The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994

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Introduction

The International Tribunal for the Law of the Sea is one of the institutions created by the United Nations Convention on the Law of the Sea, together with the International Seabed Authority and the Commission on the Limits of the Continental Shelf. While the Authority and the Commission concern new concepts introduced by the Convention in international law, the Tribunal embraces in its jurisdiction the whole Convention, and thus has to do with the whole of the law of the sea, old and new. In the same way as the matters on which the Tribunal may be called to pronounce are old and new, so are the rules on the basis of which the Tribunal will work a mixture of tradition and innovation.

The subject assigned to this paper is the "status" and "scope of jurisdiction" of the Tribunal "after November 16, 1994". November 16, 1994, is, of course, the date of entry into force of the United Nations Law of the Sea Convention. It is also the date from which starts the provisional application of the Agreement for the Implementation of Part XI of the Convention adopted by the U.N. General Assembly on 28 July 1994[1]. As far as the Tribunal is concerned, the 16th of November 1994 is the date on which starts the timetable set forth by the Convention for the election of its judges. It is also the date after which a dispute may arise "concerning the interpretation or application" of the Law of the Sea Convention, to borrow the expression used in Article 286 to indicate which disputes may be submitted to compulsory procedures entailing a binding decision.

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[1] Annex to G.A. Resolution 48/263; in: International Legal Materials 33, 1994, 1309ff.

In considering the "status" of the Tribunal "after 16 November 1994", I am supposed to dwell on the deliberations currently under way concerning the timing and modalities for the election and setting up of the Tribunal, while in examining its "scope of jurisdiction" I am supposed to give an assessment as to how wide is this scope, which cases may be brought to the attention of the Tribunal and in which circumstances, not forgetting that the provisional application of the Implementation Agreement, which brings with it the provisional application of Part XI, gives rise to some particular problems concerning jurisdiction, even though they are of a transitional nature.

I. The "Status" of the Tribunal after 16 November 1994: the Road towards its Establishment

According to Article 4 para. 3, of the Statute of the Tribunal (annex VI to the Law of the Sea Convention) "the first election shall be held within six months of the date of entry into force of th[e] Convention". According to para. 2 of the same Article, the Secretary-General of the United Nations shall address to States Parties to the Convention a written invitation to submit nominations for members of the Tribunal at least three months before the date of election. Thus, the timetable set forth by the Convention provides that by the 16th of February 1995 States Parties should submit nominations for candidates and that the election should take place on the 16th of May 1995, or earlier.

This timetable entails that the States entitled to participate in the election are those which are parties to the Convention on 16 May 1995, and that only those which are parties on 16 February may be invited to submit nominations (even though nominations, it would seem, would not be excluded by States becoming parties after that date and before the election).

Looking at the States which have ratified the Convention as of now and at the likely new ratifiers within May 1995, it appears clear that, were the election to be held on the 16th of May 1995, the States participating in it would be relatively few – possibly less than eighty – and that developed Western States would be no more than a handful, while East European State Parties would perhaps only include those succeeding to the former Yugoslavia[2]. The States called to elect the Tribunal would be a rather

[2] As at 15 March 1995, out of 73 States Parties, only three industrialized Western European States have ratified the Convention or acceded to it, namely Australia, Germany and

unbalanced group which might elect a rather unbalanced Tribunal. Moreover, substantial difficulties would arise in ensuring the financing of the Tribunal, as its expenses are to be borne, according to Article 19 of the Statute, essentially by States Parties.

Similar difficulties have been clear in the minds of States as regards the International Seabed Authority since the entry into force of the Convention became a concrete possibility, and even more so after it became a certainty on 16 November 1993. As it is well known, efforts to bring about the conditions for "universality" of the Convention have intensely engaged States since 1990 and have culminated in the adoption of the Implementation Agreement of 28 July 1994. This agreement provides that the Authority should be cost-effective and follows an evolutionary approach in the setting up of its organs and functions, that its costs shall be met, during a transitional period, through the budget of the United Nations, and that, pending its entry into force, all States participating in its adoption and not deciding otherwise will become provisional members with the same rights and obligations as those who have ratified the Convention[3].

Negotiation of the Implementation Agreement took precedence, as its success was considered necessary in order to remove obstacles to ratification of the Convention by industrialized States. However, already before 28 July 1994, many delegations, spurred by the German one, which understandably played a leading role in all matters concerning the Tribunal, had become aware of the problems which would ensue if the timetable set forth in the Convention were to be followed in a situation in which the road towards universality of the Convention was still long, even though the main obstacle had been removed.

These problems were taken up in the summer of 1994 during the final session of the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea. In the immediate aftermath of the adoption of the Implementation Agreement,

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Italy. Two more members of the Western European and other States Group, Iceland and Malta, have also ratified. The Eastern European States Parties are Yugoslavia (Serbia and Montenegro) as well as Bosnia-Herzegovina and the former Yugoslav Republic of Macedonia. All the other States Parties belong to the African, Asian or Latin-American and Caribbean Groups.

[3] On the contents of, and the negotiating process leading to, the Agreement for the Implementation of Part XI, see Treves, L'entrée en vigueur de la Convention des Nations Unies sur le droit de la mer et les conditions de son universalisme, Annuaire Français de Droit International 39, 1993, 850–873.

it seemed only natural to consider whether one could resort, as far as the Tribunal was concerned, to solutions similar to those just adopted for the Authority. Various ideas leading to this result were put forward by the German delegation. Even though they were considered as very interesting, they all met with the difficulty that many States were, rightly or wrongly, of the opinion that they could not be put in practice – some brilliant arguments to the contrary notwithstanding – without resorting to a second implementation agreement, which would have entailed further action by domestic Parliaments. The time left before entry into force was short, and delegations felt that a new agreement was more than the international system, and the domestic ones, could bear.

Some States Parties to the Convention felt, moreover, that all matters relative to the Tribunal belonged to them exclusively and that the provisions of the Convention should be followed as much as possible. Other States seemed to reflect in their attitude a certain degree of mistrust for the Tribunal, or at least the feeling that its establishment was not urgent. They put forward the idea that all problems raised could be solved through a deferment of the election of the members of the Tribunal to a time when a sufficient balance in the composition of the States Parties would have been obtained.

While these two groups of States had opposite political interests, together they were decisive for rejecting the proposals aiming at ensuring through informal agreements that a group of States far exceeding in number that of the States Parties would participate to the election on 16 May 1995 or shortly thereafter. The debate concentrated on the deferment of the election. By and large, States Parties to the Convention, as well as those which were confident that they would ratify soon, held the view that the deferment should be short and that the election should be held within 1995, so that soon after its entry into force the Convention would become fully effective. Others felt that the objective of having a balanced Tribunal could be obtained with a rather long deferment. Elections on 16 November 1996 or later were mentioned.

On 12 August 1994 the Preparatory Commission, recognizing that the decision belonged to the States Parties, but that there was a wider interest that this decision should be generally satisfactory, recommended to States Parties to meet in order to consider the organization of the Tribunal before the end of 1994 and, on that occasion, to "consider the possibility of a one-time deferment of the first election of the members of the Tribunal of a length to be decided by them". All States were, however, invited to continue consultations on the organization of the Tribunal. The Secre-

tary-General of the U.N. was invited to designate a U.N. staff member as Acting Registrar before 16 May 1995, charged with preparations of a practical nature including the establishment of a library[4].

These recommendations were put into practice when the States Parties met on the 21–22 November 1994. This meeting allowed non Member States to sit as observers and take part freely in the discussions. At the end of the meeting the date of 1st August 1996 was set for the election of members of the Tribunal, reconfirming that there would be no further deferments. Nominations for candidates will be opened on May 16, 1995. They may be submitted not only by States Parties, but also by States in the process of becoming parties. In such a case they shall remain provisional and become definitive only if the nominating State has deposited its instrument of ratification or accession before the 1st of July 1996.

