

Settlement of Disputes Arising Out of the Law of the Sea Convention

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INTRODUCTION

On the last day of the Caracas session of the Third Conference on the Law of the Sea a group of States presented a working paper on the settlement of law of the sea disputes.¹ It was the result of informal consultations held by a group of more than thirty States, from all the regions of the world, during the last month of the Conference.² The working paper set out various possible alternatives, together with notes indicating relevant precedents. The hope was expressed that the working paper might serve as a framework for further discussions at the next session of the Conference.

The proposals included in the working paper are based on a long tradition of submission to arbitration or judicial settlement of disputes relating to the interpretation or application of international

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1. U.N. Doc. A/CONF.62/L.7 (1974). See also 71 DEP'T STATE BULL. 418 (1974).

2. The Co-Chairmen of the Working Group were Ambassadors Reynaldo Galindo Pohl (El Salvador) and R.L. Harry (Australia); Professor Louis B. Sohn (U.S.A.) acted as Rapporteur. 71 DEP'T STATE BULL. 394 (1974); Borgese, *The Law of the Sea*, 7 THE CENTER MAGAZINE, November/December, 1974, at 25, 33. See also the statement by Ambassador Galindo Pohl, Aug. 29, 1974, U.N. Doc. A/CONF.62/SR.51, at 3 (prov. ed. 1974).

agreements.³ Many current multilateral and bilateral treaties contain provisions on dispute settlement as a matter of routine.⁴ In the law of the sea negotiations the settlement of disputes issue has been discussed primarily in connection with the provisions relating to the seabed,⁵ some proposals have also been made with respect to the settlement of disputes relating to fisheries.⁶ Apart from the original proposals of Malta which provided for an International Maritime Court,⁷ there was practically no discussion in the preparatory work for the Conference of the question of an overall provision for dispute settlement until the very end, when the United States raised the issue.⁸ The Caracas Working Group took

3. Already in 1890, the Washington Conference of American States called for obligatory arbitration of all controversies concerning "the validity, construction and enforcement of treaties." SCOTT, *INTERNATIONAL CONFERENCES OF AMERICAN STATES* 40 (1931). A similar provision was included by the Second Conference of American States in the 1902 treaty of arbitration. *Id.* at 100. See also the widely imitated treaty between Argentina and Italy of September 18, 1907 which provided for the arbitration of differences concerning interpretation and application of conventions. An Italian initiative in the 1870's led to the insertion in many bilateral treaties of the so-called compromissory clauses providing for submission to arbitration of questions concerning the interpretation and application of these treaties. For a list of these early treaties, see H. CORY, *COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES* 22-24 (1932).

4. More than two hundred such provisions have been collected by the Secretariat of the United Nations in the volume *A SURVEY OF TREATY PROVISIONS FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES 1949-1962* (U.N. Publ. 66.V.5) (1966) (hereinafter cited as U.N. Survey). A systematic collection of such provisions may be found in H. BLIX & J. EMERSON, *THE TREATY MAKER'S HANDBOOK* (1973) (hereinafter cited as BLIX). See also Comment, *Toward Peaceful Settlement of Ocean Space Disputes: A Working Paper*, 11 *SAN DIEGO L. REV.* 733 (1974).

5. For a summary of the early proposals, see Sohn, *A Tribunal for the Sea-Bed or the Oceans*, 32 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 253 (1972). The latest alternative proposals are reproduced in 2 Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, 28 U.N. GAOR, Supp. 21, at 130-36, U.N. Doc. A/9021 (1973).

6. The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas contained in articles 9-11 elaborate provisions for dispute settlement. [1966] 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. See also recent proposals by the United States, U.N. Doc. A/AC.138/SC.II/L.9 (1972); Japan, U.N. Doc. A/AC.138/SC.II/L.12 (1972); and Australia and New Zealand, A/CONF.62/C.2/L.57/Rev. 1 (1974).

7. Malta: Draft Ocean Space Treaty, ch. xxvi, U.N. Doc. A/AC.138/53; 21 U.N. GAOR, Supp. 21, at 105, 176, U.N. Doc. A/8421 (1971).

8. United States, Draft Articles for a Chapter on the Settlement of Disputes, U.N. Doc. A/AC.138/97 (1973). In introducing this proposal, Mr. Stevenson made the following statement (69 DEP'T STATE BULL. 412, 414 (1973)):

Our general view is that a system is needed that insures, to the maximum possible extent, uniform interpretation and immediate access to dispute-settlement machinery in urgent situations while at the same time preserving the flexibility of states to agree to re-

this United States proposal into account, but proceeded independently from it on the basis of a special questionnaire elaborated at one of its early sessions.⁹ Early in its proceedings the Working Group decided positively that the future Law of the Sea Convention should include effective dispute settlement provisions, which should be contained in a separate chapter of the Convention, without prejudice to special provisions which might be contained in other chapters of the Convention. In particular, the Working Group prepared alternative provisions on the following subjects:

1. Obligation to settle disputes under the Convention by peaceful means.
2. Settlement of disputes by means chosen by the parties.
3. Clause relating to other obligations with respect to dispute settlement.
4. Clause relating to settlement procedures not entailing a binding decision.
5. Obligation to resort to a means of settlement resulting in a binding decision.
6. The relationship between general and functional approaches.
7. Parties to a dispute.
8. Local remedies.
9. Advisory jurisdiction.
10. Law applicable.
11. Exceptions and reservations to the dispute settlement provisions.

The subsequent sections of this paper will deal seriatim with these questions.

OBLIGATION TO SETTLE DISPUTES UNDER THE CONVENTION BY PEACEFUL MEANS

The Charter of the United Nations provides in article 2(3) that all Members of the United Nations "shall settle their disputes by

solve their disputes by a variety of means. We have noted in particular the wishes of many states to resolve disputes on the basis of procedures agreed on a regional basis. What has emerged in our consideration of this question is the idea of dispute settlement by general, regional, or special agreement but with a law of the sea tribunal which would be available in cases where states do not agree to settle the disputes through other procedures.

