Dispute Settlement under the Convention on the Law of the Sea

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The Third United Nations Conference on the Law of the Sea has attached great importance to the incorporation of an effective dispute settlement system in the new Convention on the Law of the Sea. The acceptance by the participating States of compulsory judicial settlement for a wide range of disputes as an integral part of the Convention is undoubtedly a major achievement of the Conference. Although the Conference failed to adopt the Convention by consensus, it should be emphasized that the dispute settlement procedures contained in the Convention[1] were not the reason why a number of States did not support the Convention. On the contrary, for many States, including the Federal Republic of Germany, the dispute settlement system represents a valuable positive element which may carry considerable weight in their final decision whether to ratify the Convention. If during the previous negotiations there had been opposition from some States, it had in most cases not been an opposition to the system contained in the Convention, but rather opposition to its application to particular categories of disputes.

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[1] The provisions on dispute settlement are presently found in the following articles of the Convention: Arts. 186 to 191 (disputes relating to the international sea-bed régime), Arts. 279 to 299 (disputes relating to the other parts of the Convention), Annex V (conciliation procedure), Annex VI (Statute of the Law of the Sea Tribunal), Annex VII (general arbitration procedure), and Annex VIII (special arbitration procedure).

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1. The Special Features of the Disputes which Might Arise under the Convention on the Law of the Sea

The dispute settlement system that emerged from the negotiations at the Law of the Sea Conference will certainly influence future international practice in devising similar procedures in other fields of international law. But, useful as it may be to draw on the experience of the Conference in this matter, some caution must be advised against considering procedures that have been developed in the special context of the law of the sea, as being equally useful and appropriate in other areas of international relations. These procedures have been developed with regard to the special scenario of conflicting interests in law of the sea matters and disputes resulting therefrom.

Disputes which may arise under the Convention on the Law of the Sea, will most likely belong to the following categories:

a) A major category of disputes will consist of disputes between States as to their respective rights within the various maritime zones (territorial or archipelagic waters, contiguous zones, economic or fishery zones, continental shelf areas). These disputes will primarily deal with conflicts between the special sovereign or other rights of coastal States in the maritime zones before their coasts and the freedoms and rights of navigation, overflight and other internationally lawful uses of the sea to which other States remain entitled in these zones. Examples of such disputes may be cases where the coastal State prescribes requirements for or adopts measures against foreign ships in its zones for the protection of the marine environment, for the safety of offshore installations, for the regulation of fisheries, or for marine scientific research.

b) A further important category of disputes will consist of disputes between the future International Sea-Bed Authority and States or their nationals about the exercise of the regulatory and supervisory powers by the Authority over activities for the exploration and exploitation of the resources of the international sea-bed area. These disputes will primarily deal with the question of legality of the respective acts of the Authority; their pattern is more comparable to judicial protection against administrative acts of national authorities than to the traditional type of disputes between States. Examples of such disputes may be cases where the Authority and the operator who engages in sea-bed mining under a contract with the Authority, differ as to the legality of requirements imposed on the contractor for the conduct of his operations or where the Authority suspends or revokes a contract on the ground of alleged non-fulfilment by the contractor of its obligations.

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In order to deal with these two totally different types of disputes the Convention provides for two separate dispute settlement systems: A system for disputes between States in matters of the law of the sea in general[2], and a special system for disputes relating to activities for the exploration and exploitation of the resources of the international sea-bed area[3].

2. *The Concept of a "Comprehensive" Dispute Settlement System*

From the very beginning of the Conference many participating States have regarded an effective dispute settlement system an indispensable and integral part of a future Convention on the Law of the Sea. During the first substantive session of the Conference in Caracas 1974 about 30 States from all regions of the world constituted an informal negotiating group to discuss ideas and provisions for a dispute settlement chapter of the Convention[4]. During the following sessions of the Conference the concept of a comprehensive dispute settlement system culminating in compulsory judicial settlement as an integral part of the Convention prevailed over the idea of an optional protocol; even the Soviet Union and other Eastern European Socialist Countries departed from their earlier negative attitude and supported compulsory judicial settlement for the protection of navigation and fishing rights. In fact, the concept of a general obligation to submit disputes relating to the interpretation and application of the Law of the Sea Convention to judicial settlement, has not been questioned any more in the later stages of the Conference[5]. The incorporation of a compulsory judicial settlement system in the Convention itself contrasts favourably with former law-making conventions and in particular with the 1958 Geneva Conventions on the Law of the Sea where compulsory judicial settlement procedures had been relegated into an optional protocol.

