

# COMPULSORY THIRD-PARTY ADJUDICATION AND THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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## INTRODUCTION

The 1982 United Nations Convention on the Law of the Sea<sup>1</sup> contains the most sophisticated and detailed system for international dispute settlement ever drafted. The Convention is gradually attracting the ratifications necessary for its entry into force, so the time when states can use the Convention's dispute settlement provisions draws nearer.<sup>2</sup> The dispute settlement mechanisms of the 1982 Convention also deserve analysis even if the Convention never enters into force since such an analysis provides insights into the conditions that can lead states to seek multilateral treaty provisions for the compulsory binding third-party adjudication of disputes. Analysis of the compulsory adjudication provisions of the 1982 Convention also helps us to think about whether such provisions can contribute to the development of coherent, legitimate norms of international law.

Three recent books examine the history and text of the dispute settlement articles and annexes of the 1982 United Nations Convention on the Law of the Sea. Gurdip Singh's analysis, *United Nations Convention on the Law of the Sea Dispute Settlement Mechanisms*, reviews the Convention's dispute settlement mechanisms in the context of theoretical and historical developments in the law of international adjudication.<sup>3</sup> Volume 5 of *United Nations Convention on the Law of the*

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1. *Opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter LOS Convention].

2. The 1982 Law of the Sea Convention had collected forty of the sixty ratifications necessary for its entry into force as of March 2, 1989. UNITED NATIONS OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, NO. 13, LAW OF THE SEA BULL. 7 (May 1989).

3. G. SINGH, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA DISPUTE SETTLEMENT MECHANISMS (1985).

*Sea 1982: A Commentary* analyzes the main dispute settlement articles and annexes of the 1982 Convention.<sup>4</sup> The third book under review is a history of the draft texts and proposals of the Third United Nations Conference on the Law of the Sea [UNCLOS III] that addressed dispute settlement.<sup>5</sup> Its author, Dr. A.O. Adede, served as co-chairman of the Settlement of Disputes Group organized during the 1975 session of UNCLOS III. Because no formal records exist of the informal sessions and meetings of Conference Committees and Negotiating Groups, a first-hand analysis of the UNCLOS III negotiations can provide essential information.

This essay comments on the reasons nations perceived a need to provide for formal dispute settlement in the 1982 Law of the Sea Convention. Many states viewed compulsory dispute settlement provisions as necessary to promote the observance of Convention norms. Although the final complicated structure of the Convention does not authorize states to institute proceedings for binding third-party adjudication in many situations, the Convention's dispute settlement mechanisms nevertheless represent a notable achievement in the history of efforts to formalize international dispute settlement. The *Commentary* and A.O. Adede's and Gurdip Singh's books are useful both to introduce some of the particular controversies surrounding the Convention's dispute settlement provisions and to highlight some broader themes about why it is so difficult for nations to agree to adopt treaty provisions for compulsory third-party adjudication.

## I. THE 1982 CONVENTION'S DISPUTE SETTLEMENT MECHANISMS AND STATE INTERESTS

Some of the Law of the Sea Convention's provisions for compulsory dispute settlement are contained in Part XI, which governs utilization of the resources of the seabed beyond the areas of national jurisdiction.<sup>6</sup> The law of the sea traditionally constituted a system of international rules without international rulers, a system in which na-

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4. 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (M. Nordquist, S. Rosenne & L. Sohn eds. 1989) [hereinafter COMMENTARY]. Volume 5 analyzes the general and final provisions of the Convention and its provisions on settlement of disputes, other than disputes related to the deep seabed that are covered in Part XI. Part XI dispute settlement provisions will be analyzed in Volume 3 of the *Commentary*, which is still in preparation.

5. A. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY (1987).

6. LOS Convention, *supra* note 1, arts. 186-191.

tional governments retained the authority to interpret the rules.<sup>7</sup> Part XI, however, will establish an international organization, the International Sea-Bed Authority, to exercise regulatory power over the seabed beyond the limits of national jurisdiction and to approve seabed mining activities of governments, private companies and an operational arm of the Authority known as the Enterprise. Uncertainty about how the Authority might carry out its responsibilities contributed to the strongly held perception that a tribunal should be established to serve as a check on the Authority's actions. As a result, a Sea-Bed Disputes Chamber of a new International Tribunal for the Law of the Sea [ITLOS] will oversee the Authority's application of Convention standards to particular mining contracts.<sup>8</sup>

Yet the delegates to UNCLOS III also agreed that disputes relating to many other issues should be subject to compulsory binding adjudication before third-party tribunals.<sup>9</sup> Part XV, section 2 of the 1982 Law of the Sea Convention allows a state to institute third-party adjudicatory proceedings against another state concerning disputes over a wide variety of topics, such as navigation, fisheries, marine scientific research and pollution. This is true even though no international organization similar to the Authority will implement or interpret the Convention's non-seabed-mining articles. The bulk of this essay concerns the Part XV dispute settlement provisions and related annexes.

That states should agree to submit to and be bound by third-party adjudication is, as a general matter, remarkable. International law does not obligate states to submit their disputes to an international tribunal unless the states expressly agree,<sup>10</sup> and no strong tradition of interna-

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7. See Janis, *The Seas and International Law: Rules and Rulers*, 58 ST. JOHN'S L. REV. 306 (1984).

8. LOS Convention, *supra* note 1, art. 187; *id.* Annex VI, arts. 14, 35-40. Disputes arising under Part XI involving only state parties to the Convention may be heard in a variety of forums: the Sea-Bed Disputes Chamber of the ITLOS, a special chamber of the ITLOS, an ad hoc chamber of the Sea-Bed Disputes Chamber, or binding commercial arbitration. See *id.* arts. 187(a), 188.

9. See *id.* arts. 286-299 (Part XV); *id.* Annexes VI-VIII.

10. Article 33(1) of the U.N. Charter states:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

U.N. CHARTER art. 33, para. 1. See also *id.* art. 2, para. 3.

