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United Nations
Convention on the Law of the Sea
Dispute Settlement Mechanisms

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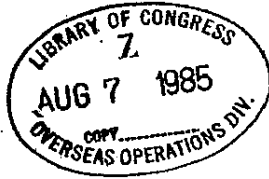
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To My Wife
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2.2 Compulsory Dispute Settlement Mechanisms: Limitations and Exceptions

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The idea of compulsory international adjudication found its place in international law only in stages. Amidst the conflicting views of the international community, the so-called Optional Clause of the Statute of the International Court of Justice finally came into existence. The history of the Optional Clause shows that the Big Powers as well as the smaller Countries have never been enthusiastic to it. The sweeping reservations made by the United States, France, U.K. and many other States have left the scope of compulsory jurisdiction extremely vague and limited.¹ Corbett remarks that these reservations and exceptions "have turned this route to generalised compulsory jurisdiction into something of a blind alley."²

The States, therefore, appear to have agreed to the idea of compulsory adjudication in case of international disputes subject only to their being allowed to exercise their right to make reservations.

The Third United Nations Conference on Law of the Sea witnessed different trends inasmuch as compulsory settlement mechanisms found the support of many States for the settlement of the law of the sea disputes. The States have also given expression to the doctrine of non-frustration while evolving the machinery for compulsory international adjudication. However, the States expressed divergent opinions on the issue of 'limitations and exceptions' of the compulsory international adjudication of the sea disputes; some delegates were strongly opposed to the exclusion of any broad categories of disputes from the jurisdiction of the dispute settlement machinery.³

In particular, several of them objected to the exemption of disputes relating to matters of exclusive jurisdiction of the coastal States and emphasized the special need for settlement of disputes relating to this novel area of international law.⁴ Another group of delegates with equal vigour insisted that exclusive economic zone should not be jeopardized by its submission to the jurisdiction of any international forum.⁵ While some members of this group opposed the exceptions suggested in the President's text, others thought that questions of navigation and overflight might be subject to international adjudication.⁶ Fears were expressed that national jurisdiction over fisheries might be threatened by distant water fishing States;⁷ on the other hand, some States pointed out that rights retained by States under the Law of the Sea Convention might be easily nullified by coastal States if no recourse to an international tribunal was available.⁸ The danger of anarchy was emphasized, and it was noted that small and poor States need the protection of the law and of international tribunals more than rich and powerful ones.⁹ Finally, it was agreed that certain categories of disputes (arising out of navigation, overflight, laying of submarine cables and pipelines, preservation and protection of the marine environment, marine scientific research and fisheries) concerning the interpretation or application of the Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction shall be settled by resort to compulsory settlement procedures.

2.21 Limitations

The consensus between the States at the UNCLOS III on the applicability of compulsory settlement procedures in cases of certain categories of disputes in the Exclusive Economic Zone gave rise to apprehension of some delegates that such procedures might jeopardise the economic or legal security of the coastal States by their constant harassment of having to appear before international tribunals at considerable loss of time and money.¹⁰ Such apprehension did not find any reflection either in Single Negotiating Text or in Revised Single Negotiating Text.¹¹ However, the matter was further pursued in 1977 and was given vigorous expression in the Informal Composite Negotiating Text.¹² The objective was achieved by setting down in paragraph 1 of Article 296, series of conditions, all of which had to be met before any forum could deal with any dispute relating to the exercise by a coastal State of sovereign rights or jurisdiction. Those cumulative conditions were: (a) the court or tribunal shall not call upon the other party or parties to respond until the party which has submitted the dispute has established *prima facie* that the claim is well-founded; (b) such court or tribunal shall not entertain any application which in its opinion constitutes an abuse of legal process or is frivolous or vexatious; and (c) such court or tribunal shall immediately notify the other party to the dispute that the dispute has been submitted and such party shall be entitled, if it so desires, to present objections to the entertainment of the application. In his explanatory memorandum, the Con-

ference President wrote:

"The new formulation of Article 296 is intended to provide safeguards against an abuse of power by a coastal State and at the same time to avoid an abuse of legal process by other States. In paragraph 1 of this article, provision has been made through procedural devices to avoid the abuse of legal process."¹³

The abovementioned preliminary requirements are familiar defences in the common law system.¹⁴ As formulated in paragraph 1 of Article 296 of I.C.N.T., the preliminary requirements put the burden on the plaintiff to establish all of these propositions even before the defendant objects to any of them.¹⁵

The philosophy behind abovementioned provision is that in given circumstances, a State might be in need of some additional protection against unjustified legal proceedings in the novel situations contemplated in the new law of the sea. However cumulative conditions mentioned in paragraph 1 of article 296 of I.C.N.T. give rise to conceptual and technical difficulties. Conceptually, the popular terms of municipal law namely 'frivolous' and 'vexatious' are unknown in international law. Both these terms, borrowed from domestic law, are inappropriate to public international law and international relations, and their introduction in the dispute settlement machinery of the Law of the Sea Convention might reduce to an empty shell all the laboriously created, balanced system of third-party settlement. The applicability of such terms to international law would result in the generation of international tension and deterioration of international relations between the States.¹⁶ Technically, the basic structure and function of international adjudication as it has developed in the practice and procedure of the International Court of Justice, in established patterns of international arbitration, and as is envisaged in the Statute of the Law of the Sea Tribunal, technical obstacles preventing *ex parte* pronouncements *proprio motu* by any standing or *ad hoc* international tribunal, solely on the basis of a unilateral institution of proceedings, that the claim is not *prima facie* well-founded, can easily be imagined.¹⁷ Since those cumulative conditions were to apply to all proceedings against all coastal States relating to the exercise of their "sovereign rights or jurisdiction provided for in the present Convention", many saw a danger that the mere presence of paragraph 1 in that form could render the whole dispute settlement process illusory and perhaps imperil the process of bringing the Convention into force.¹⁸

Negotiating Group 5 attempted to repair the situation.¹⁹ It redrafted Article 296(1) of I.C.N.T. as Article 296 bis.

Article 296 bis—Preliminary Proceedings

1. A court or tribunal provided for in Article 287 to which an application is made in respect of a dispute referred to in Article 296 shall determine at the request of a party, or may determine on its own

initiative, whether the claim constitutes an abuse of legal process or whether it is established *prima facie* to be well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.

2. On receipt of such an application, the court or tribunal shall immediately notify the other party or parties to the dispute of the application, and shall fix a reasonable time-limit within which the other party or parties may request such a determination.
3. Nothing in paragraph 1 or 2 affects the right of any party to a dispute to raise preliminary objections in accordance with the applicable rules of procedure.

Article 296 bis consolidated several informal suggestions advanced during the discussion.²⁰ The enquiry of the Article 296 bis was restricted to the following two cumulative conditions: firstly, whether the claim was *prima facie* well founded (the decision would be limited to a determination that the claim was or was not *prima facie* unfounded); and secondly, whether the institution of the proceedings was an abuse of legal process. Article 296 bis constituted an improvement over article 296(1) of I.C.N.T. inasmuch as it did not mention any frivolous or vexatious claim which could block an application to the court or tribunal. Furthermore, it required the court to decide whether a claim is *prima facie* unfounded, a significant improvement over I.C.N.T. which required the moving party to establish that the claim was well founded. If the application was faulted on either of the named grounds, the court or tribunal would not take further action in the case.

The Law of the Sea Convention contains the abovementioned safeguards for avoidance of the abuse of legal process and assurance of well founded claims being filed. The significance of such safeguards was implicitly recognized by the International Court of Justice. In some requests for indication of interim measures of protection, the International Court of Justice, on the basis of an informal reaction of the respondent State not necessarily in a pleading, has made an *ex parte* examination and provisional determination as to the existence of a *prima facie* claim.²¹ Furthermore, a close look at cases brought by unilateral application before the International Court of Justice since 1946 may support a view that not all of them were sincere attempts to seek judicial resolution of legal disputes, and in that sense may have been abusive of legal process.²² The Rules adopted by the International Court of Justice contain some safeguards against such abuse, although these are not as specific and express as the abovementioned safeguards.²³

UN Convention on the Law of the Sea imposes the following limitations on the applicability of the machinery of compulsory international adjudication:²⁴

1. Disputes concerning the interpretation or application of this Conven-

tion with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention, shall be subject to the procedures provided for in Section 2 in the following cases:

- (a) When it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58;
 - (b) When it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
 - (c) When it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.
2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
- (i) the exercise by the coastal State of a right or discretion in accordance with Article 246; or
 - (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253.
- (b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under Articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, Section 2, provided that the conciliation commission shall not call in question that exercise by the coastal State of its discretion to designate specific areas as referred to in Article 246, paragraph 6, of its discretion to withhold consent in accordance with Article 246, paragraph 5.
3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States

and the terms and conditions established in its conservation and management laws and regulations.

- (b) Where no settlement has been reached by recourse to Section 1, of this part, a dispute shall be submitted to conciliation under Annex V, Section 2, at the request of any party to the dispute, when it is alleged that:
 - (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
 - (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
 - (iii) a coastal State has arbitrarily refused to allocate to any State, under Article 62, 69, 70 and under the terms and conditions established by the coastal state consistent with this Convention, the whole or part of the surplus it has declared to exist.
- (c) In no case shall the Conciliation Commission substitute its discretion for that of the coastal State.
- (d) The report of the Conciliation Commission shall be communicated to the appropriate international organization.
- (e) In negotiating agreements pursuant to Article 69 and 70, State parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

Paragraph 1 of the above provision proceeds on the premise that the disputes relating to the exercise by a coastal State of its sovereign rights or jurisdiction are, generally, outside the sphere of application of the machinery of compulsory international adjudication. The compulsory international adjudicatory machinery finds limited application in cases of certain categories of such disputes concerning freedoms and rights of navigation, overflight, laying of submarine cables and pipelines, contravention of international rules and standards for the protection and preservation of the marine environment, marine scientific research, fisheries, etc. The applicability clause of the above provision refers to 'sovereign rights or jurisdiction' and makes no reference of 'sovereignty' in spite of the fact that the Convention on the Law of the Sea deals not only with 'sovereign rights' and 'jurisdiction' in the Exclusive Economic Zone but also with "sovereignty" in territorial waters, internal waters and archipelagic waters. Does it mean that compulsory dispute settlement procedures apply in cases of disputes on matters over which the coastal State exercises its sovereignty or such disputes are automatically excepted from compulsory settlement procedures? The answer to this question is a

matter of interpretation. According to one interpretation disputes arising out of matters under sovereignty of the coastal States shall not fall within the scope of compulsory dispute settlement procedures.²⁵ The other interpretation may be that the provision applies also to the territorial sea, in which the sovereign rights of a coastal State are even broader than the sovereign rights in exclusive economic zone, because these are not restricted to economic resources but relate also to other matters²⁶ and, therefore, in the territorial waters, on the one hand, there are much broader rights of the coastal States and on the other hand the right of innocent passage, and finally the right of the coastal State to regulate the innocent passage, which in case of violation might make compulsory dispute settlement mechanisms applicable. The adoption of former approach is preferable as it is based on logical considerations inasmuch as the disputes arising from the conduct of States in their territorial sea are assumed to be unquestionably within the competence of domestic courts, as in the case of those arising in the land territory of a State. It is for this reason that compulsory dispute settlement provisions of the Convention draw clear distinction between 'sovereignty' and 'sovereign rights'.

The Convention on the Law of the Sea implicitly provides that disputes concerning exercise of the sovereign rights or jurisdiction of a coastal State are not subject to compulsory dispute settlement procedure except in the following cases.