It was, on the other hand, clear from the beginning that consensus on such a concept could only be achieved if exceptions from the principle of compulsory judicial settlement were conceded for some important

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[2] Arts.279 to 299 of the Convention.

[3] Arts.186 to 191 of the Convention.

[4] UN Doc.A/CONF.62/L.7 (Official Records of the Conference, Vol.III, p.85).

[5] This general compulsory judicial settlement clause appeared from the beginning in each negotiating text; it is now contained in Art.286: "Subject to section 3, any dispute concerning the interpretation and application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section". Section 3 (Arts.297–299) contains the automatic and optional exceptions to this rule respectively.

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categories of disputes. The main controversies at the Conference centered on the question what categories of disputes should remain outside the orbit of compulsory judicial settlement. The exceptions from compulsory judicial settlement which presently figure in the text of the Convention are far-reaching indeed; but nevertheless a general obligation which will bind all States ratifying the Convention equally, even with broad exceptions, is still more advanced than a separate optional protocol which leaves it to each State whether and to what extent it will undertake an obligation to submit its disputes to judicial settlement. The reasons which have motivated the States participating in the Law of the Sea Conference to adopt a more favourable attitude towards compulsory judicial settlement than hitherto, are certainly complex and conceptionally different; but the main reasons may be found in the following considerations:

a) The compulsory nature of the dispute settlement procedures, including submission to an international court or tribunal, is limited to disputes about the interpretation of the Convention, that is to disputes about the interpretation of written law. Although the court or tribunal is not prohibited to have incidental recourse to customary international law or general principles of law, the cause of action could only be the alleged non-observance of a written rule contained in the Convention. Thus, one of the main apprehensions against a general obligation to submit disputes to an international tribunal, namely the uncertainty with respect to the contents of unwritten international law, looses its weight.

b) The Convention will vest coastal States with considerable regulatory and enforcement powers in extended maritime zones before their coasts; similarly, the International Sea-Bed Authority will exercise comprehensive regulatory and administrative powers over activities in the international sea-bed area. The shipping nations, including the major naval powers, have maintained that the investment of coastal States or the International Sea-Bed Authority with such broad powers could only be accepted if they would be kept within well defined legal limits and in case of dispute made subject to judicial review.

3. The Exceptions from Compulsory Judicial Settlement

The exceptions which had to be conceded for achieving the incorporation of a compulsory judicial settlement system in the Convention, are partly automatic, partly optional:

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a) The automatic exceptions

Disputes which relate to the exercise by the coastal State of its "sovereign rights or jurisdiction" in the maritime zones before its coast, among them disputes relating to the management and exploitation of the living and non-living resources in these zones, are *ipso facto* excluded from judicial settlement. This far-reaching exclusion, however, will not be absolute: Disputes relating to the sovereign rights or jurisdiction of the coastal State will nevertheless be justiciable in those cases where it is alleged that the coastal State has infringed upon the freedoms or rights which other States remain entitled to exercise in the coastal State's maritime zones (navigation, overflight, submarine cables, pipelines and other internationally lawful non-economic uses of the sea)[6]. Thus, while it will not be possible for a foreign State to challenge the exercise by the coastal State of its regulatory powers before an international tribunal *in abstracto*, it will be possible for the foreign State to challenge the actions of the coastal State on the ground and in so far as such action has affected freedoms or rights which such foreign State is entitled to exercise in the maritime zones of the coastal State.

In order to allay the fears expressed by some developing coastal States that despite these broad exceptions they might still be exposed to frequent legal actions by shipping States and would then have to appear in costly procedures before international tribunals, a formula has been adopted under which the tribunal would in any case first have to ascertain *ex officio* that the claim brought against a coastal State is not *prima facie* unfounded

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[6] Art.297, para.1 of the Convention: "Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention, shall be subject to the procedures provided for in section 2 in the following cases:

(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation or overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;

(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or

(c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference acting in accordance with this Convention".

