* note 2, at 816. This compulsory system could provide for increased "self-restraint" and caution in those international relations where the potential for disputes is greatest. *See Statement by Expert Panel*, *supra* note 26, at 440.

86. *Peaceful Settlement*, *supra* note 2, at 195. "It is one of the prerogatives of sovereign equality that in the absence of an agreement on impartial third-party adjudication, the view of one state with respect to the interpretation of the Convention cannot prevail over the views of other member states." *Id.*

87. *See* LOS Convention, *supra* note 1, arts. 297-99 (Limitations and exceptions to applicability of section 2). Section 3 provides both limitations and options to disputing parties who either do not come under the jurisdiction of section 2 or choose not to follow section 2 procedures. For a detailed enumeration of the limitations and exceptions controlling part XV, see LOS Convention, *supra* note 1, arts. 297-99.

88. J. MERRILLS, *supra* note 9, at 121.

89. *Id.* at 122-23.

90. *Id.* at 122.

91. A. ADEDE, *supra* note 3, at 9. It has been argued that the compulsory dispute settlement of claims involving the United States will be beneficial to a wide range of party interests. This procedure will theoretically discourage the unlawful detention of ships and aircraft, expedite releases, and protect workers against abuse. *Statement by Expert Panel*, *supra* note 26, at 440-41. Accordingly, this type of dispute settlement augments United States concerns for human rights, because international tribunals will be urged to interpret the "recognized rights of the accused" in subsequent proceedings in the disputed matter. *See, e.g.*, LOS Convention, *supra* note 1, art. 230, paras. 1, 3. *See*

## IV. Conclusion

In the future, part XV of the United Nations Convention on the Law of the Sea should serve as a model for dispute settlement mechanisms in various multilateral treaties, especially treaties involving international environmental issues. Some type of a generalized code on dispute settlement is necessary, and in the absence of such a code, part XV should serve as an authoritative reference to guide future treaty negotiations.

The dispute settlement mechanisms of part XV are particularly relevant to multilateral treaties involving marine pollution. The varying sources of marine pollution, the different methods by which it is transported, and the importance placed on activities that cause such pollution, all indicate the potential for disputes and the need for a system of dispute resolution that is both flexible and compulsory. The dispute settlement provisions of the LOS Convention provide these essential elements and should be used by states as an authoritative reference to guide future negotiations. Part XV has established the standard and it should be utilized.

Due to the acceptance of the dispute settlement provisions by all of the major international interest blocs, including both the Soviet bloc and the Western bloc, the LOS Convention offers a convenient starting point for international negotiations. The LOS Convention was the result of the largest treaty-making body ever convened, and the final document constitutes an outstanding compromise of national desires for the sake of international peace. Yet the flexibility of the provisions guarantees that each country retains a large degree of individual choice in determining the specific method of dispute settlement to which it will accede.

This combination of compromise and choice makes part XV an acceptable method of dispute settlement even for non-parties to the Convention, such as the United States, and thus renders part XV the most practicable choice to serve as the model for a general code of international dispute settlement. Regardless of the time frame during which part XV becomes widely utilized and referenced by the international legal community, future international disputes will necessarily be decided within the penumbra of the dispute settlement mechanisms of the LOS Convention. Accordingly, the international legal community should promote the utilization of this dispute settlement model to facilitate the maintenance of a favorable legal order, and to ensure adherence to the

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*generally* Sohn, *International Law of the Sea and Human Rights Issues*, in The Law of the Sea: What Lies Ahead? 51 (T. Clingan ed. 1988) (discussion of the effect of the LOS Convention on international human rights issues).

United Nations Charter's requirement of dispute settlement by peaceful means.