2.211 Navigation, Overflight, Laying of Submarine Cables and Pipelines, etc.

The Law of the Sea Convention favours maritime interests in providing that any interference by the coastal States with freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines, or with other internationally lawful uses of the sea specified in the Convention (in Article 58) shall be subject to review by an international tribunal.²⁷ A perusal of Article 58 makes it clear that "other internationally lawful uses of the Sea" are related to freedoms of navigation, overflight and laying of submarine cables and pipelines, such as those associated with the operation of ships, aircraft and submarine cables and pipelines and compatible with the other provisions of this Convention. The Convention, further provides that if in exercising these freedoms, rights or uses any State violates the Law of the Sea Convention or laws or regulations (e.g., in the environmental area) established by the coastal State in conformity with the Convention, such violations will be subject to compulsory international adjudication.²⁸ Thus, national courts of the coastal States have no jurisdiction to entertain disputes concerning exercise by a coastal State of its sovereign rights or jurisdiction relating to navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines and compatible with other provisions of this Convention. Such disputes are subject to the jurisdiction of international tribunals. This provision

is a paradise for the maritime States who have considerable strategic, commercial and political interests in navigational operations. Nevertheless, the provision did not arouse controversy in the Law of the Sea Conference.²⁹

2.212 *Marine Environment*

The view has been constantly expressed that, in the field of the protection and preservation of the environment, more efforts should be directed toward developing techniques for disputes avoidance as opposed to formulation of procedures for disputes settlement.³⁰ The rationale for this view is as follows:

“Certain activities harmful to the environment may cause damage or injury for which no restoration could be appreciably achieved. Moreover, it is said that the environmental damage may be such that no amount of monetary compensation for reparation would constitute a satisfactory remedy for an aggrieved party. Thus, it would be preferable to emphasise the need to develop ways and means of avoiding or minimizing the occurrence of environmental damage and disputes in the first place, rather than the desire to establish modalities for giving effect to the legal rights and interests of the parties, through a dispute settlement mechanism, after the environmental damage has actually occurred”.³¹

This approach is at the root of the national laws of certain industrial States which require the preparation of an Environmental Impact Statement or Environmental Assessment Document concerning a particular planned developmental activity.³² This procedure, which is now being followed by inter governmental institutions such as the World Bank³³ is clearly aimed at achieving the necessary evaluation of the impact of a particular developmental activity upon the environment, leading hopefully to a rational decision as to alternative means, which may require additional expenses, to carry out the project without unduly damaging the environment and avoiding the disputes which may arise from competing rights and interests.³⁴ The United Nations Environment Programme (UNEP) was the first to recognize this under its concept of ‘additionality’, built into its environmental funding programme.³⁵ At the same time, there is also a need to exercise caution not to use environmental reasons as pretexts for defeating developmental projects in the developing countries or for limiting the chances of entry into the world market of certain products from developing countries thereby affecting their international trade.³⁶ The preventive approach is clearly reflected in numerous global or regional conventions which are aimed at protecting the marine environment from land based pollution, vessel source pollution, and from pollution by any dumping activity.³⁷ If preventive approach fails, unavoided disputes are settled by resort to international adjudication.³⁸

UN Convention on the Law of the Sea gives expression to the preventive approach (dispute avoidance) by making numerous substantive provisions designed to achieve protection and preservation of the marine environment.³⁹ But where the conduct of the actors in the Ocean Space results in the damage to the marine environment, resulting in a dispute between States, the Law

of the Sea Convention has established the procedures for settling such environmental disputes. According to the Convention, international tribunal exercises jurisdiction in cases when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by the present Convention or by a competent international organization or diplomatic conference acting in accordance with the present Convention.⁴⁰ Thus, environmental disputes, without any reservation or exception, are made subject to the compulsory procedures. The absence of any exceptions concerning environmental disputes distinguishes such disputes from disputes relating to fisheries and scientific research. The problem arises because the Convention does not define 'international rules and standards.' Delegates participating in the Third United Nations Conference on the Law of the Sea generally understood that 'international rules and standards' referred to the 1973 Intergovernmental Marine Consultative Organization (IMCO) Convention as amended by the 1978 IMCO protocol thereto.⁴¹ If this interpretation is correct, the impact of the Law of the Sea Convention obligations on States parties to the Law of the Sea Convention but not parties to the IMCO Convention is unclear.⁴² Treaty law would not bind non-parties to the IMCO Convention to those provisions unless the Law of the Sea Convention specifically provided for such a result. If the standard is to take effect when the IMCO Convention has been ratified by so many States that it becomes customary international law, what are States to do in the interim? The prognosis for widespread ratification or adherence is bleak given the paucity of parties to the IMCO Convention.⁴³ Finally, "international rules and standards" could refer to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (Oil Pollution Convention).⁴⁴ If so, the rules and standards would be less comprehensive than under the 1973 IMCO Convention as amended and would regulate only Oil Pollution. Again, the small number of adherents to the IMCO Convention⁴⁵ effectively precludes any attempt to apply it as evidence of generally accepted international rules and standards. Despite the uncertainty surrounding international rules and standards, compulsory dispute settlement procedures apply only when a coastal State breaches these prescriptions. Without a clear understanding of the term, the grant of jurisdiction to dispute settlement procedures in cases of disputes relating to the protection and preservation of the marine environment could be seriously hampered.

2.213 *Scientific Research*

Scientific research is an area of considerable interest for the industrialized States. They advocate that the activities concerning scientific research in the exclusive economic zone should as far as possible be free from the control of coastal States.⁴⁶ The Law of the Sea Convention makes an endeavour to strike a balance between maritime interests and coastal interests by making certain disputes concerning scientific research subject to compulsory international

adjudication and placing many caveats on the applicability of compulsory international adjudication to such disputes.

The compulsory settlement mechanisms of the Law of the Sea Convention for the resolution of disputes relating to scientific research are linked with the substantive provisions of the Convention concerning scientific research. Article 238 of the Convention provides that all States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided in this Convention.⁴⁷ However, significant limitations to this basic right are found in Article 245 of the Convention which gives coastal States the exclusive right to regulate and conduct marine scientific research in their territorial sea.⁴⁸ Article 246 (1) allows the coastal States to regulate, authorize and conduct marine scientific research in their exclusive economic zone and continental shelf.⁴⁹ Article 246 (2) requires the consent of the coastal State to engage in the conduct of marine scientific research in the exclusive economic zone and continental shelf.⁵⁰ However, Article 246 (5) allows the coastal State to withhold its consent as a matter of discretion.⁵¹ Article 246 (6) provides that coastal States may not exercise their discretion to withhold consent in respect of marine scientific research projects on the continental shelf beyond 200 nautical miles from the baselines, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time.⁵² Article 253 allows the coastal State to require the suspension or cessation of marine scientific research activities as a matter of right.⁵³

The dispute settlement machinery of the earlier texts (before integration), produced for the facilitation of the negotiations in the Law of the Sea Conference, did not distinguish between disputes relating to marine environment and marine scientific research and made the disputes concerning marine scientific research subject to compulsory dispute settlement procedures when the coastal State had allegedly acted in contravention of specified international standards or criteria for the conduct of marine scientific research which were applicable to the coastal State.⁵⁴ Later, the integrated text laid down the general rule that no dispute relating to the interpretation or application of the provisions of the Convention concerning marine scientific research shall be subject to compulsory settlement procedures⁵⁵. However, the integrated text made the following two exceptions to the general rule: firstly, the failure to comply with the provisions of article 247 and 254 (corresponding to Articles 246 and 253 of the Law of the Sea Convention); and secondly, the substitution of discretion by the international forum for that of the coastal State.⁵⁶ The integrated text contained an exception to the first exception providing that in no case shall the exercise of a right or discretion by the coastal State in accordance with Article 247 (corresponding to Article 246 of the Convention), or a decision taken by the coastal State in accordance with Article 254.

(corresponding to Article 253 of the Convention), be called in question.⁵⁷ The approach of the integrated text is negative and pessimistic and accordingly tends to weaken compulsory international adjudication.

The Law of the Sea Convention modifies the above approach in positive terms and broadens the scope of compulsory international adjudication machinery in cases of disputes concerning scientific research. The Convention provides that disputes concerning the interpretation or application of the provisions of the Convention with regard to marine scientific research shall be subject to compulsory settlement procedures of the Convention.⁵⁸ However, the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of: (i) the exercise by the coastal State of a right or discretion in accordance with Article 246; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253.⁵⁹ While dealing with the disputes relating to scientific research, the Convention does not refer to 'sovereign rights', 'sovereignty', 'jurisdiction', or 'exclusive jurisdiction'. The omission might have opened the gates for the claims for extension of the scope of the provision to the territorial sea if there were no reference to Article 246 and 253 which implicitly indicate that the provision is only applicable to exclusive economic zone and continental shelf. To put the things beyond all possible doubts, it is in the fitness of things to make the provision regarding scientific research as sub-paragraph (d) of the paragraph (I) of Article 297, instead of keeping it in a separate paragraph.

The Convention on the Law of the Sea further provides that a dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under Articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation.⁶⁰ However, the Conciliation Commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in Article 246, paragraph 6 or of its discretion to withhold consent in accordance with Article 246, paragraph 5.⁶¹

The application of the compulsory conciliation procedure for the resolution of disputes concerning scientific research depicts exemplary enthusiasm of the coastal States for compulsory conciliation. The enthusiasm of the coastal States for compulsory conciliation procedure is also evidenced from the fact that the Convention makes compulsory conciliation procedure applicable to resolve disputes relating to scientific research arising out of the matters which are of vital importance to coastal States. Thus, the States have accepted compulsory conciliation procedure for the settlement of those disputes which they did not want to refer to compulsory settlement procedures entailing binding decisions. It is perhaps due to the fact that the decision of the Conciliation Commission is not binding for the disputing States although resort to it is compulsory in cases of certain categories of scientific

research disputes specified in the Convention. In view of the nature of the process of compulsory international adjudication, compulsory conciliation procedure is undeniably one of the modes of compulsory international adjudication. The machinery of compulsory international adjudication of the Law of the Sea Convention has, therefore, been strengthened inasmuch as it has been broad based by compulsory conciliatory technique. This technique lends acceptability to the provision which is one of the essential characteristics of an ideal dispute settlement.

2.214 *Fisheries*

The issues pertaining to fisheries are of immense economic significance to coastal States and user States. The user States including distant water fishing States, land-locked States and geographically disadvantaged States espouse the cause of international jurisdiction in cases of fisheries disputes concerning exclusive economic zone whereas coastal States are interested in the exclusion of such disputes from international jurisdiction. The Law of the Sea Convention reflects a balance of the conflicting interests of coastal States and user States by making fisheries disputes relating to exclusive economic zone subject to compulsory settlement procedures and, at the same time, placing many limitations on international jurisdiction.

The provisions concerning settlement of fisheries disputes of the Law of the Sea Convention are closely related to the substantive articles of the Convention regarding fisheries (article 61 to 75). Article 61 is the main provision setting forth the coastal State's right in relation to conservation of the living resources in the exclusive economic zone.⁶² Article 62 deals with rights to the utilization of those living resources.⁶³ Article 69 details the rights of land-locked States to those resources,⁶⁴ and Article 70 deals with the right of certain developing coastal States in a subregion or region to those living resources.⁶⁵ These provisions concretize main elements of the 'sovereign rights' of the coastal State to the living resources in the exclusive economic zone.

The Revised Single Negotiating Text subjected those fisheries disputes in exclusive economic zone to compulsory settlement procedures where coastal State had allegedly manifestly failed to comply with specified conditions established by the Convention relating to the exercise of its rights or performance of its duties in respect of living resources provided that the sovereign rights of the coastal State could in no case be called in question.⁶⁶ The provision underwent changes in the Informal Composite Negotiating Text by way of its elaboration and further specification.⁶⁷ The Law of the Sea Convention contains far reaching changes.⁶⁸ It begins by asserting in principle that disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be subject to the compulsory settlement procedures. But the exception immediately follows:

the coastal State shall not be obliged to accept the submission to such settlement "of any disputes relating to its sovereign rights with respect

to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management regulations.”

Those exceptions may well be quantitatively larger than the initial grant of jurisdiction over disputes with regard to fisheries.⁶⁹ The excepted matters themselves are regulated substantively in the substantive provisions of the Convention relating to fisheries.⁷⁰ In some respect, coastal States may have parallel rights to certain fisheries on the high Seas, specifically as regards highly migratory species and anadromous stocks,⁷¹ and more generally as well.⁷² Because the scope of the fisheries disputes settlement provision of the Law of the Sea Convention is strictly limited to the exclusive economic zone, fisheries disputes relating to maritime spaces seaward of the outer limit of the exclusive economic zone would appear to come within the scope of the compulsory settlement provisions of the Law of the Sea Convention,⁷³ and more particularly of Article 287.

