

The Settlement of Disputes under the Law of the Sea Convention—Questions in Light of the United States Position

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Abstract

At the Third United Nations Conference on the Law of the Sea, the United States delegation took the lead in negotiations concerning provisions on the settlement of disputes. In its view, a system of peaceful and compulsory settlement of disputes was one of the main objectives to be pursued as one of the essential aspects of an overall comprehensive law of the sea settlement. The influence of the United States on the negotiations and on the final text of the Convention is evident, notwithstanding the many permutations made necessary by the compromises reached in order to obtain consensus. Although, after 1994, all of the Administrations have been in favor of the U.S. accession to the Convention, the dispute-settlement provisions that were considered among the main attractions of the Convention by the Clinton Administration, are viewed as much less important and attractive by the present Administration, which has, *inter alia* proposed that the exception to compulsory jurisdiction for military activities, that the U.S. intend to utilize, be reserved for exclusive interpretation by the U.S.. The current U.S. attitude might be summarized as

one seeking minimum commitment together with maximum control. The need to take into account the traditional reluctance of the Senate as regards accepting commitments to compulsory settlement of disputes and the need to please the military, which are among the strongest advocates of the Convention, and the enhanced concerns for security issues following 11 September 2001, explain the present U.S. position.

Key Words: Law of the Sea, Settlement of disputes, United States

I. Introduction

One of the most notable characteristics of the United Nations Convention on the Law of the Sea (UNCLOS/the Convention)¹ is that, contrary to most other conventions for the codification and progressive development of international law, it contains a well-developed set of mechanisms for the settlement of disputes.² Such mechanisms have been negotiated while keeping in mind the complexity of the substantive provisions of the Convention. In some cases the “constructive ambiguity” of certain compromise solutions was accepted because it was assumed that there would be a judge to decide on the meaning of the ambiguous provisions; in other cases, a nuanced set of provisions on the settlement of disputes was adopted as an integral part of a compromise solution on particularly controversial substantive issues.

The United States delegation to the Third United Nations Conference on the Law of the Sea took the lead in negotiations on this subject from the beginning (Sohn, 1976-77: 9-14). In its view, a system of “peaceful and compulsory settlement of disputes” was one of the main objectives to be pursued,³ as one of the “essential aspects of an overall comprehensive law of the sea settlement.”⁴

The influence of the proposals of the United States on the negotiations and on the final text of the Convention is evident, notwithstanding the many permutations made necessary by the

¹ Opened to Signature on 10 December 1982, entered in force on 16 November 1994, text in United Nations Treaty Series, vol. 1833, p. 3.

² They are set out in Part XV, in Annexes V, VI, VII, and VIII, as well as in Articles 186-191 and 264-265.

³ “United States Policy for the Seabed: Statement by President Nixon” of 23 May 1970, 62 *Department of State Bulletin*, p. 737 (1970).

⁴ Statement of Ambassador John R. Stevenson, Main Committee of the United Nations Seabed Committee, 22 August 1973, 69 *Department of State Bulletin*, p. 412 at 414 (1973).

compromises reached in order to obtain consensus.

Once the 1994 Agreement on Part XI⁵ removed the objections raised by the Reagan Administration to the very principle of accession to the Convention, the attitude of the United States' government, although favoring such accession, became more restrictive as regards the settlement of disputes.⁶ This change of attitude may be understood in light of the traditional reluctance of the Senate to engaging the United States in binding obligations concerning the settlement of disputes, as in the case of the "Connally reservation" to the U.S. acceptance of the optional clause of article 36, para 2, of the Statute of the ICJ, or of the rejection of the Optional protocol on the settlement of disputes to the four Geneva Conventions on the Law of the Sea of 1958. Even though, in the present case, the restrictive attitude towards provisions on the settlement of disputes may depend on the need to meet concerns expressed by adversaries of the Convention, and be understood in light of discomfort caused by certain aspects of recent decisions of the ICJ (in particular the *Oil Platforms* judgment⁷ and the *Wall* consultative opinion⁸) it may be regretted that the present U.S. position can also be seen as the substitution of

⁵ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

⁶ Frequently updated information on the discussions in the Senate (that at the date of writing, October 2005, has not yet given its advice and consent) are in the excellent paper by M. A. Browne, "The Law of the Sea Convention and U.S. Policy," CRS Issue Brief for Congress, last updated 4 August, 2005, available through the internet. See also Duff (2004, 2005).

