

Center for Oceans Law and Policy  
University of Virginia

# UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982

## A COMMENTARY

### Volume V

Articles 279 to 320  
Annexes V, VI, VII, VIII and IX  
Final Act, Annex I, Resolutions I, III and IV

Myron H. Nordquist  
Editor-in-Chief

Shabtai Rosenne and Louis B. Sohn  
Volume Editors



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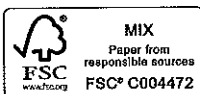
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5. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 9, VI Off. Rec. 144 (President).
6. A/CONF.62/WP.10 (ICNT, 1977), article 287, VIII Off. Rec. 1, 46.
7. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 287. Reproduced in I Platzöder 375, 491-92.
8. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 287. Reproduced in II Platzöder 3, 120.
9. A/CONF.62/WP.10/Rev.3\* (ICNT/Rev.3, 1980, mimeo.), article 287. Reproduced in II Platzöder 179, 297.
10. A/CONF.62/L.78 (Draft Convention, 1981), article 287, XV Off. Rec. 172, 219.

### Drafting Committee

11. A/CONF.62/L.75/Add.2 (1981, mimeo.).
12. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).

### Informal Documents

13. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 9; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 9 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.
14. SD/1 (1978, mimeo.) (Netherlands and Switzerland). Reproduced in XII Platzöder 234.

## COMMENTARY

**287.1.** While many States had agreed early in the Conference that most disputes arising under the Law of the Sea Convention should be submitted to a procedure entailing a binding decision, from the beginning there was disagreement on the court or tribunal to which these disputes would be presented. Some States argued for conferring jurisdiction over law of the sea disputes on the International Court of Justice at The Hague, which has already rendered several important judgments on disputes relating to the law of the sea.<sup>1</sup> They emphasized the need for uniformity of international jurisprudence and the danger of having too many tribunals which might render conflicting decisions. The Court was not too busy, and it was felt that it should not be deprived of the opportunity to increase its jurisdiction over such an important area as the law of the sea.<sup>2</sup>

<sup>1</sup> See, in particular, the judgments of the International Court of Justice in the following cases: *Corfu Channel* (U.K./Albania), 1949 ICJ Reports 4; *Fisheries* (U.K. v. Norway), 1951 *ibid.* 116; *North Sea Continental Shelf* (F.R.G./Denmark; F.R.G./Netherlands) 1969 *ibid.* 3; *Fisheries Jurisdiction* (U.K. v. Iceland, and F.R.G. v. Iceland) 1974 *ibid.* 3 and 175; *Continental Shelf* (Tunisia/Libya), 1982 *ibid.* 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/U.S.), 1984 *ibid.* 246; and *Continental Shelf* (Libya/Malta), 1985 *ibid.* 13.

<sup>2</sup> See, e.g., the statements in the Plenary during the fourth session (1976) by representatives of Switzerland, 59th meeting, para. 23, V Off. Rec. 15; Denmark, *id.*, para. 58, *ibid.* 19; Japan, 60th meeting, para. 58, *ibid.* 27; Sweden, 61st meeting, para. 5, *ibid.* 30; Turkey, *id.*, para. 11, *ibid.* 31; Nigeria, *id.*, para. 58, *ibid.* 35; Mauritius, 62nd meeting, para. 12, *ibid.* 37; and Uruguay, *id.*, para. 98, *ibid.* 43-44.

Other States expressed preference for a special Law of the Sea Tribunal, arguing the need for a tribunal which would be less conservative than the International Court of Justice, would better understand the new law of the sea, and would be more representative of various legal systems and the different regions of the world. They also pointed out that the International Court of Justice was only open to States, and in some law of the sea matters it would be important to allow international organizations, corporations and individuals to have access to the tribunal. In this context, it was also noted that the statute of the International Tribunal for the Law of the Sea can provide such access in appropriate cases.<sup>3</sup>

A third group of States opposed the establishment of such a tribunal, pointing out that standing tribunals were too rigid, as the parties could not choose the judges most knowledgeable on the subject of the dispute and had to accept a preordained procedure which was ponderous and slow. Some of them claimed that arbitration is a more flexible procedure, in that parties are allowed to select the arbitrators and can therefore ensure a proper balance in the tribunal. Parties can also design an expeditious arbitration procedure, allowing a prompt decision of their dispute, thus preventing a dangerous deterioration of relations between parties, which often results from protracted disputes.<sup>4</sup>