So, while the deferment of the election is just three and a half months shorter than that invoked by most States interested in a long deferment, the process towards election starts quite early. The early start of the process, and the involvement in it of States that have not yet become Parties, will help in making all States focus their attention on the Tribunal, and possibly in accelerating domestic procedures for ratification or accession.

The rather late holding of the election should, on the one hand, allow sufficient time to States to sort out problems concerning financing and the early phase of life of the Tribunal. On the other hand, most of these problems should become easier to solve as, at the time of election, States Parties participating to it should be numerous, widely representative and include many States whose financial contribution is important.

It is to be hoped that the deferment of the election should result in the great advantage of permitting to the Tribunal to start life in the form provided for by the Convention, without those modifications often mentioned in the Preparatory Commission and elsewhere, which, in the name of economy or of the evolutionary approach, risk making it less attractive to States and less able to perform properly its tasks.

[4] Document LOS/PCN/L.115 para. 37.

II. The Jurisdiction of the Tribunal[5]

1. General Aspects

The term "jurisdiction" refers to the power of an international court or tribunal to decide *(potestas decidendi)*. It is used with various qualifications, in order to focus on particular aspects of such power. One may speak of jurisdiction *ratione personae* in order to focus on the persons who may be parties to disputes brought before the court or tribunal: States, international organizations, individuals etc. One may distinguish a contentious from an advisory jurisdiction, depending on the binding force of the decision requested. One may speak of jurisdiction *ratione materiae*, when one wants to focus on the subject-matter of the disputes on which the court or tribunal has the power to judge. There is also the distinction between compulsory and optional jurisdiction, even though the terminology is misleading, as in all cases the jurisdiction of an international court or tribunal depends on the will of the parties. This terminology is currently used to distinguish cases in which the power to decide of the court or tribunal depends on an agreement whose existence precedes the dispute, from those in which it depends on an agreement concluded after the dispute has arisen. This distinction corresponds to that between disputes of which the court or tribunal can be seized by one party and disputes of which the court or tribunal may be seized only by the two parties together. In the case of the Tribunal, we shall adopt a

[5] The most interesting scholarly contributions regarding the system of disputes settlement of the U.N. Law of the Sea Convention and the Tribunal and its jurisdiction in particular are: Sohn, Toward a Tribunal for the Oceans, Revue Iranienne de Relations Internationales 1975/76, Nos. 5–6, 247–260; Pastor Ridruejo, La solución de controversias en la III Conferencia de Naciones Unidas sobre el derecho del mar, Revista Española de Derecho Internacional 30, 1977, 11–32; Rosenne, The Settlement of Disputes in the New Law of the Sea, Revue Iranienne de Relations Internationales 1978, Nos. 11–12, 401–433; Caflisch, Le règlement judiciaire et arbitral des différends dans le nouveau droit de la mer, Festschrift für Rudolf Bindschedler, Bern 1980, 351–371; Lehoux, La Troisième Conférence sur le droit de la mer et le règlement obligatoire des différends internationaux, Canadian Yearbook of International Law 18, 1980, 31–90; Riphagen, Dispute Settlement in the 1982 United Nations Convention on the Law of the Sea, in: Rozakis/Stephanou (eds.), The New Law of the Sea, Amsterdam 1983, 281–301; Adede, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea, Dordrecht (etc.) 1987; Nordquist/Rosenne/Sohn (eds.), United Nations Convention on the Law of the Sea 1982, A Commentary V, Boston, London 1989 (quoted as Virginia Commentary V); Cannone, Il tribunale internazionale del diritto del mare, Bari 1991; Ranjeva, Settlement of Disputes, in: Dupuy/Vignes (eds.), A Handbook on the New Law of the Sea, Dordrecht (etc.) 1991, 1333–1401.

particular, restrictive, meaning of the expression "compulsory jurisdiction" as we shall see *infra* in para. 4.

2. Advisory Jurisdiction

In examining the Tribunal from the point of view of the distinction between advisory and contentious jurisdiction, it emerges immediately that the Convention does not provide for any form of advisory jurisdiction of the Tribunal in general. The Convention entrusts, however, the Sea-bed Disputes Chamber with such jurisdiction. The Chamber can give advisory opinions in two cases: at the request of the Assembly or the Council "on legal questions arising within the scope of their activities" (Article 191), and, at the request of the Assembly, when certain procedural requirements are met, "on the conformity with th[e] Convention of a proposal before the Assembly on any matter" (Article 159 para. 10).

These provisions may be considered in the light of Article 96 of the U.N. Charter, which reserves the right to request the International Court of Justice (ICJ) to issue an advisory opinion to international organizations and organs thereof, with the distinction that the General Assembly and the Security Council may request them "on any legal question" while other organs of the United Nations and Specialized Agencies, when authorized by the General Assembly, may request such opinions "on legal questions arising within the scope of their activities". As there is no other organization, apart from the International Sea-bed Authority, which is directly created by the Law of the Sea Convention, it seems broadly consistent with the precedent of Article 96 that only this organization (through its Assembly and Council) should be entitled to request an advisory opinion to the specifically competent Sea-bed Disputes Chamber of the Tribunal.

One may express the regret that the power to request advisory opinions has not been given to other organizations which are entrusted with particular functions under the Convention. It seems questionable, for instance, that a United Nations Specialized Agency as the International Maritime Organization, should be entitled to request the International Court of Justice of an advisory opinion on whether it is the "competent international organization" mentioned in various provisions of the Law of the Sea Convention, while, on such a question arising within the scope of its activities, and so intimately connected with the interpretation of the Convention, it cannot request the opinion of the International Tribunal for the Law of the Sea.

3. Jurisdiction *ratione personae*

"The Tribunal shall be open to States Parties" (Article 20 of the Statute of the Tribunal). This provision on jurisdiction *ratione personae* is quite different from that in Article 34 of the Statute of the ICJ: "Only States may be parties in cases before the Court". Indeed, "States Parties" is a term defined by Article 1 of the Convention to include not only States which have consented to be bound by the Convention but also entities different from States, which have consented to be bound by the Convention and which are mentioned in Article 305 para. 1 b, c, d, e, and f. These include, in particular, International Organizations to which member States have transferred competence over matters governed by the Convention.

Moreover, according to para. 2 of Article 20, the Tribunal is open to entities other than State Parties in the cases expressly provided for in Part XI. This concerns the competence of the Sea-Bed Disputes Chamber, which can hear cases brought by or against, the International Sea-bed Authority, parties (including non-State parties) to a contract and prospective (including non-State) contractors.

The same provision widens further the jurisdiction *ratione personae* of the Tribunal to include "entities other than State Parties ... in any case submitted pursuant to any other agreement conferring jurisdiction to the Tribunal which is accepted by all the Parties to the case". Thus, under the condition that there is an agreement concerning such jurisdiction and that it binds all the parties to the case, the Tribunal may become competent to hear cases whose parties are States or International Organizations and entities which are not parties to the Convention.

4. Jurisdiction *ratione materiae* and its Connection with the Will of the Parties to the Dispute

It seems difficult to consider separately jurisdiction *ratione materiae* of the Tribunal and the manner in which jurisdiction is connected to the will of parties. In other words: it is difficult to consider on which disputes the Tribunal can pronounce, without saying whether it has been seized unilaterally on the basis of the Convention or otherwise. As we shall see, the scope of subject-matter jurisdiction of the Tribunal depends on whether the Tribunal is seized "at the request of any party" on the basis of rules of the Convention so providing (in this case I shall speak of "compulsory jurisdiction") or whether it is seized on the basis of an agreement differ-

ent from the Convention (in which case I shall speak of "optional jurisdiction"). It does not matter, from the point of view here adopted, whether the agreement just mentioned is a "special agreement" *(compromis)* concluded after the dispute has arisen and the Tribunal is seized by the two parties together, or an agreement concluded before the dispute arises and which may give one party the right to seize the Tribunal.