The obligation imposed by the Charter to seek to settle disputes peacefully probably constitutes customary international law, and commentators have argued that an emerging principle of customary international law would obligate parties involved in significant disputes to negotiate in

tional adjudication of interstate disputes exists. Many factors deter formal interstate adjudication of particular disputes. The doctrine of sovereign immunity employed in national legal systems means that a state generally will not feel pressure to submit to a proceeding before an international tribunal in order to avoid the unpalatable alternative of defending itself in the national courts of a foreign sovereign. States are reluctant to give up their control over diplomatic and political options for resolving their disputes, and they may distrust a judge in an international tribunal or feel uncertainty about what the judge will decide.<sup>11</sup> Most states are more comfortable seeking political legitimization, rather than declarations of legal validity, for their actions.

When a state agrees to accept a compromissory clause in a treaty, allowing another state to institute proceedings for binding third-party adjudication of future disputes related to the interpretation or application of the treaty, the first state's political control over the outcome of such disputes will be affected. The state accepts the possibility that it may be dragged before an international tribunal when its preference is to negotiate a settlement or not to settle a dispute at all. Certainly, the number, details, and surrounding circumstances of disputes arising in the future cannot be known when a treaty is negotiated or ratified. When a respondent state does not appear before a tribunal that is authorized to hear a case and to issue a binding decision, that state may be significantly embarrassed. In addition, any decision not to abide by an unfavorable ruling issued by such a tribunal will be labelled illegal and will carry with it political costs.<sup>12</sup> A state will not lightly accept treaty obligations requiring it to submit its disputes to compulsory binding adjudication.

That states agreed to accept provisions for compulsory binding third-party adjudication in the Law of the Sea Convention is particularly remarkable, given that virtually the entire world participated in the negotiations.<sup>13</sup> Many multilateral treaties do not include such provi-

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good faith about settlement. See R. BILDER, *INTERNATIONAL DISPUTE SETTLEMENT AND THE ROLE OF ADJUDICATION* 17-19 (1986).

11. For a survey of factors that cause states to find international adjudication disadvantageous, see R. BILDER, *supra* note 10, at 66-82.

12. States historically have complied with decisions of international judicial and arbitral tribunals, by a large margin, at least where the parties have clearly consented to jurisdiction. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 903 reporter's note 11, 904 reporter's note 7 (1987).

13. What opposition there has been to signing or ratifying the Convention apparently has not concerned the provisions on dispute settlement. See Oxman, *Jurisdiction and the Power To Indicate Provisional Measures*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 323,

sions. A state may be able to predict the likelihood of adjudication, and perhaps the likely subject matter of the adjudication, with a fair degree of certainty if a compromissory clause is incorporated in a bilateral treaty.<sup>14</sup> Under the Law of the Sea Convention, however, a state may face disputes over a large number of issues with a variety of states, some of which are politically friendly and some unfriendly. Furthermore, provisions for compulsory binding third-party dispute settlement had to meet the approval of states that historically have been unreceptive to the idea of submitting their disputes to international tribunals. Socialist bloc states have traditionally resisted any interference with what they perceive to be their sovereign decisionmaking prerogatives, condemning Western international tribunals as "bourgeois."<sup>15</sup> Third World states have criticized the jurisprudence and structure of the International Court of Justice [ICJ], and the lack of familiarity of many Third World states with formal adjudication also may have inhibited them from accepting formal mechanisms of international adjudication.<sup>16</sup>

Another remarkable feature of the Law of the Sea Convention's dispute settlement provisions is the removal of several traditional impediments to adjudication. If the parties do not settle a dispute informally,<sup>17</sup> and if the dispute does not involve one of the sensitive issues that the Convention excepts from binding third-party adjudication,<sup>18</sup>

345 (L. Damrosch ed. 1987). It is conceivable that some opposition based on objections to the Convention's dispute settlement provisions will be raised in the United States if the Senate considers whether the United States should accede to the Convention. See generally Bernhardt, *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, 19 VA. J. INT'L L. 69, 100 (1978).

14. See, e.g., Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58, 60 (L. Damrosch ed. 1987).

15. See, e.g., A. VYSHINSKY, THE LAW OF THE SOVIET STATE 500 (1948); Darwin, *General Introduction*, in INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 57, 68-71 (H. Waldock ed. 1972).

16. See, e.g., R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 28 (3d ed. 1985); Anand, *Attitude of the "New" Asian-African Countries Toward the International Court of Justice*, in THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW 163 (F. Snyder & S. Sathirathai eds. 1987) (Third World states are not "uniquely reluctant" to appeal to third-party adjudication in international tribunals, but they exhibit caution because of the jurisprudence likely to be applied); Anwar-I-Qadar, *The International Court of Justice: A Proposal to Amend Its Statute*, in *id.* at 179 (pro-Western construct of ICJ Statute makes Court's operation unsuitable to the needs and interests of developing states); Darwin, *supra* note 15, at 66-68.

17. See LOS Convention, *supra* note 1, arts. 279-285 (Part XV, section 1); *infra* notes 34-36 and accompanying text.

18. See LOS Convention, *supra* note 1, arts. 297-299 (Part XV, section 3); *infra* text accompanying notes 45-51.

the opportunities for a party to avoid adjudication will be limited. First, dispute settlement provisions were incorporated into the main body of the treaty and not left to an optional protocol.<sup>19</sup> Second, the Convention's rules governing arbitration eliminate many of the techniques that parties to international arbitration treaties traditionally could use to opt out of an arbitration. For example, a state's failure to appoint an arbitrator will not prevent the constitution of a tribunal, and a state's non-appearance before an arbitral tribunal will not prevent the tribunal from reaching a decision.<sup>20</sup> Since arbitration is likely to be the most commonly used form of third-party adjudication for disputes arising under the Law of the Sea Convention,<sup>21</sup> such provisions are significant. Third, the Convention generally prohibits reservations to any of its articles, including the articles providing for binding adjudication of disputes;<sup>22</sup> the permissible limitations on and exceptions to compulsory binding third-party adjudication are specified in Part XV itself.<sup>23</sup>

Why did states agree to include provisions for binding third-party adjudication of disputes in the Law of the Sea Convention? Why did they find it in their interests to accept such provisions, before they could know the states with which disputes might arise or the exact circumstances of the disputes? It would be surprising if all states would answer these questions the same way with regard to all the numerous substantive Convention articles. Three factors, relating to the scope of issues a tribunal may hear, to particular concerns of developing states, and to the fact that certain disputes might otherwise be litigated before national courts, provide at best partial, incomplete answers. First, treaty parties can narrow the scope of issues a tribunal must decide when the tribunal is given the job of interpreting treaty provisions rather than applying general principles of international law.<sup>24</sup> Thus, the Law of the Sea Convention calls on tribunals to apply "this Convention

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19. Cf. Optional Protocol to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 487; Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 241; Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 U.N.T.S. 169.