9. The papers of the Working Group have not been published, and no official minutes have been kept. The references to the proceedings of the Group in this article are based on the author's notes and recollections.

peaceful means in such a manner that international peace and security, and justice, are not endangered." In addition, article 33(1) imposes an obligation on the "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security," to seek a solution, first of all, "by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

It would seem unnecessary to repeat these obligations in any other international instrument, and they should be implied in any dispute which might arise, regardless of its subject-matter. Nevertheless, some States would like to see in the Law of the Sea Convention an explicit reference to the duty to settle a dispute through the peaceful means indicated in article 33 of the Charter. They did point out the fact that the important document forming the basis of the law of the sea negotiations, the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, proclaimed in paragraph 15 that the "parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international regime to be established."¹⁰ Similar provisions are contained in various international agreements and in some proposals made during the law of the sea negotiations.¹¹

In view of the fact that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which was adopted by the General Assembly in 1970, contained an elabora-

10. Adopted by G.A. Res. 2749 (XXV), 25 U.N. GAOR, Supp. 28, at 24-25, U.N. Doc. A/8028 (1971).

11. See, e.g., the Vienna Convention on the Law of Treaties, of May 23, 1969, article 65(3), U.N. Doc. A/CONF. 39/27 (1969), 63 AMERICAN J. INT'L LAW 875 (1969); Treaty of Friendship and Neighbourly Relations between Iraq and Turkey, of March 29, 1946, art. 5(1), 37 U.N.T.S. 226; Treaty of Friendship between Turkey and Transjordan (now Jordan), of January 11, 1947, article 4, 14 U.N.T.S. 49. See also the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, of April 29, 1958, article 9(1), [1966] 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. It may be noted that a Canadian Working Paper on International Regime and Machinery contained the following comment: "While the future sea-bed treaty should provide for the resolution of disputes in accordance with Article 33 of the UN Charter it is essential that further procedures for the settlement of disputes should be included in the treaty." U.N. Doc. A/AC.138/59 (1971); 26 GAOR, Supp. 21, at 218, U.N. Doc. A/8421 (1971). A similar statement is contained in a Polish Working Paper, U.N. Doc. A/AC.138/44, para. 24 (1971); 26 GAOR, Supp. 21, at 81, U.N. Doc. A/8421 (1971).

tion of the obligation embodied in article 2(3) of the U.N. Charter, it has been suggested that reference should be also made to that Declaration.¹² Others would prefer to have no reference to the Declaration or at most to include such a reference only in a preambular phrase.

Consequently, the Working Group proposed the following alternative texts:¹³

Alternative A

The Contracting Parties shall settle any dispute between them relating to the interpretation or application of this Convention through the peaceful means indicated in Article 33 of the Charter of the United Nations.

Alternative B

[Having regard to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,] the Contracting Parties shall settle any dispute between them relating to the interpretation or application of this Convention by peaceful means in conformity with the Charter of the United Nations.

SETTLEMENT OF DISPUTES BY MEANS CHOSEN BY THE PARTIES

A reference to article 33 of the Charter implicitly includes the enumeration in that article of means of settlement to be used by the parties. That article also makes clear that the parties are free to use, in the first place, any peaceful means of their own choice. Nevertheless it was considered desirable to confirm explicitly the right of the parties to choose freely any peaceful means they consider suitable for the settlement of a particular dispute, and to list the means which might, or should be, used.¹⁴

Consequently, the Working Group suggested the following alternative texts, the first of which puts an emphasis on the obligation to consult on the choice of appropriate means:¹⁵

12. The text of the Declaration was approved by G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. 28, at 121-24, U.N. Doc. A/8028 (1970). It is referred to in the Declaration of Principles Governing the Sea-Bed, *supra* note 10, at para. 6.

13. U.N. Doc. A/CONF.62/L.7, at 2 (1974).

14. Similar provisions are contained in the Antarctic Treaty, of December 1, 1959, article 11(1), [1961] 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71; and in the Single Convention on Narcotic Drugs, of March 30, 1961, art. 48(1), [1967] 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204. See also the United States proposal in U.N. Doc. A/AC.138/97, art. 1 (1973).

15. U.N. Doc. A/CONF.62/L.7, at 4 (1974).

Alternative A

If any dispute arises between two or more Contracting Parties relating to the interpretation or application of this Convention, those Parties shall consult together with a view to the settlement of the dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, recourse to special procedures provided for by an international or regional organization, or other peaceful means of their own choice.

Alternative B

The parties to the dispute may agree to settle the dispute by any peaceful means of their own choice, including negotiation, mediation, inquiry, conciliation, arbitration, judicial settlement, or recourse to special procedures provided for by an international or regional organization.

CLAUSE RELATING TO OTHER OBLIGATIONS WITH RESPECT TO DISPUTE SETTLEMENT

A difficult question arises with respect to the relationship between the new provision for dispute settlement and previous obligations on the subject which have been contracted by the parties to the dispute. Many States are already bound by various treaties on the pacific settlement of disputes binding them to submit all disputes to arbitration or judicial settlement.¹⁶ Many States have also agreed in a variety of treaties to settle certain categories of disputes by means specified in those treaties.¹⁷ Obligations under many of these two categories of treaties are likely to overlap with obligations under the dispute settlement provisions of the Law of the Sea Convention. The concept of freedom of choice, discussed in the preceding section of this paper, also requires that the parties should be free to agree after a dispute has arisen that it be referred to a new procedure specially tailored to the circumstances of this dispute.¹⁸

16. For a collection of such treaties, see UNITED NATIONS, SYSTEMATIC SURVEY OF TREATIES FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, 1928-1948 (U.N. Publ. 1949.V.3).

