ABHANDLUNGEN

Framework of Likely Disputes under the Law of the Sea Convention – Some Thoughts

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I. Perspective

The common interest of all States and their peoples in both exclusive and inclusive uses of the seas of the world and in a balanced accommodation of all such uses hardly requires to be emphasised. On the one hand, all States, which border upon the seas, have a common interest in those traditional and modern assertions of exclusive comprehensive authority and control in adjoining areas which permit a State to protect a variety of specific interests, in particular to defend its territory from invasion or attack from the sea and to take advantage of its proximity to the possible riches of the sea-bed and marine life. On the other hand, each State, coastal or non-coastal, has no less interest in the maximum access to all the inclusive uses of the ocean, such as navigation, fishing, cable-laying, pipelines as well as in the most rational wealth-producing, conserving and distributing uses of the sea-bed and ocean floor beyond national jurisdiction. The common interest of the international community lies "in an accommodation of exclusive and inclusive claims which will produce the largest total output of community values at the least cost"[1], at the same time providing adequate protection to exclusive claims which in the contemporary context of the demands of the developing States of the Third World have acquired special significance. A viable international law of the sea dispute settlement must reflect these goals and policies.

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[1] McDougal/Burke, The Public Order of the Oceans, 52 (1962).

II. Legislative Background

The First (1958) and the Second (1960) Law of the Sea Conferences and the resultant four conventions, the forerunners of the present convention, failed to resolve the questions of the breadth of the territorial sea, the outer limits of the continental shelf and allocation and conservation of fish stocks. These conventions also failed to cope up with the changing conditions and circumstances. In the aftermath of these two conferences, a large number of States in Asia and Africa attained independence. Since these States did not have a chance to participate in the first two Law of the Sea Conferences, they demanded the reformulation of the law of the sea adequate to meet their specific claims and interests, and to correct the inequities caused by the tyranny of the "freedom of the seas" doctrine[2]. Moreover, a very great progress was witnessed in modern technology making it possible to probe the oceans for oil, gas and precious minerals and resources at depths greater than ever before. Similarly, it is now possible to commercially exploit polymetallic nodules, containing nickel, copper, cobalt and manganese. Finally, because of the scarcity of land-based resources, nation-States, under the pressure of the growing population and higher living standards, started looking with hope towards the seas for sustenance. This also explains why they sought to maximise their position on issues such as exploitation of their coastal and offshore resources, safeguarding fishing catches, expansion of national jurisdiction over sea resources, protection of marine environment and so forth.

The inadequacy of the Geneva Conventions and customary norms, coupled with the aforesaid context of conditions and new developments, resulted in widely divergent practices and claims. Their resolution required a complete reordering of the law of the sea comprising comprehensive rules and institutional arrangements. It was in the fulfilment of this aim that the Third United Nations Conference was convened in December 1973 following extensive preparatory work and the development of important principles by the United Nations Sea-Bed Committee. The Conference has had eleven substantive sessions with more than 150 countries participating to draw a law of the sea convention designed to establish a new order of the

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[2] See generally, Oseike, The Contribution of States from the Third World to the Development of the Law on the Continental Shelf and the Concept of Economic Zone, 15 Indian Journal of International Law, 313ff. (1975); Anand, Tyranny of the Freedom of the Seas Doctrine, 12 International Studies, 416 (1973); Sharma, Composition of "Old" "New" Public Order of the Oceans, Some Reflections, 23 Indian Journal of International Law, 74 (1983).

seas[3]. The Convention was adopted by the Conference on April 30, 1982 with 130 countries voting in favour of it, 4 countries voting against it and 16 countries abstaining. The Treaty was signed on 10 December 1982 by 119 countries[4].

Regarding the settlement of disputes arising from the Law of the Sea Convention, an informal working group was first convened at the Caracas session of the Conference at the initiative of the delegation of the United States[5]. This group initiated its discussions on the subject on the basis of proposal on the settlement of disputes which had been submitted by the United States to the UN Sea-Bed Committee. Nevertheless, in the course of preliminary discussions, the Group proceeded independently of the US draft and, on the basis of a questionnaire distributed to the participating States, alternative provisions on several subjects were prepared, which were subsequently included in a Working Paper which was officially submitted to the conference on the last day of the Caracas session. A great deal of significance was attached to the projected system of dispute settlement, thus allowing governments the opportunity to study them. In the view of certain delegations, the establishment of an effective system for the settlement of disputes was part of the treaty package itself. Indeed, the acceptability of certain treaty texts prepared by the three main committees of the conference was regarded as dependent largely upon the expectation of the establishment of an effective disputes-settlement procedure. The Working Group had before it, at the Geneva session (March 26 to May 10, 1975), the Caracas document, but its aim was to produce a single informal text without alternatives for the consideration of the Conference as a whole. Initially, the Working Group, through the co-chairman submitted to the Conference President a document which contained seventeen draft articles with several sub-annexes[6]. The President then prepared and circulated

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[3] The detailed coverage of developments at each session of the conference has been provided in a series of articles published by Oxman in the American Journal of International Law between 1974 and 1982 under the title "Third United Nations Conference on the Law of the Sea". See also, Jagota, Developments in the U.N. Conference on the Law of the Sea; A Third World Review, 3 Third World Quarterly, 287 (1981); Borgese, Law of the Sea: The next phase, 4 Third World Quarterly, 712 (1982). For critical evaluation of the convention, consult Graf Vitzthum, The Law of the Sea Development, 23 Indian Journal of International Law, 161 (1983).

[4] A/CONF.62/122, 7 October 1982 (hereinafter called the Convention). See also A/CONF.62/SR.182, pp.9–10.

[5] Adede, Settlement of Disputes Arising under the Law of the Sea Convention, 69 AJIL 800 (1975).

[6] UN Doc. SD.GP/2nd Sess./No.1/Rev.5, May 1, 1975.

some months later a Single Negotiating Text (SNT) on dispute settlement which sought to blend the essence of the various alternatives presented[7]. A revised text (RSNT) was prepared by the President of the Conference, following the 1976 summer session in New York. (This happened along with the Chairman of three Committees preparing the Revised Single Negotiating Texts)[8]. At the fourth substantive session held in New York[9], the President issued the revised text on the subject[10].

The question of the settlement of disputes was not dealt with exclusively in Part IV of the RSNT negotiated in the informal plenary meetings of the Conference under the direction of the President of the Law of the Sea Conference. In fact, Part I of the RSNT dealing with sea-bed matters, which were being negotiated in Committee I of the Conference, also contained detailed draft provisions on the settlement of sea-bed disputes[11] including an annex for the establishment of a separate system for the settlement of such disputes through the Sea-Bed Tribunal as an organ of the Sea-Bed Authority. On the other hand, Parts II and III of the RSNT did not have any such elaborate provisions on settlement of disputes beyond providing some articles referring to the system under Part IV[12]. Thus, under the RSNT, there were formally two separate detailed systems: (i) the system established under Part I dealing exclusively with sea-bed disputes, and (ii) the system under Part IV manifesting a comprehensive approach to dispute settlement under the Convention as a whole and contemplating the possibility of incorporating sea-bed disputes as well under it[13]. It is interesting to note that at the end of the sixth session of the Conference in 1977, the Committee I also decided in favour of the integration of the sea-bed dispute-settlement system into the system envisaged for the settlement of disputes under the Convention as a whole. This was the approach followed in the Informal Composite Negotiating Text (ICNT)[14]. At the seventh session held in 1978, seven Negotiating Groups on outstanding hard-core issues were formed, with the fifth Group being enjoined to deal with the

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[7] UN DOC. A/CONF.62/WP.9.