20. LOS Convention, *supra* note 1, Annex VII, arts. 3, 9; Annex VIII, arts. 3-4. See COMMENTARY, *supra* note 4, at 427; G. SINGH, *supra* note 3, at 215. See also T. FRANCK, THE STRUCTURE OF IMPARTIALITY: EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD 100 (1968).

21. See *infra* text accompanying notes 40-41.

22. LOS Convention, *supra* note 1, art. 309.

23. See *id.* arts. 297-98.

24. See T. FRANCK, *supra* note 20, at 184, 190.

and other rules of international law not incompatible with this Convention"<sup>25</sup> to disputes concerning its "interpretation or application."<sup>26</sup> This limitation, however, still leaves tribunals with a broad mandate. The limitation also does not present a positive reason for states participating in the Law of the Sea Convention negotiations to seek provisions for compulsory binding third-party adjudication.

A second reason that partially explains the presence of compulsory dispute settlement provisions in the Law of the Sea Convention relates to the concerns of relatively powerless states. Some UNCLOS III delegates from developing states believed that such provisions would reduce political, economic, and military pressures by powerful states seeking to force them to give up rights guaranteed under the Convention.<sup>27</sup> But this view does not explain why powerful states, which would have diplomatic or military leverage in negotiations with developing states, also would find provisions for third-party adjudication desirable.

Third, some of the Law of the Sea Convention's provisions for utilizing international tribunals are understandable on the grounds that they help to protect a state's nationals from unfavorable treatment by a foreign domestic court. For example, suppose that one state seizes a vessel operating under the flag of another state, alleging that the vessel has discharged pollutants in the first state's coastal zone in violation of its environmental regulations. The vessel's owners attempt to post bond to obtain prompt release of the vessel from the domestic court, but the court refuses to release the vessel. Without the Convention's provisions for seeking prompt release by petitioning an international tribunal,<sup>28</sup> the vessel could be held arbitrarily or indefinitely by the detaining state. Not every potential dispute that will be subject to the Convention's dispute settlement mechanics, however, would entail a similar prospect of unfavorable national judicial rulings.

The most fundamental reason that many states sought to establish an effective system of dispute settlement, applicable to all parties to and to all parts of the 1982 Convention, was the belief that such a

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25. LOS Convention, *supra* note 1, art. 293(1). The parties may agree to allow a tribunal to decide a case *ex aequo et bono*. *Id.* art. 293(2).

26. *Id.* arts. 286, 288(1). *See also id.* Annex VI, arts. 23, 38. Other jurisdictional limitations also affect the scope of permissible litigation under the Convention. Tribunals cannot hear issues excluded under section 3 of Part XV unless the parties specifically agree, *see id.* arts. 286, 288(2), 297-298; *infra* text accompanying notes 45-51, and special jurisdictional provisions relate to disputes arising under Part XI. *See* LOS Convention, *supra* note 1, arts. 187-188, 288(3).

27. *See* A. ADEDE, *supra* note 5, at 39, 241; COMMENTARY, *supra* note 4, at 8.

28. *See* LOS Convention, *supra* note 1, art. 292.

system could further uniform interpretations of the Convention and maintain the integrity of the Convention's compromise package. If each party asserted positions only in accordance with its own unilateral interpretations of the Convention, compromises worked out in many of the complex articles of the Convention might come undone. UNCLOS III President H.S. Amerasinghe noted in 1976 that "the provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention." Without such procedures, he went on, "the compromise will disintegrate rapidly and permanently."<sup>29</sup> Developed states agreed on the need for a dispute settlement system early in the negotiations, but not on the precise form of the system. The Soviet Union and the Socialist states of Eastern Europe favored special arbitral tribunals composed of legal, scientific, and technical experts in particular fields in which disputes arose, and they eventually accepted a system that incorporated compulsory references to regular binding arbitration when all the parties to a dispute did not agree on special arbitration.<sup>30</sup> The United States, fearful of coastal or straits states ignoring Convention provisions that affirm freedom of navigation or interpreting such provisions to restrict navigation, was among the strongest proponents of provisions for compulsory binding third-party adjudication.<sup>31</sup>

Most interstate disputes involving issues of the oceans will not end up before an international tribunal, of course, for political considerations often will deter a state from instituting proceedings against another state. The Convention includes few options for direct access by private parties to tribunals—few options, in other words, for "depoliticising the act of recourse to adjudication."<sup>32</sup> The existence of Convention provisions allowing a party to the Convention to institute proceedings for binding third-party adjudication against another party does not remove the political reasons a state party may perceive for not

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29. A/CONF.62/WP.9/Add.1 (1976), para. 6, V Off. Rec. 122 (President), *quoted in COMMENTARY*, *supra* note 4, at 10. See also Oxman, *Dispute Settlement With and Among Non-Parties to the Law of the Sea Convention: Navigation and Pollution*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 479 (T. Clingan ed. 1986). For a discussion of other techniques that may be used to limit the risks of nonperformance of treaty obligations, see R. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 106-94 (1981).

30. See A. ADEDE, *supra* note 5, at 67-68, 82-83, 116, 243; *COMMENTARY*, *supra* note 4, at 42, 50, 444.

31. See 69 DEP'T ST. BULL. 412, 414 (1973) (statement of United States Ambassador Stevenson); Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976).

