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# THE LAW OF THE SEA CONFERENCE: DISPUTE SETTLEMENT IN PERSPECTIVE\*

*John King Gamble, Jr.\*\**

## I. INTRODUCTION

On March 15, 1976, the Third United Nations Law of the Sea Conference reconvened in New York City. The task of this Conference, drafting a new and comprehensive law of the sea treaty, is enormous. At the very least the new treaty will modify many of the traditional patterns for use and control of hydrospace. There is no doubt that coastal states will achieve the right to exercise control over all resources within 200 nautical miles of their coasts. If this contingency is not implemented by treaty, then it will be reached by unilateral claims to these zones. Agreeing on treaty provisions has been difficult because the issues are of immense value in economic, political, strategic, and psychological terms. Because the issues are of such importance, dispute settlement has been cast as an integral part of any new law of the sea convention.

The dispute settlement issue will be examined in three ways. First, assertions about the importance of dispute settlement and its relationship to the mission of the Conference will be summarized. Secondly, specific proposals for dispute settlement provisions will be discussed. Thirdly, the situation at the Law of the Sea Conference will be compared with other dispute settlement situations.

## II. PERCEIVED IMPORTANCE OF DISPUTE SETTLEMENT

The methods established for dispute settlement are merely the procedures by which the application of substantive treaty articles will be improved. It is, however, very important to address the issue of how dispute settlement relates to the overall mission of the United Nations Law of the Sea Conference. The consensus among

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\* The views expressed herein are those of the author and are not reflective of the Law of the Sea Institute which takes no policy positions.

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experts, which seems to be nearly unanimous, is that agreement on binding dispute settlement methods is critical to the success of the treaty.

Adede stated that creating an effective system of dispute settlement "should be regarded as one of the pillars of the new world order in the ocean space."<sup>1</sup> In a more specific vein, Sohn put it this way:

It is important to achieve a large measure of uniformity in the interpretation and application of the new Convention. Otherwise, the compromise arrived at with such great difficulty will quickly disintegrate, and the efforts of many years of negotiation would come to naught.<sup>2</sup>

Stevenson and Oxman, official representatives of the United States, noted that "there is simply too much room in the treaty for misunderstanding, abuse of power, and interference with rights on the basis of unilateral interpretation."<sup>3</sup> Burke went further, noting that states may be more willing "to accept certain ambiguity and imprecision if they are confident . . ." of third party dispute settlement.<sup>4</sup>

Most of these statements are somewhat disconcerting. What are the bases of the feeling that compulsory dispute settlement is essential to the substantive provisions? Underlying the statements about dispute settlement provisions may be the tacit assumption that widespread agreement will be reached. It is improbable that such agreement between the maritime powers and the developing states will be forthcoming in this decade. Thus, in one sense, raising the dispute settlement issue may be premature. Even if one takes the very optimistic view that some kind of a treaty will be agreed upon in the next year or two, there will be many provisions to which many states would prefer that no third party dispute settlement procedure be applied. If one of the purposes of third party dispute settlement is to provide clarity and resolution about

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1. Adede, *Settlement of Disputes Arising Under the Law of the Sea Convention*, 69 AM. J. INT'L L. 798 (1975).

2. Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 516 (1975).

3. Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea*, 69 AM. J. INT'L L. 795 (1975); See generally, J.N. Moore in F. CHRISTY, T. CLINGAN, J. GAMBLE, H. KNIGHT, & E. MILES, *LAW OF THE SEA: CARACAS AND BEYOND* 14 (1975) [hereinafter cited as CHRISTY].

4. W. BURKE, *NATIONAL AND INTERNATIONAL LAW ENFORCEMENT IN OCEAN* 134 (1975).

the intent of the treaty, it can be argued that certain states want neither resolution nor clarity. It is not obvious that dispute settlement will be necessary or even helpful in putting together an effective treaty package. It is uncertain that strong dispute settlement provisions will assure an expeditious and efficient implementation of the treaty.

### III. CURRENT FORMULATIONS ABOUT DISPUTE SETTLEMENT PROVISIONS

Considerable work has already been devoted to the discussion and drafting of dispute settlement provisions. However, the magnitude and intensity of this work seems premature since many substantive questions remain unanswered. Nevertheless, it is instructive to look at the thinking that has developed thus far.