17. See U.N. Survey, *supra* note 4.

18. In a similar spirit, the Charter of the United Nations provides in article 95, which is contained in the Chapter relating to the International Court of Justice, that:

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

See also Geneva General Act for the Pacific Settlement of International Disputes, of September 26, 1928, revised April 28, 1949, art. 29(1), 93 L.N.T.S. 345, 71 U.N.T.S. 101; European Convention for the Pacific Settlement of Disputes, of April 29, 1957, art. 28(1), 320 U.N.T.S. 243; Treaty Establishing the European Economic Community, March 25, 1957, art. 219, 298 U.N.T.S. 3. The United States proposal on the subject was limited to agreements providing for arbitration. U.N. Doc. A/AC.138/97, art. 3 (1973).

The objection was raised that the parties may have agreed or may agree to submit the dispute merely to a procedure of mediation or conciliation, and that a party is free to reject the results of such a procedure. In such a case, the dispute will not be really settled, and it would, therefore, be dangerous to oust the procedure embodied in the Law of the Sea Convention in favor of such an unreliable means of dispute settlement. To meet this objection, it was agreed that an outside procedure shall be exclusive only in cases in which it entails a binding decision, and a different solution was provided for procedures not entailing a binding decision. (See the following section with respect to such solution.)

Finally, there was a difference of opinion on the question whether the Law of the Sea Convention's procedure should have an automatic precedence over other procedures, or whether, on the contrary, the prior procedures should automatically be applied. In either case, the parties may agree, before or after the dispute has arisen, which of the procedures shall apply.

Consequently, the Working Group agreed on the following alternative texts:¹⁹

Alternative A

If the parties to a dispute [agree to resort to a procedure entailing a binding decision or] have accepted, through a general, regional, or special agreement, or some other instruments, an obligation to resort to arbitration or judicial settlement, any party to the dispute shall be entitled to refer it to [such procedure or to] arbitration or judicial settlement in accordance with that agreement or instruments in place of the procedures specified in this Convention.

Alternative B

The provisions of this Convention relating to dispute settlement shall not apply to a dispute with respect to which the parties are bound by an agreement, or other instruments, obliging them to submit that dispute to another procedure entailing a binding decision.

Alternative C

Notwithstanding the provisions of any agreement or other instruments in force between them, the Contracting Parties shall, unless they otherwise agree, apply the procedures laid down in this Convention to any dispute relating to its interpretation or application.

19. U.N. Doc. A/CONF.62/L.7, at 5 (1974). It may be noted that the phrase "procedure entailing a binding decision" is used here in preference to the phrases "compulsory dispute settlement procedure" or "binding procedure," both of which are less accurate.

CLAUSE RELATING TO SETTLEMENT PROCEDURES NOT
ENTAILING A BINDING DECISION

In order not to frustrate the provisions on dispute settlement contained in the Law of the Sea Convention, it is necessary to regulate any resort to mediation, conciliation or any other procedure not entailing a binding decision. The parties may agree to exhaust first those other procedures, and in such a case it is necessary to defer to their preference. If the parties have agreed to a time-limit for the purpose, that time-limit has to be observed.²⁰ If there are no such agreements, and one party has resorted to some other procedure, the other party should have the right to refer the dispute to the procedures under the Law of the Sea Convention either at its complete discretion or after the first procedure has not led to any result within a reasonable time.²¹

Taking these considerations into account, the Working Group agreed on the following alternative texts:²²

Alternative A

Where a Contracting Party which is a party to a dispute relating to the interpretation or application of this Convention has submitted that dispute to a dispute settlement procedure not entailing a binding decision, the other party or parties to the dispute may at any time refer it to a dispute settlement procedure provided for by this Convention, unless the parties have agreed otherwise.

Alternative B

Notwithstanding any agreement to refer a dispute to a procedure not entailing a binding decision, any Contracting Party which is a party to a dispute relating to the interpretation or application of this Convention, which is required by this Convention to be submitted on the application of one of the parties to a dispute settlement procedure entailing a binding decision, may refer the dispute at any time to that procedure.

Alternative C

The right to refer a dispute to the settlement procedure provided for by this Convention for obtaining a binding decision may be exercised only after the expiration of the time-limit established by the parties in an agreement to resort to a dispute settlement procedure which does not entail a binding decision, or, in the absence of such a time-limit, if [within a period of _____ months] [within a reasonable time, taking into account the relevant circumstances] that procedure has not been applied or has not resulted in a settlement of the dispute.

20. See, e.g., the Convention on Transit Trade of Land-Locked States, of July 8, 1965, art. 16(1), [1968] 19 U.S.T. 7383, T.I.A.S. No. 6592, 597 U.N.T.S. 42.

21. See, e.g., the Geneva General Act for the Pacific Settlement of International Disputes, *supra* note 18, art. 29(2).

22. U.N. Doc. A/CONF.62/L.7, at 7 (1974).

OBLIGATION TO RESORT TO A MEANS OF SETTLEMENT
RESULTING IN A BINDING DECISION

Once it is agreed that the disputes relating to interpretation or application of the Law of the Sea Convention should be submitted to a procedure resulting in a binding decision, several roads are open. The three main alternatives considered by the Working Group were arbitration, a special Law of the Sea Tribunal and the International Court of Justice.²³

Many agreements concluded in the maritime field provide for submission of disputes to arbitration.²⁴ A special tribunal has been proposed, in particular, in connection with seabed disputes;²⁵ the U.S. proposed in 1973 that a Law of the Sea Tribunal be established.²⁶ Many treaties provide also that disputes relating to their interpretation and application shall be submitted to the International Court of Justice;²⁷ a dispute may be submitted either to the full Court or to a special chamber of the Court.²⁸

Arbitration is the most flexible of the three methods and allows the parties to tailor the membership of the tribunal to the special circumstances of the case. On the other hand, States have been reluctant to accept foolproof provisions for the establishment of an arbitral tribunal;²⁹ and there have been many cases in which arbi-

23. Similar three alternatives are provided for in the Convention on the Protection of the Marine Environment of the Baltic Sea Area, of March 22, 1974, art. 18, 13 INT. LEGAL MATERIALS 546, 552 (1974).

