Arbitration – A Promising Alternative of Dispute Settlement under the Law of the Sea Convention?

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I. Introduction

Arbitration is one of the oldest and probably most effective methods of interstate dispute settlement. Support for this statement can be found in the "Repertory of International Arbitral Jurisprudence" (edited by V. Coussirat-Coustère and P.M. Eisemann) which comprises two impressive volumes of cases decided between 1946 and 1988 only. This collection of arbitral and quasi-arbitral awards demonstrates not only the enormous number of cases settled by arbitration but also the variety of categories of disputes which have been settled by arbitration. A further confirmation of the statement that arbitration is the primary option for binding third party dispute settlement is afforded by the fact that bilateral, as well as multilateral, agreements on the one hand increasingly contain dispute settlement clauses and on the other hand opt primarily for arbitration as the mechanism for dispute settlement. In particular, codification conventions concluded under the auspices of the United Nations clearly demonstrate the trend towards arbitration clauses. While early in the practice of the United Nations treaties drafted under its auspices contained clauses conferring jurisdiction on the International Court of Justice to decide disputes concerning interpretation or application[1], the trend now is to include instead clauses conferring jurisdiction on arbitral tribunals. There are several reasons for this change: firstly, States had made reservations concerning clauses conferring jurisdiction on the Interna-

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[1] Cf. for further information L.B. Sohn, The Role of Arbitration in Recent International and Multilateral Treaties, Virginia Journal of International Law 23 (1982/83), 171 et seq. and footnote 1 p. 172.

tional Court of Justice and the Court held that such reservations were permissible[2], secondly, submission to the compulsory jurisdiction of the International Court of Justice severely limits the sovereign power of States and therefore is not readily accepted by them.

Thus, it can be stated that at present arbitration represents the most promising method of binding third party dispute settlement because it leaves a rather large degree of influence to the parties concerned[3], such as the composition of the tribunal, the choice of the applicable law, the rules of procedure, the seat of the tribunal and even the limits of the powers of the tribunal by a narrowly defined request. In addition it can also be said that because of the necessary cooperation of the parties to the dispute in creating the arbitral tribunal this positive cooperation is already a sign for the success of the arbitration while their negative attitude, i.e. any refusal to cooperate, indicates a possible future unwillingness to accept the award and, more generally speaking, demonstrates normally a general non-acceptance of third party dispute settlement.

II. State Practice in Law of the Sea Disputes

Looking now more specifically at the practice of dispute settlement in cases concerning law of the sea disputes, it is clear that the above statements find confirmation also in this particular field of international law.

Here is not the place to review in detail the numerous decisions concerning the law of the sea disputes, but it can be stated that arbitration has been clearly the preferred dispute settlement mechanism in this field.

The International Court of Justice, the most important organ of international jurisdiction, and the alternative forum to arbitration concerning the settlement of international disputes, has in fact been requested to decide quite a series of law of the sea cases, such as i.e. the *Corfu Channel* Case[4], the *Fisheries* Case[5], the *North Sea Continental Shelf* Cases[6], the Fisheries Jurisdiction Cases[7], and the *Jan Mayen* Case[8].

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[2] Advisory opinion, Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports, 1951, 15 et seq.

[3] Cf. R.-J. Dupuy/D. Vignes, A Handbook on the New Law of the Sea, 1991, 1344.

[4] *United Kingdom/Albania*, I.C.J. Reports 1949, 4.

[5] *United Kingdom/Norway*, I.C.J. Reports 1951, 116.

[6] *Federal Republic of Germany/Netherlands*, *Federal Republic of Germany/Denmark*, I.C.J. Reports 1969, 3.

[7] *United Kingdom/Iceland*, *Federal Republic of Germany/Iceland*, I.C.J. Reports 1974, 3 and 175.

[8] *Denmark/Norway*, I.C.J. Reports 1993, 38.

The most interesting aspect of the activity of the Court in settling maritime disputes has to be seen however in the increased use of the Court for such cases since the amendment of its rules of procedure in 1972/78 so as to permit submission of a case not to the full court but to an *ad hoc* chamber in accordance with Art. 26 (2) of the Statute[9]. The most interesting particularity concerning use of these chambers is the fact that the parties to the dispute have some influence, if not a decisive impact, on the composition of the chamber which will hear the case. This aspect is similar to the parties' involvement in the composition of an arbitral tribunal. States have voluntarily made use of the Court by submitting to it several maritime boundary delimitation cases to be decided by *ad hoc* chambers. This procedure, which had been chosen in a large number of maritime cases confirms once again the preference States give to arbitration for the settlement of law of the sea disputes.

It is, therefore, not surprising that the dispute settlement machinery of the Law of the Sea Convention took account of such State practice by according a special place to arbitration, namely the one of substitute or default-procedure if no other means of dispute settlement is available or effective.

The foregoing remarks can thus be interpreted as an indication for the effective use of the dispute settlement mechanisms of the Law of the Sea Convention, in particular, arbitration as the default procedure. In order to appreciate whether this expectation is well founded we have to look at the dispute settlement system of the Convention in more detail.