#### A. *The Working Paper on Settlement of Disputes*

The most thorough attempt to come to grips with the issues of dispute settlement is seen in the "Working Paper on Settlement of Disputes" presented at the end of the Geneva Session of the Law of the Sea Conference.<sup>5</sup> In a letter of transmittal sent to the President of the Conference, the chairmen of the Working Group gave some idea of the nature and complexity of the problems encountered. The severity of the disagreement is seen in the various proposals on the scope of the dispute settlement provisions:

Some participants considered that a system of compulsory settlement should not be applied to disputes relating to maritime zones within national jurisdiction. Other participants disagreed with this point of view and thought that exceptions should be kept to a minimum.<sup>6</sup>

Since many of the most important disputes will arise over the nature and extent of states' powers within national maritime zones, it is clear that there was disagreement on very fundamental issues.

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5. Third United Nations Conference on the Law of the Sea, U.N. Doc. SDGp/2nd Session/No. 1/Rev. 5, May 1, 1975 [hereinafter cited as WORKING PAPER].

6. Letter to H.E. Mr. H. Shirley Amerasinghe from the chairmen of the Working Group, A.O. Adede, R. Galindo Pohl, and R.L. Harry (dated May 1, 1975).

## B. *Issues Raised by the Working Paper*

1. *Binding Effect*—The first four articles in the Working Paper provide nothing very surprising in multilateral treaty-making. The contracting parties are obliged to settle disputes peacefully, as indicated by article 33 of the United Nations Charter.<sup>7</sup> The parties have the right to substitute any peaceful means of their choice for provisions appearing in the Convention.<sup>8</sup> Furthermore, if a regional or special agreement is already in place between two disputants, they have the right to apply whatever dispute settlement procedure is specified in that agreement.<sup>9</sup> Nothing in these introductory articles is unusual or, for that matter, any guarantee that peaceful means will be used to settle disputes. Although the objectives are noble, these provisions provide little enforcement leverage. Since virtually all affected states are already bound by the United Nations Charter, little is added by a reaffirmation of similar principles.

Article 5 is the first place in the Working Paper that seems to place a degree of obligation on disputants:

If the Contracting Parties which are parties to a dispute have agreed to settle a dispute by a peaceful means of their own choice and have agreed on a time limit for such proceedings, the procedure specified in this Chapter shall apply only after the expiration of that time limit, provided that no settlement has been reached and the agreement between the parties does not preclude any further procedure.<sup>10</sup>

Although this article gives parties flexibility to choose their own means of dispute settlement, it also restricts disputants in an important procedural way, *i.e.* by the imposition of a time limit. Article 7 is significant because it shows the importance afforded conciliation in the overall scheme of dispute settlement envisioned for the law of the sea convention.<sup>11</sup> According to Adede this was “a deliberate attempt to encourage states to settle their disputes through such informal procedures instead of relying always upon costly judicial settlement.”<sup>12</sup>

The first seven articles illustrate a general consensus that states should have maximum latitude and flexibility to find their own

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7. WORKING PAPER art. 1.

8. *Id.* art. 2.

9. *Id.* art. 3.

10. *Id.* art. 5.

11. *Id.* art. 7.

12. Adede, *supra* note 1, at 804.

solution to disputes, provided the solutions are expeditious and peaceful. This approach is to be expected because informal methods of dispute settlement are less costly in both political and economic terms. In addition, states will be less likely to ratify a convention that seems to resort to compulsory methods of dispute settlement before these methods are absolutely necessary.

Beginning with article 9, the Working Paper addresses the contingency where disputants are unable to settle a dispute as provided in articles 1-7. Article 9 spells out the broad range of fora that is available:

1. In the disputes relating to the interpretation or application of this Convention, the following tribunals shall have jurisdiction to the extent and in the manner provided for in this Chapter:
  - a. An arbitral tribunal constituted in accordance with Annex IB.
  - b. The Law of the Sea Tribunal constituted in accordance with Annex IC.
  - c. The International Court of Justice.
2. The jurisdiction of these tribunals with respect to a Contracting Party shall be determined in accordance with the following provisions:
  - a. A Contracting Party, when ratifying this Convention . . . shall make a declaration that it accepts with respect to decisions to be made in accordance with Article 10 of this Chapter the jurisdiction of an arbitral tribunal, or the Law of the Sea Tribunal or the International Court of Justice, or any two or three of them.
  - b. If a Contracting Party has not made such a declaration, it shall be subject to the jurisdiction of [an arbitral tribunal] [the Law of the Sea Tribunal]
  - . . . .
  - d. Unless the parties agree otherwise, any case against a Contracting Party can be submitted only to the tribunal the jurisdiction of which has been accepted by that Party at the time the proceedings are being instituted.<sup>13</sup>