[8] UN Doc. A/CONF.62/WP.9/Rev.1.

[9] Held from August 2 to September 10, 1976.

[10] UN Doc. A/CONF.62/WP.9/Rev.2.

[11] See RSNT (I) Arts.33–40.

[12] For instance RSNT (II) Art.131 and (III) Arts.76 and 77.

[13] Adede, Law of the Sea – The Integration of the System of Settlement of Disputes under the Draft Convention as a whole, 72 AJIL 84 (1978).

[14] UN Doc. A/CONF.62/WP.10.

settlement of disputes over fisheries in the economic zone[15]. The revision of ICNT (No.1) achieved at the eighth session in 1979 incorporated the amendments prepared by the Group 5 on the settlement of disputes with respect to fisheries[16]. At the ninth session in 1980, the two revised versions of the ICNT were issued by the Collegium in succession; the second version was in the form of the Draft Convention on the Law of the Sea (Informal Text)[17] preceded by a debate at the plenary. In the field of settlement of disputes, the most important result was a reorganisation that clarified the structure of Part XV by dividing it into three sections. Section 1 dealt with general obligations to settle disputes peacefully, the second with compulsary procedures entailing binding decision, and the third with limitations and optional exceptions to the obligation to adjudicate or arbitrate under section 2 and establishing an alternative obligation to submit some dispute excepted from adjudication or arbitration to non-binding conciliation at the request of any party to the dispute. Negotiations regarding the settlement of disputes were nearly completed in this session except few minor drafting and technical problems. At the conclusion of the tenth session in 1981, the text of the Draft Convention was revised essentially to incorporate over 1500 Drafting Committee changes. Arrangements were also made for the final session to be held in March–April 1982 and "for the signature of the Final Act and the opening of the Convention for signature in Caracas in early September 1982"[18]. The eleventh session opened in New York on 8 March and culminated on 30 April 1982, with the adoption of the Convention.

III. Framework of Probable Claims and Controversies

The prescriptions, policies and procedures incorporated in the Convention shall be invoked in future to resolve a wide range of specific claims and controversies. These claims an be broadly classified in terms of inclusiveness and exclusiveness of use and competence in regard to oceans and the geographical area in which such use and competence will be asserted. Each specific claim to use and competence asserted by a State may be followed by an opposing counter-claim by other States asserting the denial of the

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[15] UN Doc. A/CONF.62/62, April 13, 1978.

[16] UN Doc. A/CONF.62/WP.10/Rev.1, Arts.296, 1(1) 4(3) and 297.

[17] UN Doc. A/CONF.62/WP.10/Rev.2 (1980); UN Doc. A/CONF.62/WP.10/Rev.3.

[18] See Oxman, The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981), 76 AJIL 19–20 (1982).

claimant's allegations and substituting the exercise of their authority to protect their own use of the seas. Such opposing claims concerning the lawfulness of the authority asserted would constitute the subject-matter of various controversies to which decision-makers will be required to respond. Most generally speaking, future controversies shall relate to claims relating to the access to the geographical area concerned, claims to competence to prescribe and apply policy, and claims relating to the exploration and exploitation of resources within the defined area.

1. The Pattern of Controversy

General: The Convention undisputably reflects the emergence of a network of agreed packages on major substantive issues projecting delicate compromises[19] so carefully and painfully negotiated with a view to offer a balanced protection to competing rights and duties. In many areas the Convention records elements of agreed positions of States. Solutions have been provided to all major substantive issues; all the same, the language used is generally broad and general, which may give rise to varying interpretations. There are also "a large number of vague formulations, references of ambiguous scope and intention as well as evasive compromises and agreements to disagree"[20]. They go against the notions of clarity,

[19] These compromises were of various categories. In the field of legal concepts, such competing principles as freedom of the High Seas (in respect of non-resource-oriented uses of the sea), partition into zones of national jurisdiction (in respect of resource-oriented uses of the offshores area), regionalization (with regard to conservation of certain fish stocks and co-operation between States bording enclosed or semi-enclosed seas in the fields of living resources, protection and preservation of the marine environment and scientific research), internationalisation (in respect of exploration and exploitation of the mineral resources of the deep sea-bed) had to be reconciled. In the political field, concepts persued at the conference were demilitarisation, decolonisation and the new international economic order. Then finally, there is implicit reference to the far-reaching concessions to special interests of individual States and groups of States. For instance, the new definition of the continental shelf meets the special interests of Canada, Ireland, Sri Lanka and the two super-powers. See Graf Vitzthum/Platzöder, The United Nations Convention on the Law of the Sea: The Pros and Cons, 28 Law and State, 34–35 (1983).

[20] *Ibid.*, at 37. Graf Vitzthum and Platzöder have provided examples. They are: the legal status of the exclusive economic zone as part of the High Seas, the highly unprecise definition of the continental shelf, the various competing régimes for straits used for international navigation and the uncertainties affecting deep sea-bed mines, *ibid.* These scholars have also cited the mitigating elements directed to reduce this inherent conflict potential such as tacit understanding, informal agreements, agreed interpretative statements and declarations, supplementary bilateral and multilateral arrangements, national legislation and dispute settlement systems provided in the Convention, *ibid.*

certainty and finality of the law. Multiplicity of forums for the settlement of disputes envisaged in the Convention will also pose the problem of maintaining uniformity in interpretation and application of the Convention. Thus, one can expect an increasing flow of disputes arising from the interpretation and application of the Convention once it comes into operation.

In each area of national and international jurisdictions, the Convention records a continuous operation of the interplay between the national and international rights (exclusive and inclusive interests). More specifically, the coastal States are supposed to have due regard for the rights and duties of other States in national jurisdiction areas; other States are similarly enjoined to have due regard to the rights and duties of the coastal State and to comply with its law and regulations[21]. In the same manner, on the High Seas, all States are enjoined to exercise their freedom with due regard for the interests of other States in the exercise of their comparable freedom of the High Seas and also with due regard for the rights with respect to activities in the Area[22]. With respect to resource deposits in the International Sea-Bed Area which lie across the limits of national jurisdiction, activities are supposed to be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie. Such interaction of national and international rights and duties is evident in other fields also such as the protection and preservation of the marine environment, marine scientific research, the conservation and management of the living resources and so on. The Convention has not provided any specific criteria for determining the standards of "due regard", beyond providing at places factors to be taken into account. This might give rise to many disputes posing a problem for the decision-makers who will be required to achieve accommodation in concrete cases between the competing rights and duties.

In spite of the many clarifications whether the exclusive economic zone is the part of the High Seas or vice versa, and in spite of complex interrelationship of provisions incorporated by way of clarification, disputes are bound to occur when the decision-makers will be required to deliberate on this issue.

With respect to the exclusive economic zone it is interesting to note that different States will have jurisdiction over different activities in the same area. Not infrequently, therefore, there will be parallel jurisdiction, usu-

[21] For instance see Arts.56(2) and 58(3) of the Convention.
[22] Art.87.

ally for different purposes. Also, there would exist a separate jurisdiction over the same vessel in the same area. For instance, there will be flag State jurisdiction over the vessel to punish for collision, or for violating coastal State rights or fishing laws independently of coastal State action[23]. These observations draw sharp focus upon the potentiality of future conflicts resulting from the concurrent jurisdictions.