The Law of the Sea Convention, in the process to strike a balance between the interests of coastal States and user States provides for settlement by compulsory recourse to conciliation machinery⁷⁴ for three specific types of disputes that are excluded from the binding settlement procedures, namely (a) allegations that a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; (b) allegations that a coastal State has arbitrarily refused to determine, at the request of another State the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or (c) allegations that a coastal State has arbitrarily refused to allocate to any State, under Articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.⁷⁵ The Convention further makes it clear that the conciliation Commission shall not substitute its discretion for that of the coastal State.

The ability of the compulsory conciliation machinery to come to grips with the merits of fisheries disputes, is considerably weakened by the fact that the words “manifestly”, “seriously” and “arbitrarily” admit of subjective interpretations. The deletion of such words lend certainty, specificity and effectivity to the compulsory conciliation machinery of the Convention. Such deletion would not adversely affect the element of acceptability inasmuch as acceptability has been given foremost consideration by substantially reducing the proportion of disputes relating to the living resources of the exclusive economic zone that are subject to compulsory settlement procedures whether binding in the form of a judgment or an arbitral award, or non-binding in the form of a report of a conciliation commission.

2.22 Optional Exceptions

The strength of the compulsory dispute settlement machinery is measured by the yardstick of its acceptability and consequently, closeness to the political reality. To meet the requirements of political reality, the Law of the Sea Convention contains provisions for the following exceptions.

2.221 *Delimitation of Maritime Boundaries*

Border disputes are as old as the practice of acquiring territory for one's exclusive use. Submission of the most difficult disputes to a neutral third party is a tradition nearly as old. Delimitation of boundaries was one of the most common uses of arbitration by the Mediterranean States of classical antiquity.⁷⁶ In the middle Ages, arbitration over unsettled limits "were among the more numerous."⁷⁷ In modern times, States have continued to use arbitration regularly to delineate their land boundaries.⁷⁸

As long as the right of a State to claim exclusive rights in the ocean was restricted to a narrow belt of territorial sea, disputes concerning the delimitation of maritime boundaries were relatively few and far between. Ordinarily, the reasonable room for disagreement was small, and important interests were not usually at stake. In most cases, the adjoining States were able to agree on a boundary. In others, they simply left it undelimited. Even so, it was not unheard of for a territorial sea boundary to be submitted to arbitration.⁷⁹

The Law of the Sea Conferences of the United Nations era have changed all that. In 1958, the claims of coastal States to sovereign rights over their continental shelves were crystallized. At the Third United Nations Conference on the Law of the Sea, the concept of 200 nautical miles economic zone gained acceptance and became part of the Law of the Sea Convention. The distances involved—upto 200 nautical miles or more—bring many more States into maritime contiguity than ever before. Any sea area narrower than 400 nautical miles across raises an issue of delimitation. The saying, 'everyone has a neighbour', may now be strictly and universally true with respect to States with sea coasts.⁸⁰ Furthermore, indiosyncratic coastal configurations, small islands, rocks and reefs, patterns of historic use, and in a few cases—disputed sovereignty over coastal land territory or islands—all may give rise to significant and well-founded differences about the proper delimitation, differences that simply cannot be resolved by automatic operation of a substantive rule, regardless of how skillfully drafted. Thus, maritime boundary delimitation is likely to continue to be a most prolific source of disputes between States under the Law of the Sea Convention.

The Third United Nations Conference on the Law of the Sea has witnessed difficulties in negotiating a compromissory clause for the resolution of maritime delimitation disputes. At Geneva part of its Seventh Session in

the Spring of 1978, the Conference decided that the questions associated with marine boundary delimitation were among the 'hard core issues' facing it. Combining both the substantive and jurisdictional aspects of the problem, the issue was framed by the plenary as: "delimitation of maritime boundaries between adjacent and opposite State and Settlement of Disputes thereon."⁸¹ The plenary organized Negotiating Group 7 (NG 7) to deal with the question and appointed Judge E.J. Manner (Finland) to chair it. As to the composition of the group,

"(i)t was decided that as the problems relating to this issue were essentially of a bilateral nature . . . all countries which had a special interest in the subject should be free . . . to participate in the work of the group."⁸²

The basic division within the group has been in regard to the substantive criteria which should govern delimitation. One group of States favours the median or equidistance line between coasts as the fundamental rule of delimitation, except where special circumstances require departure from it. The other group insists on the application of the principles of equity, giving no special preference to the median or equidistance line. Median line States tend to favour compulsory and binding settlement of delimitation disputes; equity States tend to oppose it. But the correlation is by no means exact; there are several exceptions to these tendencies.⁸³ The difference between compulsory and non-compulsory jurisdiction is that agreement on compulsory jurisdiction is sufficient unto itself and no further agreement is necessary to bring the mechanism into operation when a dispute arises whereas non-compulsory jurisdiction is contingent upon a subsequent agreement between the disputants—usually after the dispute has arisen—by which they consent to bring the mechanism into operation.⁸⁴ The threshold question of compulsory jurisdiction became critical point of controversy in NG 7 where one group considered it to be the *sine qua non* but for the other group, any text which included it was unacceptable.

The Informal Single Negotiating Text has given the option to the State to make a declaration while ratifying the Convention, or otherwise expressing its consent to be bound by it, that it does not accept some or all of the procedures for the settlement of disputes specified in the Convention with respect to the categories of disputes concerning Sea-boundary delimitations between adjacent or opposite States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure entailing a binding decision, which it accepts for the settlement of these disputes.⁸⁵ The Revised Single Negotiating Text keeps the substantive part of the above text intact but enlarges the scope of its operative clause by addition of the words "or at any time thereafter" after the words "or otherwise expressing its consent to be bound by it."⁸⁶ The integrated text (Informal Composite Negotiating Text) further restricts the substantive part of the above text by excluding from such procedures the disputes involving determination of any claim to sovereignty or

other rights with respect to continental or insular land territory.⁸⁷ Finally, the Law of the Sea Convention endeavours at reconciliation of the divergent positions by making the following provision:

Article 298:

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

- (a) (i) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
- (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
- (iii) this sub paragraph does not apply to any sea boundary dispute finally settled by an agreement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties.⁸⁸

The maritime delimitation disputes settlement provisions of the Convention are intrinsically linked with its substantive provisions inasmuch as these expressly refer to the substantive provisions of the Convention. More so, the substantive provisions also refer to the dispute settlement provision of the Convention. Article 15 of the Law of the Sea Convention deals with delimitation of the territorial Sea between States with opposite or adjacent coasts. It contains equidistance special circumstances formula for the purpose of such delimitation.⁸⁹ Article 74 of the Convention deals with the delimitation of the exclusive economic zone between States with opposite or adjacent coasts. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.⁹⁰ If no agreement can be reached within a reasonable period of time, the States

concerned shall resort to the dispute settlement provision of the Convention.⁹¹ Article 83 of the Convention deals with delimitation of the continental shelf between States with opposite or adjacent coasts. The principles for delimitation of continental shelf between States with opposite or adjacent coasts are similar to the principles for delimitation of exclusive economic zone between States with opposite or adjacent coasts.⁹² If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the dispute settlement provisions of the Convention.⁹³

The Law of the Sea Convention gives option to the States for exclusion from compulsory settlement procedures disputes concerning articles 15, 74 and 83 of the Convention relating to sea boundary delimitations, or those involving historic bays or titles. However, a State exercising such option is under an obligation to accept submission of the matter to conciliation when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached between the parties. The introduction of compulsory conciliation procedure in the Convention for the resolution of maritime boundary delimitation disputes constitutes compromissory clause based on the criteria of acceptability. The words 'reasonable period of time' introduce uncertainty and are subject to subjective interpretations. It is, therefore, in the fitness of things to delete these words. This would avoid unnecessary controversy that might arise. Furthermore, the substantive provisions of the Convention particularly relating to delimitation of the exclusive economic zone and continental shelf between opposite or adjacent States import vagueness and uncertainty of such a high degree as to become a prolific source of disputes in this area. These provisions are paradise for subjective interpretations. The scope of subjectivity in the interpretations of such provisions is so wide that it would make compulsory conciliation procedure ineffective. The confidence of the States in the compulsory conciliation procedure and consequently its effectiveness depends upon minimizing the uncertainty, vagueness and ambiguity surrounding the substantive provisions concerning economic zone and continental shelf between opposite or adjacent States. This would be possible by the adoption of equidistance—special circumstances principle for the delimitation of the abovementioned zones between opposite or adjacent States. The equidistance-special circumstances principle is comparatively much more specific and is based on international law and equitable considerations. There is hardly any justification behind the much ado raised at the Third United Nations Conference on the Law of the Sea on the issue of choice between equidistance-special circumstances principles or equitable principles for delimitation of maritime boundaries as former derives its genesis from the latter and, therefore, can be objectively applied to various sets of circumstances.

The Law of the Sea Convention restricts the scope of the compulsory conciliation procedure by providing that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty

or other rights over continental or insular land territory shall be excluded from submission to compulsory conciliation procedure.⁹⁴ Such exclusion is justified on the ground that the Convention relates exclusively to maritime matters. It concerns itself with land territory only insofar as it may affect the maritime regime. The provisions of the Convention on islands, for instance, are not determinative of the legal status of the island per se; they only specify the effect of the island on the ocean regime.⁹⁵ It is beyond the substantive scope of the Convention to determine the status of land territory. As the substantive articles of the Convention do not relate to such matters, it is certainly inappropriate for the dispute settlement provisions to cover them. It is, therefore, legally sound to exclude the consideration of land territory questions from compulsory delimitation jurisdiction. This provision lends acceptability to the compulsory conciliation procedure without unduly restricting its scope.

Another issue which calls for examination is the time factor for the operation of compulsory conciliation procedure. The pre-conditions for the applicability of the compulsory conciliation procedure are: firstly, the dispute must have arisen subsequent to the entry into force of the Convention; and secondly no agreement would be reached within a reasonable period of time in the negotiations between the parties. The first precondition concerning the dispute having arisen subsequent to the entry into force of the Convention deserves special emphasis and comment. The exception of the past and pre-existing disputes by the Convention is the result of the work of Negotiating Group 7. Truly past disputes are not the subject of debate in NG 7 as they are understood to be excepted regardless of any decision in that group.⁹⁶ Considerable authority supports the proposition that a general title of jurisdiction, as for example, a declaration under the Optional Clause of the Statute of the International Court of Justice, may be retroactive unless otherwise indicated.⁹⁷ Such is not the case with a special compromissory clause which is what one is dealing with in the Law of the Sea text. The International Law Commission has stated that

“when a jurisdictional clause is attached to the substantive clauses of a treaty, as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause.”⁹⁸

In other words, if the jurisdictional clause is tied to the substantive provisions of a treaty, jurisdiction cannot be retroactive unless the substantive provisions are. Furthermore, Article 28 of the Vienna Convention on the Law of Treaties specifies what may be taken as a settled principle that the substantive provisions of a Convention are not retroactive with respect to situations which have ceased to exist at the time the Convention enters into force.⁹⁹ Therefore, the Convention's provisions could not operate to reopen the United Kingdom-France continental shelf boundary, or the Tunisia-Libya shelf boundary dispute as all these would be situations which have ceased to exist.

The debate, however, took place in the Negotiating Group 7 concerning exception of pre-existing delimitation disputes, i.e., those disputes which pre-date the Convention in some way but which remain unsettled at the time it enters into force. These formulae for the exception of pre-existing disputes have been offered in NG 7. One would have excepted disputes which came into existence prior to the entry into force of the Convention. Another would have excepted disputes which relate to situations or facts prior to the entry into force of the Convention. The third was a composite, excepting disputes which fell under either of the other two formulae.¹⁰⁰ Analytically, the basic difference between first and the second formula is that the first looks to the dispute itself to see whether it is excepted and the second to circumstances which underly the dispute.