Leaving for separate consideration disputes concerning activities in the Area, I will examine first the "compulsory" jurisdiction of the Tribunal together with the questions of subject-matter jurisdiction that go with it, and deal later with "optional" jurisdiction based on agreements different from the Convention and its consequences on the subject-matters that can be decided upon.

5. Compulsory Jurisdiction and the "Choice of Procedure" Declarations of Article 287

The main difference between "compulsory" jurisdiction of the ICJ and of the Tribunal is that the compulsory jurisdiction of the Court is optional, while that of the Tribunal is not – even though it depends (at least in part) on an option. To extricate ourselves from this terminological maze, we may recall that, while the Court may be seized by an application of one party only if all parties to the dispute have made a special declaration of acceptance of its "compulsory" jurisdiction according to Article 36 para. 2, of the Statute (the "optional" compulsory jurisdiction clause), the Tribunal may be so seized without any previous declaration of acceptance on the basis of the rules of the Convention conferring the power to settle disputes to third party binding decisions – but on the condition that the Tribunal has been chosen among the various bodies to which such power is recognized.

So, while the Convention establishes cases of compulsory jurisdiction, this jurisdiction can be exercised by the Tribunal only if the conditions set forth in the "Montreux" "choice of procedure" Article 287 are met[6]. In brief, the Tribunal shall be the dispute-settlement body to which parties may unilaterally submit disputes on the matters indicated by the

[6] Rosenne, UNCLOS III – The Montreux (Riphagen) Compromise, in: Bos/Siblesz (eds.), Realism in Law-Making, Essays in Honor of W. Riphagen, Dordrecht (etc.) 1986, 169–178; Queneudec, Le choix des procédures de règlement des différends selon la Convention des Nations Unies sur le droit de la mer, in: Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally, Paris 1991, 383–387.

Convention only when all parties to the dispute, with a declaration to be made at the time of signature or ratification or later, have made a choice in its favor (Article 287 paras. 1 and 4). As is well known, if the parties to the dispute have not made the same choice, an arbitral Tribunal shall be seized of "compulsory" jurisdiction (Article 287 para. 5).

6. Compulsory Jurisdiction Independent of the Option for the Tribunal: Provisional Measures and Prompt Release of Vessels

While compulsory jurisdiction of the Tribunal on disputes concerning in general the interpretation or application of the Convention depends on the declarations just mentioned, the Convention confers to the Tribunal compulsory jurisdiction in respect of two specific substantive matters even when the conditions set forth in the "choice of procedure" provisions have not been met. These particular cases of compulsory jurisdiction have been entrusted to the Tribunal because they concern functions which cannot be performed properly by an arbitral Tribunal notwithstanding the fact that, according to Article 287 para. 5, arbitration is the "residuary" procedure for cases in which the parties to the dispute have not made the same choice of procedure. These are cases in which it is important to resort to a permanent pre-established body. The Convention has given preference to the Tribunal over the International Court of Justice, which is the other permanent pre-established body among those which can be chosen under Article 287. In this respect, for relatively limited purposes, the Tribunal functions as the only possible dispute-settlement body with compulsory jurisdiction.

The Tribunal may exercise such compulsory jurisdiction independently of the choice of procedure mechanism in two cases.

Firstly, when provisional measures have been requested in a case in which the dispute has been submitted to an arbitral tribunal, any party may request the Law of the Sea Tribunal to prescribe[7] such measures pending the constitution of the arbitral tribunal, unless the parties have

[7] Para. 5 of Article 290 says "prescribe, modify or revoke". It would seem that the inclusion of the words "modify" and "revoke" is a mistake which has eluded the attention of the Drafting Committee, as the context is such that there cannot be existing provisional measures to be modified or revoked. While this aspect is not considered in the Virginia Commentary V, it is symptomatic that, in summarizing the definitive text of Article 290 para. 5, the Commentary only mentions that the Tribunal "would be authorized to prescribe" provisional measures upon request of one of the parties (Virginia Commentary V,

agreed to seize another court of tribunal within two weeks from the date of the request for provisional measures[8]. In order to prescribe provisional measures in the above described circumstances, the Tribunal must consider that the measures are required by the urgency of the situation and that, *prima facie*, the arbitral tribunal to be constituted would have jurisdiction. The same power is given to the Sea-bed Disputes Chamber for disputes in respect to activities in the Area. This would seem to refer to cases in which a dispute has been submitted to "binding commercial arbitration" according to Article 188 para. 2.

Secondly, the Tribunal may be seized by the flag State or on its behalf in order to obtain the prompt release of a vessel or its crew detained by the authorities of a State Party. In this case it is required that, within ten days of the detention, the parties have not agreed on a different court or tribunal; and that the flag State does not prefer to bring the case to another court or tribunal accepted by the detaining State under Article 287 of the Convention (Article 292).

This competence of the Tribunal encompasses cases in which it is alleged that the detained vessel has violated the provisions of the Convention on prompt release of vessels and their crews upon the posting of a reasonable bond or other financial security. These are, it would seem, the cases set forth in Article 73 para. 2, concerning detention of ships decided for ensuring compliance with the coastal State's sovereign right in respect to fisheries in the economic zone; in Article 220 para. 7, concerning such detention decided in case of violations of international rules and standards for the prevention of pollution from vessels, if resulting in a discharge causing major damage or threat thereof and provided appropriate procedures for bonding have been agreed; and in Article 226 para. 1(b), when investigations on matters of pollution by dumping or from vessels indicate that applicable laws and regulations or international rules and standards have been violated. Even though these are not all the cases in which a vessel may be detained, they are quite important and frequent.

Moreover, the question of release may be submitted not only by the flag State but also "on its behalf". This permits to States that so wish to

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p. 58). It is to be noted that the language is stronger than in the Statute of the ICJ, which says that the Court may "indicate" provisional measures (Art. 41).

[8] This last condition seems to imply that a party is supposed to request provisional measures directed to the not yet constituted arbitral tribunal, or simply to notify such request to the other party, just for the purpose of having the two week time limit run. Strangely enough the "Final draft rules" of the Tribunal prepared by the Preparatory Commission do not shed light on this aspect.

entrust, either once and for all, or on a case by case basis, with the power to act on their behalf the interested shipowners, or, for instance, associations of such shipowners[9]. In this way, in practice even though not in principle, private parties may be allowed to further their interest before the Tribunal.

In the light of the observations made, it would seem that resort to the Tribunal on the basis of this title of jurisdiction can prove very attractive to States whose flag is flown by fishing vessels fishing in foreign economic zones and by other ships, especially tankers, which navigate in foreign economic zones. They may see in the Tribunal a preferable alternative to domestic courts of countries whose proceedings may not give sufficient guarantees.

7. "Accessory" Jurisdiction

Apart from the above examined two titles of jurisdiction conferred on the Tribunal independently of its being competent according to the choice of procedure mechanism, the Convention provides for titles of jurisdiction which, although directly created by it as the two examined before, are in various ways accessory to other titles of jurisdiction, established or to be established.

One may mention, firstly, the "competence of the competence" – the power of the Tribunal to settle a dispute as to whether it has jurisdiction (Article 288).

Secondly, the competence to prescribe provisional measures in cases brought to it when the Tribunal considers *prima facie* that it has jurisdiction (Article 290 para. 1).