32. C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 762 (1964).



bringing a formal claim against an opponent state unreceptive to having a particular case heard. Adjudication may be expensive and time-consuming, and the associated publicity and adversarial process may even heighten tensions that could be cooled diplomatically.<sup>33</sup> The Law of the Sea Convention acknowledges the continued primacy of informal mechanisms for dispute settlement in international relations. Part XV, section 1 encourages parties to resolve disputes by negotiation, enquiry, mediation, conciliation or other peaceful means of their choice.<sup>34</sup> Articles 280 to 282, which allow any party to a dispute to use general, regional, or special procedures that the parties have previously agreed upon and which give precedence to those procedures over the Convention's provisions for formal adjudication, also support the principles of party autonomy and flexibility.<sup>35</sup> Only if no settlement is reached through informal means or alternative agreements will the provisions for compulsory binding third-party adjudication in Part XV, section 2 come into play.<sup>36</sup> Actual cases among states may well be rare.<sup>37</sup>

But provisions for compulsory binding third-party adjudication are more than an ultimate fallback weapon to be used against a state that is unwilling to budge in diplomatic negotiations. States likely perceive that the threat of adjudication will constrain unreasonable unilateral interpretations of substantive Convention provisions. The existence of articles and annexes authorizing compulsory binding third-party adjudication of disputes thus may help preserve balances struck in Law of the Sea Convention articles, or at least may retard assertions of national authority over the international commons. The existence of a compulsory dispute settlement system may push the parties to negotiate in good faith and may limit the range of plausible arguments that each side can put forward, thus preserving the stability of Convention

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33. See R. BILDER, *supra* note 10, at 73-78.

34. LOS Convention, *supra* note 1, arts. 279-281, 284. See Sohn, *The Future of Dispute Settlement*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 1121, 1122-23 (R. Macdonald & D. Johnston eds. 1983) (negotiation the most efficient way of settling international disputes).

35. LOS Convention, *supra* note 1, arts. 280-282. See also *id.* arts. 283 (obligation to exchange views), 284 (invitations to conciliation).

36. *Id.* art. 286. The Part XV, section 1 general provisions on dispute settlement also apply to seabed disputes, to which the formal dispute settlement provisions of Part XI apply. *Id.* art. 285.

37. The International Court of Justice, for example, has been faced since 1945 with only ten cases brought under treaty provisions in accordance with articles 36(1) and 37 of the Court's Statute, although approximately 750 treaties authorize the ICJ to hear disputes under those articles. See Morrison, *supra* note 14, at 58-61.

rules.<sup>38</sup> Treaty provisions for compulsory binding dispute settlement may promote stable rules even though no state invokes the provisions to force an adjudication.

The dispute settlement articles in Part XV of the 1982 Convention are significantly weaker than many UNCLOS III delegates initially wished. In several important respects the final articles reflect states' desires for some control over the process of resolving disputes. Two features, relating to state flexibility in the choice of formal adjudicatory mechanisms and to exceptions of particular issues from the requirement of compulsory binding adjudication, are especially noteworthy. First, Part XV of the Law of the Sea Convention provides states with four options for formal adjudication. These are the ITLOS, the ICJ, arbitration or, in the cases of fisheries, protection of the marine environment, marine scientific research and navigation, special arbitration before panels of experts.<sup>39</sup> (While the Convention provides for a variety of forums to which states might agree, the Convention also insures that neither lack of agreement on a forum nor the failure of one state to declare its preferred forum will stymie adjudication. If a state fails to declare a preference, arbitration is deemed to be its choice.<sup>40</sup> In addition, if the state instituting a proceeding and the respondent state have not chosen the same forum, arbitration will be used.<sup>41</sup>)

The goal of achieving a consensus at UNCLOS III dictated that states be allowed to select from among several forums. Many developing states, harboring concerns about what they perceived to be a traditional pro-Western bias of the ICJ, pushed for the new Law of the Sea Tribunal as a forum whose judges would have special competence in law of the sea problems.<sup>42</sup> Socialist states of Eastern Europe, although willing to recognize the need for a preconstituted tribunal to hear arguments over the prompt release of seized vessels, took an adamant stance against the use of compulsory judicial procedures.<sup>43</sup> They favored special arbitration, a mechanism that preserves significant national input

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38. See R. BILDER, *supra* note 10, at 51-52; J. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 88, 119 (1984).

39. LOS Convention, *supra* note 1, art. 287(1). Different forums for binding dispute settlement—a Sea-Bed Disputes Chamber of the the ITLOS, an ad hoc chamber of the Sea-Bed Disputes Chamber, a special chamber of the ITLOS, or commercial arbitration—apply with respect to disputes arising under Part XI, concerning the deep seabed. See *id.* arts. 187-188.

40. *Id.* art. 287(3).

41. *Id.* art. 287(5).

42. See A. ADEDE, *supra* note 5, at 15, 24; COMMENTARY, *supra* note 4, at 42.

43. A. ADEDE, *supra* note 5, at 116, 243.

into the adjudicatory process by allowing parties to select expert members of the arbitral panel. Critics of the Convention's articles that allow parties to choose among forums stressed that the cost of flexibility could be a lack of uniform jurisprudence in interpretations of Convention provisions.<sup>44</sup> The desire for stable Convention rules to help preserve delicate compromises on substantive articles suggests that this criticism was more than a makeweight argument, but the politics of the negotiations were such that insistence on only one or two forums would have meant a lack of consensus on including provisions for binding adjudication in the text of the Convention.

The Law of the Sea Convention allows nations to preserve for themselves control or influence over the outcome of some disputes in a second way. Simply put, the Convention recognizes significant categories of situations in which compulsory binding dispute settlement is excluded or can be limited. The exceptions and limitations occupy a significant place in the Convention, encompassing the third and final section of Part XV. Delegates declared their opposition to a Convention that did not except from compulsory jurisdiction "questions directly related to the territorial integrity of States" early in the UNCLOS III negotiations;<sup>45</sup> in addition, the naval advisors to delegations feared judicial proceedings in which their states might have to disclose some military secrets.<sup>46</sup> Such concerns provided a counterweight to arguments that provisions for adjudication could forestall disputes and promote the observance of Convention norms. The final version of the Convention thus provides that a state may unilaterally declare that it will not accept compulsory binding adjudication of disputes over certain issues. Such issues include military and law enforcement activities, historic bays or titles, and maritime boundary delimitations—issues that often relate to a state's identity or perceived security.<sup>47</sup> It is too facile to claim that because disputes are "political," states therefore will not want to adjudicate them. Each side may regard certain matters as "im-

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44. See *id.* at 7, 50; COMMENTARY, *supra* note 4, at 41, 47, 409.