The Court has had a considerable difficulty in applying the 'situations and facts' formula to actual cases. The question first arose in the Phosphates in Morocco Case.¹⁰¹ The Italian Government claimed that its national, one Tassara, had been injured as a result of various acts between 1920 and 1934 by which the administration in French-protected Morocco had monopolized the phosphates industry there. The monopolization was allegedly in violation of an international regime of equal access to Moroccan industry. The Italian application based the jurisdiction on acceptance by both Italy and France of the Optional Clause of the Court's Statute. The French declaration, which had taken effect in 1931 contained a clause similar to NG 7 composite. It accepted jurisdiction only as to disputes arising after the ratification of the Convention 'with regard to situations and facts subsequent to' that date. The court found itself without jurisdiction. It decided that local acts, *dahirs*, by which the monopolization was begun in 1920, were the 'essential facts constituting the alleged monopolization' and, consequently, the facts which really gave rise to the dispute. Judge Van Eysinga dissented. He criticized the majority for looking to what he called 'casual facts'. In the Electricity Company of Sofia and Bulgaria Case,¹⁰² an identical provision in the 1926 Belgian acceptance of the Optional Clause became an issue. Although, the Court referred to its dicta from the Phosphate case, it changed the standard of interpretation from broad to narrow in stating that

"(t)he only situations or facts which must be taken into account . . . are those which must be considered as being the source of dispute."¹⁰³

The same issue again arose in the Right of Passage Over Indian Territory Case.¹⁰⁴ Portugal, the applicant, had at the time inland territories completely surrounded by Indian territory. Passage between these territories and coastal Portuguese territory had occurred regularly and more or less without incident since the early nineteenth century. The substantive question before the International Court of Justice was whether this passage over Indian territory was exercised as a matter of Portuguese right or of Indian sufferance. It was neither implicitly settled nor directly addressed until 1953. In that year and 1954, India effectively cut off passage by a series of increasingly severe rest-

riptions. India resisted the Portuguese application on the ground, *inter alia*, that its own 1940 acceptance of the Court's compulsory jurisdiction applied only to disputes with regard to situations or facts subsequent to 5 February 1930.¹⁰⁵ Relying heavily on the Electricity Company Case, the Court overruled the Indian objection and found that it had jurisdiction.¹⁰⁶ Reiterating the Permanent Court's distinction between the source of rights on which the claim is based and the source of dispute itself, the Court decided that the historic exercise of passage was only a source of rights. Nevertheless, the Court implicitly conceded that the passage was a situation prior to the critical date with regard to which the dispute arose. This was not dispositive in the Court's view. What was important was the fact that this historic practice was curtailed in 1954. The critical temporal reference was the point at which the situation and fact intersected.¹⁰⁷

The exception of disputes on the basis of their relation to situations and facts is an uncertain endeavour.¹⁰⁸ The one point on which the judicial authorities seem completely and unequivocally in agreement is that the effect of the exception turns primarily on the circumstances of each individual case.¹⁰⁹ The wisdom of using such a variable and dependent formula in a dispute settlement provision of a general international agreement is questionable; it seems more likely to cause rather than settle disputes. The difficulty becomes manifest when one tries in a general way to apply the learning of the Court to boundary delimitation matters. Nevertheless, the applicability of the above jurisprudence to maritime boundary delimitation matters might give rise to the following issues: Is the undelimited boundary the source of the right only or the source of the dispute? What is a historic fishing practice, an unusual or geological feature, or a contested piece of land? Are these facts or situations? Are these in any given case, casual or essential facts? If the case were to arise as one of delimitation pure and simple, would this be in the nature of a request for a declaratory judgment? If, on the other hand, the same case were to arise as a result of an arrest of a vessel in a doubtful border area, would this instead be a question of the redress of a wrongful act, looking only to the crystallized incident itself?

The first formula before the Negotiating Group 7 is comparatively easy to apply as it emphasises the dispute itself and not the facts and situations underlying the dispute. In *Mavrommatis Palestine Concessions* case, the Court found that the dispute arose at a time when the opposing views of the two governments took definite shape.¹¹⁰ In the words of the Court "(a) dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons."¹¹¹ Similar reasoning may be found in much later decision in the *Interhandel* case of 1959.¹¹² The case between the United States and Switzerland was grounded in the disputed nationality of *Interhandel*, a company with assets held in the United States. Switzerland asserted the non-enemy, Swiss character of the company, and sought repatriation of the assets on its behalf. The United States declaration of acceptance of

the compulsory jurisdiction of the Court referred only to disputes 'herein-after arising'.¹¹³ The United States contested jurisdiction, *inter alia*, on the ground that the dispute had arisen prior to the effective date of the United States declaration of August 2, 1946. Although the Court dismissed the Swiss application on other grounds, it rejected the United States' contention on this point. The Court found that the first definitive request for restitution and United States rejection thereof came in 1948. It was, at this point, clear "that the divergent views of the two Governments were concerned with a clearly defined legal question, namely the restitution of Interhandel's assets in the United States, and that the negotiations to this end (had) reached a deadlock."¹¹⁴ Here also, the final definitive, mutual recognition of the incompatibility of legal views, made it a dispute.¹¹⁵

These cases provide consistent and easily discernible jurisprudence to give guidance on the effects of an exception of pre-existing disputes arising before a particular date. As compared with texts incorporating the 'situations and facts' formula, such an exception is a model of clarity. The coming into existence of a dispute can, apparently be located in time with some certainty. Thus, it does not suffer from the intrinsic ambiguity of the situations and facts model. The model followed in the Optional Protocol to the 1958 Law of the Sea Conventions is a picture of absolute clarity wherein one party must notify the other of its opinion that a dispute exists, then give the other party a set period of time during which it may agree with this opinion or contest it.¹¹⁶ Such a requirement would be consistent with Kelsen's definition of a dispute to the effect that a dispute exists, if one party makes a claim against another party and the other party rejects the claim.¹¹⁷

The Law of the Sea Convention draws a distinction between States who have excepted the maritime boundary delimitation disputes from compulsory settlement procedures entailing binding decisions by making declarations under Article 298 of the Convention and those States who have not made such declarations. For the States who have made such declarations, compulsory conciliation procedure comes into operation for the resolution of the maritime boundary delimitation disputes arising subsequent to the entry into force of the Convention. There is however, no provision in the Convention similar to the Optional Protocol to the 1958 Law of the Sea Conventions to simplify the task of dating of the dispute. Does a dispute arise within the meaning of the Convention when facts or situations concerning it crystallize or when the disagreement between the disputing States takes a definite shape? The Law of the Sea Convention has no express answer to this question. It is, therefore, desirable to have a provision in the Convention similar to the Optional Protocol to the 1958 Law of the Sea Conventions. In the absence of such an express provision, one must discern from "situations or facts" formula and lean towards the adoption of "crystallization of disagreement between the disputing States" model for the purpose of dating of the dispute. Such an approach would lend certainty to the operation of compulsory con-

ciliation procedure which is fulcrum of the delicately balanced maritime boundary delimitation dispute settlement mechanism of the Convention. The unsettled maritime boundary disputes at the time of entry into force of the Convention are excepted from compulsory conciliation procedure. This blunts the edges of the compulsory conciliation procedure. It is in the fitness of the things to widen the scope of compulsory conciliation procedure so as to cover the undelimited maritime boundary disputes.

The Convention treats maritime boundary delimitation disputes similar to other maritime disputes for the States who have not made declarations for excepting such disputes from compulsory settlement mechanisms of the Convention entailing binding decisions. The substantive provisions of the Convention for delimiting the maritime boundaries are applicable to the maritime boundaries undelimited at the time of entry into force of the Convention. Therefore, the dispute settlement provisions and consequently compulsory settlement procedures entailing binding decisions are equally applicable to such maritime boundaries undelimited at the time of entry into force of the Convention. This further strengthens the point that the sphere of application of the compulsory conciliation procedure should also be broadened for the sake of consistency so as to include the unsettled maritime boundary delimitation dispute within its scope.

The Law of the Sea Convention makes it obligatory for the parties to negotiate an agreement on the basis of the report of the Conciliation Commission which shall state the reasons on which it is based. If the parties fail to negotiate an agreement on the basis of such report, they shall, by mutual consent, submit the question to one of the procedures for compulsory settlement entailing binding decision, unless they otherwise agree. In case, the parties fail to consent mutually on the choice of such procedure, the Arbitral Tribunal shall assume compulsory jurisdiction. The compulsory settlement procedures, therefore, apply in a roundabout way even in case of a dispute expressly excepted by means of a declaration from such compulsory procedures entailing binding decisions.

The Convention follows the pattern of emphasising the supremacy of the agreement between the parties by making the dispute settlement provisions inapplicable to any sea boundary dispute finally settled by an agreement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties.

2.222 Military Activities

The exception of military activities from the international jurisdiction is based on the doctrine of sovereign immunity of the warships.¹¹⁸ The doctrine finds expression in the substantive provisions of the Convention on the Law of the Sea. Article 95 of the Convention contains the rule that warships on the high seas have complete immunity from the jurisdiction of any State other

than the flag State.¹¹⁹ According to Article 96 of the Convention, ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.¹²⁰

There was not much controversy¹²¹ in the Third United Nations Conference on the Law of the Sea over exception of military activities from the compulsory dispute settlement procedures of the Convention. Both major maritime powers as well as vast majority of other countries took for granted at the beginning of the negotiations that immunity would be carried over into the dispute settlement chapter. Accordingly, military activities exception finds its place not only in the Law of the Sea Convention but also in all the texts issued during the conference for facilitation of the negotiations. The Single Negotiating Text excepts from compulsory settlement procedures disputes concerning military activities including those by Government vessels and aircraft engaged in non-commercial service, it being understood that law enforcement activities pursuant to the Convention shall not be considered military activities.¹²² The Revised Single Negotiating Text reproduces the same provision.¹²³ Law enforcement activities do not fall in the category of optional exceptions as far as earlier texts (SNT and RSNT) are concerned. However, Informal Composite Negotiating Text includes law enforcement activities within the sphere of application of the optional exceptions. Subject to the limitations of compulsory settlement procedures (contained in Article 296), the Composite Text excepted from compulsory settlement procedures disputes concerning law enforcement activities in the exercise of sovereign rights or jurisdiction provided for in the Convention.¹²⁴ Finally, the Law of the Sea Convention gives option to the parties to except from compulsory settlement procedures disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3.¹²⁵

The Exception of military activities favours naval powers as such activities of the naval powers can be excepted from international jurisdiction. This leaves tremendous scope of international military manoeuvring by naval powers. The coastal States do not object to such exception as military activities by the naval powers, in their exclusive economic zone, shall be subject to their national jurisdictions. It is only in case of military activities on the high Seas that the flag State has the jurisdiction over them. The military activities of the naval powers in the exclusive economic zone of the other States fall within the national jurisdictions of such States.

The military activities exception more closely resembles the traditional sovereign immunity of warships than the exceptional power of the coastal States to exclude warships from the territorial sea.¹²⁶ The warships of the

naval powers can freely manoeuvre in the high seas, without any possibility of being subjected to international jurisdiction. The mobility of such operations is the subject matter of national jurisdiction if such mobility extends to territorial sea or exclusive economic zone of the other States. The Law of the Sea Convention, however, makes an endeavour to strike a balance between naval interests and coastal interests by including within the category of optional exceptions disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of Court or Tribunal under Article 297, paragraph 2 or 3.¹²⁷

The fact that the military activities exception leans towards naval interests should not lead us to the conclusion that it does not serve coastal interests. The exception is of vital importance to avoid placing States in the impossible position of either having to reveal military sensitive information or being unable to defend themselves (against what may well be frivolous claims) without producing such information.¹²⁸ This is perhaps the reason that the military exception has gained general support.

2.223 Security Council's Exercise of Functions

The Law of the Sea Convention gives option to the States to except from the applicability of compulsory settlement procedures of the Convention disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in the Convention.¹²⁹ The corresponding provision in the earlier text (Single Negotiating Text and Revised Single Negotiating Text) is limited in scope wherein the optional exception is confined to only those disputes in respect of which the Security Council of the United Nations, while exercising the functions assigned to it by the Charter of the United Nations, determines that specified proceedings under the Convention interfere with the exercise of such functions in a particular case.¹³⁰

The basis of the above provision is the political nature of the proceedings in the Security Council coupled with the faith of the States in such proceedings. If the Security Council has taken cognizance of the matter and is exercising its functions under the United Nations Charter, such matter is excepted from the compulsory settlement procedures if the parties (or one of the parties) exercise their option in this regard. The importance of such an exception is obvious from the fact that it has found its place in the earlier texts without much controversy¹³¹ and was later given a much wider perspective.