Still another group of States advocated a more functional approach which would establish special procedures for each main category of disputes (e.g., those relating to seabed mining, navigation, fisheries, marine pollution and scientific research). They felt that as many law of the sea disputes are likely to relate to technical matters, it would not be appropriate for the tribunal to be composed only of lawyers; instead it should be selected primarily from lists of experts nominated by technically competent agencies such as the Inter-Governmental Maritime Consultative Organization (IMCO) [later the International Maritime Organization (IMO)], with respect to navigation (including pollution by vessels or by dumping); the Food and Agriculture Organization (FAO) with respect to fisheries; or the Intergovernmental Oceanographic Commission (IOC) of UNESCO, with respect to marine scientific research.<sup>5</sup>

<sup>3</sup> See, e.g., the statements in the Plenary during the fourth session (1976) by representatives of El Salvador, 58th meeting, paras. 5 and 11, V Off. Rec. 9; Australia, id., para. 15, *ibid.* 10; Cyprus, 60th meeting, para. 47, *ibid.* 26; United States of America, 61st meeting, para. 19, *ibid.* 31-32; Yugoslavia, id., para. 24, *ibid.* 32; Peru, id., para. 38, *ibid.* 33; Zaire, 62nd meeting, para. 24, *ibid.* 37; Tunisia, id., para. 30, *ibid.* 38; Ecuador, id., para. 46, *ibid.* 39; and Fiji, 64th meeting, para. 24, *ibid.* 49. But see also the statements of representatives of United Kingdom, 59th meeting, para. 15, *ibid.* 15; German Democratic Republic, id., para. 73, *ibid.* 20; Japan, 60th meeting, para. 59, *ibid.* 27; Poland, 61st meeting, para. 32, *ibid.* 32-33; Mauritius, 62nd meeting, para. 12, *ibid.* 37; and Israel, id., para. 52, *ibid.* 40.

<sup>4</sup> See, e.g., the statements in the Plenary during the fourth session (1976) by representatives of France, 59th meeting, paras 8-10, V Off. Rec. 14; and Madagascar, 61st meeting, para. 44, *ibid.* 34.

<sup>5</sup> See, e.g., the statements in the Plenary during the fourth session (1976) by representatives of France, 59th meeting, para. 5, V Off. Rec. 13; German Democratic Republic, id., para. 70, *ibid.* 20; Japan, 60th meeting, para. 58, *ibid.* 27; Bulgaria; id., para. 76, *ibid.* 29; Poland, 61st meeting, para. 30, *ibid.* 32; and Trinidad and Tobago, 62nd meeting, para. 34, *ibid.* 38. But

Finally, a few countries completely opposed the idea of binding third-party decisions and expressed preference for the 1958 solution, that is, for an optional protocol for the settlement of disputes.<sup>6</sup>

**287.2.** Anticipating this problem, the informal working group on the settlement of disputes (see para. XV.4 above), which first met in 1974 and was enlarged in 1975 (see paras. XV.4 and XV.5 above), arranged a private meeting of some interested delegations (at Montreux) to find a solution. At that time, Professor Riphagen (Netherlands) suggested that each party to the Convention should be allowed to select the court or tribunal it prefers; and that if it does not make a selection, it should be considered to have accepted the choice made by the other party to the dispute.<sup>7</sup> The working group subsequently prepared a draft listing the three possible choices – arbitral tribunal, special Law of the Sea Tribunal and the International Court of Justice – and provided accordingly that “any case against a Contracting Party can be submitted only to the tribunal the jurisdiction of which has been accepted by that Party at the time the proceedings are being instituted,” that is, the tribunal of the “respondent” (Source 13). President Amerasinghe’s initial draft (Source 3) contained the same three choices but provided for automatic jurisdiction of the Law of the Sea Tribunal, unless both parties have selected by prior special declarations either the International Court of Justice or an arbitral tribunal.

**287.3.** As a result of the discussion at the fourth session of the Conference (1976), a fourth choice was added entailing a system of special procedures for four categories of disputes: those relating to fisheries, [marine] pollution, scientific research and navigation (see Source 4).<sup>8</sup> Questions were raised about likely difficulties with respect to fitting a particular dispute within a particular category (e.g., whether it related to pollution, navigation or fishing). As no solution could be agreed upon, the choice seemed to belong to the applicant party, subject to the power of the chosen court or tribunal to determine whether the dispute, in whole or in part, was within its jurisdiction.