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or an "abuse of legal process" before allowing the proceedings to continue[7].

b) The optional exceptions

The Convention provides for the following optional exceptions from compulsory judicial settlement:

aa) Military activities

The most important exception relates to military activities in all parts of the sea, including the maritime zones of coastal States: A State may, by a special declaration made to this effect at or after ratification of the Convention, exclude disputes concerning such military activities from compulsory judicial settlement[8]. All major naval powers have insisted on such an optional exception; it can be expected that they will avail themselves of this option. This exception does not, however, cover law enforcement actions by naval vessels of the coastal State in its maritime zones.

bb) Enforcement activities by the coastal State in its maritime zones

Another exception relates to law enforcement activities of the coastal State: A State may, by a special declaration made to this effect, at or after ratification of the Convention, exclude from compulsory judicial settlement disputes relating to law enforcement activities which it undertakes as a coastal State in protecting its sovereign rights and jurisdiction in its maritime zones. However, such exclusion will not apply to disputes where it is alleged by another State that the coastal State, by its law enforcement action, has infringed upon the freedoms or rights to which that other State

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[7] Art.294 of the Convention:

"1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.

2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.

3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure".

[8] Art.298, para.1 *lit.*(b) of the Convention.

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remains entitled in the maritime zones of the coastal State (navigation, overflight, submarine cables, pipelines, and other internationally lawful non-economic uses of the sea[9]. Thus, the legal protection of the freedoms and rights of other States in the maritime zones of the coastal State cannot be impaired or otherwise affected by the optional exception relating to law enforcement.

cc) Delimitation disputes

A further optional exception relates to disputes about the delimitation of maritime zones between neighbouring or opposite States. There had been lengthy debates at the Conference whether and to what extent such boundary disputes should be excluded *ipso facto* or optionally from compulsory judicial settlement. The majority of participating States had maintained that compulsory judicial settlement is indispensable for the peaceful and equitable solution of such disputes because it has turned out that no detailed criteria can be established for the guidance of the parties in negotiating a boundary which is equitable for both sides; political pressure might then carry undue weight in such negotiations. On the other hand, a sizable number of States from all regions, in particular those involved in actual disputes, strongly insisted on the position that the determinations of maritime boundaries should not be left to third party determination because of the aspects of sovereignty connected therewith. The compromise solution which has found its way into the Convention goes a great length to accommodate the latter view; it nevertheless preserves a minimum of procedural safeguards against political pressure[10]: A State may by a special declaration, at or after ratification of the Convention, exclude maritime

[9] Art.298, para.1 *lit.*(b) of the Convention. Further safeguards are contained in Art.292 (prompt release of vessels and their crews upon posting of a reasonable bond or other financial security through a special speedy procedure before the International Tribunal for the Law of the Sea), in Arts.223 to 233 (special procedural safeguards in case of national proceedings against foreign ships and their crews for alleged violations of anti-pollution rules and standards), and in Art.290 (authority for the competent tribunal to prescribe binding provisional measures pending its final decision).

[10] Art.298, para.1 *lit.*(a) of the Convention:

"When signing, ratifying or acceding to this Convention, or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to

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boundary disputes from compulsory judicial settlement. This will then apply without exception to all disputes which are already in existence. However, with respect to future disputes, which will arise subsequent to the entry into force of the Convention, the State which avails itself of this exception from judicial settlement, will then become obliged to submit such dispute to the conciliation procedure provided for in Annex V of the Convention, and, if no settlement is reached on the basis of the findings of the Conciliation Commission, to negotiate an agreement for submitting the relevant questions to an international court or tribunal. Thus, although there is in those cases no automatic submission to the jurisdiction of an international tribunal, there is at least an obligation to negotiate a special agreement to this effect.

It seems that the afore-mentioned exceptions from compulsory judicial settlement were unavoidable because they all touch highly political issues. Otherwise a consensus on comprehensive and effective dispute settlement procedures providing for final judicial determination had probably not been attainable.

4. Limitations for Judicial Settlement under the Régime for the International Sea-Bed Area

For disputes concerning activities in the international sea-bed area, in particular those involving the future International Sea-Bed Authority, a special system of compulsory judicial settlement has been devised which aims at covering all conceivable categories of disputes in this field without any exception. These disputes will be decided by a special International Sea-Bed Disputes Chamber of the Law of the Sea Tribunal which will be constituted under the Convention. Some limitations of the jurisdiction of

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the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties".