III. The Dispute Settlement System under the Law of the Sea Convention

The United Nations Law of the Sea Convention of 1982 contains what has been referred to as a model of a sophisticated system of dispute settlement. There are several reasons for this assessment:

1. In the first place the 1982 Law of the Sea Convention took account of the problems concerning dispute resolution procedures contained in

[9] Cf. in this context refer to K. Oellers-Frahm, Die Verfahrensordnung des IGH vom 14. April 1978, Archiv des Völkerrechts 18 (1979/80), 309 et seq. and id., Die Bildung einer ad hoc-Kammer des Internationalen Gerichtshofs gemäß Art. 26 Abs.2 des Statuts, Archiv des Völkerrechts 21 (1983), 316 et seq.

other codifying treaties in connection with the 1958 Conventions on the Law of the Sea. For example, the Fishing Convention[10] contained elaborate provisions for the settlement of certain disputes under that Convention by *ad hoc* commissions. Each commission was to be composed of five members and could give binding decisions. However, the procedure was never applied in practice. For the other three Geneva Conventions on the Law of the Sea, the 1958 Conference adopted an optional protocol relating to the settlement of disputes, which was accepted merely by about forty States[11]. The Protocol was not ratified by the United States nor the Soviet Union. This Protocol provided for the submission of disputes arising out of the application and interpretation of these Conventions to the International Court of Justice, unless the parties to the dispute agreed to submit it within two months of its commencement to an arbitral tribunal. Alternatively, the parties could agree to submit the dispute to a conciliation commission, but if the commission's report was not accepted by the parties within two months of its delivery, either party could bring the matter before the Court. The mechanism of providing for the settlement of disputes by optional protocols was followed in some other Conventions[12]. Although the optional protocol system provided for a rather watertight system of dispute settlement it had the disadvantage that not all parties to the Convention were also parties to the protocol. Thus, there was no forum available for the settlement of a dispute if not all parties to that dispute had ratified the protocol. Taking this concern into account the Third Law of the Sea Conference insisted on including the dispute settlement system in the Convention whereby each State party to the Convention was also party to the dispute settlement system[13].

2. Another reason for characterising the dispute settlement system under the Law of the Sea Convention as a model one is the fact of its variety and flexibility. Although space does not allow for a detailed review of the rules of the Convention, a short overview is necessary in

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[10] Convention on Fishing and the Conservation of Living Resources of the High Seas, April 29, 1958, 559 UNTS 285.

[11] Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, April 29, 1958, 450 UNTS 169.

[12] 1961 Vienna Convention on Diplomatic Relations; 1963 Convention on Consular Relations; 1969 Convention on Special Missions, to cite only few of them.

[13] Cf. L.B. Sohn, The Role of Arbitration in Recent International Multilateral Treaties, Virginia Journal of International Law 23 (1982/83), 171 et seq.

order to place the régime of the Law of the Sea Convention in the more general framework of law of the sea dispute settlement.

After long and difficult discussions which will not be recounted here[14], the dispute settlement mechanism finally agreed to and set forth in Part XV of the Convention is characterized by the following main features:

a) In the first section, reference is made to the basic obligations of all States Parties to the Convention to settle all disputes concerning the interpretation and application of the Convention by peaceful means (Art. 279). This Article thus explicitly confirms the obligation laid down in Art. 33 of the Charter of the United Nations. Art. 280 of the Convention reiterates this basic principle making it clear that the parties to a dispute are completely free in choosing the procedure to be used for the settlement of their dispute. Thus the State parties are not bound by the mechanisms provided for in Part XV of the Convention. However, if the procedure chosen by the parties does not lead to a settlement of the dispute, the parties may return to the basic procedures of Part XV, Section 1 (Art. 281). A very important provision which insures the efficiency of the dispute settlement rules in the Convention is Art. 282 which gives priority to dispute settlement procedures agreed to in other general, regional or bilateral agreements which lead to a binding decision and includes also acceptance of the jurisdiction of the International Court of Justice according to Art. 36 para. 2 of its Statute. A fundamental provision meant to keep the disputing parties in contact is Art. 283 which requires the parties to exchange views at any stage of the dispute and even after the dispute has been resolved in order to implement the final settlement or decision. This obligation corresponds to the basic requirement of reasonable behaviour during the negotiating process and constitutes an explicit concretization of the obligation of all parties to the Convention "to fulfil in good faith the obligations assumed under this Convention" as laid down in Art. 300 of the Convention. Finally, Section 1 outlines the option of non-binding conciliation (Art. 284). A State party may invite the other party(ies) to the dispute to submit the dispute to conciliation. Both parties must agree on conciliation as a means of resolving the dispute and on the procedure for conciliation. For disputes dealing with deep seabed mining, non-State parties also may invoke the conciliation

[14] Cf. to S. Rosenne/L.B. Sohn, United Nations Convention on the Law of the Sea, 1982, A Commentary, vol. V, 5 et seq. and to A.L.C. De Mestral, Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective, in: Contemporary Issues in International Law, Essays in Honour of Louis B. Sohn, ed. by T. Buergenthal, 1984, 171 et seq.

procedure (Art. 285). However, in order to have the dispute settled by peaceful means, the failure to resolve disputes using the methods under Section 1 of Part XV of the Convention leads to the application of Section 2 which contains compulsory procedures invocable by any party to the dispute.

b) The dispute settlement machanisms envisaged in Section 2 are both compulsory and binding. Each party to the Convention is bound by the dispute settlement mechanisms of Section 2 by its ratification of the Convention; no further submission is required. However, these procedures are subsidiary to the choice left to the states concerning another method of dispute settlement under Section 1 and importantly, not all categories of disputes are covered by Section 2, the exceptions being laid down in Section 3.