**287.4.** The provision about reference to the tribunal of the defendant was reinstated in the ISNT, Part IV/Rev.1 (Source 4), to provide for the case where the parties choose different procedures. In the discussion of this provision in the Informal Plenary at the fifth session (1976), some States

see also the statements of the representatives of Argentina, 59th meeting, para. 52, *ibid.* 18-19; Bahrain, 62nd meeting, para. 5, *ibid.* 36; Mauritius, *id.*, para. 13, *ibid.* 37; and Ecuador, *id.*, para. 47, *ibid.* 39.

<sup>6</sup> See, e.g., the statement by China, 60th meeting (1976), para. 28, V Off. Rec. 24.

<sup>7</sup> Professor Riphagen repeated that suggestion at the fourth session of the Conference (1976), 60th plenary meeting, para. 7, V Off. Rec. 22. For similar suggestions, with variations, see also the statements by representatives of Singapore, 58th meeting, para. 22, *ibid.* 10; New Zealand, *id.*, para. 32, *ibid.* 11; Federal Republic of Germany, *id.*, para. 38, *ibid.* 12; and Ireland, 64th meeting, para. 7, *ibid.* 47.

<sup>8</sup> Annex II to the ISNT, Part IV/Rev.1 (Source 4, at 197-201), contains this “System of Special Procedures.”

9. A/CONF.62/L.41 (1979), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 94 (Chairman, Third Committee).
10. A/CONF.62/L.45 (1979), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 110 (President).
11. A/CONF.62/L.50 (1980), XIII Off. Rec. 80 (Chairman, Third Committee).
12. A/CONF.62/L.52 and Add.1 (1980), XIII Off. Rec. 86 (President).
13. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 296. Reproduced in II Platzöder 3, 121-23.
14. A/CONF.62/WS/5 (1980), XIII Off. Rec. 104 (Argentina).
15. A/CONF.62/L.59 (1980), XIV Off. Rec. 130 (President).
16. A/CONF.62/WP.10/Rev.3\* (ICNT/Rev.3, 1980, mimeo.), article 297. Reproduced in II Platzöder 179, 300-01.
17. A/CONF.62/L.78 (Draft Convention, 1981), article 297, XV Off. Rec. 172, 220-221.

#### Drafting Committee

18. A/CONF.62/L.75/Add.5 (1981, mimeo.).
19. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).
20. A/CONF.62/L.152/Add. 25 (1982, mimeo.).
21. A/CONF.62/L.160 (1982), XVII Off. Rec. 225 (Chairman, Drafting Committee).

#### Informal Documents

22. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 17; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 17 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.
23. NG5/16 (1978), reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, 120 (Chairman, NG5).
24. NG5/17 (1978), reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, 117 (Chairman, NG5). [The symbol "NG5/17" has been dropped from the reproduction of this document in the English version of X Off. Rec].
25. NG5/18 (1978), reproduced in A/CONF.62/RCNG/2 (1978), X Off. Rec. 126, 168 (Chairman, NG5).
26. SD/3 (1980, mimeo.) (President). Reproduced in XII Platzöder 239.
27. SD/3/Add.1 (1980, mimeo.) (President). Reproduced in XII Platzöder 275.

### COMMENTARY

**297.1.** The acceptance by many participants in the Third U.N. Conference on the Law of the Sea of the provisions for the settlement of disputes relating to the interpretation of the Law of the Sea Convention was, from the very beginning, conditioned on the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision.

There was no doubt that the basic obligations of Part XV, section 1, relating to the settlement of disputes by means agreed upon by the parties to the dispute (articles 279 to 284) should apply to all disputes arising under the Convention. Beyond that, however, there was some opposition to an unlimited obligation to submit a dispute to a procedure entailing a binding decision. When Ambassador Reynaldo Galindo Pohl (El Salvador) introduced the first general draft on the settlement of disputes at the second session of the Law of the Sea Conference (1974), he immediately highlighted the need for exceptions from obligatory jurisdiction with respect to "questions directly related to the territorial integrity of States." Otherwise, a number of States might have been dissuaded from ratifying the Convention or even signing it.<sup>1</sup>

