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Streamlining The System For Settlement Of Disputes Under The Law Of The Sea Convention

A. O. ADEDE*

I. Introduction

At its resumed ninth session, held in Geneva during the summer of 1980, the Third United Nations Conference on the Law of the Sea ("the Conference") produced the Draft Convention on the Law of the Sea (Informal Text), which is the third revision of the Informal Composite Negotiating Text ("Rev. 3").¹ The second revision ("ICNT, Rev. 2")² was completed during the first phase of the ninth session, held in New York during the spring of 1980, and the first revision ("ICNT, Rev. 1")³ was completed during the eighth session of the Conference, held in Geneva during the spring of 1979.

The system for the settlement of disputes as formulated in the original version of the Informal Composite Negotiating Text ("ICNT"),⁴ which was produced in 1977 at the end of the sixth session of the Conference, and the background discussions on the disputes-settlement draft articles of the ICNT, have been

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1. Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/CONF.62/WP.10/Rev.3 (1980) [hereinafter cited as Rev. 3].

2. Informal Composite Negotiating Text, Revision 2, U.N. Doc. A/CONF.62/WP.10/Rev.2 (1980) [hereinafter cited as ICNT, Rev. 2]. Rev. 3, which contains few substantive changes from ICNT, Rev. 2, is not yet widely available. Significant changes produced at the resumed ninth session are noted throughout.

3. Informal Composite Negotiating Text, Revision 1, U.N. Doc. A/CONF.62/WP.10/Rev.1 (1979) [hereinafter cited as ICNT, Rev. 1].

4. Informal Composite Negotiating Text, 8 Third UNCLOS, Off. Rec. 1 (1978), U.N. Doc. A/CONF.62/WP.10 (1977) [hereinafter cited as ICNT].

extensively analyzed elsewhere.⁵ The background analysis indicates, for example, that the establishment of a viable system for the settlement of disputes was regarded as one of the cornerstones of the new world order in the oceans which the comprehensive Law of the Sea Convention being drafted by the Conference is intended to create. Thus, during the second session of the Conference, held in Caracas, Venezuela in 1974, an informal working group of delegations took up discussion of the subject. At the end of this session, the group submitted a preliminary draft addressing eleven specific issues regarding the question of settlement of disputes.⁶

During the third session of the Conference, held in Geneva in the spring of 1975, the informal working group on the settlement of disputes continued its work, holding more frequent meetings⁷ and producing another document, which contained a series of draft articles on the subject.⁸ On the basis of that document, the President of the Conference, after the 1975 Geneva session,⁹ prepared an informal paper for discussion at the next

5. See, e.g., Adede, *Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention*, 10 N.Y.U.J. INT'L L. & POL. 253-93 (1977) [hereinafter cited as *Prolegomena*].

6. The draft co-sponsored by Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, the Netherlands, Singapore and the United States of America appears in 3 Third UNCLOS 85 (1975), U.N. Doc. A/CONF.62/L.7 (1974). For a commentary on the document, see Sohn, *Settlement of Disputes Arising out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495 (1975). See also *Prolegomena*, *supra* note 5, at 255-62.

The brief first session of the Conference, held in New York in 1973, dealt with the Conference's organizational and administrative matters, such as the establishment of the main committees and assignment of Law of the Sea topics to various committees. 1 Third UNCLOS Off. Rec. 3 (1973).

7. At the Geneva session of the Conference, the Working Group elected Co-Chairmen, Ambassadors R. Galindo Pohl (El Salvador) and R.L. Harry (Australia). When, at that session, Ambassador Galindo Pohl became Chairman of Committee II of the Conference, the Working Group elected Dr. A.O. Adede (Kenya) as Co-Chairman. Professor Louis B. Sohn (U.S.A.) served as Rapporteur for the Working Group throughout its work from the 1974 Caracas session to the fifth session, held in New York in 1976. *Prolegomena*, *supra* note 5, at 255 n. 8.

8. U.N. Doc. SD.Gp/2nd Sess./No. 1/Rev.5 (1975). For a commentary on the document, see Adede, *Settlement of Disputes Arising under the Law of the Sea Convention*, 69 AM. J. INT'L L. 798 (1975). See also *Prolegomena*, *supra* note 5, at 256-62.

9. As a result of the 1975 Geneva session of the Conference, each Chairman of the three main committees of the Conference prepared an Informal Single Negotiating Text ("ISNT") to be used as a procedural device to assist in further negotiation of the items assigned to the committees. The three ISNTs were in three parts and were distributed as an official Conference document, 4 Third UNCLOS Off. Rec. 137, U.N. Doc. A/

session of the Conference.¹⁰ This informal paper on settlement of disputes was the subject of a formal, general debate in the plenary meeting of the Conference during the fourth session, held in New York in the spring of 1976. Thus, during the fourth session, the Conference for the first time took up officially and formally the discussion of the question of settlement of disputes under the Law of the Sea Convention. The informal working group which had pioneered the Conference work on this subject terminated its work at this session. Subsequent discussions of the subject took place in the informal plenary of the Conference, chaired by the President of the Conference.

On the basis of the comments on the President's paper, which was presented during the formal debate at the fourth session, the President produced a revised conference document on the subject of settlement of disputes.¹¹ The President's document was the subject of article-by-article discussion by the Conference in the informal plenary during the fifth session, held in New York in the summer of 1976. The discussions led to a second revision of the President's paper,¹² and this revision became the subject of negotiation at the next session of the Conference.

During the sixth session, held in New York in the summer of 1977, the Conference produced a unified document containing all the draft articles which, until then, had existed as separate Parts I, II and III, prepared by the Chairmen of the three main

CONF.62/WP.8 (Parts I-III) (1975).

10. Informal Single Negotiating Text Part IV, 5 Third UNCLOS Off. Rec. 111 (1976), U.N. Doc. A/CONF.62/WP.9 (1975). For comments on the President's paper, see *Prolegomena*, *supra* note 5, at 263-68.

11. Informal Single Negotiating Text Part IV, 5 Third UNCLOS Off. Rec. 185, U.N. Doc. A/CONF.62/WP.9/Rev.1 (1976). At the 1976 spring session of the Conference, the three parts of the ISNT, *see* note 9 *supra*, were revised. The new documents were called Revised Single Negotiating Text ("RSNT") Parts I-III, 5 Third UNCLOS Off. Rec. 125, U.N. Doc. A/CONF.62/WP.8/Rev.1 (1976). The President's paper, although still designated ISNT, became Part IV of the RSNT. 5 Third UNCLOS Off. Rec. 185 & n. ** (1976). In formulating its draft provisions on settlement of disputes, it relied on the substantive relevant texts of Parts I-III. *See* Adede, *Law of the Sea: The Scope of the Third-Party, Compulsory Procedures for Settlement of Disputes*, 71 AM. J. INT'L L. 305 (1977). *See also Prolegomena*, *supra* note 5, at 279-309.

12. Revised Single Negotiating Text Part IV, 6 Third UNCLOS Off. Rec. 144 (1977), U.N. Doc. A/CONF.62/WP.9/Rev.2 (1976). For commentary on one aspect of the document, *see* Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9, 17 (1977). *See also Prolegomena*, *supra* note 5, at 309-29.

committees of the Conference, and Part IV, prepared by the President, on settlement of disputes. The result was the ICNT, comprising 303 articles and 7 annexes,¹³ which took the form of an informal draft convention. Settlement of disputes was the subject of Articles 279-297 (Part XV) of the ICNT and of Annex IV on conciliation, Annex V on the Statute of the Law of the Sea Tribunal, Annex VI on arbitration, and Annex VII on special arbitration procedures.¹⁴

At its seventh session, held in Geneva during the spring of 1978, the Conference identified, as one of the outstanding core issues, the question of settlement of disputes and established a negotiating group to consider specific aspects of the problem.¹⁵ The need for further refinement of the disputes-settlement draft articles was reflected in the discussions which led to the first revision of the ICNT,¹⁶ during the eighth session, held in Geneva in the spring of 1979.

In New York in the summer of 1979, during the resumed eighth session of the Conference, focus was upon the articles on settlement of those disputes relating to Part XI of the ICNT which deals with sea-bed matters. A Group of Legal Experts on the settlement of disputes relating to Part XI was established; it carried out the work discussed and analysed below.¹⁷ In the context of its work on delimitation, negotiating Group 7 also made efforts to formulate articles on settlement of disputes.¹⁸

Since, as noted earlier, a detailed discussion of the evolution

13. ICNT, *supra* note 4.

14. For comments on the disputes-settlement provisions, see Adede, *Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole*, 72 AM. J. INT'L L. 84 (1978). See also *Prolegomena*, *supra* note 5, at 329-73.

15. Negotiating Group 5, chaired by Ambassador C. Stavropoulos (Greece), dealt with the question of settlement of disputes relating to the exercise of sovereign rights of coastal States in the exclusive economic zone. Negotiating Group 7, chaired by Judge E. J. Manner (Finland), dealt with the question of settlement of disputes as an element of the question of delimitation of maritime boundaries between States with opposite or adjacent coasts. For a summary of the work at the first phase of the eighth session of the Conference in Geneva in the spring of 1978 of these two Negotiating Groups, see *Prolegomena*, *supra* note 5, at 373-85. For a discussion of subsequent work of Negotiating Group 7, see notes 98-131 and accompanying text *infra*.

16. ICNT, Rev. 1, *supra* note 3.

17. See notes 48-82 and accompanying text *infra*.

18. See note 15 *supra*.

and development of the draft articles on settlement of disputes from the 1974 to the 1978 sessions of the Conference has been done elsewhere,¹⁹ the purpose of this article is to offer a similar analysis of the work of the Conference, from the eighth session, in the spring and summer of 1979, and during the ninth session, in New York in the spring of 1980 and in Geneva in the summer of 1980, in further streamlining the system for settlement of disputes.

A. *Evolution of the Disputes-Settlement System: Acceptance of Multiple Forums*

The careful attention which the Third Law of the Sea Conference has devoted to the question of settlement of disputes, especially the Conference's efforts towards establishing a system which includes third-party judicial procedures available to the traditional subjects of international law (States), to individuals (natural or juridical), and/or to an international organization (the Sea-Bed Authority),²⁰ is noteworthy. Moreover, it is a unique experiment in that States have usually been reluctant to accept the inclusion in a convention of disputes-settlement machinery resulting in binding decisions. They have balked even more strenuously at any suggestion that such a system should be available also to other entities such as natural or juridical persons and international organizations.