Thirdly, the jurisdiction to judge whether a claim in a dispute referred to in Article 297 (exercise of a sovereign right or jurisdiction of the coastal state in the economic zone, see *infra*) constitutes an abuse of legal process or is *prima facie* well founded (Article 294).

Fourthly, the power to construct its own decisions, in the event of a dispute as to the meaning or scope of one such decision (Article 33 para. 1, of the Statute of the Tribunal).

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[9] The Final Draft Rules of the Tribunal prepared by the Preparatory Commission provide, in Article 49 para. 3, that: "A State Party may at any time notify the Tribunal by an official communication as to who is authorized to act on its behalf for the purpose of the proceedings under Article 292 of the Convention" (doc. LOS/PCN/SCN.4/WP.16/Add.1 of 19 January 1994).

Fifthly, the power to pronounce on questions of application or interpretation of the Convention, or of an agreement conferring jurisdiction to the Tribunal, with binding effect on a State Party to the Convention or to the agreement, which has intervened in a pending case according to Article 32 of the Statute.

A sixth case could concern the power to pronounce on the claim of a State Party which has been permitted to intervene according to Article 31 of the Statute – provided that the Tribunal does not follow the jurisprudence of the ICJ on Article 62 of its Statute, which requires that there exist an independent title of jurisdiction between the intervening State and the parties to the pending case.

Lastly, the Tribunal has jurisdiction to pronounce as to costs, as an exception to the general rule providing that each party shall bear its own costs (Article 34 of the Statute of the Tribunal).

8. Compulsory jurisdiction: the Limitations of Article 297

Once the mechanism of choice of procedure has made the Tribunal competent, any dispute concerning the interpretation or application of the Convention may be submitted to it at the request of any party. This very broad "compulsory" jurisdiction entailing a binding decision of the Tribunal has some exceptions. Some are called "limitations" and apply automatically. These are set forth in Article 297. Others are called "optional exceptions", and apply only if States declare in writing that they do not accept the compulsory jurisdiction of the dispute settlement bodies mentioned in Article 287 – and so, when the Tribunal would be, among these, the one having jurisdiction, of the Tribunal. These exceptions are set forth, for some specific subjects, in Article 298.

Article 297 is a very complex provision. Its three paragraphs have not the same logical structure and, although they are put on the same hierarchical level in the Article, the subject-matter considered in the second and third is almost completely included in the subject-matter of the first.

Indeed, the first paragraph considers disputes "concerning the interpretation or application of th[e] Convention with regard to the exercise by the coastal State of its sovereign rights or jurisdiction provided for in th[e] Convention", while the second and third paragraph, respectively, consider disputes "concerning the interpretation or application of the provisions of th[e] Convention with regard to marine scientific research" and "with regard to fisheries" – and it is well known that many of the provisions of the Convention on marine scientific research and on fisheries

concern the exercise by the coastal State of its sovereign rights or jurisdiction.

In speaking of "sovereign rights or jurisdiction" Article 297 uses the same terminology the Convention uses to refer to the rights of the coastal State in the exclusive economic zone (sovereign rights and jurisdiction) and on the continental shelf (sovereign rights). Must one conclude that disputes concerning the exercise of the "sovereignty" of the coastal State on the territorial sea and on archipelagic waters are included in compulsory jurisdiction? One could hold that they are, invoking the *travaux*[10] and using the textual argument just made and adding that Article 297 as a whole is concerned with the exclusive economic zone[11]. One could, however, also hold that they are not, arguing that it would be difficult to admit that the exercise of "sovereignty" could be questioned through a compulsory procedure for the settlement of disputes while that of sovereign rights or jurisdiction cannot, in view of that "sovereignty" is more absolute than "sovereign rights" or "jurisdiction" (which are recognized for specific purposes)[12]. Even if one were to accede to the opinion just recalled, it must be underlined that the cases in which the Convention regulates the exercise of "sovereignty of the coastal State" are very rare.

The first paragraph of Article 297 indicates three cases in which disputes concerning the exercise of the coastal State's sovereign rights or jurisdiction may be submitted to compulsory jurisdiction. These concern contraventions either by the coastal State or by other States of the rules

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[10] See the indications in the Virginia Commentary V, p. 85ff., espec. 91. The linkage with the exclusive economic zone appears clear in all phases of the elaboration of Article 297.

[11] The exceptions to the exception in para. 1 (a) and (b) are taken from Article 58 which deals with the exclusive economic zone and the one in para. 1(c) seems linked to Article 211 para. 5, which deals with the economic zone, and not to Article 211 para. 4, which deals with the territorial sea. Para. 2 mentions explicitly Articles 246 and 253 concerning rights and discretion of the coastal State in the exclusive economic zone, while among the provisions in the Convention with regard to marine scientific research there is also Article 245 on research in the territorial sea. Lastly, para. 3 explicitly speaks of the exercise of the coastal State's sovereign rights in the exclusive economic zone.

[12] This argument could be completed by saying that the term "coastal State" in the "chapeau" of Article 297 para. 1, is decisive in order to determine the scope of the limitation, which would not apply whenever the Convention does not use this expression (for instance in the Part on archipelagic States) and that the reference to "rights" together with freedoms in the exceptions in para. 1 (a) and (b) would leave under compulsory jurisdiction navigational rights in zones different from the economic zone (for this argument see Caflisch [note 5], 356f.).

concerning the high seas freedoms applicable to the exclusive economic zone and their reconciliation with the rights of the coastal State, and contraventions by the coastal State of applicable international rules and standards for the protection of the environment. The positive statement of cases concerning the exercise of the coastal State's sovereign rights and jurisdiction to which compulsory jurisdiction may apply seems to entail, on one side, that compulsory jurisdiction does not apply to all other disputes concerning such exercise, and also, on the other side, that it does apply to disputes concerning such sovereign rights and jurisdiction but not their exercise (these would include disputes on the very existence of such sovereign rights and jurisdiction and on the spatial limits thereof).

The second and third paragraphs of Article 297 start with the statement that disputes relating to the interpretation or application of the provisions of the Convention regarding marine scientific research and fisheries are subject to compulsory jurisdiction, and continue by stating exceptions. These concern, as regards scientific research, the exercise of a right or discretion under Articles 246 and 253 and, as regards fisheries, the coastal State's sovereign rights with respect to the living resources in the exclusive economic zone, including explicitly some important aspects of their exercise. Some of the disputes excluded under paras. 2 and 3 may be submitted to conciliation at the request of any party.

The structural differences between para. 1 and paras. 2 and 3 might give rise to negative implications, for instance as regards the manner in which the principle (which, in turn, is not uncontroversial) that exceptions must be interpreted restrictively would work in the complex maze of exceptions and exceptions to exceptions that is Article 297. It would seem imprudent, however, to overestimate the importance of a structural analysis of the Article. It seems more important to stress that – without prejudice to the question, in fact marginal as noted, of whether disputes concerning the exercise of "sovereignty" are included or excluded – the Article can be read as a complement to the substantive provisions on the exclusive economic zone, be they included in Part V of the Convention or elsewhere (Parts XII and XIII).

Seen from this angle, Article 297 adds some details to the already complicated borderline between the rights of the coastal State and the rights of other States in the exclusive economic zone. Its practical application may give rise to many difficult questions which cannot be discussed fully here and which, sooner or later, will have to be considered by the Tribunal and the other bodies entrusted with compulsory jurisdiction. Such questions could, for instance, dwell on whether disputes concerning mat-

ters envisaged in Article 59 (cases where the Convention attributes rights or jurisdiction in the exclusive economic zone neither to the coastal State nor to other States) are included in compulsory jurisdiction. Or on whether such jurisdiction includes disputes concerning installations and structures used for purposes different from those provided for in Article 56 and other economic purposes; or disputes concerning "implied consent" for marine scientific research under Article 252; or disputes concerning the land-locked and geographically disadvantaged States' right to participate in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zone, according to Articles 69 and 70.