24. See, e.g., the IMCO Convention for the Prevention of Pollution from Ships, of November 2, 1973, art. 10 and Protocol II, IMCO Doc. MP/CONF/WP.35 (1973), 12 INT'L LEGAL MATERIALS 1319, 1441 (1973); Convention for the Prevention of Marine Pollution from Land-Based Sources, of June 4, 1974, art. 21 and Annex B, 13 INT'L LEGAL MATERIALS 352 (1974). See also London Fisheries Convention, of March 9, 1964, art. 13 and annex II, 581 U.N.T.S. 57.

25. See 28 U.N. GAOR, Supp. 21, Vol. II, at 130-36, U.N. Doc. A/9021 (1973).

26. U.N. Doc. A/AC.138/97 (1973).

27. Most of these treaties are listed in [1973-1974] I.C.J.Y.B. 81-94.

28. Such a chamber could be created for law of the sea disputes. See arts. 26-29 of the Statute of the Court, and arts. 24-27 of the Rules of the Court, as amended in 1972. 2 INTERNATIONAL COURT OF JUSTICE, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT 9-10 (1972).

29. See, e.g., the *Model Rules on Arbitral Procedure*, prepared by the International Law Commission, 13 U.N. GAOR, Supp. 9, at 5-8, U.N. Doc. A/3859 (1958). A proposal that the General Assembly commend these Rules to the attention of Member States had to be modified, and the General As-

tral tribunals run into membership and procedural difficulties which have prevented an effective decision.³⁰ It often takes many months before an arbitral tribunal is able to function, and it cannot deal effectively with cases requiring speedy emergency action.

The International Court of Justice can quickly enact provisional measures to preserve the respective rights of the parties to the dispute. Under its new rules of procedure, it can deal as expeditiously with a case as the parties will allow. The Court has had vast experience in interpreting international agreements, and in recent years has shown great flexibility with respect to both procedural and substantive law. While the Court has sometimes been considered as too conservative, it is less likely to be so in applying a new Law of the Sea Convention representing a new stage in the development of international law. On the other hand, it can be argued that the Law of the Sea Convention will contain many technical provisions requiring not good generalists, but judges with special competence in law of the sea problems. Many questions which might arise under the Law of the Sea Convention will relate not to international law but to various administrative problems of the new regime which require a tribunal with an administrative rather than strictly legal approach, a tribunal resembling more French *Conseil d'Etat* or the Court of Justice of the European Communities than an arbitral tribunal or the International Court of Justice. The final difficulty relates to the possible parties before the Court (see *infra*). If it is decided that the law of the sea dispute settlement procedure should be open not only to States but also to international organizations, public and private legal persons, and even to individuals, they could not be given access to the International Court of Justice without a drastic amendment to its Statute.³¹

A special Law of the Sea Tribunal would avoid most of these difficulties. Being a permanent tribunal, it would be able to function expeditiously, especially in emergency cases. It could be opened to any parties to a dispute, under conditions specified in its statute. It would be composed of persons with special competence in various fields covered by the Law of the Sea Convention, and in addition it might have attached to it specially qualified tech-

sembly merely brought them to the attention of Member States. 13 U.N. GAOR, Annexes, Agenda Item No. 57, at 4-7 U.N. Doc. A/3983 (1958); and G.A. Resolution 1262 (XIII), of November 14, 1958, 13 U.N. GAOR, Supp. 18, Vol. I, at 53, U.N. Doc. A/4090 (1958).

30. For an analysis of the mishaps which can befall international arbitral tribunals, see CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946).

31. At present, article 34(1) of the Statute provides that only States may be parties in cases before the Court.

nical assessors who could be called upon to participate in cases within their field of competence.³² Functioning within the framework of the Law of the Sea Convention and under its authority, the Tribunal should be able to ensure that the guiding principles of the Convention and its spirit are properly observed.³³

The Working Group found it necessary to present the following alternatives for the three main options, as well as a text combining them in one complex formula.³⁴

Alternative A.1

Any dispute which may arise between two or more Contracting Parties regarding the interpretation or application of this Convention shall be submitted to arbitration at the request of one of the parties to the dispute.

Alternative A.2

Any dispute between two or more Parties to this Convention concerning the interpretation or application of this Convention shall, if settlement by negotiation between the Parties involved has not been possible, and if these Parties do not otherwise agree, be submitted upon request of any of them to arbitration as set out in annex . . . to this Convention.

Alternative B.1

Any dispute between two or more Contracting Parties relating to the interpretation or application of this Convention shall be submitted, at the request of any of the parties to the dispute, to the Law of the Sea Tribunal to be established in accordance with the annexed Statute.

Alternative B.2

Notwithstanding the submission of a dispute to a procedure not entailing a binding decision, any Contracting Party which is party to a dispute relating to the interpretation or application of this Convention, which is required by this Convention to be submitted on the application of one of the parties to a dispute settlement procedure entailing a binding decision, may refer the dispute at any time to the Law of the Sea Tribunal.

Alternative C.1

Any dispute arising between Contracting Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to the dispute,

32. See U.S. proposal, A/AC.138/97, arts. 4-5 (1973).

33. The Treaty Instituting the European Coast and Steel Community, of April 18, 1951, provided in article 31 that the function of the Court established by that Treaty was "to ensure the rule of law in the interpretation and application" of that Treaty and of its implementing regulations. 261 U.N.T.S. 140.