It is from unavoidable necessity that the Conference has engaged in these efforts to expand the scope of international forums for the settlement of the law of the sea disputes. Designed to be a comprehensive treatment of the law of the sea issues, the Convention being drafted deals with questions which would give rise to various categories of disputes: disputes arising between or among States in their relations *inter se*; disputes between or among one or more States and natural or juridical persons or the Sea-Bed Authority; disputes between or among natural or juridical persons; and disputes between or among the Sea-Bed Authority and natural or juridical persons.

19. *Prolegomena*, *supra* note 5.

20. Article 37 of Annex V of the proposed Statute of the Law of the Sea Tribunal provides access to the Sea-Bed Disputes Chamber to these three categories of parties. U.N. Doc. A/CONF.62/WP.10/Rev.1/Annex V (1979).

Having regard to such a mixture of the would-be actors in the ocean space, it has been necessary, under the Convention, to establish new international forums with expanded jurisdictions. The International Court of Justice ("ICJ"), under its existing Statute, cannot entertain claims from individual persons, natural or juridical, nor has it jurisdiction over contentious cases between a State and an international organization; its jurisdiction is limited to disputes between States.²¹ Thus, a suggestion was made for the establishment of a new Law of the Sea Tribunal to have general jurisdiction over any dispute arising between or among the potential actors in the ocean space. As explained elsewhere,²² an earlier approach for settling disputes arising from the activities of exploration and exploitation of the international sea-bed area suggested the establishment of a special Sea-Bed Tribunal as an organ of the Sea-Bed Authority.²³ In the process of earlier efforts to streamline the system, the idea of establishing such a Sea-Bed Tribunal was abandoned in favour of creating a Sea-Bed Disputes Chamber of the new Law of the Sea Tribunal.²⁴

The drafting history of the disputes-settlement system²⁵ indicates that some States did not appreciate the necessity of the establishment of the new Law of the Sea Tribunal; they maintained that the ICJ and its special chambers, supplemented, as appropriate, with *ad hoc* arbitral tribunals, would be enough. Some States favoured only the functional approach by which special settlement procedures culminating in binding decisions would be established for disputes, such as technical or scientific disputes concerning fisheries, pollution, scientific research, and transfer of technology, arising under various parts of the Convention. This functional approach was in contradistinction to

21. INT'L CT. JUST. STAT. art. 34, para. 1.

22. See *Prolegomena*, *supra* note 5, at 329-48.

23. An elaborate system for the settlement of sea-bed disputes, which relied upon the establishment of a Sea-Bed Tribunal as an organ of the Sea-Bed Authority, appeared in the Revised Single Negotiating Text Part I, Articles 33-40, and Annex III. 5 Third UNCLOS Off. Rec. 125, at 135-36 and 145-49 (1976).

24. See *Prolegomena*, *supra* note 5, at 330-34. At the resumed ninth session, held in Geneva in the summer of 1980, the session that produced Rev. 3, *see* notes 1-2 and accompanying text *supra*, it was decided that the Law of the Sea Tribunal would be renamed the International Tribunal for the Law of the Sea.

25. See *id.* at 268-79.

the proposed establishment of a general comprehensive system relying upon the new Law of the Sea Tribunal, the ICJ, and *ad hoc* arbitral tribunals established under the Convention or created by a special *compromis* between the parties to the dispute.

In order to accommodate the divergent views of States as to the question of a disputes-settlement system, the Conference has been constrained to produce a complicated but flexible system which offers States wide choices of modes of settlement ranging from the most informal, non-compulsory procedures with nonbinding decisions to the most formal and compulsory settlement procedures entailing binding decisions.

In order to achieve wider acceptance, this disputes-settlement system adopted the Montreux formula,²⁶ which allows a State the right, when expressing its consent to be bound by the Convention, to choose one or more of the four compulsory procedures for the settlement of disputes relating to the interpretation or application of the Convention. The four forums established with equal competence over such disputes are: (a) the Law of the Sea Tribunal,²⁷ (b) the ICJ, (c) an arbitral tribunal established under Annex VII of the Convention,²⁸ and (d) special arbitral tribunals established under Annex VIII of the Convention.²⁹ It is now settled, as reflected in Article 287, which embodies the Montreux formula, that the arbitral tribunal constituted under Annex VII of the Convention has residual jurisdiction over disputes, between State parties, with respect to which no valid declaration confers jurisdiction on any of the four forums³⁰ and disputes, between State parties, with respect to which the valid declarations confer jurisdiction on different forums.³¹ It is also now settled that, if the parties to a dispute have conferred jurisdiction on the same forum, the dispute may be submitted to only that procedure, unless the parties other-

26. ICNT, Rev. 2, *supra* note 2, Art. 287. For a documentation of the history of the Montreux formula, see *Prolegomena*, *supra* note 5, at 258-59.

27. See ICNT, Rev. 2, *supra* note 2, Annex VI. For background analysis, see *Prolegomena*, *supra* note 5, at 361-73.

28. See ICNT, Rev. 2, *supra* note 2, Annex VII. For background analysis, see *Prolegomena*, *supra* note 5, at 354-58.

29. See ICNT, Rev. 2, *supra* note 2, Annex VIII. For background analysis, see *Prolegomena*, *supra* note 5, at 358-61.

30. See ICNT, Rev. 2, *supra* note 2, Art. 287, para. 3.

31. See ICNT, Rev. 2, *supra* note 2, Art. 287, para. 5.

wise agree.³² Moreover, it has become necessary, as part of the process of streamlining the system, to include in the Montreux formula a provision to the effect that any declaration made pursuant to the formula shall not affect, and shall not be affected by, the obligation of a State party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal as provided for in the section of ICNT, Rev. 2, dealing with the sea-bed disputes-settlement procedures.³³

The adoption of the Montreux formula left unsettled one other important aspect of the system, the actual scope and competence of the procedures. Article 287, paragraph 1 deals with the definition of the types of disputes that States are to submit for compulsory settlement by the forum of their own choice,³⁴ and Article 298 gives a State the option to make a declaration excluding specifically certain sensitive issues from settlement through the compulsory procedures selected under the Montreux formula.³⁵ Ensuing sections of this paper will analyse discussions beyond the ICNT which have resulted in substantive changes on this issue,³⁶ discussions based on the ICNT which have resulted in substantive changes in the provisions relating to the settlement of sea-bed disputes,³⁷ and further improvements in the general system of disputes-settlement under Part XV and the Annexes relating thereto.³⁸ This paper will also discuss the extent to which the Conference has succeeded in formulating procedures for settling disputes relating to delimitation of maritime boundaries between States with opposite or adjacent coasts, one of the sensitive issues which a State may exclude from compulsory procedures under the Convention.³⁹

32. See ICNT, Rev. 2, *supra* note 2, Art. 287, para. 4.

33. See ICNT, Rev. 2, *supra* note 2, Art. 287, para. 2.

34. See ICNT, Rev. 2, *supra* note 2, Art. 287, para. 1.

35. See ICNT, Rev. 2, *supra* note 2, Art. 298.

36. See notes 40-47 and accompanying text *infra*.

37. See notes 48-82 and accompanying text *infra*.

38. See notes 83-97 and accompanying text *infra*.

39. See notes 98-131 and accompanying text *infra*.

B. *The Scope of Third-Party Forums: Retreat From Emphasis on Judicial Settlement Procedures*

It was clear, as indicated in the drafting history,⁴⁰ that not all States were willing to submit all disputes, especially those relating to the exercise of jurisdiction within a State's exclusive economic zone,⁴¹ to the compulsory procedures envisaged under paragraph 1 of Article 287. Accordingly, in order to establish limitations on the application of the compulsory procedures, it became necessary to articulate the scope of the forums employing these procedures.

At the seventh session, held in Geneva, this task was assigned to Negotiating Group 5 under the chairmanship of Ambassador Stavropoulos of Greece. Negotiating Group 5 produced a revised Article 296 dealing with limitations on the application of the Article 287 compulsory procedures for settlement of disputes.⁴²

The approach taken by Negotiating Group 5, as observed elsewhere,⁴³ distinguishes issues with respect to which compulsory judicial procedures are envisaged from issues with respect to which only compulsory resort to conciliation would be acceptable as a disputes-settlement procedure. Under this approach, it now seems settled that binding judicial settlement under the forums of Article 287 is to be limited to disputes relating to "non-resource uses" of the exclusive economic zone.⁴⁴ With respect to

40. See *Prolegomena*, *supra* note 5, at 269-70.

41. See ICNT, Rev. 2, *supra* note 2, Art. 56.

42. See U.N. Doc. NG 5/16, reprinted in *Prolegomena*, *supra* note 5, at 387-90.

43. *Prolegomena*, *supra* note 5, at 374-79.

44. ICNT, Rev. 2, *supra* note 2, Art. 296, paras. 1 and 2 read:

Article 296

*Limitations on applicability
of this section*

1. Notwithstanding the provisions of Article 286, disputes relating to the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention, shall be subject to the procedures specified in this section in the following cases:

- (a) When it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines and other internationally lawful uses of the sea specified in article 58; or
- (b) When it is alleged that any State in exercising the aforementioned freedoms, rights or uses has acted in contravention of the provisions of this

disputes arising from "resource uses" of the exclusive economic zone, compulsory resort to conciliation shall be employed.⁴⁵ Ac-

Convention or of laws or regulations established by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or

(c) When it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or by a competent international organization or diplomatic conference acting in accordance with this Convention.

2. (a) Unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with this section, except that the coastal State shall not be obliged to submit to such settlement any dispute arising out of:

- (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or

- (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.

(b) Disputes arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with the provisions of this Convention shall be submitted, at the request of either party and notwithstanding article 284, paragraph 3, to the conciliation procedure described in annex V, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in paragraph 6 of article 246 or of its discretion to withhold consent in accordance with paragraph 5 of article 246.