9. The "Optional Exceptions" of Article 298

"Optional exceptions" set forth in Article 298 permit States making appropriate declarations to carve certain specific categories of disputes out of the amount of disputes to which they can be parties on the basis of the rules on compulsory jurisdiction. The description of these categories of disputes is sometimes helpful in clarifying which disputes are included in (or not excluded from) compulsory jurisdiction.

Even though Article 298 para. 1, groups the possible optional exceptions under three subparagraphs, in fact both the first and the second subparagraph contain different categories, which may – it would seem – be envisaged separately in the declarations envisaged by the said Article.

The disputes which can be excluded and which, consequently, must be considered as covered by compulsory jurisdiction whenever the appropriate declaration has not been made, are the following:

Firstly, disputes "concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations". This confirms the point already made that questions concerning the limits of maritime zones are covered by compulsory jurisdiction.

Secondly, disputes "involving historic bays or titles". It would be questionable to conclude from this mention in Article 298 para. 1(a), that all disputes concerning historic bays or titles may be submitted (unless there is a declaration to the contrary) to a binding settlement procedure at the request of one party. According to Article 286, compulsory jurisdiction applies only to disputes concerning the interpretation or application of the Convention. It would seem to follow that compulsory jurisdiction can concern historic bays and titles only to the extent that the dispute concerns interpretation or application of Articles 10 para. 6, and 15.

These are the only provisions mentioning respectively historic bays and titles.

The possibility to resort to conciliation at the request of one party is provided for as regards some of the disputes belonging to these two categories.

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

Fourthly, disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from compulsory jurisdiction under Article 297 paras. 2 and 3 (questions of marine scientific research and of fisheries). It may be concluded from this that the limitations in Article 297, or at least in its second and third paragraphs, must be interpreted restrictively, as otherwise one could have argued that law enforcement activities are to be seen together with the sovereign rights or jurisdiction they protect.

Fifthly, disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. Resort to this exception may have the effect of cutting short certain difficult questions discussed recently before the International Court of Justice (*Lockerbie* case, 1992, and *Genocide Convention* case, 1993).

10. Optional Jurisdiction

State parties can submit a dispute to the Tribunal by notification of a special agreement (Article 24 para. 1 of the Statute of the Tribunal).

What is important to underline is that the concurrent will of the parties is considered decisive, so that all limitations to the jurisdiction of the Tribunal considered above can be overcome by such special agreement. Indeed, Article 280 states in very general terms that nothing in the Part of the Convention concerning the settlement of disputes "impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice". Such peaceful means include obviously the procedure before the Tribunal.

We have seen already that an agreement of the parties to a dispute may have the effect of widening the jurisdiction *ratione personae* of the Tribunal (Article 20 para. 2 of the Statute).

A further widening emerges from Article 287. The rules in that Article that give preference to the procedure chosen by both parties (para. 4) and to arbitration when the parties have chosen different procedures (para. 5), apply only "unless the parties otherwise agree". It follows that agreement between the parties to a dispute can bring the dispute to the Tribunal even when the mechanism of choice of procedure according to Article 287 would have excluded its jurisdiction. The converse is also true, however. Even when both parties have chosen the Tribunal, they may agree to submit the dispute to some other procedure entailing a binding result. Moreover, according to Article 282, if the parties to a dispute concerning the interpretation or application of the Convention "have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the proceedings provided for in this Part, unless the parties otherwise agree". Consequently, also prior agreements entrusting compulsory jurisdiction to a body different from the Tribunal shall prevail over the competence of the Tribunal established through the mechanism of Article 287. These agreements would seem to include acceptance of the compulsory jurisdiction of the ICJ as between couples of parties having made the declaration under Article 36 para. 2, of the Court's Statute.

Also the jurisdiction *ratione materiae* of the Tribunal can be wider in cases of optional jurisdiction than it is in cases of compulsory jurisdiction. The limitations set forth in Article 297 and the exceptions permitted by Article 298 can be set aside by the agreement of the parties. This emerges clearly from Article 299 para. 1, which states: "A dispute excluded under Article 297 or excepted by a declaration made under Article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute". As regards the "optional exceptions" under Article 298, this is confirmed also by para. 2 of that Article, according to which "A State party which has made a declaration under para. 1 may at any time ... agree to submit a dispute excluded by such declaration to any procedure specified in the Convention".

The agreement on the basis of which the Tribunal can be seized of a case and which permits the exercise of the wide jurisdiction now described is not only the "special agreement" *(compromis)* mentioned in Article 24 of the Statute. It may take the form of a unilateral application by a Party in cases the Tribunal lacks jurisdiction followed by consent to jurisdiction given by the other party. This is the so-called *forum pro-*

rogatum. The Statute of the Tribunal does not mention it, following the pattern of the Statute of the ICJ. The Final Draft Rules of the Tribunal, again following the lead of the Rules of the ICJ, consider *forum prorogatum* in Article 44 para. 5. However, according to this provision, and differently from the corresponding provision of the Rules of the ICJ, in order to establish the jurisdiction of the Tribunal on the basis of consent yet to be given or manifested by the other party to the dispute, it is necessary that the applicant "has accepted jurisdiction". This, it would appear, refers to the option under Article 287. It would seem that this requirement is incompatible with the true nature of *forum prorogatum*, which is that of a special agreement and not of a special form of compulsory jurisdiction. It is to be hoped that the Tribunal in adopting the definitive version of its rules will delete this condition[13].

Similarly, the Tribunal can exercise its jurisdiction independently of the mechanism of Article 287 and of the limitations and exceptions provided for in Articles 297 and 298, when the dispute is submitted in accordance with an international agreement which confers jurisdiction to it[14]. It is, however, necessary that the dispute concern the interpretation or application of the agreement and that the agreement be "related to the purposes of th[e] Convention", as it emerges from Article 288 para. 2. The Statute of the Tribunal (Article 21) adds that jurisdiction based on an agreement conferring jurisdiction to the Tribunal comprises "all matters specifically provided for" in the agreement. Thus the limits to jurisdiction are not – apart from the requirement that the agreement be related to the purposes of the Convention – those set out in the Convention but those provided for in the agreement.

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[13] Article 44 para. 5 of the Final Draft Rules (quoted *supra* at note 9) also contains the following final sentence, not to be found in the corresponding Article 38 para. 5, of the Rules of the ICJ: "Such consent (i.e. the consent of the party against which the application is made) may be given in a declaration or agreement and may be subject to qualifications included therein". Considering that consent can be not only "given" but also "manifested", it does not seem necessary to specify the form of such consent. The possibility of qualifying consent seems to open more problems than it solves.

[14] The Agreement which is currently under negotiation at the U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks will contain – it emerges from the current draft – a clause giving jurisdiction for its interpretation and application to the procedures provided for in the Law of the Sea Convention. It is interesting to note that in doing so the draft considers it necessary to spell out that such acceptance of jurisdiction (which seems to correspond to what is foreseen in Article 282 para. 2 of the Convention) is without prejudice to the limitations in Article 297. See U.N. doc. A/CONF.164/22 of 23 August 1994, Articles 28 para. 3, and 31.

The Statute of the Tribunal adds further, in Article 22, that such agreement may also be a treaty or a convention already in force (i.e. at the time of entry into force of the Convention) if all the parties agree that disputes concerning the interpretation or application of the treaty or convention may be submitted to the Tribunal. In fact, such later agreement brings the pre-existing treaties and conventions into the same category as the agreements mentioned in Article 21.