**297.2.** The document presented at Caracas by an informal working group (Source 1) suggested three basic options on the subject, each of which was defended strongly within the group. First, the integrity of the compromise package to be embodied in the Convention was to be preserved at all cost; therefore, an effective dispute settlement system must apply "to all disputes relating to the interpretation and application of this Convention" (*ibid.*, Alternative A). Second, the dispute settlement machinery should have no jurisdiction over specified categories of issues, or its jurisdiction over those issues should be limited to non-binding decisions (*ibid.*, Alternatives B.1 and B.2). The third option contained an "opt-out" system which would allow States to exclude specified categories of disputes completely from dispute settlement or at least from procedures entailing binding decisions (*ibid.*, Alternatives C.1 and C.2). In specifying the categories of disputes that could be excluded, the group listed such categories as: (a) disputes arising out of the normal exercise of regulatory or enforcement jurisdiction (except in cases of gross or persistent violation of the Convention or abuse of power) or, alternatively, disputes arising out of the normal exercise of discretion by a coastal State pursuant to its regulatory and enforcement jurisdiction under the Convention (except in cases involving an abuse of power); (b) disputes concerning sea boundary delimitation between States, including those involving historic bays or limits of the territorial sea; (c) disputes concerning vessels and aircraft entitled to sovereign immunity under international law, and similar cases in which sovereign immunity applies; (d) disputes concerning military activities; and (e) other categories that may be agreed upon.

**297.3.** On the basis of further negotiations at the third session of the Conference (1975), the informal negotiating group presented a concrete draft of provisions on dispute settlement (Source 22), which in article 17 tried to limit a State's right to make exceptions, by specifying the categories of disputes in which a State can choose not to participate in whole or in part. That text read as follows:

<sup>1</sup> 51st plenary meeting (1974), para. 10, I Off. Rec. 213.

1. When ratifying this Convention, or otherwise expressing its consent to be bound by it, a State may declare that, with respect to any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under this Convention, it limits its acceptance of some of the dispute settlement procedures specified in this Convention to those situations in which it is claimed that a coastal State has violated its obligations under this Convention by:

(a) interfering with the freedoms of navigation or overflight or of the laying of submarine cables or pipelines, or related rights and duties of other States;

(b) failing to have due regard to other rights and duties of other States under this Convention;

(c) not applying international standards or criteria established by this Convention or in accordance therewith; or

(d) abusing or misusing the rights conferred upon it by this Convention (*abus ou détournement de pouvoir*) to the disadvantage of another Contracting Party.

2. If one of the parties to a dispute has made such a declaration and if the parties to a dispute are not in agreement as to whether the dispute involves a violation of this Convention specified in the preceding paragraph, this preliminary question shall be submitted to decision by the tribunal having jurisdiction under Articles 9 and 10 of this Convention.

3. Whether or not it has made a declaration under paragraph 1 of this Article, a State may declare, when ratifying this 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 this Convention with respect to one or more of the following categories of disputes:

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

(b) Disputes concerning sea boundary delimitations between adjacent 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, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

(d) Disputes or situations 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 has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.

(e) ....



(f) ....

4. A Contracting Party, which has made a declaration under paragraphs 1 or 3 of this Article, may at any time withdraw all or part of its exceptions.

5. If one of the Contracting Parties has made a declaration under paragraphs 1 or 3 of this Article, any other Contracting Party may enforce the same exception in regard to the Party which made the declaration.

**297.4.** In revising this text for inclusion in Part IV of the ISNT (Source 2), President Amerasinghe retained its basic concepts, but clarified it by adding a more explicit introductory phrase. In this text, he omitted the reference to abuse or misuse of rights or abuse of power in subparagraphs 1(d) and 3(a); omitted in subparagraph 3(b) the alternative of submitting boundary disputes to some other nonbinding procedure; limited the right to opt out to the four categories specified; and improved the provisions relating to the effect of the declarations. Consequently, the President's text (Source 2) read as follows:

1. Nothing contained in the present Convention shall require any Contracting Party to submit to the dispute settlement procedures provided for in the present Convention any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under the present Convention, except when it is claimed that a coastal State has violated its obligations under the present Convention: (i) by interfering with the freedoms of navigation or overflight, or the freedom to lay submarine cables and pipelines, or related rights and duties of other Contracting Parties; (ii) by refusing to apply international standards or criteria established by the present Convention or in accordance therewith, provided that the international standards or criteria in question shall be specified.

2. When ratifying the present Convention, or otherwise expressing its consent to be bound by it, a Contracting Party may declare that it does not accept some or all of the procedures for the settlement of disputes specified in the present Convention with respect to one or more of the following categories of disputes:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention;

(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, providing 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;

(c) Disputes concerning military activities, including those by Government vessels and aircraft engaged in non-commercial service, it being understood that the law-enforcement activities pursuant to the present Convention shall not be considered military activities;

(d) 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 has determined that specified proceedings under the present Convention would not interfere with the exercise of such functions in a particular case.

3. If the parties to a dispute are not in agreement as to the applicability of paragraphs 1 or 2 to a particular dispute, this preliminary question may be submitted for decision to the tribunal having jurisdiction under articles 9 and 10 of this chapter by application of a party to the dispute.