This article is a careful attempt to balance the potentially conflicting dictates of compulsory settlement and flexibility. In a sense this has been achieved, but at the cost of simplicity. Article 10 explains and clarifies the use of the tribunals enumerated in arti-

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13. WORKING PAPER art. 9.

cle 9.<sup>14</sup> The article permits settlement of disputes along functional lines.<sup>15</sup>

Article 14 is the first of several attempts to come to grips with the problem of states disagreeing about the application of the dispute settlement provisions to areas of the oceans under national jurisdiction:

1. In the case of a dispute between two or more Contracting Parties relating to the exercise by a coastal State of its enforcement jurisdiction in accordance with this Convention, or relating to its exercise of jurisdiction over resources in the economic zone, a Contracting Party shall not be entitled to submit a dispute to the procedure specified in Articles 9 and 10 of this Chapter, if local remedies have not been exhausted as required by international law.<sup>16</sup>

This is an attempt to guard against abuse of the dispute settlement provisions and, hopefully, to reassure states that matters they are settling expeditiously will not be taken to an outside tribunal. It is, however, difficult to reconcile the desire of states to maintain certain things within the realm of domestic jurisdiction with the possibility that domestic jurisdiction could be defined so broadly to preclude any role for compulsory third party dispute settlement.<sup>17</sup>

2. *Choice of Law*—A fundamental issue concerning any dispute settlement tribunal is what law will be applied. Many states feel that the body of international law developed over the last several hundred years is inapplicable to the current world situation. States may feel that this law is “obsolete or grossly unjust”<sup>18</sup> or that it is simply too ambiguous and uncertain on a number of subjects.<sup>19</sup> One would expect some polarization on this issue with developing states favoring more reliance on provisions in the new law of the sea treaty and developed states preferring greater attention to previous conventions and customary law. Article 16 represents somewhat of a compromise on the subject:

1. In any dispute submitted to the tribunal having jurisdiction under Articles 9 and 10 of this Chapter, the tribunal shall apply the law of this Convention and any other applicable law.

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14. *Id.* art. 10.

15. For a full discussion see Adede, *supra* note 1, at 808.

16. WORKING PAPER art. 14.

17. Adede, *supra* note 1, at 816.

18. J. STONE, *THE INTERNATIONAL COURT AND WORLD CRISIS* 40 (1962).

19. H. HART, *THE CONCEPT OF LAW* 130 (1961).

2. In any such dispute the tribunal shall ensure that the rule of law is observed in the interpretation and application of this Convention.
3. The provisions of this Chapter shall not prejudice the right of the parties to the dispute to agree that the dispute be settled *ex aequo et bono*.<sup>20</sup>

The article makes a minor concession to the "conservative" states by allowing the use of "other applicable law," but it would seem that precedence is given to the convention itself. This is significant since the treaty will contain pronouncements on most aspects of the law of the sea, thus limiting the need to search for "other applicable law."

3. *Reservations*—An important element of dispute settlement provisions, as well as the substantive treaty articles, is the degree and type of reservations to these articles that will be permitted. Knight stated that reservations are "exceedingly likely" on the issue of compulsory settlement of disputes.<sup>21</sup> It is also likely that a complete prohibition of reservations to dispute settlement articles would reduce the number of parties to the treaty.<sup>22</sup> But reservations can emasculate compulsory dispute settlement. This creates a dilemma, one especially hard to reconcile with the statements of many leaders that compulsory dispute settlement is vital to a new law of the sea treaty. Sohn noted that the Working Group seemed to prefer a middle ground where "specified exceptions to be enumerated exhaustively" will be permitted.<sup>23</sup> It is interesting that reservations to dispute settlement provisions of treaties are rather rare. Reithel found that only two per cent of the treaties containing dispute settlement clauses had any reservations to those clauses.<sup>24</sup>

Article 17 of the Working Paper addresses the reservations problem in two distinct ways:

1. When ratifying this Convention . . . a State may declare that, with respect to any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under this Convention, it limits its acceptance of some of the dispute settlement procedures specified

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20. WORKING PAPER art. 16.