⁷ *Iran v. United States*, Judgment on the merits of 6 November 2003, <http://www.icj-cij.org>, and 42 ILM 1334 (2003) and the comments of the Legal Advisor to the Department of State William H. Taft IV (2004a, 2004b).

⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, www.icj-cij.org and 43 ILM 1009 (2004). Although the present author is not aware of official positions of the U.S., it would seem reasonable that the aspects that have raised most concern in Washington are those concerning self-defense set out especially in para 138. For a critical appraisal by an American author, Murphy (2005).

a defensive position for a forward-looking rule-of-law attitude, keen on ensuring the best functioning for all States, of the results of an extremely complex negotiation.

II. The System for the Settlement of Disputes under the Law of the Sea Convention and the Straddling Stocks Convention

A. The Main Characteristics of the System

The main characteristics of the dispute-settlement system set out in the UNCLOS are well known.⁹ It seems, nevertheless, useful to review them in order to assess the weight of the contribution of the United States to their formation and the importance of the current position of the United States. It has to be noted at the outset that the system set out in UNCLOS may expand to include disputes concerning other treaties and agreements relating to the law of the sea, when they so provide (art. 288, para 2). There are now seven agreements containing such provisions, four of which are in force.¹⁰ The most important of these is the 1995 Straddling Stocks Agreement,¹¹ to which the United States is a party.

The most relevant aspect of the dispute-settlement system of the Convention is that it is a binding system. Disputes concerning the interpretation and application of the Convention “shall . . . be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction” (art. 286).

⁹ It does not seem necessary to quote the vast literature. An indispensable tool for research is, however, Nordquist, Rosenne, & Sohn (1989).

¹⁰ See the list, and the relevant clause of each treaty, in International Tribunal for the Law of the Sea (2004b: 162-170).

¹¹ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, opened to signature in New York on 4 December 1995, entered into force on 11 December 2001, text in 34 ILM 1547 (1995).

The compulsory character of the system is nuanced by the adoption in article 287 of the “Montreux formula,” which—through a system based on declarations of preference which States parties may make as to the adjudicating body for the exercise of compulsory jurisdiction—introduces flexibility as regards the judge competent to exercise compulsory jurisdiction. Given the presumptions set out in article 287, the system in fact favors arbitration. While not excluding the possibility of using the International Court of Justice, it introduces a new permanent adjudicating body, the International Tribunal for the Law of the Sea.

The scope of compulsory settlement is narrowed by a set of limitations and exceptions. Limitations, which apply to all State Parties, concern the exercise of coastal States’ sovereign rights and jurisdiction in the exclusive economic zone, although leaving compulsory settlement applicable to cases in which there is a conflict between the exercise of such sovereign rights or jurisdiction, and the freedoms of the high seas that the UNCLOS recognizes for all States in the exclusive economic zone, as well as in cases concerning a number of violations of international rules and standards for the protection of the environment (art. 297, para 1). Disputes concerning the exercise of the coastal States’ rights to marine scientific research and to fisheries, although excluded from compulsory jurisdiction, may, in some cases, be submitted, at the request of one party, to a conciliation commission (art. 297, paras 2-3). Furthermore, disputes concerning the exercise of the coastal States’ rights in the exclusive economic zone, even when not excluded from compulsory jurisdiction in principle, cannot be adjudicated if the competent court or tribunal finds that the claim constitutes an abuse of legal process or is *prima facie* unfounded (art. 294).

Exceptions may be introduced, according to article 298, by means of a declaration by a State wishing not to be bound by compulsory settlement obligations as regards the categories of disputes set out in the abovementioned article. The declarations

may concern: disputes on the delimitation of maritime areas, military activities and enforcement activities concerning marine scientific research and fisheries in the exclusive economic zone, disputes on which the United Nations Security Council is exercising its functions.