In order to give a short summary of the sytem laid down in Section 2 it may suffice to state that the central provision, Art. 287, gives an option to the States parties to the Convention to choose between the following dispute settlement procedures by means of a written declaration: 1) the International Tribunal for the Law of the Sea, 2) the International Court of Justice, 3) an arbitral tribunal constituted in accordance with Annex VII to the Convention, and 4) a special arbitral tribunal for the settlement of disputes concerning fisheries, protection and preservation of the marine environment, marine scientific research, or navigation and pollution by vessels. These courts and tribunals have jurisdiction over all law of the sea matters submitted to them in accordance with the provisions of the Convention. The applicable law is not only the Convention but also such other rules of international law which are not incompatible with the Convention. At the request of the parties, the court or tribunal may even make its decision *ex aequo et bono*. The decisions are binding as between the parties. However, with respect to implementation, there is no provision comparable, for example, to Art. 94 of the Charter which empowers the Security Council to enforce judgments of the International Court of Justice under certain circumstances. Since all parties are bound by a compulsory procedure, but have the choice to submit to one or more of the alternatives of Art. 287, the specific procedure to be applied in case of a dispute is the one that both parties have chosen. If they have not accepted the same procedure, the dispute is submitted to arbitration in accordance with Annex VII, which defines the dispute settlement procedure applicable in any case where the parties have not reached a settlement of the dispute under Section 1, or where no other category of procedure is accepted by both of them.

c) Thus, arbitration is the residual dispute settlement mechanism. No State may escape peaceful dispute resolution unless one of the exceptions and limitations provided for in Section 3 are present. Those exceptions concern certain types of disputes that arise out of a coastal State's discretionary exercise of sovereignty with respect to the uses of its exclusive economic zone as well as some optional categories of disputes such as sea boundary delimitation, military activities and certain law enforcement measures connected with the exercise of sovereignty within the coastal State's exclusive economic zone and disputes over which the Security Council of the United Nations has exercised its jurisdiction (Art. 298).

IV. Importance of Arbitration as a Method of Dispute Settlement under the Law of the Sea Convention

In evaluating the importance of arbitration on the basis of the above outlined dispute settlement system of the Law of the Sea Convention, three aspects have to be examined:

1) the actual extent of compulsory dispute settlement in light of the limitations and exceptions set out in Section 3;

2) the extent of dispute settlement clauses contained in other instruments which prevail over the dispute settlement machinery of the Convention;

3) the room left for arbitration under the Convention with further consideration of the advantages or disadvantages of the arbitration procedure provided for in Annex VII as compared with those available under general international law.

1. The actual extent of compulsory dispute settlement in light of the limitations and exceptions according to Section 3 of Part XV

In order to identify maritime disputes which qualify for compulsory settlement procedures it is necessary to provide an overview of those categories of disputes for which limitations and exceptions are admitted under Section 3 of Part XV.

For this purpose the following classification of categories of disputes and the relative dispute settlement provisions may be useful:

a) Exercise by the coastal State of its sovereign rights or jurisdiction provided for in the Convention

In this category the Convention contains an enumeration of those disputes that must be settled by compulsory procedures; all other disputes are consequently n o t subject to compulsory dispute settlement. Accordingly, disputes relating to the freedoms and rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea as specified in Art. 58 of the Convention are subject to compulsory procedures (Art. 297 paragraph 1 a) and b)). The scope of these disputes, in fact, is very limited, so that recourse to compulsory jurisdiction will be rather exceptional. The same is true "when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection or preservation of the marine environment" (Art. 297 Paragraph 1 c)). Here, too, full protection through compulsory procedures is provided for. Although in this field disputes are very likely to arise, it does not seem very probable that they will be settled under the rules provided for in Section 2 of Part XV of the Convention, that means arbitration according to Annex VII if no other procedure has been agreed to, as there are many special dispute settlement mechanisms laid down in other instruments in this field which, according to Art. 286, have precedence over the mechanisms provided for in the Convention[15].

b) Marine scientific research

In this area the Convention enumerates the categories of disputes which States are n o t obliged to submit to compulsory dispute settlement. According to Art. 297 paragraph 2 a)(i) disputes concerning the exercise of the coastal State of a right or discretion laid down in Art. 246 of the Convention are not subject to compulsory dispute settlement as well as, according to Art. 297 paragraph a) (ii), disputes concerning the decision of a coastal State to order suspension or cessation of a research project in accordance with Art. 253 of the Convention.