45. COMMENTARY, *supra* note 4, at 88 (quoting Law of the Sea Conference, Second Session, 51st plenary meeting (1974), I Off. Rec. 213, para. 10 (statement of Ambassador Pohl of El Salvador)).

46. *Id.* at 135.

47. LOS Convention, *supra* note 1, art. 298(1)(a)-(b). Any assessment of the significance of the optional exceptions must consider the extent to which the exceptions may expand the national jurisdictional competence of either coastal states or maritime powers. On the effect of the military activities exception, compare G. SINGH, *supra* note 3, at 147-49, with Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEV. & INT'L L. 51 (1977).

portant" or "essential"—labels that are closer than the word "political" to capturing functional reasons for states to object to third-party adjudication—but states sometimes are willing to submit disputes they subjectively regard as important to third-party adjudication, particularly if they think they may win.<sup>48</sup> At the treaty negotiation stage, however, states would calculate that disputes concerning such issues as military activities, historic bays, and maritime boundaries might likely involve sensitive, polycentric problems. Neither the details of such disputes nor which party would be likely to prevail in an adjudication can be known in advance, and states preferred to preserve their diplomatic flexibility by including provisions in the Convention allowing them to opt out of third-party adjudication related to such disputes.<sup>49</sup>

Controversies among states over whether to make certain issues subject to the provisions for binding third-party adjudication resulted in many compromises. One contested issue in the UNCLOS III negotiations was whether third parties should adjudicate disputes arising in the 200-mile exclusive economic zones [EEZs] of coastal states. Maritime powers achieved agreement that the substantive articles of the Convention would allow them some rights in the coastal zones concerning fishing and marine scientific research, as well as navigation and other rights. They wanted treaty provisions for compulsory binding third-party adjudication to protect their rights from unilateral usurpation by the coastal states. The developing coastal states, on the other hand, had strongly asserted claims to control fishing and marine scientific research in their EEZs, and they resisted provisions that would enable other states to assert claims before third parties relating to EEZ fishing rights or marine scientific research. The coastal states feared vexatious suits alleging violations of their obligations concerning the rights of

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48. See T. FRANCK, *supra* note 20, at 178-84.

49. A state may also opt to exclude from the Part XV, section 2 adjudication procedures "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 this Convention." LOS Convention, *supra* note 1, art. 298(1)(c). This provision was intended to serve "the need to avoid a conflict between any dispute settlement procedure started under the Convention and any action that the Security Council might be taking under the Charter of the United Nations to maintain international peace and security." COMMENTARY, *supra* note 4, at 138. Yet Security Council disputes will not be excluded from Convention procedures unless at least one party to such a dispute has filed an optional exclusionary declaration under article 298, so to that extent the decision to adjudicate is left to the parties rather than to the Security Council. It seems likely that national concerns with submitting "sensitive" issues to third-party adjudication help explain this optional exception.

maritime powers. Convention articles mandating exhaustion of local remedies in accordance with international law and authorizing tribunals to make preliminary findings of prima facie cases did not eliminate all coastal state concerns.<sup>50</sup> Negotiators avoided an impasse by compromising on the mechanism for settling certain EEZ fisheries disputes and disputes related to the exercise of coastal state rights concerning marine scientific research in the EEZs and on the continental shelf. Coastal states need not accept binding third-party adjudication of such disputes, under the compromise, but "compulsory conciliation" of these disputes is allowed.<sup>51</sup> Under this arrangement, any party to the dispute may force conciliation proceedings; as with ordinary conciliation, however, the parties are not bound to accept the proposal of the conciliation commission.

The history of the Law of the Sea Convention does not disabuse us of the idea that states are reluctant to authorize other states to force them to adjudicate interstate disputes before third parties. Yet concerns with promoting a stable Convention regime prompted many states to seek provisions for the compulsory binding settlement of disputes relating to the interpretation or application of the Law of the Sea Convention. Many delegations to UNCLOS III that had supported a strong dispute settlement system were disappointed by compromises such as the articles on compulsory conciliation of fisheries and marine scientific research disputes arising in the EEZs.<sup>52</sup> Such compromises, however, illustrate that even on sensitive issues, states may accept the need for some formal third-party dispute settlement mechanism to help preserve substantive multilateral treaty norms.

## II. OF COMPLEX NEGOTIATIONS AND INTERPRETIVE UNCERTAINTIES

Volume 5 of the *United Nations Convention on the Law of the Sea: A Commentary*, A.O. Adede's negotiating history and Gurdip

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50. See LOS Convention, *supra* note 1, arts. 294-295; A. ADEDE, *supra* note 5, at 59, 132, 262.

51. LOS Convention, *supra* note 1, art. 297(2)-(3). For an argument that the structure of article 297(3) leaves no fisheries disputes arising in the EEZs subject to compulsory binding third-party adjudication, see M. DAHMANI, *THE FISHERIES REGIME OF THE EXCLUSIVE ECONOMIC ZONE* 121-22 (1987). See also LOS Convention, *supra* note 1, art. 298(1)(a) (compulsory conciliation of disputes concerning sea boundary delimitations, historic bays or historic titles).

52. A. ADEDE, *supra* note 5, at 242. The scope of access for non-state entities to the dispute settlement mechanisms of the Law of the Sea Convention also was cut back from that proposed in early negotiating drafts. See *id.* at 30, 62, 85, 104, 193; COMMENTARY, *supra* note 4, at 67, 411-13.

Singh's analysis of the dispute settlement provisions of the 1982 Law of the Sea Convention provide much information relevant to the question of why nations agreed to accept treaty provisions for formal third-party adjudication. This essay section comments on the books, focusing on the authors' treatments of two issues: the extraordinarily complicated nature of the negotiations in UNCLOS III and the question of how tribunals actually will interpret the Convention.