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the tribunal should nevertheless be mentioned: Art. 189 of the Convention expressly provides that the tribunal may not substitute its discretion for that of the International Sea-Bed Authority. This limitation, however, has never been controversial; it is, moreover, in line with the corresponding practice in the national legal systems. The only limitation of the competence of the tribunal which had been controversial at the Conference, concerned the judicial review of the rules and regulations of the International Sea-Bed Authority which supplement the provisions of the Convention governing the activities of operators in the international sea-bed area. These rules and regulations will be adopted by the Assembly and the Council of the Authority. Because Assembly and Council consist of delegates of sovereign States, it has been maintained that their quasi-legislative acts could not be made subject to judicial decision; on the other hand, it has been maintained that there is a need for judicial protection against enactments of these organs should they exceed the proper limits of their competence or otherwise violate the provisions of the Convention for some unjustifiable political or other reason. The compromise which finally found its way into the Convention, provides the following[11]: The tribunal will not be allowed to declare these rules and regulations invalid *in abstracto*, but the tribunal will be empowered to determine whether the application of such a rule or regulation to the individual case before the tribunal results in a violation of a provision of the Convention or in an impairment of a contract between the Authority and the operator. The tribunal will then have the power to grant the claimant adequate relief including an award for damages as the case may be. This proviso gives the tribunal a rather broad discretion in finding the proper remedy for each individual case; this remedy might even go so far as to deny the application of the contested rule or regulation in the concrete case.

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[11] Art. 189 of the Convention reads as follows:
"The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Sea-Bed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations or procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations or procedures. Its jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations or procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention".

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5. The Question of the Applicable Law

The willingness of States to accept compulsory judicial settlement presupposes a reasonable certainty of what rules of law the competent court or tribunal will apply. The respective clauses contained in the text of the Convention reflect this concern: First, the applicability of the dispute settlement procedures will be strictly confined to disputes relating to the interpretation and application of the Convention. Second, the text employs the formula that the court or tribunal will have to "apply the Convention and other rules of international law not incompatible with this Convention"[12]. By this formula the priority of the rules contained in the articles of the Convention over rules of general or customary international law is established beyond doubt; only where there are lacunae in the Convention, recourse may be had to rules of general or customary international law. In any case, however, only the alleged non-observance of a provision of the Convention may provide a legal ground for instituting proceedings and conferring jurisdiction on the court or tribunal in the matter because compulsory judicial settlement is limited to disputes relating to the interpretation or application of the Convention.

The Conference also discussed the question whether the "general principles of law" (Art.38, para.1 subpara.c of the Statute of the International Court of Justice) should be specifically mentioned. However, it was thought neither desirable nor necessary to add similar wording to the above-mentioned clause; it was argued that these "general principles of law" already formed part of international law and consequently need not expressly be referred to. Irrespective of whether this argument is correct or not, it is generally agreed that, where there is no applicable conventional or customary rule, it is implicit in the function of an international court or tribunal to develop the necessary rules for its decision from the general principles of law.

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[12] The general provision in Art.293, para.1 of the Convention reads as follows: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".

Art.38 of Annex VI concerning the law to be applied by the Sea-Bed Disputes Chamber reads as follows:

"In addition to the provisions of article 293, the Chamber shall apply:

(a) the rules, regulations and procedures of the Authority adopted in accordance with this Convention; and

(b) the terms of contracts concerning activities in the Area in matters relating to such contract".

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6. Choice of the Competent Tribunal

Another important factor for achieving agreement at the Conference on a comprehensive judicial dispute settlement system had been the flexibility with respect to the choice of the competent tribunal. At the Conference some States favoured the International Court of Justice, other States favoured a specially constituted Law of the Sea Tribunal (21 judges to be elected by a conference of the States parties to the Convention for a nine-year term and representing the principal legal systems and geographical regions of the world); again other States disliked any preconstituted court or tribunal, but favoured an *ad hoc* constituted arbitral tribunal. To accommodate all these positions the Convention provides for the following: Each State may, by a special declaration at or after ratification of the Convention, designate the court or tribunal of its choice from among the four options allowed in the Convention (International Court of Justice, Law of the Sea Tribunal, general or special arbitration)[13]. The designation need not be confined to one option; a State may designate more than one kind of tribunal the jurisdiction of which it would accept. If a State has made no declaration, that State would be deemed to have accepted the general arbitration procedure as provided for in Annex V to the Convention[14]. If a dispute arises and the parties to the dispute have both opted for the same court or tribunal, this court or tribunal will be competent[15]; if the parties to the dispute have opted differently, the case would have to be dealt with under the general arbitration procedure contained in Annex V[16].