21. H.G. Knight, *The Potential Use of Reservations to International Agreements Produced by the Third United Nations Conference on the Law of the Sea*, in AMERICAN SOCIETY OF INTERNATIONAL LAW, POLICY ISSUES IN OCEAN LAW 18 (1975).

22. *Id.* at 19.

23. Sohn, *supra* note 2, at 514.

24. C. Reithel, *Dispute Settlement in Treaties: A Quantitative Analysis*, 128 (Unpublished dissertation, Univ. of Washington, 1972).



in this Convention to those situations in which it is claimed that a coastal State has violated its obligations under this Convention by:

- (a) interfering with the freedoms of navigation or overflight, or of the laying of submarine cables or pipelines, or related rights and duties of other States;
- (b) failing to have due regard to other rights and duties of other States under this Convention;
- (c) not applying international standards or criteria established by this Convention or in accordance therewith; or
- (d) abusing or misusing the rights conferred upon it by this Convention . . . to the disadvantage of another Contracting Party.

. . . .

3. Whether or not it has made a declaration under paragraph 1 of this Article, a State may declare . . . that it does not accept some [or all] of the procedures for the settlement of disputes specified in this Convention with respect to one or more of the following categories of disputes:

- (a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.
- (b) Disputes concerning sea boundary delimitations between adjacent states . . . .
- (c) Disputes concerning military activities . . . but law enforcement activities pursuant to this Convention shall not be considered military activities.
- (d) Disputes or situations in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. . . .<sup>25</sup>

Adede noted that the matter of reservations brought about considerable disagreement in the Working Group with the resulting compromise (article 17) in which reservations are permitted in a limited number of cases.<sup>26</sup> The formulations in article 17 thus permit a wide range of reservations to the dispute settlement procedures. Article 17(1) is designed to place limits upon the use of dispute settlement procedures when they are applied to areas within the exclusive jurisdiction of the coastal state. Presumably the motivation for such an article is that many states have diffi-

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25. WORKING PAPER art. 17.

26. Adede, *supra* note 1, at 814.

culty reconciling the idea of compulsory dispute settlement with their sovereign rights within an area under national jurisdiction. One problem is that the four areas in article 17(1) to which dispute settlement procedures are limited are open to various interpretations. For example, in 17(1)(a), the term "the freedoms of navigation" may not be sufficiently precise. Additionally, in 17(1)(b), there could be substantial disagreement about what constitutes "due regard" for the rights and duties of other states.

Article 17(3) takes another approach. Instead of limiting applicability of the dispute settlement provisions to specified situations, it lists certain categories of disputes for which a state may choose *not* to have the dispute settlement provisions apply. Some of these are especially ambiguous. For example, who will determine what constitutes an abuse of power as provided for in article 17(3)(a)? The sea boundary question arising in 17(3)(b) is not surprising, since this question lies at the very heart of sovereignty. But boundary questions can be violence-prone and often linger for years without resolution, creating the possibility of escalating the conflict. The military disputes aspect of 17(3)(c) is reminiscent of problems arising from the Optional Clause of the International Court of Justice.<sup>27</sup> It is obvious that states can define military matters as broadly as they wish. Article 17(3)(d) was no doubt inserted to prevent the Convention's disputes settlement process from usurping the legitimate function of the United Nations Security Council. But again, there is considerable room for abuse. It is difficult to specify the exact bounds to functions of the Security Council. How long will the Council be permitted to exercise its function, if no resolution of the dispute is imminent?

On balance these draft articles are disturbing. They provide a labyrinth that must be successfully traversed if dispute settlement is to work. It is clear that whenever one makes the quantum jump from non-binding to binding modes of dispute settlement a whole new set of considerations is introduced necessitating many qualifications and escape clauses. One cannot help but think that a flexible formulation like the one provided in draft article 17(3) would encourage states to maximize the use of reservations. Why should a state restrict itself to a greater degree than is required of other states? There is, furthermore, serious doubt whether the intricate

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27. For example see Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357-82 (1962); Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971).

and complex types of compulsory dispute settlement presented in the Draft Articles are preferable to omitting all such provisions. There are other available alternatives, *e.g.*, an optional protocol of dispute settlement, which will be discussed later.

It must be borne in mind that the Draft Articles were prepared by the Informal Working Group on Dispute Settlement. While many influential conference delegations were represented on the Working Group, there is no guarantee that the Draft Articles will not be modified substantially before the final treaty is drafted.