[15] Cf. infra IV. 2.

c) Fisheries

Disputes concerning sovereign rights with respect to living resources in the exclusive economic zone or their exercise are n o t subject to compulsory settlement (Art. 297 paragraph 3 a)). All other disputes concerning fisheries, and there remains only fisheries in the high seas, have to be settled in accordance with the compulsory procedures. In this field, however, disputes will arise mainly over issues relating to the conservation of fishery resources or the adoption of any scheme for allocation of these resources among nations. Thus, disputes will normally not be of a predominantly legal character suitable for submission to judicial settlement, so that it may be doubtful whether the compulsory dispute settlement of the Convention will be applicable to those cases[16].

d) Sea boundaries

All disputes concerning sea boundary delimitation or historic bays or historic titles may be excepted from compulsory settlement by declaration (Art. 298 paragraph 1 a)). As State practice shows these are the majority of disputes which have been settled until now by *ad hoc* arbitration, the International Court of Justice or, since the amendment of the Rules of the Court, by an *ad hoc* chamber created according to Art. 26 paragraph 2 of the Statute of the Court. Since, however, the provisions concerning the optional exception relating to sea boundary delimitation are not applicable to disputes which have arisen before the Convention has entered into force, there remains considerable room in this field for the application of compulsory dispute settlement procedures. In the light of the State practice developed to date it seems nonetheless more probable that the States concerned will find agreement on the particular procedure to be followed for the settlement of their sea boundary disputes, although, in the event of the unwillingness of one of the parties concerned to so agree, arbitration under Annex VII of the Convention may be resorted to for the resolution of this kind of disputes.

[16] Cf. S. O d a, Some Reflections on the Dispute Settlement Clauses in the United Nations Convention on the Law of the Sea, in: Essays in International Law in Honour of Judge Manfred Lachs, 1984, 645 et seq., 654.

e) Military activities

Military activities and law enforcement activities with regard to the exercise of sovereign rights or jurisdiction may be excepted from compulsory settlement by declaration (Art. 298 paragraph 1 b)). Since all major naval powers insisted on such an optional exception, it can be expected that they will avail themselves of this possibility.

f) Disputes in respect of which the UN Security Council exercises the functions assigned to it by the UN Charter

Disputes of this kind may be declared by States not to be accepted for compulsory jurisdicton (Art. 298 paragraph 1 c)). This option seems logical because those disputes may be considered to be political by nature. The prime responsibility of the Security Council in preserving peace and the fact that the provisions of the United Nations Charter have precedence over all other international instruments explain why this category of disputes may be excepted from compulsory jurisdiction under the Convention.

Summarizing the above overview it may be noted that the categories of disputes that are excluded or may be excepted from compulsory settlement include primarily those matters which are the most likely to lead to dispute[17], as i.e. certain fishing issues, the exercise of coastal State sovereignty, enforcement authority and any decision concerning foreign research within the EEZ.

Finally, in order to complete the picture of the disputes excepted or exceptable from compulsory settlement, and in the last resort, arbitral settlement under the Law of the Sea Convention, mention must also be made of all those types of disputes that have been attributed to the International Sea Bed Disputes Chamber, a special Chamber of the International Tribunal for the Law of the Sea created under the Convention. The jurisdiction of the Chamber embraces nearly all disputes relating to seabed mining, except some particular kinds of disputes which are subject to other procedures, however not relating to Section 2 (Annex VI, Art. 36) and some disputes which are completely exempt from any dispute settlement procedure (Art. 186–191)[18].

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[17] Cf. Bréaux, The Diminishing Prospects for an Acceptable Law of the Sea Treaty, Virginia Journal of International Law, 19 (1979), 249 et seq., 287.

[18] Cf. to L.B. Sohn, Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III point the way? in: Law and Contemporary Problems 46 (1983), 195 et seq.

Thus, arbitration under the compulsory system of the Convention is not applicable to those kinds of disputes which, in the past, have been settled by voluntary resort to arbitration, a method which hopefully will be chosen also for such disputes in the future. From the above discussion, the first conclusion to be drawn is that for some categories of disputes, which have arisen in the past and probably will arise also in the future, arbitration under the Law of the Sea Convention will not be applicable because they are not covered by the compulsory dispute settlement procedures.

2. The extent of dispute settlement clauses in other instruments which prevail over the dispute settlement machinery of the Law of the Sea Convention

Even those categories of disputes that remain for compulsory dispute settlement because they neither fall under the limitations in Art. 297 nor under the exceptions in Art. 298 of the Convention might not necessarily be settled by one of the procedures in Section 2 of Part XV of the Convention. As already stated above, the dispute settlement mechanism of the Convention is subsidiary to other methods agreed upon by the States (Art. 282 and 286 of the Convention). Consequently, it must be considered whether and to what extent such instruments are likely to pre-empt the use of the dispute settlement mechanism of the Convention, i.e. arbitration in the last resort.