The coastal States have been given discretionary powers with respect to certain matters in the areas of national jurisdiction; similarly, the Authority is provided with discretionary powers in certain matters in areas beyond national jurisdiction. However, the Convention does not provide any criteria how these powers will be exercised. Municipal law standards for determining the use of discretion might vary. Hence, a great deal of litigation, with varying claims and counter-claims, might center on this aspect. This aspect will be examined in detail in this text later.

2. The Pattern of Controversy Regarding Internal Waters

The claims of a coastal State in this category are as absolute and complete as those made in terms of sovereignty over the land masses. They may include claims to control access of foreign vessels, to apply authority to vessels, to prescribe policy for activities directly relating to the use of internal waters, to prescribe and apply policy to events on board ship while in internal waters, and claims relating to resources. With particular reference to foreign vessels, the opposing claim finds expression in the allegation of a right of entry caused by necessity, stress of weather or innocent passage. Prior agreement between the concerned States might also allow access to foreign vessels. Defining internal waters, Art.8 of the Convention states that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state". It further states that where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage shall exist in those waters. The right would extend to warships as well, subject of course to the conditions laid down in the Convention. Recognition of the right of innocent passage seems to render the legal status of internal waters almost identical to that of the territorial sea. Thus, a doubt remains if the "newly created" internal waters fulfil any

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[23] Oxman, The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions, 71 AJIL 263 (1977). See also Oxman, The 1977 New York Session, 72 AJIL 74 (1978).

special function sufficient to justify their establishment. On the contrary, it might give rise to the same controversies that are expected in respect of innocent passage in the territorial waters.

3. The Pattern of Controversy in Respect of the Territorial Sea

Coastal States claims can be generalised in terms of complete sovereignty over a part of State territory. More specifically, this includes: (a) claims relating to control over access; (b) claims to prescribe rules and regulations for events in the territorial sea; (c) claims to regulate and control activities, and apply policy in respect of vessels; (d) claims to exclusive exploration and exploitation of the resources. The major counter-claim, manifesting interests of other States in access and navigation, has customarily been named as a right of innocent passage. In one sense, talking about innocent passage, would semantically mean, another way of talking about the scope of coastal authority over access to the territorial sea[24]. The specific disputes in such a situation would center upon the degree of discretion that can be permitted to the coastal State in determining the innocent character of a particular passage. So that conflicts can be kept at the minimum level, an appropriate legal formulation must clarify important factors or conditions to be taken into account in weighing the coastal interest in restriction of or interference with passage and the community interest in freedom from such restriction or interference. The new Law of the Sea Convention seeks to achieve this balance by providing a systematic categorisation and elaboration of mutual rights and duties respectively of the coastal State and other States in respect of authority in the territorial sea, which are, in a large measure, complimentary in nature[25].

The authority and rights of the coastal States are itemized in Arts.21, 22, 23, 25 and 30 of the Convention. Under Art.21 the coastal State has

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[24] McDougal/Burke (note 1), at 180.

[25] To begin with, innocent passage has been defined in a comprehensive manner in Art.19. Passage is to be regarded innocent so long as it is not prejudicial to the peace, good order and security of the coastal States. Art.19(2) goes to the extent of providing a long list of activities that would be considered prejudicial to peace, good order and security of the coastal States which include all activities involving military aspects of security, economic activities such as loading or unloading of any commodity, currency or person contrary to coastal State customs, fiscal, immigration or sanitary laws, wilful and serious pollution, fishing activities, research and survey activities, acts aimed at interfering with any systems of communications or installations of the coastal States, any other activity not having a direct bearing on passage. The last item provides direction to the coastal State.

powers to adopt laws and regulations relating to innocent passage through the territorial sea. Art.22 authorizes the coastal State to prescribe sea lanes and traffic separation schemes in the territorial sea, Art.25 empowers it to take necessary steps including non-discriminatory suspension to prevent passage which is not innocent. Warships, under Art.20, are required to comply with coastal laws and regulations failing which they may be asked to leave the coastal territory immediately.

As regards the duties, the coastal State is required under Art.24, not to hamper the innocent passage except in accordance with this Convention, nor can it (a) impose requirements on a foreign ship which has the practical effect of denying or impairing the right of innocent passage, or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State. Under Art.27, except in certain instances, a coastal State is not allowed to exercise criminal jurisdiction in connection with any crime committed on board the foreign merchant ships or government ships operated for commercial purposes. Art.28 extends this prohibition to civil jurisdiction.

In spite of inbuilt balance and safeguards, a wide range of controversies might arise in future.

All coastal States can claim authority to prescribe policies or rules and regulations regarding the use of territorial sea entailing such matters as the safety of navigation, the protection of cables and pipelines, the conservation of living resources, the enforcement of fishery laws, the preservation of environment and the prevention, reduction and control of pollution, marine scientific research, the prevention of the infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal States[26]. The counter-claims are those which question coastal competence demanding conformity to these prescriptions as conditions upon the access of foreign vessels. Art.21 authorises the coastal State to adopt laws and regulations in respect of innocent passage, but they must be in conformity with the provisions of this Convention and other rules of international law. A foreign State claiming infringement of innocent passage might claim that coastal laws are violative of the norms of the Convention and of other rules of international law, whereas the coastal State might allege that there was no such violation. Indeed, there might arise disputes even in regard to the very identification and scope of "other rules of international law". Similarly, foreign ships, under Art.21, are required to comply with all generally accepted international regulations relating to the prevention of collisions at

[26] Art.21 of the Convention.

sea; but, the rules have not been identified; this gap leaves enough room for future controversies.

In regard to designations of the sea lanes and traffic separation schemes in the territorial sea, the coastal State is required under Art.22 to take into account the recommendations of the competent international organisation, any channels customarily used for international navigation, the special features of particular ships and channels, and the density of traffic. Disputes are expected to arise regarding whether some or more of these factors have been taken into account or not. Conflicts might also arise in respect of the operation of foreign ships, particularly of tankers and nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials in the territorial sea. Claims and counter-claims may touch upon the issue whether such ships were conforming themselves to the designated sea lanes or not while passing through the territorial sea, as required by coastal laws and regulations.

The impact of coastal claims to authority which may interfere with or disrupt attempted passage through the territorial sea may vary widely in terms of the degree of interference or disruption. One possible claim may take the form of attempted suspension of all passage through the territorial sea or of assertion that vessels of a particular type or function are not entitled to use the territorial sea for passage. The counter-claim of the flag State may plead for a right of access for passage on the ground either that the coastal State is not authorised by international law to forbid all passage through its territorial sea or that all vessels are entitled to a right of access for passage (assuming it is innocent), irrespective of their specialised use or purpose. The second general claim to control access to the territorial sea may take the form of only an occasional exclusive competence to deny all passage through the belt alleging a special cause or basis of authority entitling it to deny passage. This may be alleged to be found in its authority to deny passage by virtue of general competence to prescribe regulations with respect to events within the territorial sea including the imposition of conditions for use of that area whose infringement may be regarded as making passage non-innocent, or if the passage has prejudicial impact on the security (including weapons exercises) or other interests of the coastal State[27].