Compulsory settlement as provided in the UNCLOS has a “default” or residual character as it does not prevail on different choices made by the parties. Procedures set out in the Convention do not apply if, in their agreement to resort to peaceful, but not necessarily compulsory, means of settlement, the parties to a dispute have agreed to exclude further procedures, including compulsory ones (art. 281, para 1). Procedures for the compulsory and binding settlement agreed to by the parties in agreements different from the UNCLOS may apply in lieu of those set out in the Convention (art. 282). The parties may agree to derogate, the mechanism of choice of procedure of article 287 (art. 287, paras 4-5). Such derogation makes limitations and optional exceptions inapplicable (art. 299).

Disputes concerning activities in the International Seabed Area, including those involving parties that are not States, such as natural and juridical persons, are submitted to compulsory jurisdiction concentrated, although with possible exceptions in favor of an *ad hoc* chamber of the Law of the Sea Tribunal or of a commercial arbitration tribunal, in the Seabed Disputes Chamber of the Law of the Sea Tribunal (art. 187-188).

Provisional measures may be requested from competent courts or tribunals to which a dispute has been submitted. These are compulsory under article 290 of the UNCLOS. They may be prescribed to preserve the rights of the parties (as in the ICJ) and also “to prevent serious harm to the marine environment.” Under the Straddling Stocks Agreement provisional measures may also be prescribed “to prevent damage to the stocks in question” or, pending agreement on “compatible conservation and management measures” (art. 31, para 2), to substitute for agreement on “provisional arrangements of a practical nature.”

Pending the constitution of a competent arbitration tribunal, provisional measures may be prescribed by the International Tribunal for the Law of the Sea (UNCLOS, art. 290, para 5).

A special compulsory procedure for the prompt release, upon the posting of a reasonable bond or other financial security, of vessels and crews detained for alleged violation of certain provisions of the Convention, may be brought to the International Tribunal for the Law of the Sea. Even though this is a State-to-State procedure (the flag State of the detained vessel versus the detaining State) the application for release may be submitted also “on behalf of the flag State” by a private person such as the ship-owner (art. 292).

B. The System under the test of Practice since 1994

Between 1994, when the UNCLOS entered into force, and today, the system for the settlement of disputes has begun to function, though not all its aspects have undergone the test of practice. The International Tribunal for the Law of the Sea has been established. It has adopted its Rules, a Resolution on Internal Judicial Practice and Guidelines concerning the preparation of cases.¹²

Cases based on the compulsory settlement provisions of the UNCLOS have been submitted to the Law of the Sea Tribunal and to arbitration tribunals established under Annex VII of the Convention. No case based on these jurisdictional provisions has been submitted to the International Court of Justice, nor to specialized arbitration tribunals established under Annex VIII to the Convention. The Seabed Disputes Chamber, although duly constituted, has not received any contentious cases nor any requests for an advisory opinion. Equally idle have remained the Special Chambers for Fishery Disputes and for Marine

¹² All information and documents are available on the web: <http://www.itlos.org>. See also International Tribunal for the Law of the Sea (2005).

Environment Disputes, set up by the Law of the Sea Tribunal, and available to parties agreeing to submit to them their case. No case has yet arisen on the basis of the Straddling Stocks Agreement.

The cases so far submitted for adjudication confirm that the mechanism for determining the judge competent to exercise jurisdiction under article 287 (contentious cases on the interpretation and application of the Convention) favors the “default” competence of arbitration tribunals constituted under Annex VII. All the seven such cases submitted to adjudication since 1994 have been submitted to an arbitration tribunal to be established under Annex VII, as in none of these cases have both parties declared their preference for the Law of the Sea Tribunal or for the ICJ.¹³ In two of these cases, however, at an early stage of the dispute, the parties agreed to transfer the jurisdiction from the arbitration tribunal to the Law of the Sea Tribunal (the *Saiga No. 2*