There is no doubt that the number of international agreements containing obligations for the settlement of disputes between States has increased significantly in the last years. This is so not only in the realm of general agreements for the settlement of disputes, but in particular as to special fields of disputes, *inter alia* those concerning the law of the sea. While it is not possible and not necessary to give a complete overview of these agreements, a review of some particular examples will help to indicate the likelihood of the application of Part XV, Section 2 of the Convention.

a) Considering first general agreements relating to dispute settlement mention can be made on the multilateral level, to e.g. the Hague Convention on the Pacific Settlement of International Disputes of 1907, the General Acts for the Pacific Settlement of International Disputes of 1928 and 1949, the European Convention for the Peaceful Settlement of Disputes of 1957, the new CSCE Conciliation and Arbitration Convention of 1992, and, last but not least, the Statute of the International Court of Justice; on the bilateral level reference may be made particularly to the

numerous treaties of friendship, commerce and navigation. Without going into further detail it can be stated that the application of those general treaties for the settlement of disputes has – for several reasons which are not to be discussed here – never met the expectations of the authors of such treaties. The failure of such treaties has led to the conclusion of new treaties aimed at overcoming the weaknesses of the former ones. Despite these efforts, however, an acceptable and universally workable solution has not been found, since it is not the treaties on dispute settlement which are to blame for non-use, but the attitude of States towards any general obligations which limit their sovereign powers by requiring them to submit to third party dispute settlement.

b) Thus, States are normally more inclined to accept third party settlement of disputes in relation to special matters. Accordingly, there is a great number of multilateral and bilateral agreements in the field of the law of the sea containing dispute settlement procedures. Examples include the agreements concluded under the auspices of the International Maritime Organization (IMO), which provide for arbitration of disputes arising under them.

Of greater importance, however, are those agreements which relate to marine matters and contain special dispute settlement procedures, such as the European Fisheries Convention of 1964, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of 1969, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters of 1972, the Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean of 1992, the Convention on the Protection of the Marine Environment of the North-East Atlantic of 1992, the Antarctic Treaty Convention on the Regulation of Antarctic Mineral Resource Activities of 1988 and the Protocol on Environmental Protection to the Antarctic Treaty of 1991, to mention only the most significant ones. Although not all of them are in force or will not enter into force at all, like for example the Antarctic Treaty Convention on the Regulation of Antarctic Mineral Resources Activities of 1988, they may serve as a model for future conventions and therefore are of interest in this context.

Since it is particularly in the field of the marine environment – one of the topics left explicitly to the dispute settlement mechanism under Section 2 of Part XV – that multilateral agreements have been concluded, this subject-matter may serve as a good example of the probable impact of arbitration under Section 2 of Part XV of the Convention as a means of dispute settlement.

The awareness of the common responsibility of the international community for the protection of the marine environment has not only resulted in more stringent operational standards with respect to navigation, off-shore mining industries, dumping of wastes and other uses of the sea, but also in efforts to find an adequate dispute settlement approach. In marked contrast to the rules on pollution in international watercourse law, the rules applicable to marine pollution are mostly not part of customary international law but are contained in particular treaties on the universal, regional and bilateral level. These treaties take into account the particularities of the protection of marine environment, incorporating new concepts with respect to the enforcement of environmental standards. This has resulted in a shift from the traditional system of jurisdiction of the flag State or the coastal State for ensuring compliance with the environmental standards established by international conventions to the creation of jurisdiction of an international body[19].

In the particular field of marine environmental protection enforcement of obligations (and thus disputes involving violations of such obligations) differs from traditional international legal disputes and consequently needs special provisions for enforcement. Claims involving environmental disputes aim normally not only at affirming that a breach of an obligation has taken place, but moreover at according compensation. In this context special expertise is needed in order to evaluate the facts of the case; on the other hand, environmental disputes are in general not strictly interstate disputes, but sometimes involve a non-State party, the polluter, since it is primarily industrial enterprises, who use the seas. Even though this issue might be overcome by means of diplomatic protection (the State of the polluter taking over the case for his national), it seems more appropriate to provide for direct dispute settlement between the State concerned by the pollution and the polluting entity or individual. The foregoing remarks suggest that traditional patterns of dispute settlement may not be sufficient in the field of marine environmental protection cases, a fact which, incidentally, has been addressed in the Law of the Sea Convention.

The Law of the Sea Convention provides for a special mechanism concerning the settlement of marine environmental disputes. This takes into account the particular expert knowledge needed and also the fact that

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[19] For more details cf. to J.J.A. Salmon, Marine Environment, Protection and Preservation, in: Encyclopedia of Public International Law, Instalment 11, 1989, ed. R. Bernhardt, 200 et seq.

these disputes are not generally purely interstate disputes. Originally, the idea had been to adopt the same procedure envisaged for the settlement of disputes involving the international sea-bed area for marine environmental disputes. Since agreement in this sense could not be obtained, an alternative solution was found by providing for special arbitration (Art. 287 paragraph 1 d) and Annex VIII) for cases relating to fisheries, protection and preservation of the marine environment, marine scientific research or navigation, including pollution from vessels and by dumping[20]. By preparing special lists of experts for each of these categories and by making Art. 13 of Annex VII applicable to these disputes[21], special arbitration is a means of dispute settlement designed after the experience in this field evidenced in state practice. The term "special" arbitration as opposed to "general" arbitration under the Convention recognizes the fact of the particular composition of this kind of arbitral tribunals, composed of members with special expertise in the relevant subject-matter of the dispute. Technical expertise is thus regarded as the main criterion for the settlement of marine environmental disputes.