4. A Contracting Party, which has made a declaration under paragraph 2, may at any time withdraw it in whole or in part.

5. Any Contracting Party which has made a declaration under paragraph 2 shall not be entitled to invoke any procedure excepted under such declaration in relation to any excepted category of dispute against any other Contracting Party.

6. If one of the Contracting Parties has made a declaration under paragraph 2(b), any other Contracting Party may compel the declarant to refer the dispute to the regional or other third-party procedure specified in such declaration.

**297.5.** In commenting on this proposal (see Source 3), President Amerasinghe pointed out that he had made "an attempt to compromise the extreme and conflicting views regarding the question of including or excluding certain disputes relating to the economic zone from binding dispute settlement procedures." He noted that certain drafts presented to the Sea-Bed Committee proposed that "disputes within this zone be dealt with exclusively by the authorities of the coastal State."<sup>2</sup> As a possible solution, he suggested the inclusion of "third party dispute settlement procedures for certain types of disputes whilst others are excluded." He called attention to the view that "it is not an infringement of rights to ensure that the limits of those rights and the corresponding obligations in the context of the interpretation or application of the convention should be [justiciable] be-

<sup>2</sup> For the President's remarks see A/CONF.62/WP.9/Add.1 (1976), para. 31, V Off. Rec. 122, 124. According to article F of the draft articles on fisheries presented by Ecuador, Panama and Peru, "[a]ny dispute concerning fishing or hunting activities by foreign-flag vessels within the zone under the sovereignty and jurisdiction of the coastal State shall be settled by the competent authorities of the coastal State." A/AC.138/SC.II/L.54, reproduced in III SBC Report 1973, Annex II, Appendix V, number 44, at 107.

More elaborately, the draft articles on fisheries presented by Canada, India, Kenya and Sri Lanka proposed in article 13 that the "jurisdiction and control over all fishing activities within the exclusive fishery zone shall lie with the coastal State concerned"; and that "[a]ny difference or dispute concerning the limits of the zone or the interpretation or validity of the terms, conditions or regulations referred to in article 5 [relating to historic fishing rights of neighboring developing coastal States] or the interpretation and application of these [i.e., fishery] articles shall be settled by the competent institutions of the coastal State concerned." A/AC.138/SC.III/L.38, *ibid.*, number 27, at 82.

For other proposals on the subject, see V SBC Report 1973, SC.II/WG/Paper No. 4, section 21.

fore an appropriate forum." To the argument that such a provision would leave room "for the exclusive jurisdiction of the coastal State to be questioned," he replied that it "is not the exclusive jurisdiction that is meant to be questioned but the manner of its exercise."

297.6. The President's first draft (Source 2) was subjected to a thorough debate during the fourth session of the Conference (1976). The views of the delegations on the topic of desirable or necessary exclusions covered the whole spectrum.<sup>3</sup> In opening the debate Dr. Reynaldo Galindo Pohl (El Salvador), one of the cochairmen of the earlier informal working group on the settlement of disputes, emphasized that "in outlining the exceptions great care should be taken to use language that aptly described the particular situation and to avoid general and abstract terms, for otherwise a wide loop-hole would be provided through which States could evade their obligations." He suggested that exceptions "should relate only to compulsory jurisdiction, not to other means for the settlement of disputes," as compulsory resort to conciliation "might be a valid substitute for the tribunal in certain cases." He pleaded also for equal treatment of the exceptions, and complained that, in the draft before the Conference, boundary disputes were not treated equally, because a State which excluded boundary disputes in accordance with paragraph 2(b) had to accept some other procedure entailing a binding decision.<sup>4</sup>

He was followed by another cochairman of the informal working group, Ambassador Ralph L. Harry (Australia), who stressed the importance of providing "the necessary machinery so that no significant problem of interpretation could long remain without a final and authoritative ruling." He pointed out that "many provisions of the [C]onvention would be acceptable only if their interpretation and application were subject to expeditious, impartial and binding decisions." He added that to allow parties to exclude certain types of disputes from a system of binding settlement might lead to difficulties. "If exceptions were too numerous or too broadly defined, the value of the system would be reduced and the possibility of securing agreement on compromises subject to future interpretation would also be diminished." Any solution would have to "reflect a balance between the rights of the coastal State over its resources and the rights of others."<sup>5</sup>

Many other speakers took a similar position, emphasizing that they would prefer to have no exceptions, but that if there must be some, every proposed exception should be formulated very clearly, and its scope and application should be interpreted restrictively. In particular, several of these speakers insisted that the novel provisions relating to the exclusive economic zone should not be exempt from the dispute settlement system. For instance, the Soviet delegate considered that an exemption of disputes arising out of the exercise of discretionary rights by the coastal State would considerably diminish the value of the procedures of dispute settlement, as

<sup>3</sup> The debate extended from the 58th to the 65th plenary meetings (1976), V Off. Rec. 8-54.