11. Jurisdiction on Disputes Concerning "Activities in the Area"

The provisions on disputes concerning "activities in the Area"[15] contain the most innovative concepts to be found in the Convention as regards the settlement of disputes. While the provisions on the Tribunal as a whole have in mind, broadly speaking, the model of the ICJ, those concerning disputes in respect to "activities in the Area" owe something to the model of the Court of Justice of the European Communities.

We have already seen that jurisdiction *ratione personae* on disputes concerning activities in the Area is particularly wide, as it includes disputes to which not only States Parties, but also the Authority, the Enterprise and natural or juridical persons can be parties. We have also examined advisory jurisdiction as regards "activities in the Area".

The jurisdiction of the Tribunal on these disputes is exercised by its eleven-member Sea-Bed Disputes Chamber, even though in one instance (Article 188 para. 1a) the parties to the dispute – which in the case in hand must be States Parties – may bring the case to another Chamber of the Tribunal.

As regards the relative importance of compulsory and optional jurisdiction, the contentious jurisdiction of the Sea-Bed Disputes Chamber is in all cases compulsory – even though the will of one party may exclude some aspects of certain disputes from the Chamber's jurisdiction and bring them to commercial arbitration (Article 188 para. 2). Moreover, the compulsory jurisdiction of the Chamber does not depend on the mechanism of choice of procedure illustrated above. Article 287 para. 2, clearly states that a declaration of choice of procedure made under the first paragraph of that Article "shall not affect or be affected by the obligation of a State party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the Tribunal to the extent and in the manner provided for in Part XI, section 5".

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[15] This expression is defined in Article 1 para. 1(3), of the Convention.

The scope of jurisdiction *ratione materiae* of the Sea-Bed Disputes Chamber is not determined only by the requirement that it must concern disputes "with respect to activities in the Area". It is shaped in a very intricate manner depending on the parties to the dispute, and on its specific subject-matter. In applying the provisions concerning jurisdiction sight must not be lost of the fact that Part XI, in which these provisions are contained, must be interpreted and applied as a single instrument together with the Implementation Agreement of 1994. It must also be recalled that these provisions bind not only the States Parties to the Convention, but also States and entities for which the Implementation Agreement, and consequently also Part XI and Annexes III and IV, as modified by the Agreement, apply provisionally.

It may seem odd that States applying provisionally Part XI become subject to the compulsory jurisdiction of a Chamber of a Tribunal to whose election they cannot participate. It must be observed, however, that the deferment of the election of the Tribunal mentioned before should remedy in part this situation. Moreover, never, during the negotiation of the Implementation Agreement, was it proposed that States applying the Agreement provisionally should not be subject to, or could opt out of, the jurisdiction of the Sea-Bed Disputes Chamber – a suggestion which might have been taken seriously. Lastly, States applying provisionally the Implementation Agreement have an influence, even though a limited one, on the Chamber because, in their quality of members of the Assembly of the International Sea-Bed Authority, they are entitled to participate in the adoption of recommendations of a general nature relating to the representation in the Chamber of the principal legal systems of the world and equitable geographical distribution, according to Article 36 para. 2, of the Statute of the Tribunal.

Article 187 lists six categories of disputes for the settlement of which the Sea-Bed Disputes Chamber shall have jurisdiction.

Firstly, there are disputes between States Parties. These are similar to those which fall under the jurisdiction of the Tribunal as a whole for matters different from activities in the Area. They concern the interpretation or application of Part XI and Annexes III and IV. Article 187 (a), which considers this category of disputes, must be read as saying that "State Parties" include those provisionally applying the Implementation Agreement, and that "Part XI and the Annexes relating thereto" means "Part XI and the Annexes thereto together with the Implementation Agreement and with the changes introduced by it".

A dispute belonging to this category may, at the request of all parties to it, be moved out of the Sea-Bed Disputes Chamber by referral to a special Chamber of the Tribunal, as is possible for any dispute on the interpretation or application of the Convention. It may also be brought, at the request of one party, to an *ad hoc* Chamber of the same Sea-Bed Disputes Chamber (Article 188 para. 1(a) and (b)).

Secondly, there are disputes between a State Party and the Authority. They may concern acts or omissions of the Authority or of the State Party which allegedly violate Part XI and its Annexes (including the Implementation Agreement) or rules, regulations and procedures adopted by the Authority in accordance therewith, as well as acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.

Thirdly, there are "contractual" disputes between parties to a contract (which may be States, the Authority, the Enterprise, and natural or juridical persons). They may concern the interpretation of a contract or plan of work and "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" (Article 187 (c)). Among the former one may quote suspension or termination of the contract or monetary penalties imposed by the Authority to the contractor according to Article 18 of Annex III. Emergency orders to prevent serious harm to the marine environment according to Article 162 para. 2(w) may in some cases be directed to the contractor and in other cases affect directly its interests.

Within this category of disputes, those concerning the interpretation or application of a contract may be taken away from the jurisdiction of the Chamber by any party through a request submitting them to binding commercial arbitration. The arbitral commercial tribunal shall not, however, pronounce on a question of interpretation of the Convention. Should such a question arise, the arbitral Tribunal must refer it to the Chamber for a ruling. This procedure recalls that set out in Article 177 of the EEC Treaty.

Fourthly, there are "pre-contractual" disputes, namely those between the Authority and a prospective contractor which is sponsored by a State Party according to Article 153 para. 2(b), and which has accepted the undertakings mentioned in Annex III, Article 4 para. 2(b) and paid the fee mentioned in Annex III, Article 13 para. 2, as modified by para. 3 of Section 8 of the Annex to the Implementation Agreement[16]. These dis-

[16] While Art. 13 para. 2 of Annex III provided that a fee of 500.000 U.S. dollars had to be paid for processing a plan of work in the form of a contract, according to para. 3 of

putes may concern "the refusal of a contract or a legal issue arising in the negotiation of a contract". It would seem that, when the prospective contractor is a State Party, this category of disputes is subsumed within those mentioned in Article 187(b), concerning in general disputes between a State Party and the Authority.

Fifthly, disputes in respect of the alleged liability of the Authority according to Article 22 of Annex III. These disputes are for liability for "any damage arising out of wrongful acts" in the exercise of the Authority's powers and functions, including violations of the obligations of confidentiality incumbent on the Secretary-General and its staff. These disputes are between the Authority and a State Party, a State enterprise or a natural or juridical person sponsored by a State Party. The separate status of this category of disputes with subjects that are entitled to be parties to contracts would seem to justify the conclusion that the "wrongful acts" mentioned in Article 22 of Annex III may be committed either before or after the conclusion of the contract.

Sixthly and lastly, the Chamber has jurisdiction to decide on "any other disputes for which the jurisdiction of the Chamber is specifically provided in th[e] Convention" (Article 187(f)). This provision may allude to Article 185 para. 2, according to which no action may be taken for suspending a State member from the exercise of the rights and privileges of membership of the Assembly "until the Sea-Bed Disputes Chamber has found that a State Party has grossly and persistently violated" the provisions of Part XI. It would seem, however, that this category of disputes belongs to that of disputes between a State Party and the Authority mentioned in Article 187(b).

The Sea-Bed Disputes would seem to be competent on the basis of Article 187(f) also on the two categories of disputes for which the Implementation Agreement provides for application of "the dispute settlement procedures set out in the Convention". These are disputes concerning the GATT Agreement, its relevant codes and successor or superseding agreements on which the production policies of the Authority shall be based, when one or more of the States Parties concerned are not parties to such agreements (Sect. 6 para. 1 f(ii) of the Annex); and disputes concerning the interpretation and application of the rules and regulations based on the principles concerning financial terms of contracts set out in Section

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sect. 8 of the Annex to the Implementation Agreement, the processing fee may be of 250.000 dollars for plans of work including only one phase, namely either exploration or exploitation.