The provisions of the Law of the Sea Convention concerning optional exceptions have certain striking features. Such features are as follows:

1. WITHDRAWAL OF DECLARATION

State Party which has made a declaration under 'Optional Exceptions' clause of the Convention may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.¹³² The various texts issued for facilitation of the negotiations in the Conference also contain similar provisions.¹³³

2. PRINCIPLE OF RECIPROCITY

The Convention gives expression to the principle of reciprocity by providing that a State Party which has made a declaration under its 'Optional Exceptions' clause shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in the Convention as against another State Party, without the consent of that party.¹³⁴ Similar provision is made in the various negotiating texts of the Conference.¹³⁵ This demonstrates the strong adherence of the States with the reciprocity principle which derives its origin from the 'Optional Clause' of the Statute of International Court of Justice.¹³⁶ The principle has been so indiscriminately used by the States as to reduce their acceptance of the compulsory jurisdiction of the Court to nullity.¹³⁷

The reciprocity principle in the UN Convention on the Law of the Sea entitles each State party to rely on the exception made by the other State Party. The court or tribunal exercises jurisdiction over the maritime dispute falling within the "Optional Exceptions" area of the Convention only if the subject matter of such dispute is beyond the terms of the declaration made by both the disputing States. If the dispute falls within the scope of the declaration made by even one of the States, the court or tribunal has no jurisdiction to entertain such dispute.

The principle depicts the needs of political reality and is designed to stabilize the delicately balanced equilibrium of the Law of the Sea Convention.

3. EFFECT OF NEW OR WITHDRAWAL OF DECLARATION ON PENDING PROCEEDINGS

The Convention provides that a new declaration, or the withdrawal of a declaration does not in any way affect proceedings pending before a court or tribunal unless the parties otherwise agree. This provision of the Convention is definite improvement over the Statute of the International Court of Justice which does not expressly make parallel provision. This gap in the Statute was, however, filled by the jurisprudence of the International Court of Justice.¹³⁸ The principle stated in the Convention is, therefore, an express affirmation of the jurisprudence of the International Court of Justice. It aims at bringing certainty and specificity in the Convention.

2.23 Evaluation

UN Convention on the Law of the Sea is a laudable endeavour which gives

expression to the doctrine of 'non-frustration' of the compulsory dispute settlement machinery. Nevertheless it meets the needs of political reality by providing for limitations and optional exceptions in certain areas of vital importance to the States.

The jurisprudence of the International Court of Justice brings out the importance of certain procedural safeguards in the international litigation to avoid the abuse of legal process. The assurance of non-abuse of the legal process and filing of the well founded claims shall go a long way in strengthening international maritime adjudicatory process. In the absence of the abovementioned twin procedural safeguards in the Law of the Sea Convention, the presence of a rule in the Rules of the International Tribunal for the Law of the Sea similar to Article 38 of the Rules of the International Court of Justice is of utmost importance.

The scheme of the dispute settlement machinery of the Law of the Sea Convention is that the disputes concerning activities of the States on the High Seas and the International Sea-bed Area are subject to compulsory international adjudication whereas the disputes involving exercise of sovereign rights or jurisdiction by the coastal States are excepted from compulsory international adjudication and made subject to national jurisdictions. The exception of the disputes involving exercise of sovereign rights or jurisdiction by the States except those categories of such disputes mentioned in Article 297 of the Convention suggests that the disputes involving sovereignty of the coastal States are beyond the purview of international jurisdiction and are matters of exclusive domestic concern. This approach is based on the contextual interpretation of Article 297 and enjoys the support of acceptability criterion. The delicately balanced equilibrium of the "package deal" will be disturbed considerably if the restrictive approach in interpreting Article 297 is adopted. Furthermore, the adoption of restrictive interpretation of Article 297 would give rise to absurdity inasmuch as the disputes concerning right of innocent passage in the territorial sea, right of the coastal State to regulate innocent passage, prompt release of vessels and crews detained in the territorial sea upon the posting of a reasonable bond or other financial security, exercise of sovereignty even in the airspace over territorial waters etc. would be subject to compulsory international adjudication of the law of the sea disputes would not be acceptable to the coastal States. Thus, the contextual approach, aiming at the exception from compulsory settlement procedures of maritime disputes involving exercise of sovereignty by the coastal States, is projection of the contemporary trends of universalization.

Notwithstanding the ever-growing importance of the dispute avoidance over dispute settlement techniques in the area of protection and preservation of the marine environment, the mechanism of the marine environment dispute settlement of the Convention is so strict as to give predominance to the interests of maritime powers. The disputes concerning violation by coastal State of the international rules and standards for the protection and preser-

vation of the marine environment are subject to the compulsory settlement procedures of the Convention, without any exception. These international rules and regulations for the protection and preservation of the marine environment are nowhere defined in the Convention. As pointed out in the earlier part of this chapter (Section 2.212 Marine Environment p.133-34) this might provide a handle to the maritime powers for harassing the coastal States by requiring them to appear before international court or tribunal on the allegation that national laws and regulations do not conform to the international rules and standards or by requesting the international court or tribunal to question the coastal State's exercise of a right and even substitute its discretion for that of the coastal State. The accommodation of the coastal interests would make the edges of the marine environment dispute settlement mechanism sharper. This would be possible by defining international rules and standards in the substantive law of the marine environment and placing caveat to the effect that the international court or tribunal may neither question the exercise of discretion by a coastal State nor substitute its discretion for that of the coastal State.

The provisions of the Convention concerning dispute settlement mechanisms relating to scientific research and fisheries disputes in the exclusive economic zone accommodate the interests of the industrialized, long distant fishing States as well as coastal States. The deletion of the words 'manifestly', 'seriously' and 'arbitrarily' (which are capable of subjective interpretations) occurring in the fisheries dispute settlement mechanism of the Convention would further enhance the usefulness of such mechanism (compulsory conciliation procedure).

The maritime boundaries delimitation disputes involve vital national interests. The Law of the Sea Convention is likely to become potential source of such disputes in view of the concept of exclusive economic zone of 200 nautical miles width coupled with idiosyncratic coastal configurations, small islands, rocks and reefs, patterns of historic use and disputed sovereignty over coastal land territory or islands. The difficulties are bound to escalate with the vague and uncertain nature of the substantive provisions of the Convention concerning maritime boundary delimitation. It is in the interests of the stability of the 'package deal' that the vague and uncertain nature of the substantive provisions of the Convention for delimiting adjacent or opposite exclusive economic zones and continental shelves is minimized. This would be possible by extending the applicability of the equidistance special circumstances, formula for delimitation of opposite or adjacent territorial waters to the opposite or adjacent exclusive economic zones and continental shelves also.

The compulsory conciliation procedure for the settlement of maritime boundary delimitation disputes (between States who have made declarations under Article 298 excepting the maritime boundary delimitation disputes from compulsory settlement procedures) comes into operation if the dispute

arises subsequent to the entry into force of the Convention. Therefore, dating of the dispute is of utmost importance. The Convention contains no provision in this regard. In the absence of a provision similar to 1958 Optional Protocol, as suggested earlier in this chapter (Section 2.221 Delimitation of Maritime Boundaries, pp. 139-47) the point of time when the disagreement between the parties crystallizes should be taken as material time for the purpose of dating of the dispute. The 'facts and situations' formula involves godly wisdom in its application and should, therefore, be kept apart from human application. Furthermore, the Law of the Sea Convention has unjustifiably excepted from compulsory conciliation procedure disputes unsettled at the time of entry into force of the Convention. The compulsory conciliation procedure shall become effective if its scope is widened so as to include unsettled maritime boundary delimitation disputes within the sphere of its application. The words 'when such a dispute arises' should, therefore, be deleted from paragraph 1(a) (i) of Article 298 of the Convention.

References

1. Anand, R.P., *Compulsory jurisdiction of International Court of Justice*, 1961, p. 249.
2. Corbett, P.E., *Law in diplomacy*, Princeton, 1959, p. 183.
3. See the statement by Mr. Perisic (Yugoslavia), 6 April 1976, U.N. Doc. A/CONF. 62/SR. 61, at 9 (prov. ed. 1976): "with regard to exceptions, it would be best if there were none at all; a list of exceptions would considerably reduce the value of and effectiveness of the Convention—every proposed exception should be formulated very clearly, and its scope and application should be interpreted restrictively." See also statements by Mr. Harry (Australia), 5 April 1976; Mr. Cheok (Singapore), 5 April 1976; Mr. Beeby (New Zealand), 5 April 1976; Mr. Knoke (Federal Republic of Germany), 5 April 1976; Mr. Logan (United Kingdom), 5 April 1976; Mr. Monniar (Switzerland), 5 April 1976; Mr. Fergo (Denmark), 5 April 1976; Mr. Riphagen (Netherlands), 6 April 1976; Mr. Zea (Colombia), 6 April 1976; Mr. Harrero (Spain), 6 April 1976; Mr. Vervesi (Italy), 6 April 1976; Mr. Jacovides (Cyprus), 6 April 1976; Mr. Fujisaki (Japan), 6 April 1976; Mr. Wolf (Austria), 6 April 1976; Mr. Chang-Choon Lee (Republic of Korea), 6 April 1976; Mr. Larsson (Sweden), 6 April 1976; Mr. Prander (Hungary), 7 April 1976; Mr. Malla (Nepal), 8 April 1976; Mr. Costello (Ireland), 9 April 1976; Mr. Nandan (Fiji), 9 April 1976. U.N. Docs. A/CONF. 62/SR. 58, at 8; SR. 58, at 9; SR 58, at 13-14; SR. 58, at 14-15; SR. 59, at 8; SR. 59, at 11; SR. 59 at 22; SR. 60, at 6; SR. 60, at 8; SR. 60, at 9-10; SR. 60, at 12-13; SR. 60, at 19; SR. 60, at 23; SR. 60, at 24-25; SR. 60, at 28; SR. 61, at 3; SR. 62, at 16; SR. 63, at 5-6; SR. 64, at 4-5; SR. 64, at 7 (prov. ed. 1976).

4. See the statement by Mr. Wolf (Austria), 6 April 1976. U.N. Doc. A/CONF. 62/SR.60, at 25 (prov. ed. 1976): "(I)t was hardly acceptable that States should be prevented from having recourse to the judicial machinery in respect of matters which were regulated by international law or even by the Convention itself. The example that sprang to mind was the economic zone, the provisions on which ranked first among the exceptions to compulsory jurisdiction. As the economic zone was a new legal institution and had to be defined explicitly in the Convention, interpretations concerning it could hardly be left to the discretion of coastal States but should rather be spelt out by an international judicial body." See also statements by Mr. Harry (Australia), 5 April 1976; Mr. Knoke (Federal Republic of Germany), 5 April 1976; Mr. Logan (United Kingdom), 5 April 1976; Mr. Fergo (Denmark), 5 April 1976; Mr. Jacovides (Cyprus), 6 April 1976; Mr. Karasimeonov (Bulgaria), 6 April 1976; Mr. Witek (Poland), 6 April 1976; Mr. Prander (Hungary), 7 April 1976; Mr. Costello (Ireland), 9 April 1976. U.N. Docs. A/CONF. 62/SR.58, at 8; SR.58, at 14-15; SR.59, at 8; SR.59, at 22; SR.60, at 19; SR.60, at 29-30; SR.61, at 10; SR.62, at 16; SR.64, at 4-5 (prov. ed. 1976).
5. See the statement by Mr. Andersen (Iceland), 6 April 1976. U.N. Doc. A/CONF. 62/SR.60 at 26 (prov. ed. 1976): "Yet many States, although professing to support the concept of the economic zone, where endeavouring in various ways to weaken it. They wanted to open up the possibility of disputing the decisions of the coastal State . . . If that were to happen, the concept of the exclusive economic zone would be rendered illusory and meaningless . . . consequently, the decisions of the coastal State with regard to resources within the exclusive economic zone must be considered final." See also statements by Mr. Pinto (Sri Lanka), 5 April 1976; Mr. Jagota (India), 5 April 1976; Mrs. Kelly de Guibourg (Argentina), 5 April 1976; Mr. Zegers (Chile), 5 April 1976; Mr. Bakula (Peru), 6 April 1976; Mr. Ranjeva (Madagascar), 6 April 1976; Mr. Njenga (Kenya), 6 April 1976; Mr. Sariva Gurreiro (Brazil), 6 April 1976; Mr. Gayan (Mauritius), 7 April 1976; Mr. Falcon Briseno (Venezuela) 7 April 1976; Mr. Baza (Philippines), 7 April 1976; Mr. Mahmood (Pakistan), 8 April 1976; Mr. Kwon Min Jun (Democratic Peoples Republic of Korea), 9 April 1976; Mr. Al-Moor (United Arab Emirates), 9 April 1976; Mr. Diop (Senegal), 12 April 1976. U.N. Docs. A/CONF. 62/SR. 59, at 13-15; SR. 59, at 18; SR. 59, at 18-19; SR. 59, at 23; SR. 61 at 11; SR. 61, at 13; SR. 61, at 14-15; SR. 61, at 19; SR. 62 at 3-4; SR. 62, at 20; SR. 62, at 21; SR. 63, at 6, SR. 64, at 9; SR. 65, at 8 (prov. ed. 1976).
6. See statement by Mr. Zegers (Chile), 5 April 1976. U.N. Doc. A/CONF. 62/SR. 59, at 23 (prov. ed. 1976): "His delegation was nevertheless prepared to consider the inclusion, in the Convention, of mandatory settlement with regard to specific categories of disputes relating to navi-