34. U.N. Doc. A/CONF.62/L.7, at 8-13 (1974).

Alternative C.2

Any dispute arising between Contracting Parties concerning the interpretation or application of this Convention shall be referred by application of any party to the dispute to a chamber to be established in accordance with the Statute of the International Court of Justice to deal with the Law of the Sea disputes.

Alternative D

Subject to the provisions of this Chapter, any party to a dispute relating to the interpretation or application of this Convention shall be entitled to refer such dispute at any time to [the dispute settlement procedures entailing a binding decision which are provided for in this Convention] [arbitration] [the tribunal established under this Convention] [the International Court of Justice].

THE RELATIONSHIP BETWEEN GENERAL AND FUNCTIONAL APPROACHES

The acceptance of over-all dispute settlement procedures depends to a large extent on the solution of the problem of its relationship to special, functional procedures devised for such areas as seabed and fishing. Before the concept of an over-all dispute settlement machinery was developed, certain "vested rights" were established in several functional areas. There seems to be a general acceptance of a Seabed Tribunal and various proposals have been advanced to deal with difficult fishing problems. How can these functional approaches be reconciled with the more general procedure to be embodied in the dispute settlement chapter of the Convention?

The simplest approach would be to divide the field on functional lines. Wherever the Convention provides for a special procedure—as for instance, with respect to the seabed or fisheries—this special procedure would apply, and the general approach would be restricted to areas not covered by special procedures. The general procedures might also apply in cases where there are conflicts between various uses, for instance, between seabed exploitation and fishing, or between navigation and seabed exploitation.

At the other extreme, should a Law of the Sea Tribunal be established it might replace all the functional procedures. To facilitate, however, different approaches in various fields, separate functional chambers might be established for each field. Any special jurisdiction contemplated in a functional chapter would thus be transferred to the appropriate chamber of the Tribunal. Variety and flexibility would thus be preserved, without a proliferation of special commissions and tribunals. To facilitate this approach, it has been suggested (as noted *supra*) that technical experts or assessors be attached to the Tribunal. Such experts could function semi-independently, as special committees dealing in a preliminary fashion

with scientific and technical questions, leaving to the Tribunal only such issues as cannot be resolved on the technical level. Alternatively, the experts might function as assessors, participating in all stages of the proceedings, but without the right to vote. It is quite likely that in either case, the Tribunal would rely heavily on the findings and the advice of the experts and would try to mesh them with its own conclusions derived from the language and spirit of the Convention.

A third approach has also been considered which relies on a two-step procedure. In some cases, for instance, if there is a separate seabed tribunal, an appeal to the Law of the Sea Tribunal might be allowed in specified categories of cases. Thus an appeal would be possible if the decision on the lower level is challenged on such grounds as lack of jurisdiction, infringement of basic rules of procedure, misuse of power (in French administrative law—*abus de pouvoir* or *detournement de pouvoir*), or a violation of the Convention.³⁵ In other cases, where the functional chapters place reliance on fact-finding commissions (for instance, with respect to fishing, pollution or scientific research), the findings of fact thus made either might be considered conclusive or might result in a shift in the burden of proof.³⁶

In this case also the Working Group found it necessary to present a variety of options, with the following alternatives:³⁷

Alternative A.1

When a party to a dispute objects to a decision arrived at through a specialized dispute settlement procedure³⁸ provided for in this

35. For analogous provisions, see the Treaty Establishing the European Community, *supra* note 18, art. 173; and the Statute of the Administrative Tribunal of the United Nations, as revised in 1953 and 1955, art. II(1), U.N. Doc. AT/11/Rev. 2 (U.N. Publ. 62.X.3) (1962).

36. For a parallel approach, see the Agreement for the Establishment of the Indo-Pacific Fisheries Council, *as amended* in 1961, art. XIII, 418 U.N.T.S. 334, 348; the International Olive Oil Agreement, of April 20, 1963, art. 35, 495 U.N.T.S. 381, 383. A proposal by Australia and New Zealand concerning highly migratory species provides for reference by the tribunal of scientific and technical questions to a group of experts. U.N. Doc. A/CONF.62/C.2/L.57/Rev. 1, art. 9(A) (1974).

37. U.N. Doc. A/CONF.62/L.7, at 14-15 (1974).

38. It is envisaged that provisions relating to special procedures which may be required in such functional fields as fishing, sea-bed, marine pollution, scientific research, will be set out either in a separate part of the dispute settlement chapter or within the chapter to which they relate [footnote in original text of Working Group proposal].

Convention, that party may have recourse to the dispute settlement procedure entailing a binding decision provided for in this chapter on any of the following grounds:

- (a) lack of jurisdiction;
- (b) infringement of basic procedural rules;
- (c) misuse of powers; or
- (d) violation of the Convention.

Alternative A.2

Whenever this Convention provides for a specialized procedure, without allowing further recourse to the dispute settlement procedure entailing a binding decision, this chapter shall not apply.

Alternative B.1

1. Before resorting to the dispute settlement procedure entailing a binding decision provided for in this chapter, the parties to any dispute relating to chapters _____ of this Convention [*e.g.*, those relating to fishing, pollution, or scientific research] may agree to refer it to a special fact-finding procedure in accordance with the provisions of annex _____.

2. In any procedure entailing a binding decision under this chapter, the findings of fact made by the fact-finding machinery shall be considered conclusive [unless one of the parties presents positive proof that a gross error has been committed].

or

2. Should the findings of fact made by the fact-finding machinery be challenged by a recourse to the dispute settlement procedure provided for in this chapter, the party challenging such facts shall bear the burden of proof.