### C. *The Informal Single Negotiating Text*

One indication of the Conference's stance on dispute settlement can be obtained from the Informal Single Negotiating Text produced at the close of the last session of the Law of the Sea Conference.<sup>28</sup> Although the Negotiating Text in no way carries the weight of law, it does represent at least one element of the thinking on these critical issues. Interestingly, the Negotiating Text in two of its three major sections completely avoids discussion of the dispute settlement issue.

The Informal Single Negotiating Texts produced by Committees II and III make no substantive statements about the dispute settlement issue. The Committee III text states:

Any dispute with respect to the interpretation or application of the provisions of this Convention with respect to marine scientific research (the preservation of the marine environment) shall be resolved by the dispute settlement procedures contained in Chapter \_\_\_\_ of this Convention.<sup>29</sup>

The assumption here seems to be that satisfactory dispute settlement articles will have been worked out. This is the easy way out of the dilemma. The Negotiating Text from Committee II deals with dispute settlement in an equally cursory manner:

Disputes arising out of the interpretation or application of articles shall be resolved in accordance with the provisions of Part \_\_\_\_ of the present Convention.<sup>30</sup>

It seems ironic that a comprehensive and detailed document like the Committee II Negotiating Text would devote so little attention

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28. Informal Single Negotiating Text, A/CONF.62/WP.8/ Parts I, II, III, May 7, 1975.

29. *Id.* Part III, art. 37 (pt. 1), art. 44 (pt. 2).

30. *Id.* Part II, art. 137.

to the issue of dispute settlement, especially if dispute settlement is as vital to the overall treaty as most experts have asserted.

#### D. *The International Seabed Tribunal*

In contrast to the Negotiating Texts produced by Committees II and III, the Committee I Negotiating Text pays considerable heed to dispute settlement. One reason for this greater concern is that one of the principal aspects of the Committee I Text is the creation of the International Seabed Authority. It would have been almost impossible to describe a new international organization without describing its dispute settlement function. Beginning with article 32 the powers and duties of the judicial organ of the International Seabed Authority are described in detail:

1. The tribunal shall have jurisdiction with respect to:
  - (a) Any dispute relating to the interpretation or application of this Convention; and
  - (b) Any dispute connected with the subject matter of this Convention and submitted to it pursuant to a contract or arrangement entered into pursuant to this Convention.<sup>31</sup>

The Tribunal will consist of nine judges chosen from persons of high moral character who possess the qualification for appointment to the highest judicial offices in their respective countries.<sup>32</sup> In addition the principal legal systems of the world must be represented.<sup>33</sup> In general the Tribunal "shall decide all disputes relating to the interpretation and application of this Part."<sup>34</sup> Article 34 does provide the customary escape clause:

Nothing in the foregoing articles shall prevent Members of the Authority from settling their disputes by any other means prescribed by Article 57 of this Convention.<sup>35</sup>

But the most important restrictions to the exercise of the dispute settlement function come from article 32(2) which cross-references articles 57, 58, 60, 61, 62, and 63. Article 57 states:

When a dispute falling within article 32 of this Convention has arisen between States Parties to this Convention, or between such State Party and a national of another State Party, or between na-

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31. *Id.* Part I, art. 32(1).

32. *Id.* Part I, art. 32(3), 32(4).

33. *Id.* Part I, art. 32(5).

34. *Id.* Part I, art. 33.

35. *Id.* Part I, art. 34.

nationals of different State Parties, or between a State Party or a national of a State Party and the Authority or the Enterprise, the parties to the dispute shall first seek solution through consultation, negotiation, conciliation or other such means of their own choice. If the dispute has not been resolved within one month of its commencement any party to the dispute may institute proceedings before the Tribunal, unless the parties agree to submit the dispute to arbitration pursuant to article 63 of the Convention.<sup>36</sup>

This is a vitally important provision. It seeks to provide a balance between states' desire to have latitude to select their own process for dispute settlement and the necessity for some kind of binding procedure if the other attempts do not resolve the dispute quickly, *i.e.* within a month. Many states may balk at such a total and quick commitment to a binding decision. Equally disturbing to many states may be that nationals seem to be given status almost equal to that of the states themselves. This would clearly not be acceptable to those states that take a narrow view of international legal personality. For example, there is no doubt that the Soviet Union would not accept such a provision.<sup>37</sup>

Article 58 gives a state party to the Convention the right to question the legality of actions taken by organs of the Authority by bringing such issues before the Tribunal. If the Tribunal considers the complaint justified, it "shall declare the decision concerned to be void."<sup>38</sup> It is difficult to assess how states might react to a provision like this one. Obviously, if they have confidence in the basic structure and make-up of the Tribunal, such a provision would cause little alarm.