Originally, in an earlier text before the Conference[17], the choice of the defendant State had been made determinant in those cases where States have made divergent choices. This seemed to be an attractive solution because it would protect a State against being dragged before a court or tribunal which it does not consider acceptable. Later, however, it was thought that this solution might not achieve its purpose because it could lead to attempts of manoeuvring the other party to the dispute into the role of the claimant in order to gain the favourable position of the defendant with respect to the choice of the court or tribunal. Therefore, in cases of

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[13] Art.287, para.1 of the Convention.

[14] Art.287, para.3 of the Convention.

[15] Art.287, para.4 of the Convention.

[16] Art.287, para.5 of the Convention.

[17] Art.9, para.7 of Part IV of the Informal Single Negotiating Text (6 May 1976) – UN Doc.A/CONF.62/WP.9/Rev.1 (Official Records of the Conference, Vol.V, p.185).

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divergent choices by the parties to the dispute, arbitration was considered the most neutral solution.

With respect to disputes relating to activities in the international sea-bed area a more rigid attitude has prevailed: Here most States, foremost the group of the developing States, insisted that such disputes, in particular those involving the International Sea-Bed Authority should come under the exclusive jurisdiction of the International Sea-Bed Disputes Chamber[18]. This Chamber will be part of the future Law of the Sea Tribunal and its 11 members will be elected by the Tribunal itself from among its 21 members for a three-year period[19]. The only exception from the otherwise exclusive jurisdiction of the International Sea-Bed Disputes Chamber has been allowed for disputes of an essentially commercial or technical nature between the International Sea-Bed Authority and natural or juridical persons (including States) operating in the international sea-bed area under a contract with the Authority. Such disputes will be decided by commercial arbitration under the Rules of the United Nations Commission of International Trade Law; this applies, however, only to disputes for which the Convention makes express provision in this respect e.g. disputes arising out of the undertaking of the contractor to transfer technology under fair and equitable commercial terms and conditions, disputes about the calculation of the payments due to the Authority under a contract for exploration or exploitation[20]. Other disputes arising under contracts with the Authority will, at the request of the operator, also be submitted to commercial arbitration, but with the important proviso that the arbitral tribunal is not allowed to decide incidentally on questions of interpretation of the Convention or the Annexes thereto, but must refer such a question to the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal for a ruling on the interpretation[21].

The reasons advanced by the developing States for the exclusive character of the jurisdiction of the International Sea-Bed Disputes Chamber were the reluctance to put the International Sea-Bed Authority under the judicial control of an *ad hoc* tribunal, and the desirability for a consistent jurisprudence preserving and developing the basic principles of the international sea-bed régime as part of the New International Economic Order.

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[18] Arts. 187, 287, para. 2, 288, para. 3 of the Convention.
[19] Art. 35 of Annex VI of the Convention.
[20] Art. 5, para. 4 and Art. 12, para. 15 of Annex III of the Convention.
[21] Art. 188, para. 2 of the Convention.

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7. The Role of Conciliation in Law of the Sea Disputes

The system of the Convention for the settlement of disputes between States will, in principle, consist of three stages: negotiation, conciliation, judicial settlement. The conciliation stage, however, will not be mandatory: it will become operative only, if both parties agree to make use of it before instituting judicial proceedings; if one of the parties does not agree, the conciliation stage will be deemed to be terminated[22]. If the parties to the dispute agree on conciliation the procedure will start with the setting up of a 5-member Conciliation Committee (two conciliators appointed by each party and a neutral chairman, in case of disagreement between the parties to be appointed by the Secretary-General of the United Nations)[23] and will end with a non-binding report (containing, as the case may be, conclusions on fact and law as well as recommendations for a settlement)[24]. If no settlement is reached on the basis of the report, judicial proceedings may then be instituted[25].