This follows the approach adopted by State practice in the, somewhat reticent, development of peaceful dispute settlement mechanisms in the marine environmental field. As a general rule, the agreements in this field which contain dispute settlement provisions, all provided for arbitration. The arbitrators in these cases were to be selected from special lists of acknowledged experts in the special subject matter of the agreement. As different agreements had been concluded for specific pollution sources respectively, there exist a variety of dispute settlement provisions; the Law of the Sea Convention represents thus the first comprehensive, universal instrument in this field.

Following the traditional approach of exclusive jurisdiction of the coastal State or flag State with regard to disputes concerning the marine environment without providing in the same time for compensation of damages, the first Conventions for the protection of the marine environment only contain incomplete provisions[22].

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[20] Cf. Dupuy/Vignes (note 3), 1367.

[21] Art. 13 of Annex VII reads: "The provisions of this Annex shall apply mutatis mutandis to any dispute involving entities other than State Parties".

[22] Cf. for example the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) of 1954, taken over by IMCO and amended in 1962 and 1969; the 1958 Geneva Convention on the High Seas, which provides in Art. 24 and 25 for the protection of pollution of the seas but does not include any provision concerning the enforcement of the obligation of States parties to the Convention set forth in these articles;

The first Convention containing an improved dispute settlement mechanism was the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualities of November 29, 1969[23], which provides for a special dispute settlement mechanism (Art. VIII and Annex to the Convention). According to this Convention, the parties may take such measures on the high seas as they consider necessary in order to prevent, mitigate or eliminate danger to their coasts from pollution or the threat of pollution of the seas by oil, following maritime casualities. Any party which has acted against such dangers in violation of, or beyond the scope of, the provisions of the Convention must pay compensation for the resultant damage. Disputes concerning the question of whether the measures taken were in contravention of the Convention or whether compensation must be paid, may be submitted to conciliation, or, if conciliation has failed, to arbitration. Conciliators or arbitrators are chosen by the parties from a list of qualified persons drawn up by the parties to the Convention, which provides, however, for the selection of conciliators or arbitrators if the parties to the dispute are unable to agree on the members.

A slightly different model, which also leads to arbitration in the final phase, has been adopted by the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters of December 19, 1972 as amended in 1978 and followed by a series of subsequent Conventions[24]. These Agreements provide for the submission of any dispute which the parties have been unable to settle by agreement, to the International Court of Justice or to arbitration, arbitration being the default procedure. The arbitrator or arbitrators have to be chosen from a list of qualified persons drawn up by the parties. The Convention provides for the selection of experts by a third organ if the parties to the dispute cannot reach agreement on this issue.

The few examples discussed above demonstrate that, in disputes concerning the marine environment, arbitration by experts has become the

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the 1962 Convention on the Liability of Operators of Nuclear Ships. For further information cf. to S. Rosenne/A. Yankov, United Nations Convention on the Law of the Sea 1982, A commentary, Vol. IV, Articles 192 to 278, Final Act, Annex VI, 1991, 7 and Appendix, 23 containing a list of multilateral treaties dealing with the protection of the marine environment.

[23] 970 UNTS 212.

[24] I.e. the International Convention for the Prevention of Pollution from Ships of November 2, 1973; Convention for the Prevention of Marine Pollution from Land-Based Sources of June 4, 1974; Convention for the Protection of the Mediterranean Sea against Pollution of February 16, 1976.

preferred mechanism, a fact that has found – as noted earlier – confirmation in the relevant provisions of the Law of the Sea Convention.

While at first sight, arbitration under the Convention may thus appear promising for the resolution of disputes in these particular fields, a more thorough look leads to the opposite conclusion. It must be borne in mind that special arbitration under the Convention requires first that both parties have opted for it and that the other means of dispute settlement agreed to in other instruments have failed. As special arbitration is the dispute settlement approach adopted in numerous international agreements concerning the protection of the marine environment, it seems more likely that States will apply those mechanisms, if they are not even obliged to apply them because number of them are mandatory ones.

The reason for opting for these special mechanisms instead of having recourse to special arbitration under the Convention resides in the fact that these instruments are more narrowly suited to a specific dispute arising under that particular convention and that experience by a body constituted under the respective convention may already exist and may make the outcome of the dispute settlement more predictable. Since consent of the States parties to a dispute is explicitly required for special arbitration under the Convention, this consent will be given more easily for special dispute settlement procedures under special agreements, if it is not altogether mandatory.

Thus, special arbitration under the Law of the Sea Convention does not seem to be a very promising alternative for the settlement of marine environmental disputes, not because it would not be suitable, but only because of the great number of special instruments in this field having priority over the dispute settlement procedures of the Convention.

Only in the event that these mechanisms fail – which is not very probable as most are mandatory – and where agreement on special arbitration under the Convention cannot be reached does the default-procedure of "general" arbitration under the Convention become applicable.