Among the duties of the coastal State under Art.24, there is emphasis on the prohibition of imposition of the stringent requirements on foreign ships having practical effect of denying or impairing the right of innocent

[27] Art.25.

passage and prevention in form or in fact of discrimination against the ship of any State or against ships carrying cargoes to, from or on behalf on any State. Whether a coastal State's conduct, in application of the Convention, or laws and regulations of any State, result in the imposition of requirements denying in effect the innocent passage is a matter of judgment; so is the issue whether there was any discrimination. The attitudes of the involved coastal State and foreign States may vary giving rise to conflicts. Typically, the injured foreign State shall plead denial or impairment of the right of innocent passage alleging imposition of harsh requirements on its ship and discrimination against its ship. In counter-claim, the coastal State would deny such charges.

The coastal State is given vast powers under Art.25 to take necessary steps in its territorial sea to prevent passage which is not innocent, including to suspend temporarily, in specified areas, the innocent passage of foreign ships should that become essential for the protection of security, including weapons exercises. Again, this right of suspension must be exercised without any discrimination and this may give rise to claims and counter-claims.

In the past, coastal States have been allowed to prescribe and to apply policy to events occurring aboard vessels in the territorial sea. Coastal competence also permitted the expansion of coastal criminal law to justify the arrest of persons aboard a passing ship and to the application of expansion of the specified civil jurisdiction. These claims have been opposed by the assertion that the right of innocent passage is unreasonably affected by the procedure of extending criminal law to events aboard a vessel merely passing through the territorial sea. According to Art.27, a coastal State is generally disallowed to exercise criminal jurisdiction on board a foreign merchant ship or government ships operated for commercial purposes during its passage and before entering the territorial waters (except as provided in parts of the Convention dealing with the Exclusive Economic Zone and the Protection and Preservation of Marine Environment). However, the above prohibition does not apply in those cases (a) where the consequences of the crime extend to the coastal State; (b) if the crime is of kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. Past experience of litigation in respect of such provisions indicate that in future also there will be conflicts among States regarding the application and scope of these exceptions. Typically,

for instance, the coastal State would allege that the consequences of a crime in a given case extended to it thereby allowing it jurisdiction, whereas the foreign ship State would plead that the consequences were strictly confined to the ship.

The immunities of warships and government ships operated for non-commercial purposes have been kept intact under Art.32, subject of course to exceptions that apply to all other ships as discussed above. Additionally, if any warship fails to comply with the laws and regulations of the coastal State concerning passage through the territorial sea, the coastal State is authorised to require it to leave immediately and the flag State shall bear responsibility for any loss or damage caused from the non-compliance of the laws and regulations or with other provisions of the Convention or other rules of international law. The Convention does not identify which are other rules of international law and this might give rise to some conflicts in future.

A great deal of confusion in actual cases might arise as to whether the unilateral interpretation of the coastal State in regard to all provisions concerning innocent passage of foreign ships in the territorial sea will be treated by courts as final, or will the concerned foreign States shall at all have say in the matter.

Regarding the control of resources in the territorial sea, the claims of the coastal States to exclusive exploitation or disposition of all resources are undisputed. They might come under challenge only if there is any conflict between them and claims of other States with respect to innocent passage or scientific research or other international rights.

Coastal States under Art.211 have been empowered in the exercise of their sovereignty, to adopt laws and regulations for the prevention, reduction and control of pollution from foreign vessels, including vessels exercising the right of innocent passage, provided such laws and regulations do not hamper innocent passage. A foreign State may allege that laws were so harsh and demanding that they virtually amounted to hampering innocent passage. The coastal State may deny this and counter-claim that the foreign State had in fact violated such laws which rendered the passage not innocent.

In the exercise of their sovereignty, the coastal States have been given the exclusive right under Art.245 to regulate, authorise, and conduct marine scientific research in their territorial sea. However, such research can be conducted only with the prior explicit consent of and under the conditions set forth by the coastal State. The powers of the coastal State in this regard are absolute. The claims and counter-claims may still arise in regard to the

grant or refusal or termination of consent or in respect of violations/ fulfilment of conditions and resultant liability or damages.

A good number of disputes might relate to boundary delimitation. The expected disputes here would concern the division of sea areas between States when more than one State borders upon the same waters. The controversy concerning delimitation of boundaries will be two-fold: (1) The boundary problem may arise because the coastal States have a common land boundary and the question is how to extend it over into the sea so as to delimit the water territory of these adjacent States. There may also arise a problem of dividing an area between States on opposite coasts when these States meet at the head of the bay. (2) There will also be a boundary problem if the area of the water separating the State is not as wide as the combined belts of the territorial sea claimed by each State. This will be an instance of delimitation of boundary between States on opposite coasts. This might be further complicated if these States claim differing breadths of the territorial sea. Disputes might also arise in regard to the manner of drawing the median line and its suitability in particular instances. Conflicting claims may also relate to "historic" titles[28].

4. Pattern of Controversy Regarding International Straits and Archipelagic States

All ships and aircraft are entitled to continuous and expeditious transit passage in straits used for international navigation. Such a passage under Art.38 of the Convention cannot generally be impeded, nor can it be suspended. However, ships and aircraft must observe the conditions enumerated in Art.39 which includes prohibition of the threat or use of force, conformity with international regulations for safety at sea, prevention of collisions at sea, prevention, reduction and control of pollution from ships and so on. In actual disputes, the strait State would allege violation of one or more of these conditions, whereas the flag State would deny it. Claims and counter-claims may also entail the identification of generally accepted regulations, procedures and practices concerning matters mentioned above. Under Art.42, strait States are empowered to adopt laws and regulations relating to transit passage, but they should not discriminate among foreign ships. Any violation of this provision would entail international responsibility for any loss or damage which results to States bordering straits. Conflicting claims may be made in respect of

[28] Art.15.

whether there was any violation of these rules or whether there was any discrimination. Strait States are allowed under Art.41 in consultation with competent international organisations to designate sea lanes and traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships and ships in transit must respect them. Such sea lanes and traffic separation schemes must conform to generally accepted international regulations, which remain unidentified thus leaving room for future conflicts.

The legal status of the archipelagic States has been recognised in Part IV of the Convention and they are entitled to establish the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. Their sovereignty extends to the waters enclosed by archipelagic baselines, to the airspace over such waters, as well as their bed and subsoil, and the resources therein. Under Art.52, foreign ships have the right of innocent passage, which can be suspended temporarily if it is non-discriminatory and is essential for the protection of the security of the archipelagic State. The pattern of disputes here will be similar to those discussed above regarding innocent passage in the territorial waters. Archipelagic States have been given a right under Art.53 to designate sea lanes and air routes thereabove suitable for the continuous and expeditious passage of foreign ships and aircrafts through or over its archipelagic waters and the adjacent territorial sea. They can also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes. The above stated sea lanes and traffic separation schemes must conform to generally accepted international regulations which remain unidentified. Conflicts may arise among States due to this gap. Archipelagic States, like the strait States, have been authorised to prescribe conditions for transit passage and to adopt laws and regulations relating to transit passage. Therefore, the kinds of controversies which were discussed above in respect of passage through straits are likely to occur here also.

5. Pattern of Controversy Concerning the Exclusive Economic Zone and the Continental Shelf

In the past the claims made in regard to access to the continental shelf area and other contiguous zones were of more limited scope when compared to claims made in regard to access to internal waters and the territorial sea. It was to an occasional, exclusive competence to control access by prohibition or regulation of entry for certain specified and limited purposes, usually also in relation to limited areas and for temporary periods.