<sup>4</sup> 58th plenary meeting, para. 10, V Off. Rec. 9.

<sup>5</sup> Ibid. 9-10, paras. 12 and 18-19.

they would no longer "protect the legitimate rights and interests of other States Parties to the Convention."<sup>6</sup>

Others, with equal vigor, insisted that the hard-won exclusive jurisdiction of the coastal States in the economic zone should not be jeopardized by its submission to third-party adjudication. Ambassador Hans G. Andersen (Iceland) pointed out, for instance, that "many States, although professing to support the concept of the economic zone, were endeavouring in various ways to weaken it"; that, in particular, they "wanted to open up the possibility of disputing the decisions of the coastal State." He also felt that, if "that were to happen, the concept of the exclusive economic zone would be rendered illusory and meaningless"; and that, to avoid this, "the decisions of the coastal State with regard to the resources within the exclusive economic zone must be considered final."<sup>7</sup> Some of the delegates supporting this view, however, were willing to accept mandatory settlement of disputes relating to navigation in, and overflight over, the exclusive economic zone.<sup>8</sup>

<sup>6</sup> 58th meeting, para. 28, V Off. Rec. 11. See also statements in the Plenary by the delegations of Singapore, *id.*, para. 23, *ibid.* 10; New Zealand, *id.*, para. 35, *ibid.* 11-12; F.R.G., *id.*, para. 41, *ibid.* 12-13; U.K., 59th meeting, para. 17, *ibid.* 15; Switzerland, *id.*, para. 29, *ibid.* 16 (there should be no exceptions); Denmark, *id.*, para. 60, *ibid.* 19 (the proposed exceptions were "so far-reaching as to undermine the whole idea of a mandatory dispute settlement procedures"); the Netherlands, 60th meeting, paras. 11-12, *ibid.* 22 ("[t]here was no justification for any of the exceptions" mentioned in the President's draft); Colombia, *id.*, para. 18, *ibid.* 23; Spain, *id.*, para. 23, *ibid.* 23; Italy, *id.*, para. 32, *ibid.* 24 (exceptions were contrary to the principle of sovereign equality, as they "would allow one party to impose on the others its interpretation of the rights and obligations it had freely accepted upon becoming party to the convention"); Japan, *id.*, para. 57, *ibid.* 27; Austria, *id.*, para. 62, *ibid.* 28 (as the economic zone was a new legal institution, 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"); Republic of Korea, *id.*, para. 73, *ibid.* 29; Yugoslavia, 61st meeting, para. 27, *ibid.* 32; Hungary, 62nd meeting, paras. 60-61, *ibid.* 41 (a landlocked country could not accept a full exemption of disputes arising out of the exercise of discretionary rights by a coastal State, as "the convention should contain adequate safeguards against the abuse of those rights"); Nepal, 63rd meeting, para. 18, *ibid.* 45 (rights were never legal rights unless they were "legally protected rights," and they "should never be left to the unilateral interpretation of an interested party"); Iceland, 64th meeting, para. 12, *ibid.* 48; Fiji, *id.*, para. 23, *ibid.* 49 (exceptions were "too broad and ambiguous" and would exclude "many disputes which by their very nature should be the subject of prompt compulsory settlement").

<sup>7</sup> 60th meeting, para. 67, V Off. Rec. 28. See also the statements in the Plenary by the delegations of Kenya, 61st meeting, para. 49, *ibid.* 34 (the obligation to submit the exercise of exclusive jurisdiction to compulsory third-party settlement mechanisms "might be used as a pretext for turning the exclusive economic zone into an international zone," and 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"); Brazil, *id.*, para. 63, *ibid.* 35-36 (no binding decisions are acceptable with respect to disputes relating to matters under the jurisdiction of the coastal State, but certain matters might be referred to some type of international conciliation or arbitration entailing only nonbinding recommendations); Mauritius, 62nd meeting, para. 10, *ibid.* 36-37 (the proposed dispute settlement system would lead to "needless tension and bad feeling" among neighboring States; the reasons against it were "overwhelming"); Venezuela, *id.*, para. 78, *ibid.* 42; Pakistan, 63rd meeting, para. 21, *ibid.* 45; and Democratic People's Republic of Korea, *id.*, para. 31, *ibid.* 46.