The fact that general arbitration (with possible non-expert arbitrators) in the field of marine environment or marine scientific research or whatever is the actual subject of the dispute applies only where the conditions discussed above have been met may make hesitant parties to a dispute prefer special arbitration so that experts might decide the case.

Finally, there is one further argument which supports the unlikelihood of general arbitration under the Law of the Sea Convention to be frequently used. This argument is drawn from a recently introduced mechanism for the settlement of disputes in a particular Convention

which simply leaves no room for the application of Part XV of the Law of the Sea Convention. The reason for this situation is that this Convention, namely the Convention on the Regulation of Antarctic Mineral Resource Activities of June 2, 1988, reflects to a considerable degree the provisions of Part XV of the Law of the Sea Convention[25]. The same pattern has been followed by the Protocol on Environmental Protection to the Antarctic Treaty of October 4, 1991 which, in Art. 18–20 and in the Schedule to the Protocol on Arbitration contains similar provisions. While the Convention on the Regulation of Antarctic Mineral Resources will, for reasons not concerning the dispute settlement mechanism, not enter into force, the Protocol on the Environmental Protection foreseeably will enter into force. Thus, in the broad field concerning the Antarctic scientific research and environmental protection there is no doubt that the dispute settlement mechanism under Section 2 of Part XV of the Law of the Sea Convention will not apply. If this example is followed by parties to other conventions – and that is rather likely because of the flexibility and variety of choices allowed to the parties – general arbitration under the Convention will very likely not play an important role in the settlement of marine disputes.

3. The room left to arbitration under Part XV, Section 2 of the Convention

The arguments used in the above examples apply equally to other areas of law of the sea disputes, such as marine scientific research, fisheries and navigation. Here too, several international conventions with particular dispute settlement procedures apply and these take priority over the proceedings provided for in the Convention. These Agreements provide at least for arbitration, which generally is the default option if other means fail. Consequently, the conclusion that general arbitration under the Convention will rather be the exception than the rule in law of the sea disputes leads to the more important question of what is the real possibility of arbitration under the Convention and, further, what are the advantages or disadvantages of such recourse.

There are apparantly only three situations which might lead to compulsory dispute settlement, and thus arbitration in the final resort, under the Law of the Sea Convention:

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[25] See Chapter VI of the Convention. Cf. for detailed information to R. Wolfrum, The Convention on the Regulation of Antarctic Mineral Resource Activities, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 102, 1991, 74 et seq.

a) The most evident possibility for having recourse to Section 2 of Part XV of the Convention is the case where no other dispute settlement mechanism is provided for and the parties to the dispute do not agree *ad hoc* to some procedure outside or under the Convention. This alternative is limited however to disputes concerning the alleged non-observance of the Convention, as the compulsory dispute settlement procedure is limited to disputes relating to the interpretation or application of the Convention. In addition, the parties to the dispute must clearly be parties to the Convention.

b) The second category of disputes which may lead to compulsory dispute settlement under the Convention are those cases where not all of the parties to the dispute are bound by the agreement containing the dispute settlement procedure. Also in this hypothetical example all of the parties must be parties to the Convention and must have failed to agree upon any other means to settle their dispute.

c) And finally there are those "mixed" disputes which involve more than one subject matter covered by the dispute settlement provisions of particular conventions. In these cases the recourse to arbitration under the Convention seems unlikely since the parties might prefer to apply a particular convention even though it does not cover the whole of the dispute.

To fully appreciate the possible significance of general arbitration under the Convention in the above noted categories of disputes, the following considerations may be of relevance:

a) Firstly the fact that third party dispute settlement is compulsory for parties to the Convention may encourage States to agree to a dispute settlement mechanism under or outside of the Convention. The recourse to the residual procedure of arbitration might be considered a sign of a negative attitude on the part of at least one of the disputants, and States may prefer not to be blamed openly for such an attitude. It is, however, true, that arbitration is not only the mechanism available to States that do not agree, or have not formerly agreed upon any mechanism to settle their disputes but also the applicable procedure under the Convention where States have not opted for the same procedure or procedures for the settlement of their disputes under the Convention. As indicated above, the existence of special mechanisms for the settlement of particular disputes will generally encourage States prepared to accept third party settlement to agree to one of those special procedures. If States refuse to do so, such action may be taken to be a sign of unwillingness to accept third party dispute settlement at all. Therefore, the above arguments are, to a

considerable extent, valid also for the alternative of the applicability of the arbitration procedure in case of different options of the States under Section 2 of Part XV of the Convention.

b) Secondly, it seems likely that States parties to an actual dispute will agree more readily to proceed before one of the specialized bodies for the settlement of marine disputes under the Convention, such as the Tribunal for the Law of the Sea or special arbitration or the International Court of Justice, rather than leave the case to be resolved by general arbitration. If third party dispute settlement cannot be avoided, States may prefer to select themselves the most appropriate mechanism to resolve their dispute, having due regard to the case-law developed already by these bodies – for the moment only the International Court of Justice. It seems evident that a body experienced in deciding marine disputes, as for example the International Court of Justice or an *ad hoc* chamber of the Court, may be a more attractive forum for the parties because the result would be more predictable than that of an arbitral tribunal under Art. 287 paragraph 1c) of the Convention.