Article 59, although not cross-referenced as a condition for implementing the dispute settlement provisions, contains important information. The judgments of the Tribunal shall be "enforceable in the territories of Members of the Authority in the same way as judgments or orders of the highest Court of that Member State."<sup>39</sup> This leaves no room for states to avoid the impact of actions of the Tribunal because of the lack of enforcement provisions. But the wording of the provisions seems somewhat heavy-handed. It is certain that many states will not tolerate the implication that enforcement action may be taken by some third party within their territory.

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36. *Id.* Part I, art. 57.

37. For example see A. Kolodkin in CHRISTY 172.

38. Negotiating Text, *supra* note 28, Part I, art. 58(3).

39. *Id.* Part I, art. 59(1).

Article 60 illustrates the drafters' realization that in certain situations a dispute settlement tribunal must be willing and able to act with dispatch, *e.g.*, when delay would mean severe, perhaps irreversible, harm to the marine environment. Specifically, the article says that the Tribunal may "order provisional measures for the purpose of preserving the respective rights of the parties, or preventing serious harm to the marine environment."<sup>40</sup>

Article 63 provides the option for disputants to submit to an Arbitration Commission. The Commission will be composed of three members, one chosen by each disputant and the third selected by mutual agreement, if possible, or otherwise by the President of the Tribunal.<sup>41</sup> The powers of the Arbitration Commission shall be identical to those of the Tribunal, *i.e.* those specified in article 32.<sup>42</sup> As with previous provisions, the arbitration option forces disputants to settle quickly to avoid submitting to a binding decision. Many states can be expected to be disposed against such procedures.

#### IV. PARALLELS WITH OTHER DISPUTE SETTLEMENT SITUATIONS

In discussing other dispute settlement processes, it must be conceded at the outset that there are no complete parallels to the Third United Nations Law of the Sea Conference. The scope and complexity of the issues and the economic and strategic value of the territory involved make the Conference and the resulting treaty unique. Nevertheless, it can be instructive to look for comparisons between the situation occurring at the Law of the Sea Conference and other attempts to come to grips with the dispute settlement problem.

If the Law of the Sea Conference is viewed principally as a treaty-generating exercise, there are many other treaties with which the emerging treaty can be compared. In the most detailed study ever attempted of dispute settlement clauses appearing in treaties, Reithel found that about one quarter (24.7%) of treaties have dispute settlement provisions.<sup>43</sup> Reithel also proves empirically what might have been suspected, *i.e.* "Nations possessing advantages in the contemporary national state system (will) be less willing to provide for dispute settlement in their relations."<sup>44</sup>

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40. *Id.* Part I, art. 60(1).

41. *Id.* Part I, art. 63(1).

42. *Id.* Part I, art. 63(3).

43. Reithel, *supra* note 24 at 47.

44. *Id.* at 71.

Furthermore, it has been demonstrated that states much prefer negotiation followed by arbitration to the use of the International Court of Justice as a method for settling their disputes.<sup>45</sup> The fact that states seem leery of one method of judicial settlement may portend similar feelings toward the new law of the sea tribunal.

Many of the dispute settlement treaties opting for judicial settlement are treaties of friendship and amity,<sup>46</sup> treaties which are usually so broad and platitudinous that the chances of an actual dispute situation arising are very remote.<sup>47</sup> Such treaties are very dissimilar to the emerging law of the sea treaty. It is revealing that only about five per cent of dispute settlement clause treaties specify a time for implementing the dispute settlement provisions. This means that the new law of the sea convention would be unusual since virtually all dispute settlement draft articles *do* place strict time limits on the dispute resolution process. Reithel notes that communist states have been especially hesitant about using dispute settlement provisions in their treaties, suggesting that they will be unreceptive to any such provisions in the new law of the sea convention.<sup>48</sup>

There is always the temptation to compare the situation at this Conference with that occurring at the 1958 Law of the Sea Conference. To a limited degree, the experience at the 1958 Conference may be indicative of what will occur at the current Conference. Of the four 1958 Geneva Conventions, only the Convention on Fisheries and Conservation of Living Resources of the High Seas has dispute settlement provisions. The Convention states:

1. Any dispute which may arise between States under articles 4, 5, 6, 7 and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement. . . .