The major counter-claim was that the coastal State was not authorised, under the given circumstances, to protect the purposes specified and that other States may operate their ships free of its asserted controls[29]. Similarly, the claims to resources beyond the territorial sea in adjacent ocean areas were continuous in nature, in the sense of permanence, but were limited in scope. Such claims to the resources of the continental shelf were limited in comprehensiveness, because they related only to the resources of the shelf and made just limited assertion of exclusive competence over the waters above the shelf and activities in such waters. Counter-claims in opposition to demands for exclusive access to the resources of the adjacent sea-bed centred about the area to be claimed, the resources affected, and the kinds of authority permitted. Because of the rapid developments in marine science and technology and because of overpowering demands of States for extended national jurisdictions in seas and for larger exercise of all types of jurisdictions to protect their social processes, the pattern of claims and counter-claims have undergone substantial changes, which were reflected in the deliberations of the Third United Nations Conference on the Law of the Sea.

The Convention provides for the establishment of a contiguous zone of 24 nautical miles, an exclusive economic zone of 200 nautical miles and still more wide continental shelf. Inasmuch as it would result in the extension of territorial domain of the coastal State, it will give rise to a wide range of controversies in future. On the one side, the coastal States would demand exclusive exploitation of both animal and mineral resources, conservation of living animal resources, enforcement of anti-pollution rules, regulation of scientific research and so on. The counter-claims will be made in terms of freedom from asserted authority of the coastal States for purposes of navigation, overflight, laying submarine cables, conduct of scientific research and so on. More, specifically, claims and counter-claims may be related to the following categories.

In Part V of the Convention the competence of the coastal State in the exclusive economic zone has been categorised as of the following types: "sovereign rights" (for the purpose of exploring, conserving and managing the natural resources and with regard to economic activities such as production of energy from the water, currents and winds), "jurisdiction" (with regard to the establishment and use of artificial islands; installation and structures; marine scientific research; the protection and preservation of marine environment), "exclusive right" (to construct and to authorise

[29] McDougal/Burke (note 1), at 575–577.

and regulate the construction, operation and use of artificial islands, installations and structures), "exclusive jurisdiction" (over such artificial islands and structures and installations), and "jurisdiction" (with regard to customs, fiscal, health, safety and immigration laws and regulations concerning the above mentioned artificial islands, structures, etc.). This multiplicity of terms, even if clear to the draftsmen, may lead to divergent claims and counter-claims. At times it becomes difficult to classify all issues in neat categories like the above without inviting future conflicts. A great deal of litigation would arise in regard to the scope of the coastal State's competence in respect of each term used above *vis-à-vis* the competence of foreign States concerning their competing rights. More specifically, disputes would arise in regard to the extent to which each right or jurisdiction is sharable or not sharable between the coastal States and other States.

Part V of the Convention may however be read in conjunction with Art.297 which lays down the extent of the coastal States power to exclude disputes from the compulsory settlement procedures. In fact, with respect to each category of the coastal States competence as defined above, the coastal State exercises the right of excluding certain matters from the compulsory procedures contained in section 2 Part XV except for the cases specifically mentioned in Art.297. There is, comparatively, more scope for third-party settlement procedures with respect to issues over which the coastal States only exercise "jurisdiction" less scope for third-party settlement procedures on issues over which coastal States exercise "exclusive jurisdiction", and still less scope for compulsory procedures as issues become those over which a coastal State exercises "exclusive rights" or "sovereign rights"[30]. Art.297 distinguishes the scope of third-party settlement procedures in the context of coastal States rights in the exclusive economic zone with respect to matters related to the exploration and exploitation of the living resources on the one hand and those related to the preservation of the marine environment and the conduct of marine scientific research on the other. With respect to the former, international proceedings are envisaged, but the sovereign rights of a coastal State or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surplus to other States and terms and conditions established in its conservation and management laws and regulations are not to be questioned. Even if this dispute is referred to conciliation under Art.297(3)(b) the Conciliation Commission cannot sub-

[30] Adede, Law of the Sea: The Scope of the Third Party, Compulsory procedures for settlement of disputes, 71 AJIL 308 (1977).

stitute its discretion for that of the coastal State under Art.297(3)(c). With respect to the latter, the international proceedings are envisaged even to the extent of calling in question sovereign rights, provided that in respect of marine scientific research the coastal State shall not be obliged to accept the submission to compulsory third-party settlement of any dispute arising out of (i) the exercise by the coastal State of a right or discretion in accordance with Art.246; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with Art.253. Even if the dispute is referred to the Conciliation Commission under Art.297(2)(iii) exercise by the coastal State of its discretion to designate specific areas as referred to in Art.246 para.6, or of its discretion to withhold consent in accordance with Art.246 para.5, cannot be called in question. Thus, Art.297 recognises the hierarchy of coastal powers as defined in the terms discussed herein, just as Part V describes the hierarchy of the coastal State's competence in relation to the nature of the coastal State's activities described therein[31]. When read together, these two sets of provisions (Part V and Art.297) tend to simplify the task of understanding the basic pattern of controversy between competing jurisdictions of the coastal States and other States in the exclusive economic zone.

Disputes may also arise in respect of the precise criteria for determining the lawful exercise of the rights and discharge of the duties on the part of the coastal States *vis-à-vis* other States in the exclusive economic zone. In exercising their rights and performing their duties under the Convention in the exclusive economic zone, the coastal States are enjoined to have due regard to the rights and duties of other States; similarly, other States are required to have due regard to the rights an duties of the coastal States[32]. The Convention does not lay down any criteria or norms for determining reasonable exercise of the rights of States and due regard for the rights and duties of other States. This gap is likely to give rise to many disputes in practice. Any State may claim that a coastal State has acted in violation of the provisions of the Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses related to these freedoms. In counter-claim, the coastal State may deny this and allege that its actions were grounded on lawful use of its authority in the economic zone, and it may charge the complainant for violating the Convention or the laws and regulations adopted by the coastal State in conformity with this Conven-

[31] *Ibid.* 309.
[32] Art.58.

tion and other rules of international law not incompatible with the Convention. Conflicts may also arise in regard to the identification and scope of the other rules of international law not incompatible with the Convention.

Under Art.60, a coastal State has the exclusive right to construct and to authorise and regulate the construction, operation and use of artificial islands, installations and structures and reasonable safety zones around them, but they should not be established where interference may be caused to the use of recognised sea lanes essential to international navigation. Disputes might occur where a coastal State is insisting on its right to construct and operate the artificial islands or installations, at a particular location, whereas the outside State is alleging interference with international navigation. Similarly, all ships are required to respect the safety zones and comply with international standards of navigation around artificial islands, installations etc., but the Convention has not identified such standards thus leaving room for controversies.

In the field of the regulation and control of marine pollution, the coastal State is given a right to enforce its laws, yet it has to observe international standards. Problems concerning the balancing of national standards with international standards may give rise to controversies. A State may allege that a coastal State has acted in contravention of the 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 through a competent international organisation or diplomatic conference. The coastal State, in a counter-claim, might allege that in fact there was no such violation and that its laws and regulations fully conformed and gave effect to generally accepted international rules and standards[33].