Alternative B.2

1. At the request of any party to a dispute relating to chapters _____ of this Convention [*e.g.*, those relating to fishing, pollution or scientific research], the dispute shall be referred to a special fact-finding procedure in accordance with the provisions of annex _____.

2. If any party to the dispute considers that the fact-finding decision is not in accordance with the provisions of this Convention, it may appeal to the dispute settlement procedure provided for in this chapter.

Alternative C.1

1. The Law of the Sea Tribunal, to be established in accordance with the annexed statute shall establish special chambers to deal with disputes relating to chapters _____ of this Convention. Each chamber of the Tribunal shall be assisted in the consideration of a dispute by four technical assessors sitting with it throughout all the stages of the proceedings, but without the right to vote. These assessors shall be chosen by each chamber from the list of qualified persons prepared pursuant to the statute of the Tribunal. [Their opinion on scientific and technical questions shall be considered by the chamber as conclusive.]

2. Each chamber shall deal with the dispute in accordance with the special procedure prescribed for that chamber by the statute of the Tribunal, taking into account the special requirements of each category of cases.

Alternative C.2

1. When a dispute submitted to the Law of the Sea Tribunal involves scientific or technical questions, the Tribunal shall refer

such matters to a special committee of experts chosen from the list of qualified persons prepared in accordance with the statute of the Tribunal.

2. If the dispute is not settled on the basis of the committee's opinion, either party to the dispute may request that the Tribunal proceed to consider the other aspects of the dispute, taking into consideration the findings of the committee and all other pertinent information.

PARTIES TO A DISPUTE

It is quite difficult for some States to reconcile themselves to the idea of a dispute settlement machinery resulting in a binding decision. One cannot be surprised, therefore, that they balk even more when it is suggested that this machinery should be open not only to States but also to other entities, or even individuals. Others believe, however, that several categories of law of the sea disputes are likely to go beyond the usual State-to-State framework. The Charter of the United Nations departed from traditional international law by recognizing the rights of individuals and the United Nations has slowly developed machinery to protect these rights, at least in cases of gross violations.³⁹ It would be incongruous to deny the minimal procedural rights to individuals in the new Law of the Sea Convention which is meant to provide new vistas of international law. There need not be, however, a complete break with the past, and appropriate conditions might be imposed on the use by legal entities and individuals of the facilities established under the Law of the Sea Convention.⁴⁰ These conditions might be different for international intergovernmental organizations, international nongovernmental organizations, other legal entities and individuals.

The Working Group decided to present on this subject the following stark alternatives:⁴¹

Alternative A

1. The dispute settlement machinery shall be open to the States parties to this Convention.
2. The conditions under which the machinery shall be open to other States, international intergovernmental organizations, [non-

39. L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1-19, 505-22, 772-856 (1973).

40. See, e.g., the restrictions included in article 173 of the Treaty Establishing the European Economic Community, *supra* note 18.

41. U.N. Doc. A/CONF.62/L.7, at 17 (1974).

governmental international organizations having a consultative relationship with the United Nations or a specialized agency of the United Nations or any other international organization], and natural and juridical persons shall be laid down [by . . .] [in an annex to this Convention], but in no case shall such conditions place the parties in position of inequality.

Alternative B

The dispute settlement machinery shall be open to the States parties to this Convention [and to the Authority, subject to the provisions of article]

LOCAL REMEDIES

One of the oldest rules of international law is the rule requiring exhaustion of local remedies before a resort to international remedies.⁴² It has been considered appropriate that ordinarily a State should not be internationally responsible if an adequate remedy might have been obtained in its courts. On the other hand, if no such remedy exists or it is insufficient, too slow or likely to be biased, international law allows this requirement to be skipped.⁴³ There are also some international agreements which completely dispense with the requirement that local remedies be exhausted.⁴⁴

Consequently, the Working Group suggested the following alternatives:⁴⁵

Alternative A

A Contracting Party which has taken measures alleged to be contrary to this Convention shall not be entitled to object to a request for submission of a dispute to the dispute settlement procedure under this chapter solely on the ground that any remedies under its domestic law have not been exhausted.

Alternative B.1

The Contracting Parties shall not be entitled to submit a dispute to the dispute settlement procedure under this chapter, if local remedies have not been previously exhausted, as required by international law.

Alternative B.2

1. In the case of a dispute relating to the exercise by the coastal State of its enforcement jurisdiction in accordance with this Con-

42. The rule on exhaustion of local remedies, and the closely related rules on denial of justice, can be traced at least to the ninth century. See SOHN & BUERGENTHAL, *supra* note 39, at 32-40.

43. See generally F. GARCÍA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 72-78, 261-70, 362, 366, 400-01 (1974). See also Geneva General Act, *supra* note 18, arts. 31-32.

44. See, e.g., Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, of November 29, 1969, art. VIII(2), Br. Parl. Papers, Cmnd. 4403 (1970); 2 Lay, Churchill & Nordquist, NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS 592 (1973).

45. U.N. Doc. A/CONF.62/L.7, at 18-19 (1974).

vention, the occasion [subject matter] of which, according to the domestic law of the coastal State, falls within the competence of its judicial or administrative authorities, the coastal State shall be entitled to request that the submission of the dispute to the means of dispute settlement provided for in this chapter be delayed until a decision with final effect has been pronounced, within a reasonable time, by the competent authority.

2. In such a case, the party to the dispute which desires to resort to the procedure for dispute settlement provided for in this chapter may not submit the dispute to such procedure after the expiration of a period of one year from the date of the aforementioned decision.

[3. When the case has been submitted to the settlement procedure under this chapter, the party challenging the findings of fact by the judicial authorities of the coastal State shall bear the burden of proof.]