It has been debated whether conciliation should be made obligatory in those cases where certain categories of disputes are excluded from compulsory judicial settlement. Although this idea had not found favour in the earlier phases of the Conference, it has gradually gained ground in the later phases of the Conference and has been adopted for some categories of disputes:

a) Disputes relating to the conservation and management by the coastal State of the fishery resources in its economic zone are totally excluded from compulsory judicial settlement, including those cases where other States may claim or have been granted fishing rights in the zone. Coastal States have in so far fully succeeded in maintaining their concept of sovereign rights over the living resources in their exclusive economic zones[26]. However, by way of compromise, the coastal States have agreed to accept a limited obligation for conciliation. In this respect the Convention provides the following[27]: Conciliation will be mandatory if it is alleged that the coastal State has "manifestly" failed to comply with its

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[22] Art.284 of the Convention.

[23] Art.3 of Annex V of the Convention.

[24] Art.7 of Annex V of the Convention.

[25] Arts.284, para.4, 286 of the Convention; Art.8 of Annex V of the Convention.

[26] Art.296, para.3 *lit.*(a) of the Convention.

[27] Art.296, para.3 *lit.*(b) and (c) reads as follows:

"(b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:

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obligations for the proper management of the fisheries in its economic zone or has "arbitrarily" failed to determine the allowable catch and the surplus which might be available for other States or has "arbitrarily" refused other States access to the surplus which it has admittedly declared to exist.

b) Disputes relating to the control of the coastal State over research activities of other States or their nationals in the exclusive economic zone are in most cases excluded from judicial settlement because according to Art.297, para.2 of the Convention the coastal State is not obliged to submit a decision by which it refuses the necessary consent to such research or requires the cessation of such research, to judicial settlement. States interested in fundamental marine scientific research, among them the Federal Republic of Germany, have insisted on the restoration of the justiciability of such disputes at least in so far as non-resource-related fundamental research is at stake in respect of which the coastal State shall grant its consent under normal circumstances; the coastal States, on the other hand, have maintained that they alone, in the exercise of their sovereign rights over the resources of their economic zones, should be entitled to the final determination whether a research project is resource-related and consequently subject to their discretionary right to withhold the consent or to require the cessation of such research activities. Finally, the Conference arrived at a compromise solution which obliges coastal States to submit the dispute, at the request of the researching State, to the conciliation procedure provided for in the Convention if it is alleged that the coastal State, in withholding consent or requiring the cessation of the research, has not acted in a manner compatible with the relevant provisions of the Convention[28].

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest the living resources with respect to stocks which that other State is interested in fishing;

(iii) a coastal State has arbitrarily refused to allocate to any State, under articles 68, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

(c) In no case shall the conciliation commission substitute its discretion for that of the coastal State".

[28] Art.297, para.2 *lit.*(b) of the Convention reads as follows: "A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the

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c) Disputes relating to the delimitation of maritime boundaries will be another case of compulsory conciliation if a State party to the Convention avails itself of the option, as indicated above, to exclude such disputes from compulsory judicial settlement.

I do not share the view that compulsory conciliation is so much inferior to compulsory judicial settlement. Although the findings of the Conciliation Commission are not legally binding on the Parties, they carry nevertheless the weight of an impartial judgment and cannot as such be lightly discarded by a party to the dispute.

8. Conclusions

The following points should be stressed:

a) The dispute settlement system of the Convention, despite its gaps and limitations, is nevertheless a valuable, if not essential procedural safeguard for the substantive rights and guarantees recognized by the Convention and may as such positively influence the decision to ratify the Convention.

b) The dispute settlement system of the Convention, judged in retrospect at the discussions during the Conference, represents the maximum of what one could expect to achieve in view of the reluctance of States to accept general clauses for the judicial settlement of future disputes.

c) The dispute settlement system of the Convention if widely accepted by a high number of ratifications may play an important role in the interpretation and clarification of the new law of the sea embodied in the Convention. The Convention contains many provisions which because of their compromise character are either carefully worded for achieving a balance between conflicting interests or have intentionally been left indefinite for later concretization in accordance with their object and purpose. The application of provisions of such kind needs judicial determination in order to preserve their legal content against unilateral or one-sided interpretation which might destroy the careful achieved compromise. Such jurisprudence may also contribute to the universal recognition of the rules contained in the Convention as general international law.

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coastal State of its discretion ... to withhold consent in accordance with article 246, paragraph 5". Arts.246 and 253 referred to in this compromise formula contain the right of the coastal State to grant or withhold consent and the right to require the cessation of research activities respectively. The discretion to withhold consent under Art.246, para.5 relates to resource-related research projects.

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