A wide variety of disputes might arise regarding the conduct and promotion of the marine scientific research in the exclusive economic zone and the continental shelf. In the exercise of their jurisdiction in these areas, the coastal States have the right to regulate, authorize and conduct marine scientific research. This jurisdiction is sharable with other States, the latter exercising it with the consent of the coastal States and subject to other conditions laid down under Arts.246–253. The specific disputes may assume the following forms:

In the normal circumstances, the coastal States are required to grant their consent for research projects by other States and competent international

[33] Art.211(5) and (6).

organisations provided they are carried on in accordance with this Convention exclusively for peaceful purposes and in order to increase the scientific knowledge of marine environment for the benefit of all mankind[34]. The coastal States are, indeed, obligated to establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably. A researching State might allege the violation of these duties on the part of the coastal State on the ground that even in normal circumstances, consent for a research project was delayed or denied, even though it had complied with all requirements. The coastal State might counter allege that the circumstances were not normal, or that the project was not carried out exclusively for peaceful purposes or for the increase of the scientific knowledge of the marine environment for the benefit of all mankind, or that the researching State had not fulfilled other conditions of Arts.248, 249, 246(5), or that the matter fell within its discretionary powers.

The coastal States have discretion to withhold consent to the conduct of a research project if that project is of direct significance for the exploration and exploitation of natural resources, or involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment, or involves the construction, operation or use of artificial islands, installations and structures, or contains inaccurate information regarding the nature and objectives of the project or if there are some outstanding obligations to the coastal State from a prior research project[35]. A researching State or an international organisation might also allege that the discretion has been arbitrarily or capriciously exercised, whereas the coastal State might deny it and invoke one of the grounds mentioned above for withholding the consent.

A coastal State might claim that research activities have unjustifiably interfered with the activities undertaken by the coastal States in the exercise of their sovereign rights and jurisdiction[36]; on the other hand, the researching State or international organisation might plead strict observance of the rules of the Convention.

A coastal State is given a right to require the suspension of any marine scientific research activities in progress[37] if they are not being conducted in accordance with the information communicated (under Art.248) upon which the consent of the coastal State was based, or with other conditions

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[34] Art.246(3).
[35] Art.246(5).
[36] Art.246(8).
[37] Art.253.

specified in Art.249. Similarly, a coastal State is empowered to require the cessation of research activities in case of any non-compliance with the provisions of Art.248 which amounts to a major change in the research project or the research activities[38]. A dispute may arise in which the researching State might allege that with respect to a specific project the coastal State is not exercising its right concerning (discretionary) grant of the coastal consent or the suspension or cessation of research activities in a manner compatible with the Convention. The coastal State might deny this and invoke the applicability of specific grounds, permitted by the Convention, in exercising its powers.

Under Art.254, the neighbouring land-locked and geographically disadvantaged States are, at their request, to be given the opportunity to participate, whenever feasible, in the consented maritime scientific project. Disputes are likely to arise where such States might allege arbitrariness in refusing them to participate in the research project. The counter-claim may be that these States did not qualify for such participation.

The disputes concerning living resources in the exclusive economic zone may be classified as under: The coastal State has sovereign rights with respect to the living resources in the exclusive economic zones or their exercise. It has also got discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of the surplus to other States and the terms and conditions established in its conservation and management laws and regulations[39]. Obviously, other States too have a right correlative to the duty of the coastal State in respect of the surplus of its harvesting capacity and in respect of the conservation and management measures to be adopted by it. In the absence of the precise criteria, the issues with regard to determining the "allowable catch", "harvesting capacity" and "surplus" are likely to become subjects of expected future controversies. Disputes are likely to arise in which a foreign State may claim that a coastal State has manifestly failed to comply with its obligation to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; that 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 the claimant State is interested in fishing; or that a coastal State has arbitrarily refused to allocate to the claimant State the whole or part of its surplus it has declared

[38] *Ibid.*

[39] Arts.61 and 62.

to exist. The coastal State, in a counter-claim, might allege the absence of arbitrariness in its actions. More especially, it may plead that the conservation measures adopted by it were adequate in the total context of factors and that the consideration of optimum utilisation did not permit the claimant State access for fishing.

Similarly, there might arise some controversies in respect of the right of the land-locked and geographically disadvantaged States in the exploitation of the surplus of the living resources of the exclusive economic zones of the coastal States of the same sub-region or region[40]. The actual disputes may assume the form of claims and counter-claims regarding the terms and modalities of participation, and the interpretation of the relevant bilateral, sub-regional or regional agreements.

Some controversies might relate to measures adopted by the coastal States which include boarding, inspection, arrest and judicial proceedings, enforcement of laws and regulations adopted in the exercise of their sovereign rights to explore, exploit, conserve and manage the living resources and regarding the marine scientific research in the exclusive economic zone[41]. Such measures may be challenged by foreign flag States in specific instances on technical legal and procedural grounds.

Some disputes are expected concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service.

The sovereign rights of a coastal State over the continental shelf for the purpose of exploring it and exploiting its natural resources are to be exercised subject to the condition that the exercise of those rights must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms such as the right to lay submarine cables and pipelines. Measures adopted by the coastal State for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution might be challenged on the ground that they unjustifiably interfered with navigation or the laying or maintenance of cables and pipelines or impeded the laying or maintenance of such cables and pipelines[42].

A major part of future disputes may fall in the area of delimitation of maritime boundaries or interpretation of maritime boundary agreements. The delimitation of the continental shelf involves conflicting claims of

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[40] Arts.69 and 70.
[41] Art.73.
[42] Art.79.

States who are adjacent or opposite neighbours across a body of water under which the sea-bed may be a continuation of the natural continental shelf. The issue here is about criteria to be applied in the delimitation of continental shelf jurisdiction between them. The problems concerning delimitation of exclusive economic zone jurisdiction between the adjacent and opposite States are comparable. Art. 74 as well as Art. 83 lay down only a very broad criteria: "the delimitation shall be affected by agreement on the basis of international law, as referred to in Article 38 of the statute of the International Court of Justice, in order to achieve an equitable solution". The claims and counter-claims will arise with respect to the identification of rules of international law relevant to maritime boundary delimitations. Even if rules are identified, there might be controversies in regard to their scope and applicability in the actual situation. Specific disputes may touch upon (a) the boundary between the continental shelf and the international area, (b) the continental shelf of one State lying under the exclusive economic zone of another, (c) delimitation of the exclusive economic zone between adjacent or opposite States, (d) delimitation of the continental shelf between adjacent or opposite States.

Land-locked States have been given the right of access to and from sea for the purpose of exercising the rights provided in the Convention including those relating to the freedom of the High Seas and the common heritage of mankind. To this end, they shall enjoy freedom of transit through the territory of transit States by all means of transport[43]. Inasmuch as this right might touch upon the sovereignty of the coastal States and their legitimate interests in the areas of national jurisdiction, it will lead to disputes. Conflicts might also arise in regard to the terms and modalities of exercising freedom of transit.

6. Pattern of Controversy in Respect of the High Seas

Regarding access to and use of the High Seas, the pertinent claims and counter-claims will be those which would involve reference to the general doctrine of the freedom of the High Seas. In the past when such claims were made, States did not concede to other States a competence to impose any limitations upon the purposes of use, other than those involved in the requirements both of minimum order and of appropriate accommodation of other uses[44].

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[43] Art. 125.

[44] McDougal/Burke (note 1), at 744.

Art. 87 defines freedom of the High Seas as comprising (a) freedom of navigation, (b) freedom of overflight, (c) freedom to lay submarine cables and pipelines, (d) freedom to construct artificial islands and installations, (e) freedom of fishing, (f) freedom of scientific research. These freedoms are to be exercised under the conditions laid down by this Convention and other rules of international law, and with due regard for the interests of other States in their exercise of the freedom of the High Seas and also with due regard for the rights under this Convention with respect to activities in the Area. This provision would lead to two types of controversy.