45. ICNT, Rev. 2, *supra* note 2, Art. 296, para. 3 reads:

3. (a) Unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with this section, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management regulations;

(b) Where no settlement has been reached by recourse to the provisions of section 1, a dispute shall, notwithstanding article 284, paragraph 3, be submitted to the conciliation procedure provided for in annex V, at the request of any party to the dispute, when it is alleged that:

- (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper

cordingly, it may be said that the Conference retreated from its earlier emphasis upon compulsory judicial procedures for settling disputes arising from the exercise, by the coastal States, of rights and jurisdictions over the living resources in their respective exclusive economic zones and accepted, as a compromise, "compulsory resort to conciliation" for the settlement of such disputes. Whether emphasis upon compulsory resort to conciliation, as defined in Article 296, with respect to such disputes is a satisfactory solution remains the subject of continued evaluation.⁴⁶ It is clear, however, that the approach represents the absolute limit of compromise for a number of developing coastal States. Indeed, in the view of Chairman Stavropoulos, that approach constitutes a mini-package in the nature of a conditional consensus.⁴⁷

After completing the process of establishing the system and defining its scope, efforts continued towards elucidation of the procedures especially related to settlement of disputes arising

conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal State has arbitrarily refused to determine, upon the request of another State, the allowable catch and its capacity to harvest the living resources with respect to stocks which that other State is interested in fishing;

(iii) a coastal State has arbitrarily refused to allocate to any State, under the provisions of articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

(c) In any case the conciliation commission shall not substitute its discretion for that of the coastal State;

(d) The report of the conciliation commission shall be communicated to the appropriate international organizations;

(e) In negotiating agreements pursuant to articles 69 and 70 the parties, unless they otherwise agree, shall include a clause on measures which the parties shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how the parties should proceed if a disagreement nevertheless arises.

46. See, e.g., Rosenne, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 73 AM. J. INT'L L. 89 (1979).

47. Report to the Plenary by the Chairman, Ambassador Constantin Stavropoulos (Greece), 10 Third UNCLOS Off. Rec. 117, 117 (1978) [hereinafter cited as Chairman's Report].

from the exploration and exploitation of the sea-bed area.

II. Settlement of Disputes Relating to the Exploration and Exploitation of the Sea-Bed Area—the Eighth and Ninth Sessions (1979-80)

The eighth session of the Conference, which met first in Geneva in the spring of 1979 and resumed in New York in the summer of 1979, and the New York ninth session, in the spring of 1980, focused on, among other issues, the question of settlement of disputes relating to Part XI of the Convention. Following the traditional negotiating process employed by the Conference, the President established a Group of Legal Experts, under the Chairmanship of Professor H. Wunsche of the German Democratic Republic, to examine the ICNT provisions on settlement of disputes relating to the sea-bed area, "the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction."⁴⁸ The Group of Legal Experts commenced its work at Geneva,⁴⁹ continued its work at the New York resumed session,⁵⁰ and completed its work at the New York portion of the ninth session. Some of the major changes, suggested by the Group, in the ICNT provisions are the subject of analysis in this section.

A. *Abandonment of the Substantive Link between the Sea-Bed Disputes Chamber and the Sea-Bed Authority*

The Conference originally envisioned the establishment of a Sea-Bed Tribunal, as one of the principal organs of the Sea-Bed Authority, to deal exclusively with sea-bed disputes.⁵¹ This approach was, as noted above,⁵² abandoned in favour of the crea-

48. ICNT, *supra* note 4, Art. 1, para. 1.

49. See Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text, 11 Third UNCLOS Off. Rec. 109 (1980), U.N. Doc. A/CONF.62/C.1/L.25 and /Add.1 (1979) [hereinafter cited as Report L. 25].

50. See Report on Negotiations Held by the Chairman and the Co-ordinators of the Working Group of 21, Appendix B: Report by the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI, U.N. Doc. A/CONF.62/C.1/L.26 (1979) [hereinafter cited as Report by the Chairman of the Group of Legal Experts]. This limited distribution document was reprinted for general distribution in 12 Third UNCLOS Off. Rec. 71, at 90 (1980), U.N. Doc. A/CONF.62/91 (1979).

51. See notes 22-23 and accompanying text *supra*.

52. See note 24 and accompanying text *supra*.

tion, as part of the comprehensive system for the settlement of disputes under the Convention as a whole, of a Sea-Bed Disputes Chamber ("SBDC"), to be incorporated into the new Law of the Sea Tribunal, the body which would have a general jurisdiction.⁵³

In achieving the integration of sea-bed disputes-settlement procedures into the envisioned comprehensive system, a link was maintained between the Sea-Bed Authority and the SBDC: the Assembly of the Authority was empowered to select the eleven judges of the SBDC from the list of the twenty-one judges comprising the Law of the Sea Tribunal.⁵⁴

The necessity of such a link was questioned later, and its abandonment was suggested. The argument in favour of abandonment ran as follows: since the twenty-one judges of the Law of the Sea Tribunal are to be elected by the Conference of States parties to the Law of the Sea Convention, which would be comprised of the same members as the Assembly of the Sea-Bed Authority, no need was apparent for the "second vote of confidence" implied by giving the Assembly of the Authority the power to select the eleven judges of the SBDC from the list of twenty-one already elected by the Conference of the parties to the Convention. As a compromise, it was suggested that, instead of insulating the SBDC completely from the Authority, some link be maintained by giving the Assembly the right to make recommendations to be followed in the selection of the eleven judges in order to insure equitable geographical distribution and representation of the principal legal systems.

In the streamlining process, these suggestions have been reflected in the proposals for revising the ICNT. It is now clear that the SBDC will be composed of eleven members selected by the Law of the Sea Tribunal itself from among its members and that the Assembly of the Authority will only adopt recommendations of a general nature relating to the questions of equitable

53. See ICNT, Rev. 2, *supra* note 2, Annex VI, Art. 14, which maintains the provision substantially as it appeared in the ICNT, *supra* note 4, Annex V, Art. 15. See also *Prolegomena*, *supra* note 5, at 330.

54. This was provided in the ICNT, *supra* note 4, in Article 158, paragraph 2 (iii), which enumerated powers and functions of the Assembly of the Sea-Bed Authority, and in Article 37 of Annex V, which established the Sea-Bed Disputes Chamber as part of the new Law of the Sea Tribunal.

geographical distribution and representation of the principal legal systems.⁵⁵ This limitation on the role of the Assembly in the selection of the judges of the SBDC signifies that the substantive link initially envisioned between the Authority and the SBDC was abandoned.

B. *Expansion of Forums for Settlement of Sea-Bed Disputes Involving States inter se: The Case for ad hoc Sea-Bed Disputes Chambers*

The idea behind establishing one forum for the settlement of sea-bed disputes was that such a forum would deal exclusively with these disputes and that all parties to the Law of the Sea Convention would be obliged to accept its exclusive jurisdiction with respect to sea-bed disputes. The Sea-Bed Disputes Chamber was regarded as such a forum.

Later discussions revealed that serious consideration should be given to the rights of States to choose a forum other than the SBDC for the settlement of sea-bed disputes which involve States *inter se* and relate to interpretation and application of the Convention. The supporters of this view, as observed elsewhere,⁵⁶ maintained that for sea-bed disputes between States the choice of procedures provided under Article 287 of the general system should be made available. Reliance upon the choices of Article 287, it was emphasized, "would ensure consistency of application of dispute settlement procedures in all cases of interpretation or application of the Convention."⁵⁷

The above view was strongly opposed by those who asserted the need to maintain the exclusive jurisdiction of the SBDC over all disputes relating to the exploration and exploitation of the sea-bed area pursuant to the Convention so as to achieve the

55. For the text of suggested Article 36(2), see Report on Negotiations Held by the Chairman and the Co-ordinators of the Working Group of 21, Appendix A: Suggestions Resulting from Consultations Held by the Chairman and the Co-ordinators of the Working Group of 21, U.N. Doc. A/CONF.62/C.1/L.26, at 47 (1979) [hereinafter cited as Suggestions of the Working Group of 21]. This limited distribution document was reprinted for general distribution in 12 Third UNCLOS Off. Rec. 71, at 84 (1980), U.N. Doc. A/CONF.62/91 (1979).

56. See Report by the Chairman of the Group of Legal Experts, *supra* note 50, at 49.

57. *Id.*

goal of unity of jurisdiction.

A compromise emerged in a suggestion for the establishment of an *ad hoc* chamber of the SBDC.⁵⁸ Whether resort to the *ad hoc* chamber was to be regarded as the rule, by allowing any party to the dispute to request that the Chamber be constituted, or whether resort to the Chamber was to be considered an exception, by requiring agreement of all the parties to the dispute to so request, became a troublesome question. Those favouring the use of the *ad hoc* chamber of the SBDC took the former view, while those advocating the exclusive jurisdiction of the SBDC itself adopted the latter position.

Beyond the implications of accepting the idea of an *ad hoc* chamber lay controversy over its composition. What would be the size of such a chamber? Would the judges be elected from the eleven members of the SBDC? Would it be possible to elect a judge or judges having the same nationality as a State party to the dispute? In an attempt to answer these questions, existing models in the ICNT were examined. It seemed that a model which permitted the inclusion of national members, and selection from among the twenty-one members of the Law of the Sea Tribunal, would gain some support. It was pointed out that a chamber composed in this manner would in fact be a Special Chamber of the Law of the Sea Tribunal. The alternative model, also commanding support, suggested the establishment of an *ad hoc* chamber of three judges selected from among the eleven members of the SBDC and excluded nationals of parties to the dispute.

The divergent views regarding the establishment of an *ad hoc* chamber and the composition of this chamber were reconciled at the resumed eighth session in compromise formulations which are reflected in suggested revised versions of Article 188, paragraph 1, and Article 36 *bis* of Annex V, which read as follows:

Article 188

*Submission of disputes to a Special Chamber of the
Law of the Sea Tribunal or an ad hoc Chamber of the Sea-
Bed Disputes Chamber or to binding arbitration*

58. Report L. 25, *supra* note 49.

1. Disputes between States Parties referred to in article 187, paragraph 1, may be submitted:

- (a) to a Special Chamber of the Law of the Sea Tribunal to be established in accordance with articles 15 and 17 of annex V, upon the request of the parties to the dispute; or
- (b) to an ad hoc Chamber of the Sea-Bed Disputes Chamber to be established in accordance with article 36 bis of annex V, upon the request of any party to the dispute.