<sup>8</sup> See statements in the Plenary by the delegations of India, 59th meeting, para. 44, V Off.

In responding to some of the stronger statements concerning the untouchable sovereignty of the coastal States, Ambassador Andrew J. Jacovides (Cyprus) pointed out that small and militarily weak States "needed the protection of the law, impartially and effectively administered, in order to safeguard [their] legitimate rights"; that there "was a danger that the substantive articles which the Conference was attempting to formulate might be interpreted arbitrarily and applied unilaterally"; that, in consequence, "the whole system would disintegrate amid complete anarchy"; and that, should too broad exceptions be made from the third-party dispute settlement system, especially regarding matters of delimitation, "small and weak States would be left at the mercy of arbitrary interpretations and unilateral measures by States strong enough to impose their will."<sup>9</sup>

297.7. As a result of that plenary debate, the President prepared a revision of Part IV of the ISNT (Source 4), in which he tried to find a middle road between the extreme points presented during that debate. He omitted the optional exception relating to the discretionary rights of the coastal State, as the matter was already covered by the obligatory exclusion in article 18(1) of the text. The latter provision was modified in both directions. On the one hand, the scope of the exclusionary clause was broadened by making it clear that it applied to the whole gamut of the rights of the coastal States, namely to "any dispute in relation to the exercise of sovereign rights, exclusive rights or exclusive jurisdiction of the coastal State." On the other hand, to compensate for this concession to the coastal States, the President made some of the exceptions from the exclusion more explicit by defining more precisely the questions that would remain subject to the jurisdiction of the international courts and tribunals to be established under the Convention. In particular, the revised text provided for submission to international adjudication not only violations of the basic freedoms of navigation and overflight, but also any failure of the coastal States "to give due regard to any substantive rights specifically established by [the Convention] in favor of other States" (article 18, paragraph 1(a)).<sup>10</sup> To balance this extension, the exception permitting the submission to international adjudication of any refusal by a coastal State to apply international standards or criteria established by the Convention, or in accordance therewith, was narrowed down to standards or criteria "which relate to the preservation of the marine environment" (article 18, paragraph 1(c)).

Rec. 18; Argentina, *id.*, para. 49, *ibid.* 18; Chile, *id.*, para. 63, *ibid.* 19; and Senegal, 65th meeting, para. 20, *ibid.* 51.

<sup>9</sup> 60th meeting, paras. 44 and 49, V Off. Rec. 25-26.

<sup>10</sup> A similar exclusion was contained in the 1975 informal working group's draft (Source 21, article 17, paragraph 1(b)), which allowed a coastal State to limit its acceptance of jurisdiction to "situations in which it is claimed that the coastal State has violated its obligations under this Convention by ... failing to have due regard to other rights and duties of other States under this Convention" (namely those other than the basic freedoms). The full text of that provision is reproduced in para. 297.3 above.

the fact that additional recourse to third-party dispute settlement procedures was provided in other paragraphs of that article (see para. 297.19 below).

**297.19.** Subject to further minor drafting changes made in the Draft Convention (Source 17), and by the Drafting Committee (Source 18), this text of article 297 aims at balancing the interests of the coastal States and those of the States with major navigational interests, as well as those of the landlocked and geographically disadvantaged States. The two latter groups wanted to ensure, in particular, that the few rights they were able to salvage in the tough bargaining with the coastal States would be protected by the availability of recourse to third-party dispute settlement procedures. The basic freedoms and rights of the sea – navigation, overflight and the laying of submarine cables and pipelines – as well as 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, as specified in article 58) retained the complete protection of the compulsory adjudicative procedures provided in Part XV, section 2. Such protection was also extended to the marine environment in cases involving contravention of international rules and standards established for the protection and preservation of that environment. Under a parallel provision, non-coastal States acting in contravention of the Convention, or of the laws or regulations enacted by a coastal State, were made subject to adjudication under section 2 of Part XV, as long as those laws and regulations were adopted in conformity with both the Convention itself and with “other rules of international law not incompatible with the Convention.”