8 of the Annex (Section 8 para. 1(f)). The above quoted provisions of the Implementation Agreement do not, however, seem easy to apply in practice. It is not clear whether these disputes should be somehow fitted into the existing categories set out in Article 187, and, if this were not to be the case, how wide should the Chamber's jurisdiction be. There is room for some clarification in the Rules of the Tribunal.

The jurisdiction of the Chamber is limited by various rules, set out in Article 189, which aim at reconciling the need to provide for effective judicial remedies against decisions of the Authority, and the need – considered as important by some States – that the possibility to challenge the use of its discretion by the Authority should not be allowed and that no judicial entity should have the power to decide that certain acts or omissions of the Authority are invalid because they are not in conformity with the Convention.

So Article 189 provides that the 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". The Chamber remains, however, competent to decide whether an act of the Authority was adopted within its discretion, as it is competent to judge disputes between States Parties and the Authority concerning "acts of the Authority alleged to be in excess of jurisdiction or a misuse of power" (Article 187(b)(ii) to be read in connection with Article 189, last sentence).

So the same Article provides also that, in exercising its contentious jurisdiction, the Chamber "shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with th[e] Convention, nor declare invalid any such rules, regulations and procedures". When settling disputes involving rules, regulations and procedures which might not be in conformity with the Convention, the Chamber's jurisdiction is limited to the possibility of deciding that, in the individual case submitted to it, the application of the rules, regulations and procedures "would be in conflict with the contractual obligations of the parties to the dispute or their obligations under th[e] Convention" and to claims for damages for failure to comply with contractual obligations or obligations under the Convention. So, while it will be possible to read through the lines of the judgments of Chamber that certain rules, regulations and procedures are not in conformity with the Convention, as the judgment will state that their application would be in conflict with the parties' obligations under the Convention, this will not be part of the *dispositif*, as the binding force of the judgment will

remain limited to the specific relationship between the parties to the dispute.

III. Conclusions: the Impact of the Tribunal on the Peaceful Settlement of Disputes

1. The Possible Impact of the Various Kinds of Jurisdiction

What will be the impact on the peaceful settlement of disputes of the presence of the International Tribunal for the Law of the Sea? In the light of the developments above, the establishment of the Tribunal adds three main possibilities of bringing disputes concerning the law of the sea to third party binding settlement to those now existing. Firstly, the Tribunal's "residuary" jurisdiction on prompt release of vessels and on the granting of provisional measures pending constitution of an arbitral Tribunal and all the cases of contentious jurisdiction of the Sea-Bed Disputes Chamber. Secondly, all cases of "optional jurisdiction" of the Tribunal. Thirdly, all cases of compulsory jurisdiction of the Tribunal whenever the choice of procedure mechanism permits, and provided they are not excluded because of the limitations and optional exceptions mentioned before. Moreover, apart from these three groups of cases in which the Tribunal may exercise its contentious jurisdiction, one should not forget the cases in which the Sea-Bed Disputes Chamber may exercise its advisory jurisdiction.

In order to make an assessment of the actual possible scope of jurisdiction of the Tribunal under each of these categories of disputes one may observe that compulsory jurisdiction of the Sea-Bed Disputes Chamber seems to be the most important source of jurisdiction of the Tribunal independent of choice of procedure or of special or other agreements. However, according to the Implementation Agreement, the setting up and the functioning of the organs and subsidiary bodies of the Authority shall follow an evolutionary approach. Since it is unlikely that much activity will start during the next few years that will give rise to disputes relating to activities in the Area, it would seem that this jurisdiction of the Tribunal may not be utilized for some time – even though it would not seem impossible that a dispute arises in the near future, for instance as regards the position of States mentioned in Resolution II, according to para. 6 of Section 1 of the Annex to the Implementation Agreement. This possibility notwithstanding, as regards "activities in the Area", it would seem more likely that the Sea-Bed Disputes Chamber be called to pro-

nounce on the basis of its advisory jurisdiction. According to Article 159 para. 10, a request in writing to the President sponsored by at least one fourth of the members of the Authority is sufficient for obtaining that the Assembly of the Authority request an advisory opinion concerning the conformity with the Convention of a proposal before the Assembly on any matter. The request for an advisory opinion may thus function as a guarantee for minorities which feel the majority is about to exercise illegally its power, and also as a mechanism for defusing tension as regards a controversial proposal.

As far as jurisdiction regarding prompt release of vessels and crews is concerned, as we have already said, it may prove attractive as an alternative to domestic courts. It may even become one of the main attractions of the Tribunal. Considering the innovative character of this jurisdiction – which brings to the level of an international tribunal matters hitherto left to domestic courts – the success of this form of jurisdiction will depend on its being made well known in maritime circles. States parties may also help by adopting promptly provisions in order to make it easier for private persons or entities to act "on their behalf".

As far as optional jurisdiction is concerned, this can be a very important source of jurisdiction for the Tribunal. In the present situation of international law, even though forms of compulsory jurisdiction are making progress, as evidenced by the very Law of the Sea Convention, it remains true that in order to have a third party settle a dispute with a binding decision States most often resort to an agreement for that purpose. Of course, whether States will prefer to conclude such agreements in favor of the Tribunal and not of the ICJ or of an arbitral tribunal, will depend on the degree of trust the Tribunal will be able to earn – primarily as regards its fairness and legal prestige, but also in the light of more practical aspects such as costs, time necessary for a decision, facilities etc. The same elements will influence the inclusion of clauses conferring jurisdiction to the Tribunal in agreements related to the purposes of the Convention.

2. Compulsory Jurisdiction: Choice of Procedure and Lack thereof, Legal and Policy Aspects

Coming now to compulsory jurisdiction of the Tribunal, it must be said at the outset that, notwithstanding the important limitations and optional exceptions, and the considerable problems of interpretation the provisions setting out such limitations and exceptions entail, by far the

most innovative aspect of the system provided in the Convention for the settlement of disputes is that, by becoming parties to it, States become bound by rules for the compulsory settlement of disputes. This aspect makes the Convention go far beyond what has been done so far in major conventions for the codification and progressive development of international law.

Whether the Tribunal will be the forum to which States will bring cases under the compulsory settlement mechanism of section 2 of Part XV of the Convention will depend on whether all parties to the dispute have chosen the Tribunal according to Article 287. If one looks at the declarations made so far by the States which have ratified the Convention, it emerges clearly that, among States that have made a declaration of choice of procedure, those choosing the Tribunal are in a clear majority. It also emerges very clearly, however, that declarations under Article 287 are very few as the Tribunal has been chosen only by a handful of States. The vast majority of States ratifying the Convention has made no choice[17].

What is the meaning of this lack of choice? Does it indicate a refusal of the Tribunal? According to Article 287 para. 3, a lack of choice gives rise to a presumption of choice for arbitration, and, again, according to para. 5, the choice of different procedures by the parties to a dispute entails jurisdiction of an arbitral tribunal.

In the light of these rules of the Convention, two questions arise. Does the fact that a State has not made a declaration of choice of procedure automatically entail competence of an arbitral Tribunal? And does it mean that States really prefer arbitration to other means of settlement? Obviously, the first question requires an answer in legal terms, while the second has to be answered in the light of policy considerations.