Article 36 (bis)

Ad Hoc Chambers of the Sea-Bed Disputes Chamber

1. The Sea-Bed Disputes Chamber shall form an ad hoc chamber, composed of three of its members, for dealing with a particular dispute submitted to it in accordance with article 188, paragraph 1(b). The composition of such a chamber shall be determined by the Sea-Bed Disputes Chamber with the approval of the parties.

2. If the parties do not agree on the composition of an ad hoc chamber referred to in paragraph 1, each party to the dispute shall appoint one member, and the remaining member shall be appointed by them in agreement. If they disagree, or if any party fails to make an appointment, the President of the Sea-Bed Disputes Chamber shall promptly make such appointments from among the members of the Sea-Bed Disputes Chamber, after consultation with the parties.

3. Members of the ad hoc chamber must not be in the service of, or nationals of, any of the parties to the dispute.⁵⁹

Furthermore, the descriptive heading of Article 188 was changed from "Submission of disputes to Arbitration," used in the ICNT, to "Submission of disputes to a Special Chamber of the Law of the Sea Tribunal or an *ad hoc* Chamber of the Sea-Bed Disputes Chamber or to binding arbitration," used in the suggested revised version.⁶⁰ In short, in the process of further streamlining these provisions, it was determined that Article 188 should refer to four forums: a Special Chamber of the Law of the Sea Tribunal, the SBDC of the Law of the Sea Tribunal, an *ad hoc* Chamber of the SBDC, and binding arbitration, with appropriate cross-reference to the relevant articles of Annex V containing the Statute of the Law of the Sea Tribunal.

59. Suggestions of the Working Group of 21, *supra* note 55, at 44, 47.

60. *Id.* at 44.

C. *Exclusive Jurisdiction of the SBDC Re-examined: The Question of Enumeration of Categories of Disputes v. Designation of Parties with Access*

Since entities other than States may also participate in the activities in the sea-bed area, it was necessary to establish a disputes-settlement forum to which States, natural or juridical persons and an international organization (the Sea-Bed Authority) could have access. This expanded jurisdiction of the SBDC gave it the uniqueness that supported its creation as an international judicial forum well-suited for the settlement of all disputes in the sea-bed area.

There was need, however, to delineate precisely the conditions under which parties other than States would have access to the SBDC. Article 187 of the ICNT, which was intended to do that, attempted to describe parties with access to the forum. Further discussions on the Article disclosed that States were not satisfied with this approach. It was suggested that the Article could be improved by focusing upon the precise enumeration of the categories of disputes with respect to which access to the SBDC might be had by certain parties instead of focusing upon the designation of parties with access. This approach permitted the precise enumeration of the category of disputes between States *inter se* and other categories of disputes involving non-State entities carrying out activities in the area.

In its emphasis on the enumeration of the categories of disputes, the new Article 187, which defines the scope of jurisdiction of the SBDC, reads:

Article 187
Jurisdiction of the Sea-Bed
Disputes Chamber

The Chamber shall have jurisdiction under this Part and the annexes relating thereto, in the following categories of disputes with respect to activities in the Area:

1. Disputes between States Parties concerning the interpretation or application of this Part and the annexes relating thereto.

2. Disputes between a State Party and the Authority concerning acts or omissions of the Authority or of a State Party which are alleged to be in violation of this Part or the annexes relating thereto, or of rules, regulations or procedures promul-

gated in accordance therewith, or acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.

3. Disputes between parties to a contract, being State Parties, the Authority or the Enterprise, State entities and natural or juridical persons as referred to in article 153, paragraph 2(b), concerning:

(a) the interpretation or application of a relevant contract or a plan of work;

(b) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests.

4. Disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in article 4, paragraph 4 and article 12, paragraph 2, of annex II, concerning the refusal of a contract, or a legal issue arising in the negotiation of the contract.

5. Disputes between the Authority and a State Party, a State entity or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in article 21 of annex II.

6. Any dispute for which jurisdiction of the Chamber is specifically provided in this Part and the annexes relating thereto.⁶¹

Paragraph 1 of the Article enumerates disputes, concerning the interpretation of the Convention, arising between States with traditional access to international judicial forums for the settlement of such disputes. The discussion in the previous section noted movement towards allowing States to settle such disputes, relating to interpretation or application of Part XI of the Convention and its annexes, by judicial forums other than the SBDC, since the freedom to choose a forum is considered to be more consistent with customary practice. The deliberate limitation of paragraph 1, above, to disputes between States *inter se* is significant in that it opens the way for the possibility of agreement between States parties to such a dispute to settle the dispute in a third-party forum other than the SBDC.

Paragraph 2 of the Article deals with disputes concerning the Authority's or a State party's acts or omissions which are

61. *Id.* at 43.

alleged to be in violation of Part XI of the Convention and the annexes related thereto, or of relevant rules and regulations. Under this paragraph, the Authority could be sued for alleged excess of jurisdiction or misuse of power. It is to be noted that, with respect to the category of disputes enumerated under this paragraph, only States parties and the Authority would have access to the SBDC.

Paragraph 3 of the Article deals with disputes concerning the interpretation or application of a contract or plan of work, or acts or omissions of a party to a contract. Taking into account the entities which are expected to conduct activities in the seabed area, the paragraph gives SBDC access, as contractors, to States, natural or juridical persons, State entities, the Authority or the Enterprise.

The disjunctive "or," with respect to the reference to the Authority or the Enterprise as contractors, is significant. It was intended to underline that the Authority and the Enterprise could not be opponent parties to a dispute submitted for settlement. It was maintained that, since the Enterprise is an arm of the Authority, other internal, nonjudicial forums, such as, for example, the Assembly or the Council, would be more appropriate.

At the ninth session, held in New York, the question was raised, with respect to paragraph 3, as to whether the provision, as it stands, would cover a joint venture or a joint arrangement as a party to a dispute. The Chairman noted that, if a joint venture or joint arrangement has an independent legal personality, it would be a juridical person and, as such, could, under paragraph 3, have access to the SBDC. If a joint venture or joint arrangement has no independent legal personality, the participants in the joint venture or joint arrangement would have access to the SBDC individually as contractors.

During the discussions of the category of disputes enumerated under paragraph 3, a proposal was made for their settlement through binding commercial arbitration or other arbitration outside the jurisdiction of the SBDC. Under paragraph 2 of Article 188 of the ICNT, Rev. 1, the option to refer commercial disputes to such arbitration procedures could be exercised only if the contract under which the dispute arose provided for such procedures and a party to the contract requested invocation of that contractual provision. This requirement was retained in the

revised paragraph 2 of Article 188, suggested by the Chairman and the Co-ordinators of the Working Group of 21, which states:

Disputes referred to in article 187, paragraph 3, shall be submitted to binding commercial or other arbitration in so far as provided in any contract between the parties to the dispute at the request of any party thereto. Failing agreement of the parties, the procedure in accordance with commercial arbitration rules to be specified shall apply.⁶²

As observed elsewhere,⁶³ it appears that the UNCITRAL rules for commercial arbitration could be acceptable. Alternatively, or in addition, the Sea-Bed Authority could specify other arbitration rules to be promulgated pursuant to its power to formulate rules, regulations and procedures.

On one side, the view was maintained that commercial arbitration would be the most appropriate procedure for the resolution of disputes of a purely commercial or technical nature.⁶⁴ Such disputes would fall into the category of subparagraph (a) of paragraph 3 of Article 187; therefore it was thought that the reference in Article 188, paragraph 2, could appropriately be limited to subparagraph (a).⁶⁵ On the other side, there was strong sentiment that the unity of jurisdiction of the SBDC should be maintained for all disputes arising under Part XI.⁶⁶

In an effort to reconcile these divergent positions, it was suggested that the items of consensus which emerged be combined in a manner which would be acceptable to all. These items of consensus follow:

(i) contractual disputes could be submitted to commercial arbitration at the request of a party; (ii) subject to the proviso that, the parties have not agreed otherwise in the contract or at any time thereafter; (iii) a commercial arbitral tribunal would not be competent to determine questions of interpreting the Convention; and (iv) where such a commercial dispute involves the interpretation of part XI, that question must be referred to the Sea-Bed

62. *Id.* at 44.

63. See Report by the Chairman of the Group of Legal Experts, *supra* note 50, at 51.

64. *Id.*

65. *Id.* at 50-51.

66. Report of the Co-ordinators of the Working Group of 21 to the First Committee, U.N. Doc. A/CONF.62/C.1/L.27 (Part V), at 3 (1980).

Disputes Chamber for a ruling.⁶⁷

It was also suggested that, where a ruling of the SBDC has been sought by an arbitral tribunal, it may be necessary to specify that the award of the arbitral tribunal must be consistent with the ruling of the SBDC.⁶⁸

Article 188, paragraph 2, as reformulated at the ninth session, in New York, reads:

(a) Disputes concerning the interpretation or application of a contract referred to in article 187, paragraph 3(a), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless at any time the parties to the dispute otherwise agree or have agreed. A commercial arbitral tribunal, to which such dispute is submitted, shall have no jurisdiction to determine any question of interpretation of the Convention. When such a dispute also involves a question of the interpretation of part XI of the present Convention and the annexes relating thereto, with respect to activities in the Area, such question shall be referred to the Sea-Bed Disputes Chamber for a ruling.

(b) If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or *proprio motu*, that its decision depends upon a ruling of the Sea-Bed Disputes Chamber, the arbitral tribunal shall refer such question to the Sea-Bed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Sea-Bed Disputes Chamber.

(c) Unless the parties to the dispute otherwise agree, in the absence of a provision in the contract on the arbitration procedure to be applied in such a dispute, the arbitration shall be conducted in accordance with the UNCITRAL arbitration rules or other arbitration rules as may be prescribed in the rules, regulations and procedures adopted by the Authority.⁶⁹

Here again it can be seen that Article 188 provides, by an action initiated by any party to the dispute, an exception to the jurisdiction of the SBDC and an expansion of the choices of forums for the settlement of sea-bed disputes. It should be noted that, as to the specific rules to be used in the case of resort to

67. *Id.*

68. *Id.*

69. *Id.* at 6.

commercial arbitration, the parties have the option to agree upon rules other than UNCITRAL or any others specified by the Authority.