- gation and overflight in the exclusive economic zone." See also statement by Mr. Jagota (India), 5 April 1976; Mrs. Kelly de Guibourg (Argentina), 5 April 1976; Mr Diop (Senegal), 12 April 1976. U.N. Docs. A/CONF. 62/SR. 59, at 18; SR. 59, at 19; SR. 65, at 8 (prov. ed. 1976).
7. See the statement by Mrs. Kelly de Guibourg (Argentina), 5 April 1976, U.N. Doc. A/CONF. 62/SR. 59, at 18-19 (prov. ed. 1976): "(D)istant water fishing States might advocate the establishment of a special procedure with regard to fisheries which would include acceptance of the compulsory jurisdiction of somebody; in her delegation's view that would put coastal States at a disadvantage, particularly those developing States which did not have powerful fishing fleets and which would be obliged to institute proceedings, pursuant to their rights under the Convention, in order to secure compliance with relevant regulations." Although distant water fisheries are not mentioned specifically, similar fears are expressed in statements by Mr. Anderson (Iceland), 6 April 1976; Mr. Njenga (Kenya), 6 April 1976; Mr. Gayan (Mauritius), 7 April 1976. U.N./Docs. A/CONF. 62/SR. 60, at 26; SR. 61, at 14; SR. 62, at 3-4 (prov. ed. 1976).
 8. See statement by Mr. Karasimeonov (Bulgaria), 6 April 1976. U.N. Doc. A/CONF. 62/SR. 60, at 29-30 (prov. ed. 1976): "(His delegation) could not agree with the exclusion from (dispute settlement) procedures of disputes arising out of the exercise of discretionary rights by a coastal State. Exclusion of all disputes arising in areas where the coastal State had some clearly defined rights would leave the other States without any possibility of protecting the rights legitimately granted to them in those areas by the Convention." See also statements by Mr. Cheok (Singapore), 5 April 1976; Mr. Kozyrev (U.S.S.R.), 5 April 1976; Mr. Knoke (Federal Republic of Germany), 5 April 1976; Mr. Georner (German Democratic Republic), 5 April 1976; Mr. Harrero (Spain), 6 April 1976; Mr. Nimer (Bahrain), 7 April 1976; Mr. Nyamdo (Mongolia), 7 April 1976; Mr. Prander (Hungary), 7 April 1976. U.N. Docs. A/CONF. 62/SR. 58, at 9; SR. 58, at 10-11; SR. 58, at 17; SR. 59, at 26; SR. 60, at 9-10; SR. 62, at 3; SR. 62, at 6; SR. 62, at 16 (prov. ed. 1976).
 9. See the statement by Mr. Jacovides (Cyprus), 6 April 1976. U.N. Doc. A/CONF. 62/SR. 60, at 17, 19 (prov. ed. 1976): "(A compulsory dispute settlement system) could only further the effective exercise of the sovereignty of the weaker States by preventing the stronger States from imposing their will. Participation . . . demanded self-imposed restrictions . . . but that was a very small price to pay considering that the alternatives were anarchy and the law of the jungle . . . His delegation was not in favour of allowing any exceptions . . . his delegation was opposed to any exception regarding . . . delimitation of the maritime zones . . . such matters . . . were likely to cause disputes

- which might escalate into . . . confrontation. Under such circumstances small and weak States would be left at the mercy of arbitrary interpretations and unilateral measures by States strong enough to impose their will." See also the statement by Mr. Beeby (New Zealand), 5 April 1976, U.N. Doc. A/CONF. 62/SR. 58, at 14 (prov. ed. 1976).
10. See statement by Mr. Njenga (Kenya), 6 April 1976. U.N. Doc. A/CONF. 62/SR.61, at 34: ". . . All matters relating to (Exclusive Economic) Zone were exclusively within the compétence of the coastal State, and to accept the possibility of compulsory third-party settlement would mean that the coastal State might be subjected to constant harassment by having to appear before international tribunals at considerable loss of time and money . . ."
 11. Article 18, Part IV, Informal Single Negotiating Text, 5 Third United Nations Conference on Law of the Sea, Official Records 111, U.N. Doc. A/CONF. 62/WP.9(1975), reprinted in 15 I.L.M. 61(1976); Revised Single Negotiating Text (RSNT) Articles 17, 18, Part IV, *ibid.*, p. 144. U.N. Doc. A/CONF. 62/WP. 9/Rev. 2(1976).
 12. Article 296, para 1, Informal Composite Negotiating Text, 8 Third United Nations Conference on Law of the Sea, at 1 U.N. Doc. A/CONF. 62/WP.10 (1977), reprinted at 16 I.L.M. 1108 (1977); Also see Adede, A.O., Law of the sea: The scope of third party compulsory procedures for the settlement of disputes, 71 A.J.I.L. 305 (1977); Adede, A.O., Law of the sea: The integration of the system of settlement of disputes under the draft convention as a whole, 72 A.J.I.L. 84 (1978); Adede., A.O., Prolegomena to the dispute settlement part of the Law of the Sea Convention, 10 New York University Journal of International Law and Politics 253-393 (1977).
 13. *Ibid.*, at 65; 70, U.N. Doc. A/CONF. 62/WP. 10/Add. 1(1977), reprinted in 16 I.L.M. 1099(1977).
 14. See *Matthews v. Eldridge*, 424 U.S. 319 (1976) (Due process requires that defendant be afforded notice and opportunity to be heard); *Lilienthal v. Tobacco vs. United States*, 97 U.S. 237 (1877) (burden on party asserting affirmative in civil cases); *The Hornet*, 58 U.S. 100 (1854) (when party holding burden makes *prima facie* case, burden shifts to other side); *Hollingsworth vs. Barton*, 29 U.S. (4 pet.) 466 (1830); *Waldrom vs. British Petroleum Co.*, 38 F.R.D. 170 (S.D.N.Y. 1965), *aff'd* 361 F. 2d 671 (2nd Cir. 1966), *aff'd sub nom. First Nat'l Bank of Ariz vs. Cities Serv. Co.* 391 U.S. 253 (1968) (Party may not maintain an action which is merely vexatious or which is unnecessary and cannot be productive of any practical result).
 15. Calfisch and Piccard, The legal regime of maritime scientific research and the Third United Nations Conference on the Law of the Sea, 38 *Zeit. Ausl. Offen. Recht. und Volk.* 848 (1978); Bernhardt, J. Peter A., Compulsory dispute settlement in the law of the sea negotiations: A reassessment, 19 *Virginia Journal of International Law* 78 (1978).

16. Rosenne, Shabtai, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 78 A.J.I.L. 101 (1979).
17. *Ibid.*
18. *Ibid.*
19. The Informal Composite Negotiating Text was issued after the close of the sixth session (1977). In the organization of the work of the seventh session, a number of "core issues", defined as matters "without a settlement of which we could not possibly secure general agreement on a Convention," were identified, see U.N. Doc. A/CONF. 62/62 (1978). Seven open-ended negotiating groups were set up to examine them, see U.N. Doc. A/CONF. 62/63 (1978). Negotiating Group 5, under the Chairmanship of Ambassador Constantin Stavropoulos (Greece), was given the mandate to examine the question of the settlement of disputes relating to the exercise of sovereign rights of coastal States in the exclusive economic zone. The report of the Chairman of Negotiating Group 5 (Doc. NG 5/17) and his suggestion for a compromise formula (NG 5/16) are reproduced in 3 *Seerechts Konferenz* 820, 824. And see the formal report by the Chairman at the 105th plenary meeting of UNCLOS III (May 19, 1978). The nucleus composition of Negotiating Group 5 consisted of the following 36 States: to represent the African Group—Algeria, Angola, Egypt, Lesotho, Liberia, Madagascar, Nigeria, Swaziland, Zambia; to represent the Asian Group—China, Fiji, India, Indonesia, Iran, Oman, Pakistan, Singapore; to represent the Latin-American Group—Argentina, Chile, Colombia, Ecuador, Guyana, Jamaica, Mexico; to represent the Socialist Group—Bulgaria, Hungary, USSR., Yugoslavia; to represent the Western Europe and Others Group—Australia, Canada, Denmark, Federal Republic of Germany, Iceland, Norway, Switzerland; and the United States. It was understood that this allocation of seats among the different regional groups did not follow the established pattern, and was to be regarded as exceptional because of the subject matter of the issue involved. However, all the groups were "open-ended" in the sense that any participant not included in the nucleus was free to join any group with the same status as the original members. About 100 delegates participated in the plenary meetings of Negotiating Group 5. Similarly, its smaller working group was not restricted to the nucleus States.
20. Notably by Switzerland, Federal Republic of Germany, and Israel, in working papers NG 5/7, NG 5/8 and NG 5/12, reproduced in 3 *Seerechts Konferenz* 808, 809, 812. The suggested modification of Article 296(1) by Switzerland provides:
 1. Without prejudice to the obligations under section 1, disputes relating to the exercise by a coastal State of sovereign rights or jurisdiction provided for in the present Convention shall only be subject to the procedures specified in the present Convention when the conditions laid down in the succeeding paragraphs of this article have

been complied with.

2. The Court or tribunal shall immediately notify the other party or parties to the dispute that the dispute has been submitted to it and shall fix the time limit within which such other party or parties may appeal against the entertainment of the claim on the grounds that the claim constitutes an abuse of legal process or is manifestly unfounded. If the court or tribunal admits the objection, it shall declare the claim inadmissible.
21. See, e.g., the orders indicating interim measures of protection in the *Nuclear Tests Cases*, 1973 I.C.J. Rep. 99, 103, 135 and 139.
22. Rosenne, Shabtai, 1 *Law and Practice of the International Court of Justice* 363 (1965).
23. Article 38, Rules of the I.C.J. adopted on 14 April 1978, reproduced in 17 I.L.M. 1286-1304.
Article 38:
 1. When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.
 2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. It shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.
 3. The original of the application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party in the country in which the Court has its seat, or by some other duly authorized person. If the application bears the signature of someone other than such diplomatic representative, the signature must be authenticated by the latter or by the competent authority of the applicant's foreign ministry.
 4. The Registrar shall forthwith transmit to the respondent a certified copy of the application.
 5. When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not, however, be entered in the general list, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purpose of the case.
24. *UN Convention on the Law of the Sea*, Article 297.
25. Djalal, *Problems of dispute settlement, discussion and questions*. In: *Law of the Sea Conference: Outcomes and problems of implementation*. Law of the Sea Institute, Tenth Annual Conference, June 22-25, 1976. Proceedings, ed. by Edward Miles and John Gamble, Jr. p. 262.
26. Sohn, *Ibid.*, p. 262.