ADVISORY JURISDICTION

To further facilitate the coordination between domestic and international remedies, it has been suggested that it would be desirable to allow domestic tribunals to request the Law of the Sea Tribunal for an advisory opinion authoritatively interpreting the provision of the Convention which is at issue in the domestic forum. Some delegations would prefer a binding ruling similar to those given by the Court of Justice of the European Communities in analogous situations.⁴⁶ A domestic tribunal would be authorized to request such an opinion only if its own law authorizes such a reference to an international authority. The Law of the Sea Tribunal may either be bound to give such an advisory opinion or the matter may be entirely at its discretion, depending on the circumstances of the case, the seriousness of the issues involved, and the need to maintain uniform jurisprudence.

Consequently, the Working Group agreed on the following proposal, embodying the basic options:⁴⁷

If a court of a Contracting Party has been authorized by the domestic law of that Party to request the Law of the Sea Tribunal to give an advisory opinion [a ruling] on any question relating to the interpretation or application of this Convention, the Law of the Sea Tribunal may [shall] give such an opinion [ruling].

46. Treaty Establishing the European Economic Community, *supra* note 18, art. 177.

47. U.N. Doc. A/CONF.62/L.7, at 20 (1974).

LAW APPLICABLE

One of the basic reasons for the acceptance of an international tribunal for the settlement of treaty disputes is that the treaty itself embodies the law to be applied by the tribunal, and that, consequently, the discretion of the tribunal to apply rules of customary international law would be quite narrowly circumscribed. In areas of the law as controversial in recent years as the law of the sea, some States found it even necessary to modify their previous acceptances of the jurisdiction of the International Court of Justice in order to avoid premature decisions while the law was in the process of revision.⁴⁸ However, once the law is codified and developed to the satisfaction of all the States concerned in the new Law of the Sea Convention, that convention will constitute the law to be applied and previous anxieties will disappear.

Some delegations did not think it necessary to single out the new Law of the Sea Convention as the only law applicable. They expressed the view that once that convention comes into effect it will form a chapter of general international law, and it should be sufficient to state quite simply that the law of the sea dispute settlement machinery should decide in accordance with applicable international law. They pointed out that even if priority should be given to the Law of the Sea Convention, other rules of international law would also have to be applied from time to time, and the Convention will have to be interpreted in accordance with the rules of international law relating to interpretation.

A question was also raised about the content of the "law of this Convention." Is it limited to the text of the Law of the Sea Convention only, or does it also embody the regulations enacted thereunder as well as regional arrangements and public or private contracts concluded pursuant to the Law of the Sea Convention? Some delegations would also like to preserve the right of the parties to agree that a dispute be decided *ex aequo et bono*.⁴⁹ Finally, some delegations suggested that the dispute settlement machinery should be expressly given the function to ensure that the law of the Law of the Sea Convention would be observed in the interpretation and application of that Convention.⁵⁰

Taking these proposals into consideration, the Working Group

48. See, e.g., the recent declarations by Australia, Canada and the Philippines. [1973-1974] I.C.J.Y.B. 49-51, 53-54, 73-74.

49. The Statute of the International Court of Justice contains such provision in art. 38(2).

50. For a similar provision, see the Treaty Establishing the European Economic Community, *supra* note 18, art. 164.

proposed the following alternatives concerning the law applicable and a separate provision on equity jurisdiction.⁵¹

Alternative A

In any dispute submitted to it the dispute settlement machinery shall apply the law of this Convention, and shall ensure that this law is observed in the interpretation and application of this Convention.

Alternative B

In any dispute submitted to it, the dispute settlement machinery shall apply, in the first place, the law of this Convention. If, however, the dispute relates to the interpretation or application of a regional arrangement or public or private agreement concluded pursuant to this Convention, or to regulations adopted by a competent international organization, the dispute settlement machinery shall apply, in addition to the Convention, the rules contained in such arrangements, agreements, or regulations, provided the regulations are not inconsistent with this Convention.

Alternative C

Any dispute submitted to the dispute settlement procedure established by this Convention shall be decided in accordance with applicable international law.

Alternative D

In any dispute submitted to it, the dispute settlement machinery shall apply:

- (a) the provisions of this Convention;
- (b) the rules and regulations laid down by the competent international authority;
- (c) the terms and conditions of the relevant contracts or other legal arrangements entered into by the competent international authority.

Equity Jurisdiction

The provisions of this chapter shall not prejudice the right of the parties to a dispute to agree that the dispute be settled *ex aequo et bono*.

EXCEPTIONS AND RESERVATIONS TO THE DISPUTE
SETTLEMENT PROVISIONS

Some delegations believe that the integrity of the compromise package to be embodied in the Law of the Sea Convention needs to be preserved at all cost and that effective dispute settlement provisions are needed, applicable without exception to all parts of the

51. U.N. Doc. A/CONF.62/L.7, at 20-21 (1974).

Convention.⁵² Others would like to allow exceptions with respect to some parts of the Convention, or, alternatively, to limit binding decisions to specified chapters or articles of the Convention.⁵³ The extreme approach of making the provisions on dispute settlement merely optional⁵⁴ was rejected by the Working Group in favor of a compromise proposal allowing specified exceptions to be enumerated exhaustively in the Convention.⁵⁵ While some would allow such exceptions with respect to all procedures, others would allow them only insofar as procedures leading to a binding decision are concerned, thus prohibiting reservations with respect to conciliation, mediation and similar procedures.

For the moment, the Working Group has limited itself to listing exceptions which were suggested by various delegations. It did not try to draft them in a final, more precise form; nor did it consider the desirability or the danger of particular formulations.⁵⁶

The following options and alternatives were listed by the Working Group:⁵⁷

Alternative A

The provisions of this chapter shall apply to all disputes relating to the interpretation and application of this Convention.