An important question arose as to whether, if the plaintiff were a natural or juridical person, it would be appropriate to expect a defendant sovereign State to appear automatically before an international forum established for the settlement of the disputes enumerated under paragraph 3 of Article 187. It was generally felt that a State should not be called to court by a natural or juridical person without the State's consent and that some procedure should be established which would permit participation in the proceedings by any State sponsoring the natural or juridical person bringing the case in question. A new provision has now been proposed, articulating the nature of the participation and appearance of a sponsoring State in such proceedings. Proposed paragraph 2 of Article 191 reads:

In any dispute referred to in article 187, paragraph 3, if an action is brought against a State Party by a natural or juridical person, of another nationality, the State Party sponsoring that person may be requested by the Respondent State Party to appear in the proceedings on behalf of that person. Failing such appearance, the Respondent State may arrange for the appearance on its behalf of a juridical person of its nationality.⁷⁰

Paragraph 4 of the above version of Article 187 gives the SBDC jurisdiction over any disputes which may arise, in the process of negotiating for the award of a contract, between the Authority and an applicant. For the first time, the question of the rights of prospective contractors who have fulfilled the application requirements of Annex II, Article 12, paragraph 2 and Article 4, paragraph 9 were taken into account, and a procedure for the settlement of disputes that arose between the Authority and prospective contractors was established. For such disputes, the jurisdiction of the SBDC is paramount, whereas, as has been noted in the discussion of paragraph 3 of Article 187,⁷¹ for the settlement of disputes arising under an existing contract, the possibility for using binding commercial arbitration outside the

70. Suggestions of the Working Group of 21, *supra* note 55, at 44.

71. See notes 62-67 and accompanying text *supra*.

SBDC is envisaged.

Paragraph 5 of Article 187 addresses the category of disputes, involving the Authority as a respondent party, in which it is alleged that the petitioning party has suffered damage from the Authority's alleged wrongful exercise of its powers and functions, as provided in Article 21 of Annex II.⁷²

A final category of disputes arises from violations of the provisions relating to the responsibilities of the staff of the Secretariat of the Authority. Such responsibilities fall into two categories: (1) the traditional obligations of staff members of any international organization to maintain impartiality and of States to respect that specific character of an international Secretariat;⁷³ and, (2) in the context of the Law of the Sea, the additional obligation of staff members not to disclose, at any time, industrial secrets or data or other confidential information of commercial value of which the staff members have knowledge, by virtue of their affiliation with the Sea-Bed Authority.⁷⁴ For violation of the traditional responsibility, resort to an appropriate administrative tribunal constituted under the staff rules of the Authority is envisioned.⁷⁵ For violations of the second type, however, which may cause grave damage to third parties, it was felt that a forum outside the Authority would be more appropriate, since the Authority itself might be a respondent in such disputes. The designation of the SBDC for the settlement of such disputes is provided in paragraph 6.⁷⁶

D. *Decisions of the Authority Regarding Limitation of the Jurisdiction of the SBDC*

As observed in *Prolegomena*,⁷⁷ a definite attempt was made to preclude access to the Sea-Bed Authority in controversies arising from the exercise of the discretionary powers of the Authority, much like the approach which de-emphasized use of third-party judicial procedures for challenging the decisions of

72. See Suggestions of the Working Group of 21, *supra* note 55, at 45.

73. *Id.* at 42 (ICNT, Rev. 1, *supra* note 3, Art. 168, para. 1, as redrafted).

74. *Id.* (ICNT, Rev. 1, *supra* note 3, Art. 168, para. 2, as redrafted).

75. *Id.* (ICNT, Rev. 1, *supra* note 3, Art. 168, para. 3, as redrafted).

76. *Id.* at 43.

77. *Prolegomena*, *supra* note 5, at 337.

coastal States relating to the management of the living resources within their exclusive economic zones.⁷⁸ Attempts to limit the jurisdiction of the SBDC have continued to date and have become more emphatic. Thus, while Article 187, paragraphs 2, 3 and 4, establishes the jurisdiction of the SBDC over disputes involving acts or omissions on the part of the Authority, the exercise of the discretionary powers of the Authority, if exercised as stipulated in the Convention, is excluded from judicial challenge and scrutiny by the SBDC. To make this clear, Article 190 now reads:

The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 189, in exercising its jurisdiction pursuant to article 187, the Sea-Bed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations or procedures adopted by the Authority are in conformity with the provisions of this Convention, nor declare any such rule, regulation or procedure invalid. Its jurisdiction shall be confined to determining whether the application of any rules, regulations or procedures to individual cases would be in conflict with the contractual and Conventional obligations of the parties to the dispute, and to claims concerning lack of competence or misuse of power, as well as to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its Conventional or contractual obligations.⁷⁹

This provision is very specific in proscribing the SBDC from pronouncing on the validity of a rule, regulation or procedure framed by the Authority if the Authority clearly has competence to exercise discretion. Without such proscription, the effect would be to shift to the SBDC the competence of the Authority in areas in which the Authority may exercise discretion. Furthermore, in order to protect the integrity of the legislative powers of the Authority, if a dispute involves a rule, regulation or procedure of the Authority, Article 190 makes it clear that the jurisdiction of the SBDC is confined, within the framework of con-

78. See text accompanying notes 40-47 *supra*.

79. See ICNT, Rev. 2, *supra* note 2, Art. 190.

tractual and Conventional obligations of the parties, to the question of the application of such rule, regulation or procedure to the particular case.

E. *Advisory Jurisdiction of the SBDC*

Article 189 of the ICNT, Rev. 1 has been changed to eliminate the possibility of subsidiary organs of the Council requesting advisory opinions, as had been envisaged in the earlier versions of Article 190 of the ICNT. As reformulated, Article 189 closely follows the United Nations Charter, which provides that only the General Assembly and the Security Council are directly authorized to request advisory opinions from the International Court of Justice.⁸⁰ Therefore, in the context of the present Convention, if a subsidiary organ of the Council of the Authority desires an advisory opinion on a legal question arising within the scope of its activities, it would have to channel such a request through either the Council or the Assembly.

At present, Article 189 reads:

The Sea-Bed Disputes Chamber of the Law of the Sea Tribunal shall give advisory opinions when requested to do so by the Assembly or the Council on legal questions arising within the scope of their activities. Such advisory opinions shall be rendered as a matter of urgency.⁸¹

It is important to note that, as stipulated above, only the SBDC is authorized to render advisory opinions. The Law of the Sea Tribunal itself has no advisory jurisdiction.⁸²

III. Further Improvements in the General System of Settlement of Disputes under Part XV and the Annexes Relating Thereto

A. *Changes Discussed Relating to Part XV*

At the resumed eighth session, some changes were made to

80. U.N. CHARTER art. 96.

81. ICNT, Rev. 2, *supra* note 2, Art. 189.

82. It is evident from the discussion in this entire section that the Group of Legal Experts made a valuable contribution to streamlining the disputes-settlement system for disputes relating to sea-bed matters.

Article 284 of Part XV, dealing with conciliation.⁸³ That Article, as revised, reads:

Article 284
Conciliation

1. Any State Party which is a party to a dispute relating to the interpretation or application of this Convention may invite the other party or parties to the dispute to submit the dispute to conciliation in accordance with the procedure in annex IV, or with some other *conciliation* procedure.
2. If the other party accepts this invitation and *if* the parties agree upon the procedure in annex IV or such other conciliation procedure, any party to the dispute may submit it to the agreed procedure.
3. If the other party does not accept the invitation or the parties do not agree upon the procedure in annex IV or such other conciliation procedure, the conciliation proceedings shall be deemed to be terminated.
4. When a dispute has been submitted to conciliation, such conciliation proceedings may only be terminated in accordance with the provisions of annex IV or other agreed conciliation procedure, as the case may be.⁸⁴

The changes were made in view of a proposal put forward by the delegations of the Netherlands and Switzerland. The purpose of the changes in the first three paragraphs was to eliminate an ambiguity caused by the use of the word "procedure" in more than one sense. Accordingly, each use of the word "procedure" has been qualified in order to make the intent of the provision clear.

The delegations of the Netherlands and Switzerland had proposed also that the International Court of Justice be given prominence by listing it first in Article 287, the Article which names the four forums for judicial settlement of disputes under

83. For a background analysis of conciliation, see *Prolegomena*, *supra* note 5, at 349-54.

84. Report of the President to the Plenary on the Work of the Informal Plenary on the Settlement of Disputes, U.N. Doc. A/CONF.62/L.45 at 1 (1979) [hereinafter cited as Report of the President]. This limited distribution document was reprinted for general distribution in 12 Third UNCLOS Off. Rec. 71, at 110 (1980), U.N. Doc. A/CONF.62/91 (1979).

the Convention.⁸⁵ At present, the Law of the Sea Tribunal appears first in the list, enjoying that position by virtue of the Tribunal's uniqueness as a new judicial organ with comprehensive jurisdiction to deal with cases involving non-State entities.⁸⁶ Thus, it has been maintained that the Tribunal should retain that position despite Article 92 of the Charter of the United Nations which gives the ICJ prominence as the principal judicial organ of the United Nations.

Because several provisions of the Convention⁸⁷ provide for compulsory resort to conciliation, an innovative procedure in the international system of settlement of disputes, it was suggested, at the New York portion of the ninth session, that a new provision, clarifying the distinction between the new conciliation procedure and other, traditional conciliation procedures provided for under the Convention, be added to Part XV, perhaps after Article 287.⁸⁸

During the resumed ninth session, held in Geneva in the summer of 1980, the President of the Conference, in response to this suggestion, proposed a new structure, that Part XV be divided into three sections: (i) the first section, providing for voluntary procedures, would remain as found in Section 1, Articles 279-295 of ICNT, Rev. 2; (ii) the second section, which would provide for the compulsory and binding dispute-settlement procedures found in Articles 286-295 of ICNT, Rev. 2, would become a new Section 2; (iii) the third section would consist of Articles 296 and 298, which deal with limitations and optional exceptions to the binding procedures of the second section, and Article 297 on the preliminary procedures. This third section would thus include disputes in respect of which compulsory resort to conciliation would be the settlement procedure.