27. UN Convention on the Law of the Sea, Article 297, para 1 (a).
28. *Ibid.*, Article 297, para 1 (b).
29. The Third United Nations Conference on The Law of the Sea, Official Records, Vol. 5: see Jagota (India), at 18; Mrs. Kelly de Guibourg (Argentina) at 18; Zagers (Chile) at 19.
30. Adede, A.O., Environmental disputes under the Law of the Sea Convention, 7 *Environmental Policy and Law* 63-66 (1981) at p. 64.
31. *Ibid.*
32. *Ibid.*, an Environmental Impact Statement, as distinguished from an environmental assessment, provides the legal basis according to which a party may invoke proceedings to prevent the carrying out of a particular project on environmental grounds and to ensure that all other alternative means have been fully weighed with regard to the execution of the project, as provided by the law in question requiring the Impact Statement; See e.g. the power of the National Environmental Protection Agency (NEPA) of U.S.A.
33. A recent controversy surrounding the World Bank involvement in the upper Mazaruni Dam Project in Guyana, is a case in point: See World Bank Weights Disputed Guyana Dam Project, *New York Times*, 30 Oct. P.A. 2, quoted in *ibid.*
34. *Ibid.*
35. S. Schneider-Sawiris, The concept of compensation in the field of trade and environment, 5 *Georgia Journal of International Law and Comparative Law* 357, at 361 (1975), quoted in *Ibid.*
36. Consideration of such issues were projected in the research studies of the American Society of International Law, see 72 *A.J.I.L.* 356, at 368 (1978); quoted in *Ibid.*
37. *Ibid.*, p. 64; Also see Chayes and Stein, R., The avoidance and adjustment of environmental disputes. Special Publication of the American Society of International Law, published in 1976; quoted in Hargrove, John Lawrence, Settlement of Dispute Under Law of Ocean Use, with particular reference to Environmental Protection, 6 *Georgia Journal of International and Comparative Law* 181 (1976).
38. The Nordic Convention on the Protection of the Environment, Feb. 19, 1974, reprinted in 13 *I.L.M.* 591 (1974) contains provisions for suit in foreign courts, even by individual aggrieved persons (Article 3) as well as for consultation between governments assisted by an Advisory Commission (Article 11, 12); The Baltic Convention contains comprehensive dispute settlement procedures providing for negotiation, conciliation and eventually arbitration or adjudication, but resort to these procedures is not compulsory (Done on March 22, 1974, reprinted in 13 *I.L.M.* 544 (1974); Article 18 of the Current Draft Convention for the protection of Marine Environment against pollution in the Mediterranean (U.N. Doc. UNEP/W.G. 2/INF 3 (1975) provides for compulsory submission to adjudication by the I.C.J. or arbitration.

39. The Law of the Sea Convention, Part XII, Articles 192 to 237.
40. *Ibid.*, Article 297, para 1 (c).
41. Intergovernmental Maritime Consultative Organization Convention for the Prevention of Pollution of the Sea from Ships, 1973 IMCO Doc. MP/CONF/WP. 35 (1973), reprinted in 12 I.L.M. 1319 (1973), quoted in Bernhardt, J. Peter A., Compulsory dispute settlement in the law of the sea negotiations, 19 Virginia Journal of International Law 69-105 at 80 (1978); Also see Sohn, Problems of dispute settlement, discussion and questions, *supra*, note 24, p. 263.
42. Bernhardt has made similar observation while examining the corresponding provisions of Informal Composite Negotiating Text, See Bernhardt, J. Peter A., Compulsory dispute settlement in the law of the sea Negotiations, 19 Virginia Journal of International Law 80 (1978).
43. *Ibid.*
44. Done at London, May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 (entered into force Dec. 8, 1961), quoted in *ibid.*
45. As on Jan 22, 1979; only three States had ratified the IMCO Convention. Article 15 of the Convention provides that the IMCO treaty enters into force when 15 States, the combined merchant fleets of which constitute not less than 50% of gross tonnage of the world's merchant shipping have become parties to it. The 1978 amendments to the 1973 Convention have incorporated in 1973 Convention by reference in order to facilitate ratification by permitting ratification of treaty upon ratification of the 1978 amendments; quoted in *ibid.*
46. Gurdip Singh, Compulsory international adjudication of the law of the sea disputes: An enquiry, 6 and 7 Delhi Law Review 117 to 128 and 123 (1977 and 1978).
47. The Law of the Sea Convention, Article 238.
48. *Ibid.*, Article 245, which provides that "coastal States, in the exercise of their sovereignty, have the exclusive right to regulate authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.
49. *Ibid.*, Article 246, para 1, which reads as: "coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.
50. *Ibid.*, Article 246, para 2, which reads as: "Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.
51. *Ibid.*, Article 246, para 5, which reads as: "coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf

of the coastal State if that project:

- (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
- (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
- (c) involves the construction, operation or use of artificial islands, installations and structures referred to in Article 60 and 80;
- (d) contains information communicated pursuant to Article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project.

52. *Ibid.*, Article 246, para 6, which reads as "Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under sub-paragraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time. Coastal States shall give reasonable notice of the designation of such areas, as well as any modifications thereto, but shall not be obliged to give details of the operations therein.

53. *Ibid.*, Article 253, which reads as:

1. Coastal States shall have the right to require the suspension of any marine scientific research activities in progress within its exclusive economic zone or on its continental shelf if:
 - (a) the research activities are not being conducted in accordance with the information communicated as provided under Article 248 upon which the consent of the coastal State was based; or
 - (b) the State or competent international organization conducting the research activities fails to comply with the provisions of Article 249 concerning the rights of the coastal State with respect to the marine scientific research project.
2. Coastal States shall have the right to require the cessation of any marine scientific research activities in case of any non-compliance with the provisions of article 248 which amounts to a major change in the research project of the research activities.
3. Coastal States may also require cessation of marine scientific research activities if any of the situations contemplated in paragraph 1 are not rectified within a reasonable period of time.
4. Following notification by the coastal State of its decision to order suspension or cessation, States or competent international organiza-

- tions authorized to conduct marine scientific research activities shall terminate the research activities that are the subject of such a notification.
5. An order of suspension under paragraph 1 shall be lifted by the coastal State and the marine scientific research activities allowed to continue once the researching State or competent international organization has complied with the conditions required under Article 248 and 249.
54. Revised Single Negotiating Text, Article 17(1) (c), Part IV, U.N.Doc. A/CONF.62/WP.9/Rev.2.
55. Informal Composite Negotiating Text, Article 296, para 3, U.N.Doc. A/CONF.62/WP.10, 15 July 1977.
56. *Ibid.*
57. *Ibid.*
58. The Law of the Sea Convention, Article 297, para 2(a).
59. *Ibid.*, Article 297, para 2(a) (i) and 2(a) (ii).
60. *Ibid.*, Article 297, para 2(b)
61. *Ibid.*
62. *Ibid.*, Article 61, which reads as:
1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether sub-regional, regional or global, shall cooperate to this end.
 3. Such measures shall also be designed to maintain or restore populations on harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global.
 4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
 5. Available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global where appropriate and with participation by all States concerned including

States whose nationals are allowed to fish in the exclusive economic zone.

63. *Ibid.*, Article 62.
64. *Ibid.*, Article 69.
65. *Ibid.*, Article 70.
66. The Revised Single Negotiating Text, Article 17, Para 1(d), U.N.Doc. A/CONF.62/WP.9/Rev.2.
67. The Informal Composite Negotiating Text, Article 296, para 4, U.N. Doc.A/CONF.62/WP.10, which reads as under:

“No dispute relating to the interpretation or application of the provisions of the present convention with regard to the living resources of the sea shall be brought before such court or tribunal unless the conditions specified in paragraph 1 (various safeguards discussed above) have been fulfilled; provided that:

 - (a) when it is alleged that there has been a failure to discharge obligations arising under Article 61, 62, 69 and 70, in no case shall the exercise of a discretion in accordance with Articles 61 and 62 be called in question; and
 - (b) the court or tribunal shall not substitute its discretion for that of the coastal State; and
 - (c) in no case shall the sovereign rights of a coastal State be called in question.
68. The Law of the Sea Convention, Article 297, para 3.
69. Rosenne, Shabtai, Settlement of fisheries disputes in the exclusive economic zone, 73 A.J.I.L. 89 (1979) at 98.
70. The Law of the Sea Convention, Articles 61-75.
71. *Ibid.*, Articles 64 to 66.
72. *Ibid.*, Articles 116 to 120.
73. *Ibid.*, Part XV, Section II.
74. The conciliation procedure of Annex V is closely modeled on that of the Annex to the Vienna Convention on the Law of Treaties of May 23, 1969, in which it is expressly stated that that the report of a Conciliation Commission shall not be binding. United Nations Conference on the Law of Treaties. First and Second Sessions, Official Records, Documents of the Conference 289, U.N.Doc.A/CONF.39/27(1969), reproduced in 63 A.J.I.L. 875(1969). An informal suggestion has been submitted by the Netherlands and Switzerland that would allow any party to a dispute before a Conciliation Commission to declare unilaterally that it will abide by the conclusions or recommendations of the report as far as it is concerned. Doc. SD/1, reproduced in 3 Seerechts Konferenz 1099. That question is based on Article 85, paragraph 5, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of March 14, 1975, 2 United Nations Conference on The Representation of States in their Relations with International Organizations, Offi-

- cial Records, 207, U.N.Doc.A/CONF.67/16(1975), also in U.S. Dept. of States pub. no. 8865, 1975 Digest of United States Practices in International Law 41(1976). But the maintenance of the exclusively non-binding character of the report of the Conciliation Commission is an essential element of the near consensus reached in Negotiating Group 5.
75. Bernhardt, J.Peter.A., Compulsory dispute settlement in the law of the sea negotiations: A reassessment, 19 Virginia Journal of International Law 69-105(1978). Bernhardt vehemently criticizes this provision in the following words:
- “... The proposed Article 297(3) does lip service to CDS procedures by providing that fisheries disputes shall be settled in accordance with Section 2 of Part XV. This provision is virtually meaningless, however, because . . . , the only significant disputes that will arise in the living resources area, such as coastal State sovereign rights, discretionary powers for determining the allowable catch, harvesting capacity, and allocation of surplus, will not be subject to CDS procedures leading to a binding decision—Article 296(3) precludes binding dispute settlement decisions in any fisheries disputes, even in the case of coastal State over exploitation of the living resources of the EEZ, the one area in which CDS procedures leading to a binding decisions would probably apply under ICNT formulation. Even non-binding conciliation will apply to overexploitation disputes only if the coastal State has manifestly failed to comply with its obligation to ensure that living resources in the EEZ are not endangered by overexploitation. Although Article 297(3) provides that conciliation will apply if a coastal State has arbitrarily refused to determine the allowable catch and its capacity to harvest or has arbitrarily refused to allocate the surplus, this safeguard is relatively ineffective because the Conciliation Commission may not substitute its discretion for that of the Coastal State. This latter prohibition can be deleted because the discretion of a coastal State which is acting in good faith need never be disturbed under the arbitrary refusal standard...”
76. Tod, M.N., in *International arbitration among the Greeks* (London, 1913) states, at pp. 53-54: “By far the largest class of disputes submitted to arbitration in the ancient Greek world appears to have consisted of those which arose out of conflicting territorial claims.” See also Ralston, J.H., *International arbitration from Athens to Locarno*, (Palo Alto, CA, 1929) pp. 158. 170-73.
77. Ralston, *ibid.*, at p. 179.
78. Stuyt, A.M., in his *Survey of international arbitrations, 1794-1970* (Leyden and Dobbs Ferry, NY, 1972), indexes 74 arbitrations in the period as relating to boundary questions.
79. In the *Grisbadarna* case of 1909, for example, an arbitral tribunal established in the framework of the Permanent Court of Arbitration determined the territorial sea boundary between Norway and Sweden. Scott, J.B., 1 Hague Court Reports, pp. 122-32. (New York, 1916) 4 A.J.I.L.