Adede's history and the *Commentary* indicate the complicated nature of the Convention negotiations.<sup>53</sup> Virtually every nation participated in UNCLOS III, a Conference that met in different formal negotiating sessions from 1974 to 1982. Alliances sometimes shifted from issue to issue, and the matters addressed in the Conference related to virtually every aspect of the law of the sea. The questions about dispute settlement were difficult. These questions involved the nature and powers of various tribunals, the relationships among the different tribunals, the use of and relationship among different binding and nonbinding procedures, the access of international organizations and private entities to various forums, the involvement of experts in different adjudicatory functions, and the need to find generally acceptable preconstituted judicial forums to provide interim protective orders and to arrange for the prompt release of seized vessels.<sup>54</sup> Negotiation of dispute settlement provisions relating to the exercise of coastal states' rights in their EEZs and to maritime boundary delimitations between opposite and adjacent states proved to be particularly difficult. During the 1978 Geneva session, for example, a negotiating group had before it forty-five different proposals concerning the settlement of maritime boundary disputes, and the proposals indicated disagreement on such fundamental points as whether third-party procedures were to be compulsory at all.<sup>55</sup> The detailed structure of the articles containing exceptions to and limitations on the use of compulsory binding third-party adjudication hints at the complicated nature of UNCLOS III negotiations.<sup>56</sup> That there was eventual consensus on some provisions for formal third-party adjudication is testimony both to the hard work of the negotiators and to the strongly perceived need for such provisions in the Law of the Sea

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53. For an excellent overview of the UNCLOS III negotiating process, see Koh & Jayakumar, *The Negotiating Process of the Third United Nations Conference on the Law of the Sea*, in 1 UNITED NATIONS CONVENTION ON THE LAW OF SEA 1982: A COMMENTARY 29 (M. Nordquist ed. 1985).

54. See A. ADEDE, *supra* note 5, at 7-9; COMMENTARY, *supra* note 4, at 7.

55. See A. ADEDE, *supra* note 5, at 177; COMMENTARY, *supra* note 4, at 120.

56. See LOS Convention, *supra* note 1, arts. 297-298.

## Convention.

The *Commentary*, a collaborative effort by authors and editors intimately familiar with the complicated negotiating history of the 1982 Convention,<sup>57</sup> is an extraordinarily valuable resource. A short introduction to Volume 5 highlights the work of the various sessions and negotiating groups and the major changes made to the Part XV dispute settlement provisions in the various draft versions of the Convention.<sup>58</sup> The volume then analyzes each article of the Convention and of each annex. The analysis of an article is preceded by the final version of the text of the article and a list of all formal and informal documentation relevant to the history of the article. The discussion of each article typically begins with a brief statement of the purpose of or the early perceived need for the article, followed by an objective assessment of the changes made in various negotiating texts and the reasons for those changes. The treatment is accurate and thorough, and the overall organization is well-reasoned.

Adede's goal in *The System for the Settlement of Disputes Under the United Nations Convention on the Law of the Sea* is also to present a legislative history of the dispute settlement mechanisms of the Law of the Sea Convention, focusing chronologically on the formal and informal draft texts that were used in the various negotiating sessions of UNCLOS III. Adede's book includes coverage of the dispute settlement articles of Part XI, a subject that is not directly within the scope of the *Commentary's* analysis.<sup>59</sup> Adede recognizes the central fact that the Convention embodies diplomatic compromises, and his discussion of the negotiating texts highlights many of the central controversies concerning dispute settlement; yet his reluctance to be specific about some

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57. Although several prominent law of the sea experts edited the *Commentary*, primary responsibility for the discussion of the dispute settlement articles rests with Professor Louis Sohn, who participated in UNCLOS III as a member of the United States delegation in charge of dispute settlement issues. Gritakumar Chitty, currently Special Assistant to the United Nations Under-Secretary-General for Ocean Affairs and the Law of the Sea, and Secretary of Special Commission 4 of the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, prepared the first draft of the *Commentary's* analysis of Annex VI, containing the Statute of the International Tribunal. Daniel Vignes, who was an observer at all sessions of UNCLOS III in his position as a senior legal advisor to the European Communities Council of Ministers, drafted the superb analysis of the conciliation, arbitration, and special arbitration annexes.

58. COMMENTARY, *supra* note 4, at 5-15.

59. The *Commentary* does discuss Part XI-related material in its treatment of the Sea-Bed Disputes Chamber articles of the Statute of the ITLOS (Annex VI). COMPARE COMMENTARY, *supra* note 4, at 336, 361, 399-416 with A. ADEDE, *supra* note 5, at 142-63.

details of the informal sessions is frustrating. Adede often writes that "an objection was raised" or that a "view was expressed" by "some participants" or "certain participants";<sup>60</sup> the participants' identity and often the reasons for their objections or statements are left unstated. Even as a nonpolitical guide to the drafting history of the 1982 Convention's dispute settlement articles and annexes, Adede's book unfortunately is flawed. It omits an index, appendices containing the relevant Convention provisions, tables comparing changes in draft articles and some essential footnote references. A detailed table of contents saves the book from being totally inaccessible to someone researching the history of particular Convention articles.

Gurdip Singh's *United Nations Convention on the Law of the Sea Dispute Settlement Mechanisms* implicitly suggests that the divergent political views that made the efforts to arrive at a consensus in UNCLOS III so difficult will certainly be present in future arguments over the Convention's substantive and procedural articles. The book is not fundamentally a political account: Gurdip Singh's scholarly overview of the structure of the dispute settlement articles and annexes of the 1982 Convention, and his effort to place the Convention's work on dispute settlement and dispute avoidance in historical and theoretical context by discussing provisions for international adjudication in other treaties,<sup>61</sup> are, on the whole, evenhanded and thorough. Yet he does show that he understands and appreciates Third World perspectives toward the Convention. Gurdip Singh stresses that the Law of the Sea Convention embodied many compromises in a "package deal,"<sup>62</sup> a phrase that upsets some Western observers who postulate the customary legal nature of Convention obligations other than those concerning the deep seabed regime.<sup>63</sup> If Third World states view the Convention as a package deal, they may not readily afford "customary" navigational rights to developed states that have not accepted the entire Convention.<sup>64</sup>

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60. A. ADEDE, *supra* note 5, at 36, 66, 139.