The proposed structure for Part XV appeared to be eminently suitable: it did not in any way affect the substance of the delicately balanced text but it achieved the necessary separation

85. Report of the President, *supra* note 84, at 2.

86. ICNT, Rev. 2, *supra* note 2, Art. 287.

87. Compulsory resort to conciliation is contemplated in ICNT, Rev. 2, *supra* note 2, Arts. 264, 296 and 298.

88. Preliminary Report of the President on the Work of the Informal Plenary on Settlement of Disputes, U.N. Doc. A/CONF.62/L.52, at 2 (1980) [hereinafter cited as Preliminary Report of the President].

of the Section 1 traditional conciliation procedures from the new procedure in Section 3 of compulsory resort to conciliation. This restructuring was another effort at streamlining the system for the settlement of disputes under the Convention. Without this effort, the provisions relating to the new procedure of compulsory resort to conciliation would remain scattered in various paragraphs of Article 296, Article 297, and Article 298. The new structure for Part XV, and the consequential changes in the relevant Articles of the main Parts and the Annexes, was the basic disputes-settlement system question discussed at the resumed ninth session. The result is reflected in Rev. 3.⁸⁹

B. *Changes Discussed Relating to the Annexes*

The changes being considered with respect to Annex IV, dealing with conciliation, related to Article 3, paragraphs 2 and 4.⁹⁰ As Article 3, paragraph 2 stands in ICNT, Rev. 1, each party to the dispute may appoint two conciliators, who may be nationals of the party, to a conciliation commission consisting of a total of five members.⁹¹ It was suggested that such a provision would place a heavy burden on the chairman of the conciliation commission, "who would have a greater responsibility, acting as the sole arbiter amongst four other members who represent the interests of the parties."⁹² Therefore, at the resumed eighth session, it was proposed that the number of national conciliators of any party be limited to one.⁹³ This suggestion was unacceptable to some who preferred the provision as it stood. A compromise formulation was suggested: each party would be allowed one national as a conciliator, unless the parties otherwise agree.⁹⁴

In New York at the ninth session of the Conference, this issue was discussed again, and the compromise formula was accepted and incorporated in ICNT, Rev. 2. The new Article 3, paragraph (b) of Annex V of ICNT, Rev. 2, reads:

(b) The party submitting the dispute to conciliation shall ap-

89. Rev. 3, *supra* note 1.

90. ICNT, Rev. 1, *supra* note 3, Annex IV, Art. 3.

91. *Id.*

92. Report of the President, *supra* note 84, at 2.

93. *Id.*

94. *Id.*

point two conciliators to be chosen preferably from the list, *one of whom* may be its national, unless the parties otherwise agree. Such appointments shall be included in the notification under article 1.⁹⁵

Paragraph 4 of Article 3 of Annex IV of ICNT, Rev. 1 allows any party to terminate the conciliation proceedings when the four conciliators appointed by the parties fail to appoint a fifth conciliator. The delegations of the Netherlands and Switzerland proposed that any reference in paragraph 4 to the termination of proceedings be deleted. Among other reasons proffered for this change, it was argued that to allow such termination would derogate from the principle of compulsory resort to conciliation provided for in Article 296 of Part XV. Accordingly, paragraph 4 of Article 3 of Annex IV was changed and became paragraph (d) of Article 3 of Annex V of ICNT, Rev. 2, which reads:

Within 30 days following the date of the last of their own appointment [sic], the four conciliators shall appoint a fifth conciliator chosen from the list, who shall be chairman. If the appointment is not made within the prescribed period, either party may, within one week of the expiration of the prescribed period, terminate the proceedings by notification addressed to the other party or, where the proceedings are not so terminated, request the Secretary-General to make the appointment in accordance with subparagraph (e).⁹⁶

At the resumed eighth session, one further change was made in the annexes relating to Part XV, a change clarifying Article 4 of Annex V of ICNT, Rev. 1, the Statute of the Law of the Sea Tribunal. Paragraph 4 of that Article previously provided that the Secretary-General convene a meeting of States Parties for the purpose of electing the members of the Tribunal. A phrase has now been added specifying in Article 4 of Annex VI of ICNT, Rev. 2 that the Secretary-General *of the United Nations* shall convene such a meeting.⁹⁷

During the ninth resumed session, held in Geneva in the summer of 1980, at which the new structure for Part XV was streamlined, Annex V on conciliation was also restructured.

95. ICNT, Rev. 2, *supra* note 2, Annex V, Art. 3, para. (b).

96. ICNT, Rev. 2, *supra* note 2, Annex V, Art. 3, para. (d).

97. ICNT, Rev. 2, *supra* note 2, Annex VI, Art. 4, para. 4.

That Annex is now divided into two sections: Section 1 deals with the procedure under the traditional conciliation mechanism provided for in Article 284 of Part XV; Section 2 deals with the new mechanism of compulsory resort to conciliation provided for, under Section 3 of Part XV, in the new structure discussed above.

It should be emphasized that the new structures of Part XV and Annex V both constitute great progress in streamlining the system for the settlement of disputes under the Law of the Sea Convention as a whole. It is now possible clearly to distinguish compulsory procedures entailing binding decisions from the traditional conciliation procedures with nonbinding decisions and the new procedures of compulsory resort to conciliation, in which only the initiation of conciliation procedure is compulsory while the result of the procedure still remains nonbinding. Whether or not this latter procedure is also suited for boundary delimitation disputes remains a troublesome question.

IV. Special Attention to Settlement of Maritime Boundary Disputes Between States with Opposite or Adjacent Coasts

The settlement of maritime boundary disputes is one of the sensitive issues which, by declaration, a State may exclude from the compulsory disputes-settlement procedures of Article 298 of the draft Convention.⁹⁸ This provision creates problems in that,

98. This provision was originally embodied in Article 299, paragraph 1(a), of the ICNT, *supra* note 4. On revision of the ICNT, a new Article 297 on "Preliminary proceedings" was introduced and ICNT, Art. 297 became ICNT, Rev. 1, Art. 298, which provides:

1. Without prejudice to the obligations arising under section 1, a State Party when signing, ratifying or otherwise expressing its consent to be bound by this Convention, or at any time thereafter, may declare that it does not accept any one or more 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 concerning sea boundary delimitations between adjacent or opposite States, or those involving historic bays or titles, provided that the State making such a declaration shall, when such dispute arises, indicate, and shall for the settlement of such disputes accept a regional or other third party procedure entailing a binding decision, to which all parties to the dispute have access; and provided further that such procedure or decision shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory.

For the current text of this provision, see ICNT, Rev. 2, *supra* note 2, Art. 298, para.

on the one hand, it allows a State to exclude maritime boundary disputes from the compulsory procedures under the Convention while, on the other hand, it requires a State exercising this option to accept a regional or other third-party procedure entailing a binding decision and accessible to all parties to the dispute. The background discussion of this problem, and various attempts towards making the provision generally acceptable, has been explained in detail elsewhere.⁹⁹ Examination here will be limited to the context in which this question was discussed at the last three sessions of the Conference.

At the seventh session in Geneva, in the spring of 1979, the Conference decided to establish Negotiating Group 7, under the chairmanship of Judge Manner of Finland, with the mandate to consider the questions of delimitation of maritime boundaries between adjacent or opposite States and settlement of disputes thereon. The basic articles considered by the Group were Article 15 of the ICNT on delimitation of the territorial sea, Article 74 on delimitation of the exclusive economic zone between States with opposite or adjacent coasts, and Article 83 on delimitation of the continental shelf between States with opposite or adjacent coasts. The examination of the texts of these articles required consideration of (1) the substantive rule on boundary delimitation and the two competing approaches to it — the use of median/equi-distance lines or the use of equitable principles; (2) the question of interim arrangements pending the final settlement of the delimitation question; and (3) the procedure for disputes-settlement. With respect to this last issue, the major focus of this article, Negotiating Group 7 had before it Article 297, paragraph 1(a) of the ICNT, which became Article 298, paragraph 1(a) of ICNT, Rev. 2.¹⁰⁰

A. *Development of Approaches to the Question: Contribution of Professor Louis B. Sohn*

The work of Negotiating Group 7 dealing with the question of settlement of maritime boundary disputes may be explained in the context of the efforts of Professor Louis B. Sohn of the

1(a)(i).

99. See *Prolegomena*, *supra* note 5, at 344-46.

100. See note 98 *supra*.

United States, in informal papers discussed in informal groups of experts, to provide various models for approaches to this question. His efforts began during the seventh session, at which two basic positions had emerged: Position I was supported by those who wanted to exclude maritime boundary disputes from any compulsory settlement procedures; Position II was supported by those who wanted to subject all maritime boundary disputes to compulsory procedures. In an attempt to find a compromise, Professor Sohn produced a paper containing seven models and fifteen variants. As analysed in detail elsewhere,¹⁰¹ Professor Sohn's informal paper, not discussed by the Group during the Geneva seventh session because of lack of time, envisaged a step-by-step approach to the delimitation disputes and included various approaches excluding certain types of delimitation disputes from compulsory procedures. When the seventh session of the Conference resumed in New York during the summer of 1979, Negotiating Group 7 had before it a revised and annotated version of Professor Sohn's seven models and their variants.¹⁰² Since the Group spent more time discussing the other two items under its consideration, the substantive standard for delimitation and the question of interim measures, the question of settlement of disputes was only taken up briefly, and Professor Sohn's revised models were not fully examined by the Group. The brief discussion at the resumed seventh session revealed, however, that supporters of Position I (excluding all delimitation disputes from compulsory settlement procedures) and supporters of Position II (subjecting all delimitation disputes to compulsory settlement procedures) were far from accepting any model which did not embody their respective primary concerns.¹⁰³

Before the eighth session of the Conference, at Geneva in the spring of 1978, this item was discussed at an intersessional meeting. At that meeting, Professor Sohn presented an informal paper containing a list of twenty-eight possible combinations.

101. See Adede, *Toward the Formulation of the Rule on Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coasts*, 19 VA. J. INT'L L. 207 (1979) [hereinafter cited as *Toward the Formulation*].