- 226, (1910).
80. Irwin Paul C., *Settlement of maritime boundary disputes: An analysis of the Law of the Sea Negotiations*, 8 *Ocean Development and International Law* 105-148 (1980) at p. 107.
 81. U.N.Doc. A/CONF. 62/62, paragraph 5(7), 10 UNCLoS III, Official Records 6, at p. 8 (U.N.Pub.E. 79.V. 4).
 82. U.N.Doc. A/CONF. 62/63, April 18, 1978, p. 4.
 83. Irwin, Paul C., *Settlement of maritime boundary disputes: An analysis of the Law of the Sea Negotiations*, 8 *Ocean Development and International Law* 105-148 (1980) at p. 110.
 84. *Ibid.*, p. 111.
 85. The Informal Single Negotiating Text, Article 18(2) (a), Doc.A/CONF. 62/WP. 9/Rev. 1.
 86. The Revised Single Negotiating Text, Article 18(1) (a), Doc.A/CONF. 61/WP. 9/Rev. 2.
 87. The Informal Composite Negotiating Text, Article 297(1) (a), U.N. Doc.A/CONF. 62/WP. 10.
 88. The Law of the Sea Convention, Article 298(1) (a).
 89. *Ibid.*, Article 15, : "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.
 90. *Ibid.*, Article 74, para 1.
 91. *Ibid.*, Article 74, para 2.
 92. *Ibid.*, Article 83, para 1.
 93. *Ibid.*, Article 83, para 2.
 94. This provision of the Convention differs from Informal Composite Text inasmuch as under the Convention, the entire dispute is excepted from compulsory process any time a land territory question figures in a delimitation dispute whereas under the Informal Composite Negotiating Text, the delimitation dispute is actually not excepted at all; the competent court, tribunal, or other body is simply precluded from pronouncing on the land sovereignty question in the course of considering the maritime delimitation. The practical consequences of this distinction may not be so great as the theoretical differences might suggest. Although the dispute settlement procedure remains operative under the Composite Text, the court or tribunal can only pronounce a decision if it can sensibly do so without commenting on the land territory question. Short of some sort of hypothetical or contingent judgment, the court or tribunal could only realistically decide the case if it determined that the

land sovereignty question was essentially irrelevant to the maritime delimitation. The likelihood of such a determination particularly where the continental shelf delimitation is part of the dispute is exceedingly small. In finding that the Greek reservation of "disputes relating to the territorial status of Greece" deprived the Court of jurisdiction in the Aegean Sea Continental Shelf case, the Court noted that "it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it— A dispute regarding those rights would, therefore, appear to be one which may be said to relate to the territorial status of the coastal State." 1978 I.C.J. Rep. 3 at 36. Nevertheless, in case of a situation, although remote, where the land sovereignty question is essentially irrelevant to the maritime delimitation, the Court or tribunal would take jurisdiction even under the Convention when it determined that the case did not "necessarily involve concurrent consideration of any unsettled claim to a land the territory.

95. The Law of the Sea Convention, Article 121.
96. For example, it was thought necessary to include in the American Treaty of Pacific Settlement (Pact of Bogota) the following proviso: "The aforesaid (dispute settlement) procedures . . . may not be applied to matters already settled by arrangement between the parties, or by arbitral award, or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present treaty." Treaty of April 30, 1948, Article 6, 30 UNTS 84, at 85. See e.g.; Rosenne, S., *the Law and Practice of the International Court of Justice*, 483-86 (Leyden, 1965). Ambassador Rosenne marshals the authority of theoreticians, the work of the International Law Commission and the jurisprudence of the Permanent Court, including the *Mavrommatis and Phosphates in Morocco Cases*, to reach the conclusion that "in the absence of an express provision in the title of jurisdiction there is, in the words of Sir Gerald Fitzmaurice, "an absolutely necessary inference of retroactivity which can only be expressly displaced." *Ibid.*, at 486.
97. *Ibid.*
98. (1966) 2 YBILC 212. This would seem to be the necessary conclusion of the Court's judgment in *Ambatielos Case*, 1952 I.C.J. Rep. 28-47.
99. On the basis of international jurisprudence and practice, the International Law Commission believed this article to be expressive of existing international law on the point, see 1 United Nations Conference on the Law of Treaties, Official Records 158-62; Convention of May 23, 1969; U.N.Doc. A/CONF. 39/27, in 3 United Nations Conference on the Law of Treaties, Official Records 289, at 293.
100. Doc. NG7/20/Rev. 1, Model A, 2-3; see Rosenne, S., *Time Factor in the jurisdiction of the International Court of Justice* 15 (Leyden, 1960), at 36.

101. Judgment (Preliminary Objections) of June 14, 1938, P.C.I.J. Series A/B, No. 74, pp. 10-48.
102. Judgment (Preliminary Objections) of June 14, 1939, P.C.I.J. Series A/B, No. 77, p. 64-149.
103. *Ibid.*, p. 82.
104. (Merits), 1960 I.C.J. 6-144. The jurisdictional issue had previously been deferred for consideration with the merits of the case. Judgment (Preliminary Objections) of November 20, 1957, 1957 I.C.J. 125 at 152.
105. Quoted at 1960, I.C.J. 33.
106. *Ibid.*, p. 36.
107. *Ibid.*, p. 35.
108. Anand, R.P., *Compulsory jurisdiction of the International Court of Justice* (Bombay, 1961); Anand points out that this formulation can be alarmingly comprehensive. It is indeed difficult to imagine any great number of international disputes that are completely divorced from situations or facts prior to the entry into force of such a (treaty)." at p. 228; see also Hambro, E., *Some observations on the compulsory jurisdiction of the International Court of Justice*, 1948 BYIL 133 at pp. 144-45.
109. Rosenne, S., *The Law and Practice of the International Court of Justice* (Leyden, 1965), at 494, puts it quite succinctly: "The consistent feature of this jurisprudence is the premise that this type of objection (the Belgian model) relates intimately to the particular facts, and this accounts for the apparent inconsistency of the actual decisions."
110. Judgment (Jurisdiction) of August 30, 1924, P.C.I.J. Series A, No. 2, pp. 6-93, at 35.
111. *Ibid.*, at p. 11.
112. Judgment (Preliminary Objections) of March 21, 1959; 1959 I.C.J. Rep. 125.
113. Quoted *ibid.*, p. 14.
114. *Ibid.*, p. 21.
115. *Ibid.*, p. 22-23.
116. See Optional protocol of signature concerning the compulsory settlement of disputes, April 29, 1958, Article 3, 450 U.N.T.S. 169.
117. Kelsen, Hans, *Law of the United Nations*, New York, 1951, at 360; Also see Schwarzenberger, G., *International law as applied by international courts and tribunals*, at 414-16, London, Second Ed., 1949.
118. The Brussels Convention, 1910, Article 11, "this Convention does not apply to ships of war or to Government ships appropriated exclusively to a public service." In: Philco-Manca, *International maritime law* 111, at p. 71 (1970); Brussels Convention, 1926, concerning the immunity of State owned ships, Article 111, "(t)he provisions of the two preceding articles shall not apply to ships of war, State owned yachts,

patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service, and such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem (in *Philco Manca*, *International maritime law I*, at 111-12 (1970); *The London Convention of 1973 for the prevention of pollution from ships*, Article 3 [12 *I.L.M.* 1321 (1973)]; *The Helsinki Convention of 1974 on the Protection of Marine Environment of the Baltic Sea Area*, Article 4 [13 *I.L.M.* 548 (1974)]; although not framed as an exception to compulsory dispute settlement procedures, Article 8(1) of the 1958 Geneva Convention on the High Seas provides that "(w)arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State" and Article 9 provides that "(s)hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State." *Convention on the High Seas*, April 29, 1958, 450 *U.N.T.S.* 82.

119. *The Law of the Sea Convention*, Article 95.
120. *Ibid.*, Article 96.
121. *UNCLOS III*, p. 11, Mr. Beeby (New Zealand) opposed such exception by observing: "...most disputes concerning military activities would arise out of some action that had been taken by a government vessel or aircraft. Such vessels and aircraft must plainly continue to be exempt from the exercise of national jurisdiction, and that was a strong reason for not excluding disputes arising from their activities from the scope of a system of international jurisdiction..."
122. *U.N. Doc. A/CONF. 62/WP. 9/Rev. 1*, Article 18(2)(b).
123. *U.N. Doc. A/CONF. 62/WP. 9/Rev. 2*, Article 18(1)(b).
124. *U.N. Doc. A/CONF. 62/WP. 10*, 15 July 1977, Article 297(1)(b).
125. *Law of the Sea Convention*, Article 298(1)(b).
126. Janis, Mark W., *Dispute settlement in the Law of the Sea Convention: The military activities exception*, 4 *Ocean Development and International Law* 51(1977); Janis comes to the conclusion that such exception favours coastal States by making following observations: "(i)f the naval power is generally satisfied with the provisions of the Law of the Sea Convention as a whole, as they pertain to naval operations, then it is probably the coastal State that benefits from the military activities exception. If the coastal State decides that the Convention gives the naval power too much mobility in its territorial sea or exclusive economic zone, it can choose to elect the exception. In this case, the coastal State could interfere with the naval operations of the naval power but the naval power could not bring the coastal State to compulsory dispute settlement..." *Ibid.*, at p. 56-57.
127. This clause was skillfully inserted by one of the delegates of the coastal

State territorialist group at the eleventh hour during the debate in the sixth session of the Conference; quoted in Bernhardt, J. Peter A, Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Re-assessment, 19 Virginia Journal of International Law 69-105, p. 98 (1978).

128. 11 International Lawyer 365, at 368 (1977).
129. The Law of the Sea Convention, Article 298, para 1(c).
130. Informal Single Negotiating Text, U.N.Doc.A/CONF.62/WP.9/Rev.1 Article 18(2) (c); Revised Single Negotiating Text, U.N.Doc.A/CONF.62/WP.9/Rev.2, Article 18(1) (c).
131. However, a few voices were raised against such an exception: see 5 UNCLOS III; Mr. Goerner (German Democratic Republic) raised objections to the exception by pointing out, "... (the exception) whereby a State could decide by unilateral declaration, at the time of ratifying the Convention, whether or not the Security Council was competent in certain questions. Such a stipulation could lead to a dangerous undermining of the security mechanism of the United Nations. It was for the Security Council alone to decide whether or not a dispute threatened international peace and security, and, on that basis, to take the measures which it deemed appropriate. Consequently, —(the exception) —should be amended so that the disputes referred to would be excluded *ipso jure* from the procedures provided for in the Convention," at 21; Mr. Riphagen (Netherlands) commented, "(p) articularly unjustified was the exception relating to disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. That provision was in clear contradiction to Article 36 of the Charter of United Nations and it was open to the controversy about when the Security Council was actually exercising its functions. Furthermore, any of the permanent members of the Security Council, whether or not involved in the dispute, could through its veto power prevent the Security Council from determining proceedings under the future Convention would not interfere with the exercise of its functions. If it was necessary to provide for the case in which the same dispute that was brought before the Security Council was at the same time the object of a dispute settlement procedure under the future Convention, it should at least be required that the Security Council should decide that the procedure under the Convention was in fact interfering with the exercise of the Council's functions, before the procedure provided for in the Convention was discontinued. Indeed, the Security Council could take such a binding decision at any time, even in the absence of such a provision in the future Convention, let alone any reservation of any State Party to that Convention, a reservation which in any event could affect only disputes in which that State was the defendant," at 22; Mr. Galindo Pohl (El Salvador) adopted a different

approach when he observed: "... it would be better not to make any exception with regard to disputes before the Security Council. There was no contradiction between measures which the Council might take when a dispute constituted a threat to international peace and security and the use of any of the peaceful solutions, including compulsory jurisdiction. The Council remained competent to deal with any dispute that constituted a threat to peace and could take any step that fell within its competence; however, those measures were entirely consistent with the use of means that might be established in the Convention as a development of Article 33 of the Charter," at 9.

132. The Law of the Sea Convention, Article 298, paragraph 2.
133. Single Negotiating Text, U.N.Doc.A/CONF.62/WP.9/Rev.1, Article 18(4); Revised Single Negotiating Text, U.N.Doc.A/CONF.62/WP.9/Rev.2, Article 18(3); Informal Composite Negotiating Text, U.N.Doc.A/CONF.62/WP.10, Article 297(2).
134. The Law of the Sea Convention, Article 298, para 3.
135. Single Negotiating Text, U.N.Doc.A/CONF.62/WP.9/Rev.1, Article 18(5); Revised Single Negotiating Text, U.N.Doc.A/CONF.62/WP.9/Rev.2, Article 18(4); Informal Composite Negotiating Text, U.N.Doc.A/CONF.62/WP.10, Article 297(3).
136. The Statute of the International Court of Justice, Article 28, para 2 and 3.
137. See, Sub-section 4 under Section 1.25 of Chapter 1.2, pp. 33-34 of this book.
138. Nottebohm Case, 1953, I.C.J. Rep. 111-25, where the Court *inter alia* held that the Court would not be desisted of jurisdiction on the expiry of a declaration during the pendency of the case already filed in the Court. The above ruling was reaffirmed by the Court in the Right of Passage Case, 1957, I.C.J. Rep. 125-180.