Disputes relating to marine scientific research and fisheries were divided into three categories: those that would remain subject to adjudication (namely all those that do not fall into the other two categories), those that would be completely excluded from adjudication (and, like all other disputes, would remain only subject to section 1 of Part XV), and those that would be subject to compulsory resort to conciliation. To the second group belong primarily disputes relating to the exercise by a coastal State of those powers with respect to which the substantive provisions of the Convention granted such State complete discretion. The third group includes disputes involving clear cases of abuse of discretion, where a State manifestly or arbitrarily has failed to comply with some basic obligations under the Convention. In a case relating to such an abuse of discretion, the conciliation commission shall, in accordance with Annex V, section 2, examine the claims and objections of the parties and make recommendations to the parties for an amicable settlement, provided that the conciliation commission shall not substitute its discretion for that of the coastal State. The report of the conciliation commission is to be communicated to the appropriate international organization.

Finally, the coastal States accepted a provision requiring that their agreements with the landlocked and geographically disadvantaged States, with respect to their access to coastal fisheries, shall include sufficient

measures for minimizing the possibility of disagreements concerning the interpretation or application of these agreements, as well as measures for dealing with disagreements should they arise nevertheless.

Despite the complexities of article 297 and some dissatisfaction with various details, the balance of this arrangement was generally accepted early in the Conference. This enabled article 297 to be maintained throughout the Conference and refined, thereby contributing to the integrity of the Convention by making possible agreement on article 309.

**Informal Documents**

19. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 17; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 17 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.
20. NG7/20 (1978, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 408.
21. NG7/20/Rev.1 (1978, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 412.
22. NG7/27 (1979, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 438.
23. NG7/30 (1979, mimeo.) (Israel). Reproduced in IX Platzöder 451.
24. NG7/37 (1979, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 457.
25. NG7/45 (1979, mimeo.), article 298(1)(a), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 107 (Chairman, NG7).
26. SD/3 (1980, mimeo.) (President). Reproduced in XII Platzöder 239.
27. SD/3/Add.1 (1980, mimeo.) (President). Reproduced in XII Platzöder 257.

**COMMENTARY**

**298.1.** In view of the general reluctance to allow reservations to the Law of the Sea Convention and, at the same time, the insistence of some delegations that certain categories of disputes could not be submitted to third-party adjudication, an agreement was reached early in the Conference on the need for a list of well-defined classes of disputes which may be exempted from such adjudication by a declaration filed in advance (see para. 309.6 below). Once the special concerns of the coastal States with respect to their special rights in the exclusive economic zone were satisfied by the provisions which now are incorporated in article 297 (see article 297 Commentary), several other issues remained that had to be taken care of by an exemption clause. Prominent among these issues were disputes relating to sea boundary delimitations, historic bays or titles, military and law enforcement activities, and issues relating to the maintenance of international peace and security which are being dealt with by the Security Council of the United Nations. The provisions relating to each of these categories developed along different lines and will be dealt with separately, after a general consideration of the drafting history of this article.

**298.2.** The idea of a specific exemption clause for certain categories of disputes was considered early in the Conference by the informal working group on the settlement of disputes in 1974. While some of its members believed that the integrity of the compromise packages to be embodied in the Convention had to be preserved at all costs against unravelling by reservations that would actually result in a disintegration of the package, the majority agreed that various States consider certain matters to be so sensitive that they should not be subject to the far-reaching dispute settle-



ment procedures being envisaged for inclusion in the Convention. Consequently, the working group listed in its report (Source 1) alternative formulations of various items suggested by its members, without trying to decide at that time on the general desirability of a particular item or on its most appropriate formulation. These items related to disputes concerning the exercise of a State's regulatory or enforcement jurisdiction, sea boundary delimitations, historic bays, vessels and aircraft entitled to sovereign immunity under international law, and military activities.

**298.3.** Further negotiations at the third session of the Conference (1975) enabled the enlarged informal working group to prepare a more definitive draft of the list of disputes that could be excepted by a declaration (Source 19, para. 3). It included the following items:

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

(b) Disputes concerning sea boundary delimitations between adjacent 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, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

(d) Disputes or situations 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 has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.

Although this list was supposed to be open-ended, no further items were ever added to the list. Further, the first item was soon removed in view of the elaboration of more precise provisions with respect to the applicability of dispute settlement procedures to disputes relating to the exercise by the coastal State of its sovereign rights or jurisdiction (see para. 297.7 above).

**298.4.** The working group's draft of article 17, paragraph 3, was revised slightly by President Amerasinghe for inclusion in article 18, paragraph 2, of his first draft of a new Part IV of the ISNT (Source 2). The only substantive change he made was to omit the reference to abuse of power in subparagraph (a), so that this subparagraph read:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention[.]

**298.5.** During the plenary debate on the settlement of disputes at the fourth session of the Conference (1976) (see para. 297.6 above), issues were raised