There will be disputes regarding the fulfilment of conditions attached to each type of freedom mentioned above. Typically, one State would assert its freedom, and the other side would defend interference in the freedom on the ground that one or more of the important conditions were not fulfilled.

Another type of controversy is expected to arise in respect of the requirements of accommodation of one or more than one States' claim with interests and comparable claims of other States in their exercise of the freedom of the High Seas and with the rights of States with respect to activities in the Area. In the former case, one State would typically assert freedom and allege that the other side is interfering in it. No less typically, the other side would also assert, in a counter-claim, its exercise of freedom and would allege that the first side was interfering in it. In the latter situation the Authority or any State would claim that activities in the Area were hampered due to the unauthorised manner in which the freedom of the seas was exercised, whereas the target of claimant would deny this and would plead reasonableness of manner in which it was exercising its freedom on the High Seas. Decision-makers will be required to draw a balance between various competitive assertions.

In prescription and application of policy to the High Seas issues, each State commonly claims to exercise authority only over its own vessels and refrains reciprocally from exercising authority over the ships of others, except in cases of violation of international law such as relating to piracy and slave trade and violations of exclusive international law prescriptions extended to the High Seas involving enforcement procedures of visit and search and hot pursuit. Thus, Art. 94 stipulates that every State shall effectively exercise jurisdiction and control in administrative, technical and social matters over a ship flying its flag. Every State is also authorised to take such measures for ships flying its flag as are necessary to ensure safety at sea. If a proper jurisdiction and control have not been exercised, any State may report the matter to the flag State which would investigate the

matter and take remedial measures. However, the requirement[45] that each State should conform to the generally accepted international regulations, procedures and practices and should take steps that may be necessary to secure their observance might lead to conflicts, as it would be difficult to know what were the generally accepted international regulations, procedures and practices.

A whole range of disputes may relate to the nationality of ships and their control and regulation. Specific controversy may entail authority to attribute national character to vessels, claims to protect ships to which national character has been attributed against unlawful assertions of authority by other States, claims with respect to stateless ships or ships having double nationality, claims to take punitive measures against ships fraudulently changing flags on the High Seas, claims to conform with internationally adopted rules of the road and regulations for prevention of collision at the sea, for the maintenance of signals and communications, with respect to the construction, equipment and sea worthiness of the ship, in respect of adequate manning and competent crew, relating to assistance to persons and ships in distress. Disputes will also arise in regard to claims relating to events occurring on board ship on the High Seas. According to the Convention, the flag State will have exclusive jurisdiction over it.

Another type of claim relevant here concerns the prohibition of unlawful coercion by States and by individuals. Thus, Art. 88 states that the High Seas shall be reserved for peaceful purposes and the authority for the other is found in Art. 105 which authorises any State to seize a private ship or aircraft and arrest the persons and seize the property on board. Similarly, illicit traffic in narcotic drugs or psychotropic substances and unauthorised broadcasting from the High Seas have been made the subjects of suppression under the Convention[46]. Claims and counter-claims would thus arise concerning the competence to seize for piracy, where seizure may be made, the method of seizure and the disposition of the seized persons and vessels. Regarding the slave trade, the pertinent question would be regarding the claim of a warship to visit and search a foreign vessel suspected of carrying slaves.

Claims and counter-claims are likely to arise in regard to the right of warships and military aircraft to visit and search a foreign ship where there is a suspicion that it might be engaged in piracy, slave trade, unauthorised

[45] Art. 94(5).
[46] Art. 108.

broadcasting, or is without nationality and so on[47]. Here the dispute might arise regarding the reasonableness in assessing the lawfulness of the measures taken and the payment of compensation for any loss or damage that may have been sustained.

The right of hot pursuit is one in which an unsuccessful effort is made to stop a foreign vessel for application of coastal laws in the adjacent ocean, whether within the territorial sea, exclusive economic zone and continental shelf or beyond, and is followed by pursuit of the suspected vessels on the High Seas[48]. Specific disputes are expected to arise raising questions regarding the authority of a particular ship to undertake pursuit, the basis for seeking arrest of a vessel, degree of proof of violation, the requirements for commencement and cessation of pursuit, requirements for conducting pursuit and responsibility for unjustified action.

The principal claims concerning the conservation and management of the living resources on the High Seas relate to State demands for free and uninhibited access to available living resources and those relating to the conservation and management of those resources. The conservation gives to all States the right for their nationals to engage in fishing on the High Seas subject to their treaty obligations and certain rights and duties of the coastal States in regard to the exclusive economic zone[49]. Disputes are likely to arise about differing interpretation of treaties and rights and duties of the coastal States as defined in Arts.63(2), 64 and 67. All States have been enjoined to adopt with respect to their nationals measures for the conservation of the living resources of the High Seas. States are also required to co-operate with each other in the conservation and management of living resources. In this they are required to ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State[50]. Conflicts might ensue alleging such discrimination in fact or in form, with opposite claim totally or partially denying it.

7. Pattern of Controversy Regarding the International Sea-Bed Area

The sea-bed area and the ocean floor along with the resources therein, beyond the limits of national jurisdiction, have been named as the common

[47] Art.110.
[48] Art.111.
[49] Under Arts.63, 64 and 67.
[50] Arts.118 and 119.

heritage of mankind. No State can claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor can any State or natural or juridical person appropriate any part thereof. The authority would be an organisation through which the States would administer the Area. It may conduct its activities in the Area through its own Enterprise or may enter into agreements with States or their nationals. The Convention includes financial arrangements also. The principal organs of the Authority will be the Assembly, a Council and a Law of the Sea Tribunal. The specific future disputes can be categorised as follows:

International organisations and State parties (on behalf of themselves as well as State enterprises or natural and juridical persons under their control) are enjoined with responsibility to ensure that activities in the Area are carried out in conformity with Part XI of the Convention (including Annexes such as dealing with basic conditions of prospecting, exploration, and exploitation, statute of the Enterprise as well as requirements of financial arrangements of the Authority, transfer of technology and so on), failing which liability (joint and several) shall entail, except in instances provided in the Convention[51]. Thus, claims are likely to arise where a State party or an international organisation might accuse each other or another State invoking non-conformity with some essential requirements resulting in claims for damages. The counter-claims shall plead denial of any violations, or that the case is governed by permissible exceptions, or that the fault lies with some other party.

The disputes between a State party and the Authority may be of two types: (a) acts of omissions of the Authority or of a State party alleged to be in violation of this part (xi) or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith, or (b) acts of the Authority alleged to be in excess of jurisdiction or misuse of power.

There will also be disputes between parties to a contract (being State parties, the Authority or the Enterprise, State enterprises and natural or juridical persons) concerning (i) the interpretation or application of the terms of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests. Disputes might also arise between the Authority and a prospective contractor who has been sponsored by a State[52] and has duly fulfilled the conditions referred to in

[51] Art. 139.

[52] Under Art. 153 para. 2(b).

Annex III, Art.4 para.6, and Art.13 para.2, concerning the refusal of a contract or a legal issue arising in the negotiation of a contract. Further, disputes between the Authority and a State party, a State enterprise or a natural or juridical person sponsored by a State party might entail allegations that the Authority has incurred liability as provided in Annex III, Art.22 on account of wrongful acts in the conduct of the operations by the contractor. A similar allegation can be made by the contractor against the Authority as well.