5. The special commission shall render its decision within a period of five months from the time it is appointed unless it is decided, in case of necessity, to extend the time limit for a period not exceeding three months.

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45. *Id.* at 96.

46. *Id.* at 109.

47. See Treaty of Friendship, Commerce and Navigation with Italy, Feb. 2, 1948, art. 26, 63 Stat. 2255 (1949), T.I.A.S. No. 1965, 79 U.N.T.S. 171.

48. Reithel, *supra* note 24, at 117.

49. *Id.* at 150. Also see Rohn, *A Computer Search in Soviet Treaties*, 2 INT'L LAWYER 661 (1968).

6. The special commission shall, in reaching its decisions, adhere to these articles and to any special agreements between the disputing parties regarding the settlement of dispute.<sup>50</sup>

These may seem to be fairly potent provisions, but their use has seldom been considered. It is possible to speculate why the Fisheries Convention, the only one of the four 1958 Conventions with dispute settlement provisions, also has the fewest number of ratifications and accessions.<sup>51</sup> No cause and effect relationship can be proven, but it is at least evident that stronger dispute settlement language did not produce a rash of ratifications.

To a degree, the problem of dispute settlement was dealt with by the adoption of an Optional Protocol of Signature to the four 1958 Geneva Conventions. Of course, such an approach completely removes the binding character of the dispute settlement provisions, and hence has generally been seen as inadequate. In fact, Sohn has suggested that if a similar procedure were followed for the new law of the sea convention, it might jeopardize the signature and ratification of that treaty.<sup>52</sup> Nevertheless, the tactic used by the 1958 Conference may illuminate certain problems at the present conference.

The Optional Protocol states that parties to this Protocol and to any of the 1958 Conventions agree to the compulsory jurisdiction of the International Court of Justice unless some other method is provided or agreed to by the parties within a reasonable period of time.<sup>53</sup> The use of an arbitration procedure instead of the International Court of Justice is permitted if this is done expeditiously.<sup>54</sup> Additionally, states may opt to use conciliation before resorting to the International Court of Justice.<sup>55</sup> On balance the Protocol addresses a similar problem and provides a similar solution to that of the present Conference, *i.e.* ample opportunities are provided for settling disputes by whatever means the parties choose, but in the event these fail within a specified amount of time, then third-

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50. Convention on Fishing and Conservation of the Living Resources of the High Seas, April 12, 1961, art. IX, [1966] 1 U.S.T. 139, T.I.A.S. No. 5969, 559 U.N.T.S. 286.

51. The High Seas Convention has 48, the Continental Shelf Convention 48, the Territorial Sea Convention 40, and the Fisheries Convention 32.

52. Sohn, *supra* 5 note 2, at 516.

53. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes Adopted by the United Nations Conference on the Law of the Sea, *opened for signature* April 29, 1958, art. II, 450 U.N.T.S. 170.

54. *Id.* art. III.

55. *Id.* art. IV.



party methods will be employed.

Perhaps the more interesting question is whether states have accepted or ignored the Optional Protocol. To date only seventeen states have accepted the Protocol, far fewer states than have ratified *any* of the 1958 Conventions. But the impact of this goes further. If two states have a dispute about the terms of the 1958 Conventions, the Optional Protocol can be applied only if both states are party to the Protocol *and* to the relevant one of the four Conventions. The chances of this occurring are quite remote.

In terms of scope perhaps the most direct parallel is between the new law of the sea convention and the principal judicial organ of the United Nations, the International Court of Justice (ICJ). It is common knowledge that the provisions of the United Nations Charter "obliging" states to solve their disputes by peaceful means, while laudatory in intent, have been impossible to enforce in most situations. The International Court of Justice was designed to provide the institutional framework for the judicial settlement of disputes. Member states of the United Nations are automatically parties to the Statute of the ICJ. But for compulsory jurisdiction of the ICJ to be operative states must accept the Optional Clause:

Article 36(2)

2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

There can be no doubt that article 36(2), even though presumably limiting the range of situations in which the Court can be used, provides for a significant amount of compulsory jurisdiction. One can think of few disputes that might not fit within one of the four specified categories. There is thus a rough parallel between the compulsory jurisdiction under the Optional Clause of the ICJ Statute and that envisioned in many of the draft texts before the Third United Nations Law of the Sea Conference, *i.e.* both require a considerable commitment to binding third-party dispute settlement procedures. If one accepts this parallel, it becomes important

to look at the record of states accepting the Optional Clause. Nineteen states have accepted the Optional Clause with severe reservations, sixteen with minor reservations, and eight without reservations.<sup>56</sup> This means that the vast majority of states have avoided any acceptance of the Optional Clause. This does not portend success for the new dispute settlement provisions suggested at the Law of the Sea Conference.