102. For analysis of Professor Sohn's annotated models, see *id.* at 225-34.

103. *Id.*

The combinations ranged from exclusion of all maritime boundary disputes from any compulsory settlement procedures to submission of all such disputes to third-party binding procedures. Out of the twenty-eight combinations, twenty-two were based on conciliation procedures; only six dealt with the possibility of binding procedures.

It is to be noted that reliance upon conciliation as the third-party procedure for settlement of delimitation disputes paralleled developments in the general system for the settlement of disputes under the Convention as a whole, an area in which compulsory resort to conciliation received emphasis.¹⁰⁴ In the introductory section of the present analysis, mention was made of Negotiating Group 5, which had adopted an approach, in suggested Article 296, making the settlement of disputes arising from coastal States' exercise of sovereign rights over the living resources in the exclusive economic zone subject to compulsory resort to conciliation. In view of the continued resistance of certain delegations to compulsory judicial procedures for the settlement of delimitation disputes, and the support of conciliation for other important issues, it became evident that, with respect to delimitation disputes, conciliation would be an acceptable solution. Accordingly, at the intersessional meeting in Geneva, Ambassador Rosenne of Israel presented an informal paper¹⁰⁵ based primarily upon conciliation as the third-party procedure for settlement of delimitation disputes.

When the eighth session convened in Geneva, Negotiating Group 7 had before it an expanded version of Professor Sohn's combinations with forty-five possibilities, including some based exclusively upon conciliation and some based on judicial procedures. In formulating these possible approaches, four basic questions, reflected in the various models presented, were considered: (1) whether the third-party procedure for settlement of delimitation disputes should be compulsory or noncompulsory; (2) whether the third-party procedures should have only the limited competence to determine the specific circumstances, principles, or methods to be applied by the parties in resolving the dispute, an approach in contradistinction to the approach that would

104. See text accompanying notes 40-47 *supra*.

105. See *Toward the Formulation*, *supra* note 101, at 248-49.

give the envisaged third-party procedures the competence to settle the substantive delimitation dispute; (3) whether all delimitation disputes which arise in the context of previously established conflicting claims to sovereignty should be automatically excluded from the third-party procedures being established; and (4) whether a distinction should be made between past delimitation disputes and delimitation disputes arising after the Law of the Sea Convention entered into force. This fourth question was aimed at creating the possibility of subjecting past disputes only to conciliation or excluding them completely, while subjecting future disputes either to conciliation or to judicial procedures or, in the extreme, excluding them from compulsory procedures altogether.

The difficulty of this approach was in determining when, for purposes of distinguishing past from future disputes, a dispute may be said to have arisen. Moreover, it was argued that this approach would encourage States to rush to start delimitation disputes before the Law of the Sea Convention enters into force so that such disputes would be automatically excluded under the "past disputes" formula.

Departing from his usual style, reflected in his earlier papers, of suggesting texts ranging from noncompulsory to compulsory procedures, Professor Sohn finally presented a paper containing only four alternatives, specific texts extrapolated from the forty-five combinations. Alternative A utilized two procedures: compulsory settlement, according to Section 2 of Part XV of the ICNT, of the threshold question on principles or methods to be applied, and conciliation, under Annex IV of the ICNT, for the settlement of the actual delimitation problem. The Alternative excluded disputes involving determination of previously established conflicting claims to sovereignty. It made no distinction between past and future disputes.¹⁰⁶

Alternative B was the simplest, providing for conciliation concerning all aspects of a delimitation problem. It included the Bulgarian formula, according to which, by mutual consent, States parties to a delimitation dispute might refer the dispute for final solution by the compulsory procedures of Section 2 of

106. *Id.* at 250 n. 92.

Part XV of the ICNT.¹⁰⁷

Alternative C was based on conciliation of the basic issues with respect to past disputes and the determination of similar basic issues by both Section 1 (conciliation) and Section 2 (compulsory procedures) of Part XV of the ICNT, as to future disputes. It did not envisage the settlement of the delimitation problem itself.¹⁰⁸

Alternative D, similar to one of the alternatives presented by Ambassador Rosenne, was based on conciliation procedures. It excluded mixed disputes and was limited to the conciliation of future disputes only as to the basic principles and methods to be applied.¹⁰⁹ Unfortunately, because of lack of time, the Negotiating Group at the resumed eighth session did not discuss these alternatives after they were introduced by Professor Sohn.¹¹⁰

B. *The Emergence of Conciliation as the Basic Procedure for Settlement of Delimitation Disputes*

The eighth session of the Conference resumed in New York in the summer of 1979. Negotiating Group 7, for the first time, held a rather extensive discussion of the question of settlement of disputes. Before the Group were the relevant parts of Chairman Manner's report on the work of the spring eighth session in which he suggested the following text for consideration:

Disputes concerning sea boundary delimitations between States with opposite or adjacent coasts, or those involving historic bays or titles, provided that the State having made such a declaration shall, when, thereafter, such dispute arises and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, and notwithstanding article 284, paragraph 3, accept submission of the dispute to the conciliation procedure provided for in Annex IV; and provided further that such procedure shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory.

After the Conciliation Commission has presented its report,

107. *Id.* at 251 n. 93.

108. *Id.* at 251 n. 94.

109. *Id.* at 252 n. 95.

110. *Id.* at 250-51.

the parties shall negotiate an agreement on the basis of that report. If these negotiations do not result in an agreement within a period of _ from the date of the Commission's report, the parties to the dispute shall, by mutual consent, submit the question to the procedures provided for in Section 2 of Part XV, unless the parties otherwise agree.¹¹¹

The above formulation admittedly borrowed elements from Professor Sohn's last paper,¹¹² the proposal by Ambassador Rosenne of Israel¹¹³ and a proposal by Bulgaria.¹¹⁴ It was based mainly on conciliation as the procedure for settlement of delimitation disputes; application of the compulsory procedures of Part XV of the Convention was to be by mutual consent of the parties.

The discussions during the resumed eighth session, based on the above text, led to certain suggested amendments for its improvement.¹¹⁵ One amendment, by referring only to disputes which arose subsequent to the entry into force of the new Law of the Sea Convention, excluded past disputes from the text.¹¹⁶ Another amendment excluded specifically from the above text disputes which involve concurrent considerations of any unsettled disputes concerning sovereignty over continental or insular land territory.¹¹⁷ A final amendment added a clause to the above text declaring that the provisions of this subparagraph shall not apply to any sea boundary dispute finally settled by an arrangement between all the parties to the dispute or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon these parties.¹¹⁸

The incorporation of such amendments by the Chairman

111. Report of the Chairman on the Work of Negotiating Group 7, U.N. Doc. NG 7/39 at 4 (1979).

112. *Toward the Formulation*, *supra* note 101, at 251.

113. *Id.* at 248-50.

114. The Bulgarian proposal provided that "parties to the dispute should, if the negotiations do not result in an agreed delimitation within a fixed period, submit the question of delimitation, by mutual consent, to the procedures provided for in Section 2 of Part XV, unless the parties otherwise agree." Statement by the Chairman made at the 28th Meeting of NG 7, U.N. Doc. NG 7/26 at 5 (1979).

115. United States of America: Informal Proposal, U.N. Doc. NG 7/40 at 1 (1979).

116. *Id.*

117. *Id.*

118. *Id.*

into an informal document led to a revised compromise formula included in the following text:

*Revised compromise formula by
the Chairman of NG7
Article 298 1(a)*

(i) Disputes concerning sea boundary delimitations between States with opposite or adjacent coasts, or those involving historic bays or titles, provided that the State having made such a declaration shall, when such a dispute has arisen subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, and notwithstanding article 284, paragraph 3, accept submission of the matter to conciliation provided for in Annex IV; and provided further that such procedure shall exclude consideration of any claim or dispute concerning sovereignty or other rights over continental or insular land territory;

(ii) After the Conciliation Commission has presented its report, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to the procedures provided for in Section 2 of Part XV, unless the parties otherwise agree;

(iii) The provisions of this subparagraph shall not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties.¹¹⁹

Further discussions, based on the above text, were held. As noted by the Chairman in his report of the work of the resumed eighth session, "[T]he [above] text was found inadequate by a number of delegations, while several others, many of whom considered the proposal as the maximum compromise they could approve of, advocated its adoption as a basis for a consensus."¹²⁰

119. See Revised Compromise Formula by the Chairman, U.N. Doc. NG 7/41 at 1 (1979).

120. See Report of the Chairman on the Work of Negotiating Group 7, U.N. Doc. NG 7/45 at 3 (1979) [hereinafter cited as Report NG 7/45]. This limited distribution document was reprinted for general distribution in 12 Third UNCLOS Off. Rec. 71, at 107 (1980), U.N. Doc. A/CONF.62/91 (1979).

In his efforts to find a more satisfactory compromise text, the Chairman held further consultations. On the basis of these discussions, the Chairman included in his report another version based on the above text. The Chairman's suggestion, set out below, introduced some changes into the opening paragraph. For example, unlike the revised text given above, "[d]isputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles,"¹²¹ are mentioned. Arguably, by referring to these articles in the first paragraph, it is not necessary to add that, as stated in all the previous versions, such delimitation disputes involve States with opposite or adjacent coasts. The exclusion of "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory,"¹²² provided for in the Chairman's new text set out below, was more in line with the amendment suggested by the United States than was the incorporation of that amendment into the first paragraph of the Chairman's revised text set out above. Finally, in paragraph (ii), the new text introduced the requirement that the report of the conciliation commission "shall state the reasons on which it is based."¹²³ The Chairman's new text for Article 298 1(a), submitted in his report of the work of the resumed eighth session, reads:

(i) Disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that the State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, and notwithstanding article 284, paragraph 3, accept submission of the matter to conciliation provided for in annex IV; and provided further that there shall be excluded from such submission any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory;

121. Report NG 7/45, *supra* note 120, at 4.

122. *Id.*

123. *Id.*

(ii) After the Conciliation Commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2 of part XV, unless the parties otherwise agree;

(iii) The provisions of this subparagraph shall not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties.¹²⁴

In submitting the above text, the Chairman noted that the lengthy discussions on the questions during the session "strengthened [his] understanding that only a proposal based upon the procedure of compulsory conciliation is consistent with a realistic view of the possibilities, if any, to reach a compromise on this controversial issue."¹²⁵ It was the Chairman's view that none of the proposals set out in this section met the standard adopted by the Conference for selecting new proposals to be used for revising the ICNT. In other words, none of the above texts could be "found, from the widespread and substantial support prevailing in the Plenary, to offer a substantially improved prospect of a consensus."¹²⁶ The above text, suggested by the Chairman in his report of the work of the resumed eighth session, was therefore submitted to serve as a basis for further negotiations at the ninth session of the Conference.