61. The *Commentary*, Adede and Gurdip Singh only briefly note the history of dispute settlement in pre-UNCLOS III law of the sea conferences and treaties. See A. ADEDE, *supra* note 5, at 68, 89; COMMENTARY, *supra* note 4, at 5-6; G. SINGH, *supra* note 3, at 8-10. Another book-length treatise, not yet published, provides a thorough account of that history. See R. Schallawitz, *The Settlement of Disputes in the New Law of the Sea Convention 27-79* (University of Geneva, 1986).

62. G. SINGH, *supra* note 3, at 6, 42, 151, 173.

63. See, e.g., Malone, *Freedom and Opportunity: Foundation for a Dynamic Oceans Policy*, 84 DEP'T ST. BULL. 76 (1984).

64. See, e.g., Djalal, *The Effects of the Law of the Sea Convention on the Norms That Now Govern Ocean Activities*, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE



Gurdip Singh also demonstrates his sensitivity to the views of developing states in his criticism of weighted voting provisions that "impair the principle of equality of . . . States."<sup>65</sup>

Of the three works, Gurdip Singh's grapples most directly with the question of how the 1982 Convention's dispute settlement provisions will function in the face of live, contested disputes. Gurdip Singh's most noticeable evaluative bias is in favor of an instrument that nations will find to be effective and acceptable in settling disputes related to the interpretation or application of the Convention. These goals can be furthered, Gurdip Singh believes, by making some of the language of the dispute settlement articles of the Convention more determinate. Thus, he is critical of provisions that indicate the situations in which compulsory conciliation will be required for EEZ fisheries disputes because the provisions require adjudicators to interpret subjectively the meaning of the words "manifestly," "seriously" and "arbitrarily."<sup>66</sup> Gurdip Singh would prefer simply to delete those modifiers. He criticizes the fact that article 298's language concerning compulsory conciliation of certain maritime boundary disputes is vague. Article 298 states that it applies to disputes arising subsequent to the entry into force of the Convention, but it does not specify whether "a dispute arise[s] 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."<sup>67</sup> Gurdip Singh thinks that the Convention should have specified a method for dating disputes. In the absence of an express provision, he prefers the "disagreement takes definite shape" formulation because it "would lend certainty to the operation of [the] compulsory conciliation procedure."<sup>68</sup> One of his repeated concerns is whether the Law of the Sea Convention's dispute settlement provisions can be used effectively in legal proceedings.

Gurdip Singh believes that impartial, expert decisionmakers will attract parties to participate in international adjudications. He adopts the call for "social conditioning" to create an "acquired international bias" to replace the inevitable influences of a judge's national commu-

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LAW OF THE SEA CONVENTION 50 (J. Van Dyke ed. 1984) [hereinafter *CONSENSUS AND CONFRONTATION*]; *Discussion*, in *id.* at 59-61 (comments of T. Koh).

65. G. SINGH, *supra* note 3, at 61.

66. *Id.* at 138.

67. *Id.* at 146.

68. *Id.* at 146-47. For a discussion of the difficult negotiations of the provisions concerning settlement of maritime boundary delimitation disputes, see *COMMENTARY*, *supra* note 4, at 116-34.

nity.<sup>69</sup> On this point, Gurdip Singh may not fully appreciate that states do not demand, and apparently do not want, totally impartial international decisionmakers. Arbitration—the favored compulsory procedure under the Convention<sup>70</sup>—allows party input into the adjudicatory process: each state selects, for the five-person panel, an arbitrator who may be a national of the appointing state.<sup>71</sup> In special arbitration, each party selects two experts, one of whom may be its national, to serve on a five-member tribunal.<sup>72</sup> Similarly, any state party to a dispute relating to Part XI seabed issues may request submission of the dispute to an ad hoc chamber of the Sea-Bed Disputes Chamber of the ITLOS, and each state may appoint one member to the ad hoc chamber.<sup>73</sup> The statutes of the ICJ and the ITLOS also do not comport with traditional conceptions of objective adjudication, in that they allow any party to a case to include one of its nationals on the bench.<sup>74</sup> As Professor Oscar Schachter has stated:

The fact that judges often reflect particular State interests is of course at variance with the ideal of objectivity of the judicial function. Yet it is not unreasonable to regard the reflection of national or group interests as appropriate and advantageous for an international court in a divided and heterogeneous world.<sup>75</sup>

In short, states may not want to avoid all bias in the members of an international tribunal. Instead, it is an imbalance in the apparent bias of members of a tribunal that will contribute to criticisms of its composition and actions.<sup>76</sup>

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69. G. SINGH, *supra* note 3, at 32. For discussion of the issue of bias in international adjudication, see T. FRANCK, *supra* note 20, at 212-98.

70. See *supra* text accompanying notes 40-41.

71. LOS Convention, *supra* note 1, Annex VII, art. 3.

72. *Id.* Annex VIII, art. 3.

73. *Id.* art. 188; *id.* Annex VI, art. 36(2).

74. *Id.* Annex VI, art. 17; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 31.

75. Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178(V) RECUEIL DES COURS 13, 70 (1982).

76. At least one commentator has argued that the Law of the Sea Convention could lead to an imbalance of certain tribunals in favor of the Third World. For example, the President of the ITLOS, who has the power to appoint arbitrators if the parties cannot agree on them, LOS Convention, *supra* note 1, Annex VII, art. 3(e), may well be a Third World national, given the composition of the ITLOS. In addition, the composition of the Sea-Bed Disputes Chamber of the ITLOS, which provides the major option for settlement of disputes over sea-bed mining, may reflect Third World interests. See Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the*

Gurdip Singh believes that the effectiveness of the dispute settlement mechanisms of the Law of the Sea Convention will be increased if decisionmakers with "political, economic and sociological depth" adjudicate with an eye toward "political reality."<sup>77</sup> But Gurdip Singh does not completely develop his views on what approach toward treaty interpretation an impartial yet "realistic" judge should use. Even when decisionmakers construe ambiguous terms—in other words, when their task is rule clarification—they should pay attention to the parties' intentions at the time of drafting, to the "political reality" that led to the particular balance or formulation in the Convention text. Such an approach may well inspire more confidence in the tribunal's impartiality than would an open-ended excursus dependent on the then-current political climate.<sup>78</sup> Interpretations of the Convention will be impugned if they stray far from what the parties intended.