One might also ask how often the ICJ has been used, the theory being that its use might be a rough measure of things to come for the new law of the sea dispute settlement tribunal. In this instance the most meaningful indicator is the number of appearances in contentious cases. Twenty-six states have appeared in exactly one contentious case.<sup>57</sup> Only eight states have appeared in more than one contentious case.<sup>58</sup> The success of judicial settlement, at least in quantitative terms, has been decidedly underwhelming. More than three quarters of the states have never appeared before the ICJ, an astonishing fact since the Court has existed for thirty years during an epoch with its share of international disputes.

## V. CONCLUSIONS

It is somewhat premature to discuss dispute settlement provisions of a treaty about which there are severe, perhaps unbridgeable, differences among the negotiating states. But the attention already devoted to dispute settlement indicates that it is important and has been a frequent concern of delegations at the Conference. However, there remains little convincing evidence that compulsory dispute settlement provisions are essential to a successful treaty.

Assertions about the importance of dispute settlement seem to rest on a number of assumptions. The first assumption is that a single treaty acceptable to most of the factions at the Conference can be drafted; if no widely-acceptable treaty can be agreed upon, there will be little role for compulsory dispute settlement. It is entirely possible that seemingly consistent statements from different delegations, all of which extol the virtues of compulsory dispute settlement, are predicated on vastly different perceptions of what substantive treaty provisions will be agreed upon. Perhaps

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56. For a full discussion see J. GAMBLE & D. FISCHER, *THE INTERNATIONAL COURT OF JUSTICE* 81-85 (1976).

57. *Id.* at 84.

58. *Id.*

delegates are saying if we get a treaty that is generally acceptable to our government, *i.e.* with an acceptably low number of compromises, then we shall sign the treaty, but we want compulsory settlement of disputes to make sure that other states follow the terms of the treaty. Agreement on this need for dispute settlement provisions means little in the absence of concomitant broad-based agreement on the substance of treaty articles. Furthermore, it is assumed that dispute settlement provisions will not seriously undermine the breadth of participation in the new law of the sea treaty. There is wide acknowledgement that without acceptance by most states—developing, developed, maritime, etc.—the treaty cannot succeed. But the evidence from past experiments with compulsory settlement of disputes suggests that states may be very hesitant to agree to binding techniques. Considering the fragile nature of the negotiations, it may not be worth sacrificing a sizeable number of parties simply to achieve compulsory dispute settlement. This becomes all the more important if the adopted dispute settlement articles provide numerous loopholes and exceptions. It is clear that political reality dictates that some such exceptions be made, but the nature and degree of the exceptions is vitally important. It is at least possible that the Conference will adopt the worst possible dispute settlement articles, *i.e.* those that are sufficiently porous to permit parties to avoid applying the provisions yet sufficiently binding to reduce significantly the number of signatory parties.

Compulsory dispute settlement, like any method of enforcing international law, is delicate. It works well only when it has to work seldom. If there is no basic agreement by a majority of states on most of the legal norms, the dispute settlement provision will be overworked, ineffective, or avoided entirely. The inclusion of ambitious dispute settlement articles in a treaty accepted by few countries will have no positive effect. Unless agreement can be reached on major substantive issues, it might be preferable to settle for general non-binding dispute settlement articles. If the Conference reaches a situation where every last bit of diplomatic lubricant is needed to get most states to sign the new treaty, it may be better not to introduce the friction caused by the dispute settlement issue.

Unquestionably, the law of the sea has entered a new era. But there is little reason to believe that state attitudes toward compulsory settlement of disputes have changed radically. Instead, one still finds fear and suspicion about many types of compulsory dispute settlement. There is simply little reason to believe that the

nature of the new law of the sea will fundamentally change state posture toward dispute settlement. After all, the principal change in the law of the sea is increased coastal state jurisdiction, not an accelerated tendency to relinquish sovereignty to the processes of binding dispute settlement.