As regards the first question, to make a declaration of choice of procedure under Article 287 may be considered as unnecessary by States which have accepted the compulsory jurisdiction of the International Court of

[17] As at 15 March 1995 the States having ratified the Convention or having acceded to it are 73, out of which only eight have made declarations on the basis of Article 287. Of these, five have given preference to the Tribunal: Cape Verde, Germany, Oman, Tanzania and Uruguay. One has given preference to arbitration according to Annex VII: Egypt. Two have made negative declarations, stating that they exclude the jurisdiction of the International Court of Justice: Cuba and Guinea Bissau. The four signatories which have not yet ratified and which have made a declaration according to Article 287 have expressed their preference for special arbitration and, in second place, the Tribunal in the case of Belgium (in fact it is a general choice for the Tribunal); and for arbitration according to Annex VII and for special arbitration in the case of Belarus, the USSR, now Russia, and Ukraine.

Justice according to Article 36 para. 2, of the Statute of the Court. They may consider that such acceptance is equivalent to the choice of the Court, as all disputes which would become liable to be submitted to the jurisdiction of the Court according to the declaration under Article 287 para 1(b), are already liable to be submitted to it because of the acceptance of the "optional clause" of Article 36 para. 2, of the Statute of the Court. While this would seem to be correct in substance, the formal requirements of Article 287 would still be missing. This would not be the case, if one considers States having made the declaration under Article 36 para. 2 of the Statute of the Court, as having accepted a binding procedure "through a general, regional or bilateral agreement or otherwise" according to Article 282. The acceptance of the "optional clause" can be seen as one of the various ways mentioned in this Article for a State to accept a binding procedure with the consequence of making that procedure applicable in lieu of those provided for in the Convention.

It is worth mentioning that more than a quarter of the States having ratified the Convention to date have accepted the compulsory jurisdiction of the International Court of Justice[18]. A problem of interpretation may arise as to whether two States one of which has accepted the compulsory jurisdiction of the Court according to Article 36 para. 2, of the Statute, and the other has chosen the Court according to Article 287 of the Law of the Sea Convention, can be deemed to "have accepted the same procedure" for the purpose of para. 4 of Article 287. Another question is raised by the position of Uruguay, which has accepted the compulsory jurisdiction of the Court, but has also given his preference to the Tribunal, even though "without prejudice to its recognition of the jurisdiction of the International Court of Justice and of such agreements with other States as may provide for other means of peaceful settlement".

Declarations of acceptance of compulsory jurisdiction of the ICJ cannot, however, be deemed to be equivalent in all cases to the acceptance of a binding procedure under Article 282 or to an option for the Court under Article 287. When these declarations contain reservations excluding matters which are comprized in compulsory jurisdiction under section 2 of Part V of the Convention, these matters remain covered by such jurisdiction and, by consequence, unless a different choice is made, the State

[18] They are the following 21 States: Australia, Barbados, Botswana, Cameroon, Costarica, Cyprus, Egypt (whose acceptance is, however, limited to disputes which may arise out of para. 9 b of the Declaration of 24 April 1957), Guinea-Bissau, Honduras, Kenya, Malta, Mauritius, Nigeria, Philippines, Senegal, Somalia, Sudan, Togo, Uganda, Uruguay and Zaire: see International Court of Justice, Yearbook, 1993–1994, 83 ff.

concerned shall be deemed to have chosen arbitration. This seems to be the case, as regards the declarations made, under Article 36 para. 2, of the Statute of the Court, by Honduras, by Malta and by the Philippines, three States which have ratified the Law of the Sea Convention. Honduras has excluded from the scope of its declaration, among others, disputes concerning "bays, the territorial sea and the legal status and limits thereof" and "the rights of sovereignty or jurisdiction concerning the legal status and limits of the contiguous zone, the exclusive economic zone and the continental shelf"[19]. Malta has excluded from its acceptance of the compulsory jurisdiction of the ICJ disputes concerning: "a) its territory, including the territorial sea, and the status thereof; b) the continental shelf or any other zone of maritime jurisdiction, and the resources thereof; c) the determination or the delimitation of any of the above; d) the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Malta"[20]. The Philippines has excluded from acceptance of the compulsory jurisdiction of the ICJ "disputes arising out or concerning jurisdiction or rights claimed or exercised by the Philippines, (i) in respect of the natural resources, including living organisms belonging to sedentary species, the seabed and subsoil of the continental shelf of the Philippines or its analogue in an archipelago ... (ii) in respect of the territory of the Philippines, including its territorial sea and inland waters"[21]. Whatever the interpretation of the limitations set forth in Article 297, it is clear that these categories of excepted disputes are covered at least in part by compulsory jurisdiction according to Section 2 of Part XV of the Convention. It follows that the acceptance by the three above-mentioned States of the compulsory jurisdiction of the ICJ has a very limited significance as far as disputes in respect to the interpretation and application of the Law of the Sea Convention are concerned.

Coming now to the second question, apart from the cases in which States Parties consider, as we have seen not always rightly, that they do not need to make a choice under Article 287 because of their acceptance of the compulsory jurisdiction of the ICJ, it would seem that the fact that a State Party has not chosen a procedure does not mean *per se* rejection of the Tribunal, and does not mean convinced acceptance of arbitration. In

[19] International Court of Justice, Yearbook, 1993–1994, 94f.

[20] Ibid., 102. Among the numerous declarations made by Malta upon ratifying the United Nations Law of the Sea Convention none contains a choice of procedure according to Article 287 (Law of the Sea Bulletin, No. 25, June 1994, 15).

[21] International Court of Justice, Yearbook, 1993–1994, 111.

fact, declarations under Article 287 may be made at any time after ratification. Many States Parties are probably still considering which choice is the most convenient for them even though this entails, for the time being, to be subject to arbitration.

It would seem that time is ripe for States Parties, and prospective State Parties, to engage, domestically and internationally, in a serious discussion on choices available under Article 287. The advantages of arbitration, in particular the fact that parties can choose the members of the tribunal, may have to be reconsidered in the light of other factors, such as costs and the fact that proceedings before the Tribunal and the ICJ can be brought before Chambers of these judicial bodies, and that in the choice of members of these Chambers parties to the dispute have, as is well known, a decisive voice. The assessment of the pros and cons of a choice between the Tribunal and the ICJ is even more delicate. The ICJ has on its side tradition and experience, the Tribunal its specialization and its close linkage with a Convention which many States see as a very important step in the development of international law. Broader considerations of policy may, at the end, be decisive in the choices made by States. To facilitate this choice it would be very useful that in the early phase of its life the Tribunal undertook efforts to make its existence and characteristics well known.

Be that as it may, it would seem important that States which are persuaded that a choice in favor of a permanent judicial body is preferable to arbitration, consider, in making the option under Article 287, the possibility of indicating both the Tribunal and the ICJ. The very Article 287 seems to encourage this in saying that States can choose "one or more" of the procedures listed. Cape Verde and Oman have already taken advantage of this possibility by choosing both the Tribunal and the Court. Their declarations already point to two possibilities available, as Cape Verde stated that the Tribunal and the Court are chosen "in order of preference"[22], while Oman seems to put them on the same level. The precise functioning, according to the rules of Article 287, of these declarations in the various permutations of the multiple choices made by States can create some problems of interpretation, especially as regards the meaning to be given to the expression "if the parties to a dispute have

[22] The position of Germany is similar, as, when it acceded to the Convention, it declared its choice under Article 287 in favour of the Tribunal, of a special arbitration tribunal (which, however, is competent only on disputes concerning certain matters) and of the International Court of Justice, in that order.

accepted the same procedure" in Article 287 para. 4[23]. This notwithstanding, widespread resort to this practice would certainly narrow the likelihood of utilization of arbitration as a residuary procedure, and entail more frequent resort to either the ICJ or the Tribunal.

[23] For example: can two States be considered as having chosen the same procedure if one has chosen, in the order, the Tribunal and the ICJ and the other, in the order, the ICJ and the Tribunal, in particular if the State making the application makes it before the judicial body which enjoys the first preference of the other party?