c) Finally, it may be argued that the law applicable by the dispute settlement bodies under the Convention may lead the parties to prefer a mechanism other than those contained in the Convention. The underlying reasons for this are, on the one hand, that only disputes relating to the interpretation and application of the Convention may be submitted to the procedures of Part XV, and, on the other hand, that the court or tribunal has to "apply the Convention and other rules of international law not incompatible with this Convention" (Art. 293 paragraph 1). This means that the rules contained in the Convention have priority over the rules of general or customary international law, since recourse can be had to these categories only if there are *lacunae* in the Convention[26]. In contrast to the foregoing there may also exist cases where it is exactly the reliance on written law that encourages States to have recourse to one of the dispute settlement bodies of the Convention. However, also in this hypothesis, general arbitration will probably not be the preferred option.

[26] Cf. G. Jaenicke, Dispute Settlement under the Convention on the Law of the Sea, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 43 (1983), 813 et seq., 822.

V. Conclusion

On the basis of the above remarks, the question of whether arbitration under the Law of the Sea Convention is a promising alternative for the resolution of disputes under the law of the sea must be answered in the negative.

As has been shown above, arbitration is, and probably remains, the primary and preferred means of international dispute settlement, not only in the field of marine disputes, and the dispute settlement system established in the Law of the Sea Convention itself supports this result.

In any event, third party settlement of disputes constitutes an interference with the sovereign powers of the disputing States and this is why it is dependant upon the consent of the parties to the dispute. However, as the long history of international dispute settlement illustrates only too clearly, consent by States to a particular dispute settlement mechanism is no guarantee that this obligation will be honoured. In international law there is no means to enforce the decisions of courts and tribunals, as is possible in national law[27] and thus the final resolution of the dispute depends on the actual consent or, more precisely, cooperation and good will of the parties involved. Therefore, it is only logical that the Law of the Sea Convention leaves as much choice as possible to States in the area of dispute settlement and offers a great variety of mechanisms which recognizes the sensitivities of sovereign States. This latitude does not, however, go so far as to finally lead to the failure of peaceful dispute settlement. The fact that States cannot avoid third party dispute settlement and that a variety of refined and appropriate mechanisms to each category of disputes is available under and outside of the Convention, will likely encourage States to have recourse to one of those procedures.

Thus, the dispute settlement mechanism of the Convention is designed itself to considerably reduce the occurrence of general arbitration under Annex VII of the Convention. This statement, and that has to be stressed explicitly, does not express or imply any negative judgement concerning the suitability of arbitration for the settlement of marine disputes or the quality of the system of Part XV of the Convention.

Recourse to arbitration under Art. 287 paragraph 1 e) of the Convention will thus be had only in very exceptional cases, either for very special reasons, or as a consequence of a general unwillingness to accept third

[27] Only for decisions of the International Court of Justice Art. 94 of the UN Charter provides for action of the Security Council.

party dispute settlement since, for the reasons stated above, it seems even more likely that States that have not opted for the same mechanism under Section 2 of Part XV, in the event of an actual dispute, will prefer to agree that a special body more suited for their case will hear the matter.

This conclusion, i.e. that general arbitration will only be used in exceptional cases for the settlement of marine disputes invalidates in the same time, to a certain degree, the fear that has been expressed with regard to the possibility that not only a separate branch of law but also a separate judicial authority concerning law of the sea disputes may develop by having recourse to the dispute settlement mechanisms of the Convention[28]. Given the structure of the dispute settlement system of the Convention, especially the priority given to other conventional mechanisms for the settlement of marine disputes, the actual situation will not be changed profoundly. As is the case today, it will be, in the first place, the International Court of Justice or arbitral tribunals that will continue to decide marine disputes. The possible impact of the new International Tribunal for the Law of the Sea is not yet forseeable and neither is its relationship to the International Court of Justice which, until now, has fulfilled the functions of the new tribunal. But, even if the impact of the new organs under the Convention will be important, the fear that this will separate this branch of law from general international law is not a real one. Firstly, the Convention provides that rules not incompatible with the Convention may be applied – such as those rules that have developed through state practice and in international courts and tribunals. Secondly, the dispute settlement system of the Convention is only subsidiary to all other dispute settlement mechanisms separately agreed to – thus it depends on the States concerned to develop any possible separation of this particular branch of international law from the corpus of general international law. And finally, and this argument is apt to minimize the above mentioned fear considerably, the law as codified in the Convention has already been applied by international courts or tribunals because the parties to a dispute had explicitly so agreed or because the rules of the Convention had been applied as rules of customary international law[29]. Thus, the only remaining question relates to the possible use of the International Tribunal for the Law of the Sea and its Deep Sea-Bed Chamber for the

[28] Cf. Oda (note 16), 645 et seq., 649.

[29] Cf. E.J. de Aréchaga, Customary International Law and the Conference on the Law of the Sea, in: Essays in International Law in Honour of Judge Manfred Lachs, 1984, 575 et seq.

settlement of marine disputes since neither special arbitration under Annex VIII nor general arbitration under Annex VII will, for the reasons given above, play a considerable role in the settlement of marine disputes.