Alternative B.1

The dispute settlement machinery shall have no jurisdiction to render binding decisions with respect to the following categories of disputes:

(a) Disputes arising out of the normal exercise of regulatory or enforcement jurisdiction, except when gross or persistent violation of this Convention or abuse of power is alleged.⁵⁸

(b) Disputes concerning sea boundary delimitations between States.

52. Many international agreements provide for an over-all dispute settlement machinery, without exceptions. See, e.g., BLEX, *supra* note 4, at 117.

53. For an example of this approach, see Vienna Convention on the Law of Treaties, *supra* note 11, art. 66.

54. At the 1958 Law of the Sea Conference a separate optional protocol on dispute settlement was adopted; not many countries ratified it. 450 U.N.T.S. 169. For a criticism of this approach, see the statement by Ambassador Galindo Pohl, U.N. Doc. A/CONF.62/SR.51, at 4 (prov. ed. 1974).

55. A similar method was adopted in drafting the Geneva General Act, *supra* note 18, art. 39.

56. As Ambassador Galindo Pohl has noted, certain fundamental or constitutional problems facing some States need to be taken into account, allowing them to protect their vital interests through "exceptions which had to be determined with the greatest care." U.N. Doc. A/CONF.62/SR.51, at 4-5 (prov. ed. 1974).

57. U.N. Doc. A/CONF.62/L.7, at 22-24 (1974).

58. The precise drafting and implications of this exception will require further examination in the light of the substantive provisions of this Convention [footnote in original text of Working Group proposal].

(c) Disputes involving historic bays or limits of territorial sea.

(d) Disputes concerning vessels and aircraft entitled to sovereign immunity under international law, and similar cases in which sovereign immunity applies under international law.

(e) Disputes concerning military activities [unless the State conducting such activities gives its express consent].

(f)

(g)

Alternative B.2

The dispute settlement machinery shall have no jurisdiction with respect to the following categories of disputes:

(a) Disputes arising out of the normal exercise of discretion by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.⁵⁹

(b) Disputes concerning sea boundary delimitations between adjacent and opposite States, including those involving historic bays and the delimitation of the adjacent territorial sea.

(c) Disputes concerning vessels and aircraft entitled to sovereign immunity under international law, and similar cases in which sovereign immunity applies under international law.

(d) Disputes concerning military activities [unless the State conducting such activities gives its express consent.]

(e)

(f)

Alternative C.1

1. In ratifying this Convention, acceding to it, or accepting it, a State may declare that it does not accept the jurisdiction of the dispute settlement machinery to render binding decisions with respect to one or more of the following categories of disputes:

[(a)-(g) as in Alternative B.1.]

2. If one of the Contracting Parties has made such a declaration, any other Contracting Party may enforce the same exception in regard to the Party which made the declaration.

Alternative C.2

1. In ratifying this Convention, acceding to it, or accepting it, a State may declare that it does not accept the jurisdiction of the dispute settlement machinery with respect to one or more of the following categories of disputes:

[(a)-(f) as in Alternative B.2]

2. If one of the Contracting Parties has made such a declaration, any other Contracting Party may enforce the same exception in regard to the Party which made the declaration.

59. The precise drafting and implications of this exception will require further examination in the light of the substantive provisions of this Convention [footnote in original text of Working Group proposal].

CONCLUSION

The working paper prepared by the Working Group on the settlement of the law of the sea disputes is only provisional in character and limited to outlining the basic alternatives. It needs to be completed and various issues need to be further clarified. However, once an agreement is reached on the basic elements it should be relatively easier to arrive at a solution of the less essential points.⁶⁰ It is hoped that the suggestions of the Working Group will facilitate the final settlement.

In conclusion, it might be useful to note some of the important reasons for including in the Law of the Sea Convention effective dispute settlement provisions:⁶¹

1. Effective legal procedures for dispute settlement are necessary to avoid political and economic pressures. While the larger and richer countries can apply extra-legal, political and economic pressures to achieve their ends, it is especially important for small countries and for developing countries to have disputes directed into legal channels where the principle of equality before the law prevails.

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

3. The system of dispute settlement must be an integral part of the Law of the Sea Convention. An optional protocol would be a totally inadequate way of dealing with the problem. An attempt to relegate dispute settlement to an optional protocol might jeopardize the ratification and even the signing of the Convention. For many countries, the adjustments made for the sake of obtaining an agreement on the Law of the Sea Convention are only justifiable if effective means are provided to avoid the political and even military confrontations which otherwise might occur.⁶²

60. Statement by Ambassador Galindo Pohl, August 29, 1974, *supra* note 56, at 4.

61. For a similar list, see Ambassador Galindo Pohl's statement, *id.*

62. See, e.g., the following statement by Ambassador Stevenson, July 11, 1974, 71 DEP'T STATE BULL. 232, 235 (1974):

[My] government believes that any law of the sea treaty is almost as easily susceptible of unreasonable unilateral interpretation as are the principles of customary international law. This is particularly true when we consider that the essential balance of critical portions of the treaty, such as the economic zone, must rest upon impartial interpretation of treaty provisions. One of the primary motivations of my government in supporting the negotiation

4. The injunction of the Charter of the United Nations that international disputes must be settled "by peaceful means in such a manner that international peace and security, and justice, are not endangered" cannot be complied with unless effective means are actually provided for such a settlement in the far-ranging Law of the Sea Convention which will decide the fate of some 70% of the earth surface covered by seas and oceans. The more encompassing the solutions are, the more the Convention lays down novel principles for the solution of current and future problems, the more it is necessary to provide for the stability of the new regime through generally accepted, effective and flexible means for the settlement of law of the sea disputes.

of a new law of the sea treaty is that of making an enduring contribution to a new structure for peaceful relations among states. Accordingly, we must reiterate our view that a system of peaceful and compulsory third-party settlement of disputes is in the end perhaps the most significant justification for the accommodations we are all being asked to make.