In his report of the work of the ninth session,¹²⁷ convened in New York, the Chairman observed that the negotiations had not added any new features to the consideration of the disputes-settlement question. He noted that the issue had proved difficult to solve. Thus, the Chairman repeated his own proposal on Article 298 1(a), submitted at the end of the eighth session, set out

124. *Id.*

125. *Id.*

126. Organization of Work: Decisions Taken by the Conference at its 90th Meeting on the Report of the General Committee, 10 Third UNCLOS Off. Rec. 6, 8, U.N. Doc. A/CONF.62/62 (1978).

127. U.N. Doc. A/CONF.62/L.47 (1980).

above, which was included in ICNT, Rev. 2.¹²⁸

C. *Evaluation of the Settlement Procedure in the Contexts of the Main Trends*

As observed at the beginning of this section, the system for the settlement of delimitation disputes is only one of the three issues which Negotiating Group 7 was to consider in an attempt to improve Articles 74 and 93 of the ICNT. One of the elements closely connected with the question of disputes-settlement is the substantive standard for the actual delimitation of maritime boundaries between States with opposite or adjacent coasts.

It appears that, in the course of discussions of the substantive standard for delimitation,¹²⁹ the supporters of the "median/equidistance line" rule usually accepted, as part of the package, the idea of establishing a compulsory, third-party system for the settlement of delimitation disputes. Those, however, who have maintained that delimitation must be based upon "equitable principles," have generally also rejected the idea of including, in the relevant articles, compulsory judicial procedures for the settlement of delimitation disputes.

It is now evident that, on the one hand, there are those who would not accept a treaty provision in which compulsory judicial procedures for settlement of delimitation disputes were included. On the other hand, there are those who would have equally great difficulty in accepting any of the competing substantive rules on delimitation unless a third-party system capable of disposing conclusively of the issues in a delimitation dispute were included. The existence of such a system is seen as more crucial with respect to the "equitable principles" standard which may need a neutral party, as appropriate, to determine, for the parties to a delimitation dispute, the question of what is equitable. Accordingly, attention must be paid to the nature of the third-party procedure envisaged.

The discussion in this section indicates that the emerging third-party procedure is not a judicial one. The Chairman's sug-

128. *Id.*, Annex, at 2. The proposal was incorporated as paragraph 1(a)(i) of Article 298 of ICNT, Rev. 2, *supra* note 2, at 142-43.

129. For a discussion of the efforts made to date on this issue by Negotiating Group 7, see *Toward the Formulation*, *supra* note 101, at 209-17.

gested text includes "compulsory conciliation"¹³⁰ which relies on the conciliation procedures of Annex V of the Convention, part of the general system for the settlement of disputes under the Convention as a whole. The selection of a third-party procedure with nonbinding decisions (conciliation) may prove to be the only third-party procedure acceptable to those totally opposed to compulsory procedures for delimitation disputes. The compromise on conciliation would, however, be only barely tolerable to those who insist upon a third-party system capable of rendering binding decisions in delimitation disputes. They would be constrained to accept a system with nonbinding decisions, but, at least, a third-party system of settlement.

Generally, and especially under the usage adopted in the Law of the Sea negotiations, only a third-party procedure which entails binding decisions is referred to as a "compulsory" procedure. This usually means judicial procedures. Thus, a procedure, although third-party in nature, which does not entail binding decisions is not compulsory. It may be noted, therefore, that the term "compulsory conciliation," used by the Chairman of Negotiating Group 7, is a misnomer, since conciliation, even under Annex V of the Convention, is a noncompulsory procedure. What is envisaged by the Chairman would be more accurately described as "compulsory resort to conciliation." Thus, it is the resort to conciliation as the procedure for settling the dispute which is binding and not the outcome of the procedure itself. The drafting history of Annex V of the Convention reveals that the idea of a conciliation procedure rendering decisions binding upon the parties was completely rebuffed. Emphasis was placed on the fact that the conciliation procedure under Annex V was a noncompulsory procedure in that its findings are only recommendations and are not binding upon the parties.¹³¹ It would seem that this system may be the compromise solution.

Acceptance of "compulsory resort to conciliation" as the third-party system for the settlement of delimitation disputes would, accordingly, be consistent with the approach already adopted under the general system for the settlement of disputes under the Convention as a whole.

130. See Report NG 7/45, *supra* note 120.

131. See *Prolegomena*, *supra* note 5, at 349-54.

V. Conclusion

In the introductory part of this article, it was observed that the efforts which the Conference has made toward the establishment of a viable system for the settlement of disputes under the emerging Law of the Sea Convention is noteworthy. The Conference has experimented with the idea of creating an international judicial forum open to all the potential actors in the ocean space, including States, natural or juridical persons, and an international organization. As analysed in this article, in the recent discussions, the efforts towards streamlining the system have resulted in certain important proposals for changing the text of the ICNT. Such important changes deserve brief summary here by way of conclusion.

The changes noted below must be understood as demonstrating that the Conference has continued to be attentive to the wishes of the negotiating sovereign States on this important question of establishing compulsory judicial procedures for the settlement of disputes, an area in which no recent diplomatic conference, including the 1969 Vienna Convention on the Law of Treaties,¹³² has been successful. The elaborate efforts made in the Vienna negotiations to include a general compulsory settlement procedure of a judicial nature did not succeed, and the adopted convention on the Law of Treaties included only a conciliation procedure.¹³³ The major diplomatic conferences convened since 1969 to conclude multilateral treaties have all failed to establish compulsory judicial procedures for the settlement of disputes.¹³⁴ In a recent United Nations Convention on Succession of States in Respect of Treaties, adopted on August 23, 1978, the question of disputes-settlement was taken up almost as an afterthought and did not receive detailed examination.¹³⁵ The United Nations Convention adopted conciliation as the

132. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 Int'l Legal Materials 679 (1969) (*entered into force* Jan. 27, 1980).

133. The Vienna Convention does provide for compulsory judicial settlement of challenges to treaties on the basis of *jus cogens*.

134. A survey of the disputes-settlement provisions in the recent UN multilateral conventions is beyond the scope of the present analysis.

135. For an analysis of the disputes-settlement procedures of that Convention, see Laval, *Dispute Settlement Under the Vienna Convention on Succession of States in Respect of Treaties*, 73 AM. J. INT'L L. 407 (1979).

third-party procedure for the settlement of disputes. Reference of disputes to adjudication through *ad hoc* arbitration or by the ICJ is not a compulsory procedure since mutual consent of the parties is necessary.

With its longstanding focus on this issue, the Law of the Sea Conference has now adopted the following primary approach to the settlement of disputes:

1. The Conference has retreated from earlier attempts to emphasize compulsory judicial settlement of disputes in forums of the parties' own choice and has accepted compulsory resort to conciliation as the basic third-party procedure for settling a large category of disputes that would arise within the exclusive economic zone. Thus, issues with respect to which compulsory resort to conciliation would be the only acceptable procedure have been clearly segregated from the limited issues still subject to the compulsory judicial procedures as explained herein. In the effort to streamline the system as a whole, the same reliance upon conciliation as the basic third-party procedure now has been emphasized with respect to disputes relating to the delimitation of maritime boundaries between States with opposite or adjacent coasts.¹³⁶ It also has been found necessary to formulate a provision dealing with settlement of disputes arising from coastal States' exercise of jurisdiction with respect to scientific research within their exclusive economic zones and on the continental shelf. The provision is now made part of Article 296, paragraph 2 of ICNT, Rev. 2, establishing compulsory resort to conciliation as the procedure for settlement of such disputes.¹³⁷

2. The focus upon the system for the settlement of sea-bed disputes has revealed that additional exceptions may be made to the competence of the Sea-Bed Disputes Chamber, at present having exclusive jurisdiction over all sea-bed disputes and being regarded as the only forum to which States, natural or juridical

136. See text at note 124 *supra*.

137. *Supra* note 2. The Chairman of Committee III had prepared a new Article 264 dealing specifically with settlement of disputes concerning marine scientific research as provided for in Articles 246 and 253. The Chairman's formulation, specifically providing for compulsory resort to conciliation for such disputes, was then integrated into Article 296, paragraph 2 of Part XV dealing with the system for the settlement of disputes under the Convention as a whole.

Article 296, ICNT, Rev. 2, appears in Rev. 3 as Article 297.

persons, and the Sea-Bed Authority would be required to submit all sea-bed disputes for settlement. Proposed departure from the exclusive jurisdiction of the SBDC over sea-bed disputes has now appeared in proposals for an *ad hoc* Sea-Bed Chamber and for settlement of certain commercial disputes by commercial arbitration or other binding arbitration outside the SBDC. Settlement through compulsory resort to conciliation, as a first step, has been abandoned in favour of the use of binding arbitral procedures.

3. It also seems that, in streamlining the system, the insulation of the discretionary and legislative powers of the Sea-Bed Authority from judicial scrutiny by the SBDC is now as clearly established as the protection of coastal States from judicial procedures with respect to disputes concerning their exercise of discretionary and legislative powers relating to the living resources within the exclusive economic zone.

4. It is hoped that all the other specific improvements made in the ICNT text, as analysed here, will serve as a guide to what is likely to emerge as the comprehensive system for the settlement of disputes under the Law of the Sea Convention, combining in one part all the substantive provisions on this question. Thus, all the disputes-settlement provisions found in various parts of the Convention¹³⁸ should be brought under Part XV dealing with the disputes-settlement system under the Convention as a whole.

138. See, e.g., ICNT, Rev. 2, *supra* note 2, Annex III, Art. 5, para. 4 (disputes relating to transfer of technology to the Authority).