The Authority is enjoined to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to Art.82 through any appropriate mechanism, on a non-discriminatory basis[53]. The Authority is empowered to make rules, regulations and procedures, taking into particular consideration the interests and needs of developing States and peoples who have not attained full independence or other self-governing States[54]. A great deal of litigation might center upon the claims and counter-claims concerning the interpretation of these rules, regulations and procedures of the equitable sharing.

Another field of litigation might relate to interaction between the rights and legitimate interests of the coastal States and the activities of the Authority in the Area. Such activities are to be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie[55]. There is possibility of the infringement of such rights and interests; also, activities in the Area might result in the exploitation of resources lying within the national jurisdiction. Art.142 provides for the requirement of consultations, system of prior notification, and prior consent. The coastal State might allege violations of such requirements and resultant damages caused. In fact, the coastal States are authorised to take appropriate necessary measures to prevent, mitigate, or eliminate grave and imminent danger to their coastline, or related interests from pollution or other hazardous occurrences resulting from or caused by any activities in the Area[56]. This may also lead to conflict with the Authority alleging that any of such measures were not necessary, while the coastal State contending the contrary.

Some of the expected controversies might concern the accommodation

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53 Art.140.
54 In accordance with Art.160 para.2(f)(i).
55 Art.152(1).
56 Art.142(3).

of activities in the Area and in the marine environment. Activities in the Area are to be carried out with reasonable regard for other activities in the marine environment and other activities in the marine environment are to be conducted with reasonable regard for activities in the Area[57]. Installations used for carrying out activities in the Area have been subjected to several conditions and violations of such conditions might also constitute the subject-matter of future disputes.

There is a special obligation for ensuring effective participation of developing States in the activities in the Area, having due regard to their special interests and needs, and in particular to the special needs of the land-locked and geographically disadvantaged States among them to overcome obstacles from their disadvantaged location, including remoteness from the Area and difficulty of access to and from them[58]. This provision might lead to general claims for denial or inadequacy of permitted participation.

Claims and counter-claims would also arise regarding the duty of the Authority to establish a system of compensation to assist developing countries which are adversely affected in their export earnings or economies due to activities in the Area[59].

With reference to production policies, the Authority is authorised to take measures necessary to promote the growth efficiency and stability of markets for those commodities produced from the minerals derived from the Area at prices remunerative to producers and fair to consumers and for this it may act through existing forums and make new arrangements and agreements. However, for carrying out its obligations under the arrangements or agreements, the Authority must assure a uniform and non-discriminatory implementation of all production in the Area of the minerals concerned. In doing so the Authority shall act in a manner consistent with the terms of the existing contracts and approved plans of work of the Enterprise[60]. Claims are likely to arise where a State party or an international organisation might challenge a particular action of the Authority being discriminatory or not uniform.

The scope of the Authority exercising incidental powers that are implicit in and necessary for the exercise of explicit powers and functions with

[57] Art. 147.
[58] Art. 148.
[59] Arts. 150(b) and 151(10).
[60] Art. 151(b) and (c).

respect to activities in the Area might also become a subject-matter of specific disputes[61].

A great deal of litigation might ensue regarding the scope of the powers and functions of each organ of the Authority as well as the scope of the functions and powers of each organ in relation to other organs. In principle, each principal organ is required to avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.

The Assembly which is given the place of supreme organ of the Authority is empowered to establish general policies in conformity with the Convention on any question or matter within the competence of the Authority. The powers and function of the Assembly have been enumerated in the Convention[62]. The Council on the other hand has powers to establish specific policies, in conformity with the Convention and the general policies, to be pursued by the Authority on any question or matter within the competence of the Authority. There is also a long list of items which falls within its competence[63].

The first question will arise whether a particular item relates to the general policy or the specific policy. Some conflicts are likely to arise in this area. Then, in the case of the Assembly, the claims and counter-claims will be directed to the issue whether its actions were in conformity with the Convention or not, and in the case of the Council, whether specific policies adopted were in conformity with the Convention and the general policies adopted by the Assembly.

In the field of the preservation and protection of the marine environment the Convention simultaneously provides for national legislation and international rules to prevent, reduce and control pollution arising from land-based sources, sea-bed activities subject to national jurisdiction, from activities in the Area, dumping, vessels and from and through the atmosphere[64]. Also, States are empowered to enforce their laws and regulations and adopt measures to implement applicable international rules and standards. This dual responsibility will give cause to many controversies, as there will be always areas of conflicts between national and international standards, rules, regulations, policies and so on. States are not supposed to discriminate in form or fact against vessels of any other State while exercis-

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61 Art.157(2).
62 Art.160.
63 Art.162.
64 See Section 5 Part XII of the Convention.

ing their rights and performing their duties. Thus, in some cases States while instituting proceedings might allege discrimination in the adoption of national or international rules and regulations and procedures, as well as measures of implementation. Claims and counter-claims might also arise in respect of fixing responsibility and liability for violations, criteria for assessing compensation for damage and criteria and procedure for the payment of adequate compensation. The Authority is also empowered to adopt appropriate rules, regulations and procedures (a) for the prevention, reduction and control of pollution and other hazards to the marine environment and (b) for the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment[65]. Conflicting interpretation of these requirements might lead to specific controversies.

All States, irrespective of their geographical location and competent international organisations, have the right to conduct marine scientific research in the Area[66]. The possible points of dispute could be that (a) the research is not in conformity with Part XI of the Convention, (b) that it violates the rights of other States, (c) that it has not been conducted exclusively for peaceful purposes, and with appropriate scientific methods and means compatible with this Convention, (d) that it has unjustifiably interfered with other legitimate uses of the sea, (e) that it has violated some other rules such as those relating to the protection and preservation of the marine development[67]. Claims and counter-claims will also relate to the assessment of the responsibility and liability and criteria for determining compensation for damages. The Authority may enter into contracts for carrying out marine scientific research concerning the Area and its resources. Disputes might arise regarding the interpretation of the terms of these contracts[68].

IV. Objectives of Settlement Procedures

The most general objective should be the securing of the common interests of all participants in both exclusive uses and competences and inclusive uses and competences, and in this process maintaining of a continuing balance between different, common interests when in a particular context

[65] Art.145.
[66] Part XIII of the Convention, Art.238.
[67] Art.240.
[68] Art.143(2).

particular interests conflict. The balancing of common interests obviously, in the modern context of the demand for a new equitable economic order, emphasises the honouring and protection of assertions by coastal States of their exclusive interests, subject of course to due regard by them for accommodation of inclusive interests of other States. The settlement of disputes system should, therefore, be flexible, with greatest emphasis on the freedom of the parties to choose particular peaceful methods of settlement. Indeed, Art.279 of the Convention, Part XV, provides that "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter". Art.280 preserves the right of States to agree at any time to settle a dispute between them in regard to the Law of the Sea Convention by any peaceful means of their choice. Further, in order to secure the above objectives, it is necessary to clarify disputes by category and by determining the different variables which need to be taken into account when choosing the methods of settling disputes. Similarly, a set of procedures suited to the nature and subject of each category and the geographical area in which they will apply should be adopted. The Convention, happily, provides a comprehensive dispute settlement system by incorporating in it essential fundamental principles of peaceful settlement of disputes.