Yet it is also true that some of the compromises embodied in the final text of the 1982 Convention have just postponed decisions on controversial issues. This situation was inevitable in a multi-issue, multilateral conference that proceeded to determine the text of articles by means of consensus. Some of the imprecise provisions in the Convention will require continuing international communication to resolve issues.<sup>79</sup> Thus, article 59, which addresses conflicts regarding the attribution of certain rights and jurisdiction within the exclusive economic zone, broadly calls for resolution of conflicts between coastal states and other states "on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."<sup>80</sup> Article 300 requires states parties to "fulfil in good faith the obligations assumed under this Convention and [to] . . . exercise the rights, jurisdiction and freedoms recognized in this Convention in a

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*Sea*, 19 SAN DIEGO L. REV. 577 (1982). But it does not necessarily follow either that the Third World is homogeneous in outlook or that a Third World national will reflect only "Third World values." Furthermore, any effort to condemn a potential lack of balance in the composition of tribunals also should take into account any concessions on substantive provisions that an apparently disfavored state obtained in exchange for what it regards as less than ideal dispute settlement provisions. See R. OGLE, INTERNATIONALIZING THE SEABED 217-20 (1984).

77. G. SINGH, *supra* note 3, at 217-18.

78. See generally A. MCNAIR, THE LAW OF TREATIES 364-489 (2d ed. 1961); I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 114-58 (2d ed. 1984); Jacobs, *Varities of Approach to Treaty Interpretation, with Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969).

79. See M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 58-64 (1985).

80. LOS Convention, *supra* note 1, art. 59.

manner which would not constitute an abuse of right.”<sup>81</sup> The *Commentary* notes that article 300 contains “highly subjective elements” that make it “idle to speculate on the possible interpretation and application of this article.”<sup>82</sup> Ultimately, the success of an international legal regime for the oceans will depend on whether states and other entities can maintain an open dialogue. This dialogue is required both to settle particular disputes through such consensual means as negotiation and conciliation, and to modify Convention standards or adopt interpretive criteria that will help allocate rights and responsibilities concerning the oceans among all interested entities. Absent such a dialogue, tribunals themselves may be forced to define and adjust equitably parties’ responsibilities under vague substantive articles of the Convention.

We cannot know many of the factors that will bear on whether the Law of the Sea Convention’s provisions for compulsory dispute settlement can help to preserve a stable system of international legal rules governing the law of the sea. Will the various tribunals that decide cases apply a uniform jurisprudence, drawing from each other’s decisions? Will the exceptions to binding third-party adjudication be construed broadly, thus decreasing the number of disputes that might be settled and the number of rules that might be promoted and clarified through adjudication? Will judges rely on the parties’ intentions in construing Convention provisions? Will there be a balance, an overall impartiality, in the composition of tribunals that will increase the acceptability of their work? Will decisionmakers act promptly? Will the parties respect the tribunals’ decisions?

Despite the uncertainties concerning the implementation of the Law of the Sea Convention’s third-party dispute settlement provisions, their potential value in helping to preserve Convention norms and retard unilateral extensions of national authority into the international commons is significant. Yet current debates about the 1982 Convention on the Law of the Sea have not centered on the value of the Convention’s dispute settlement articles. Many of these debates concern whether particular Convention articles reflect customary international law. The Convention’s compulsory third-party dispute settlement provisions, which will utilize new institutional structures, certainly will not become customary international law. Other current debates relate to the content of, and the procedures for implementing, potential changes

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81. *Id.* art. 300.

82. COMMENTARY, *supra* note 4, at 152.

or clarifications affecting Part XI of the Convention, which concerns exploitation of seabed resources in the area beyond national jurisdiction. Such changes or clarifications may well be necessary before developed mining states will ratify or accede to the Convention. If problems with Part XI prevent the Convention's entry into force, the dispute settlement provisions of the Convention will be lost.

The 1982 Law of the Sea Convention may marshal a sufficient number of ratifications and accessions to enter into force, even though many states, including the developed states, may not become parties. Nonparties would not automatically be able to take advantage of the Convention's provisions for compulsory binding adjudication, even in disputes with parties to the Convention.<sup>83</sup> This fact would contribute to the pressures pushing against uniform observation and interpretation of Convention norms.

The struggle in UNCLOS III to achieve consensus on dispute settlement mechanisms still has value, even if the mechanisms are never widely used. UNCLOS III teaches us what is politically achievable in complex treaty negotiations involving many states with diverse attitudes and experiences toward formal methods of dispute settlement. States may draw from the experience of the 1982 Convention to incorporate dispute settlement provisions in multilateral treaties involving fewer issues and fewer states. Treaties negotiated since 1982, in fact, have adopted some of the dispute settlement features of the Law of the Sea Convention. For example, the 1985 Vienna Convention for the Protection of the Ozone Layer requires compulsory conciliation of disputes.<sup>84</sup> The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities requires binding third-party adjudication of most disputes, but allows the parties to choose between two forum options.<sup>85</sup> Future treaties may create new tribunals if the parties want to avoid the jurisprudence of the ICJ, provide a forum that can offer particular expertise, or allow access for non-states. Most broadly and most significantly, the work of UNCLOS III helps to highlight the role that treaty

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83. See, e.g., *Discussion*, in CONSENSUS AND CONFRONTATION, *supra* note 64, at 497-99 (comments of T. Koh, L. Lee & S. Nandan); Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541, 550 (1983). States that are not parties to the Convention may have access to the ITLOS if a case is "submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all parties to that case." LOS Convention, *supra* note 1, Annex VI, art. 20. See COMMENTARY, *supra* note 4, at 375.

84. *Done* Mar. 22, 1985, art. 11, 26 I.L.M. 1529 (1987).

85. *Done* June 2, 1988, arts. 55-59, 27 I.L.M. 868 (1988).

provisions for compulsory third-party adjudication can play in clarifying and promoting the observance of treaty norms.