¹³ These are: (1) the *M.V. Saiga (No. 2) case*, St. Vincent and the Grenadines v. Guinea, see notification instituting arbitral proceedings of 22 December 1997, in *ITLOS Pleadings, Minutes of Public Sitzings and Documents 1998*, vol. 2, p.14; (2) the *Southern Bluefin Tuna case*, Australia and New Zealand v. Japan, Award on Jurisdiction and Admissibility of 4 August 2000, 39 ILM 1359 (2000); (3) the *case concerning the conservation and sustainable exploitation of swordfish stocks in the Southwestern Pacific Ocean*, Chile/European Community, ITLOS Order of 20 December 2000, *ITLOS Reports 2000*, 148; (4) the *MOX plant case*, Ireland v. United Kingdom, Arbitration Tribunal Order No. 3, of 24 June 2003, 42 ILM 1187 (2003), further documents on the case in <http://www.pca-cpa.org>; (5) the *case concerning Land Reclamation by Singapore in and around the Straits of Johore*, Malaysia v. Singapore, Arbitral award on agreed terms of 1 September 2005, <http://www.pca-cpa.org>; (6) *the case concerning the delimitation of the continental shelf and the exclusive economic zone*, Barbados v. Trinidad and Tobago, Notification and Statement of claim, including the request to constitute the arbitral tribunal under Annex VII of 16 February 2004; arbitral award of 11 April 2006, see <http://www.pca-cpa.org>; (7) the *case concerning the delimitation of the marine boundary*, Guyana v. Surinam, Notification and Statement of claim, including the request to constitute the arbitral tribunal under Annex VII of 24 February 2004, see the information in <http://www.pca-cpa.org>

case)¹⁴ or to an *ad hoc* chamber thereof (the *Swordfish* case between Chile and the European Community).¹⁵ The bulk of the work of the Law of the Sea Tribunal has concerned urgent cases for which its jurisdiction is both compulsory and exclusive: prompt release cases (seven have been submitted),¹⁶ and requests for provisional measures pending the establishment of the competent arbitral tribunal (Four such cases involving provisional measures have been submitted, of which one submitted to the Tribunal was transformed into a normal provisional measure.)¹⁷

While no decision on the merits has been handed down by the arbitral tribunals established under the UNCLOS,¹⁸ there is now a not unsubstantial *corpus* of decisions by the Law of the Sea

¹⁴ International Tribunal for the Law of the Sea, Order of 20 February 1998, *ITLOS Reports 1998*, p. 10.

¹⁵ International Tribunal for the Law of the Sea, Order of 20 December 2000 quoted above.

¹⁶ These are: (1) the *M.V. Saiga* case, St. Vincent and the Grenadines v. Guinea, Judgment of December 1997, *ITLOS Reports 1997*, p. 16; (2) the *Camouco* case, Panama v. France, Judgment of 7 February 2000, *ITLOS Reports 2000*, p. 10; (3) the *Monte Confurco* case, Seychelles v. France, Judgment of 18 December 2000, *ITLOS Reports 2000*, p. 86; (4) the “*Grand Prince*” case, Belize v. France, Judgment of 20 April 2001, *ITLOS Reports 2001*, p. 17; (5) the “*Chaseeri Reefer*” case, Panama v. Yemen, Order of 13 July 2001, *ITLOS Reports 2001*, p. 82; (6) the “*Volga*” case, Russian Federation v. Australia, Judgment of 23 December 2002, *ITLOS Reports 2002*, p. 10; (7) the “*Juno Trader*” case, St. Vincent and the Grenadines v. Guinea Bissau, Judgment of 18 December 2004, <http://www.itlos-tidm.org>

¹⁷ These are: (1) the *M.V. Saiga (No. 2)* case, St. Vincent and the Grenadines v. Guinea, transformed into a normal article 290, para 1, provisional measures case, see Order of 20 February 1998, *ITLOS Reports 1998*, p. 10; (2) the *Southern Bluefin Tuna* case Australia and New Zealand v. Japan, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280; (3) the *MOX plant* case, Ireland v. United Kingdom, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95; (4) the *case concerning Land Reclamation by Singapore in and around the Straits of Johore*, Malaysia v. Singapore, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10.

¹⁸ But see below, footnote 20 and corresponding text.

Tribunal.¹⁹ The Tribunal has clarified many aspects of the prompt release procedure, especially in cases concerning alleged fisheries violations. As regards substantive questions of international law, in its *Saiga No. 2* judgment²⁰ the Tribunal has tackled a number of questions regarding the law of the sea (the genuine link, special jurisdictional zones established by the coastal State, hot pursuit, use of force at sea) and general international law (diplomatic protection, necessity, responsibility and reparations). In its provisional measures orders it has contributed to the development of international environmental law, dealing with such subjects as the precautionary principle and the obligation to cooperate. In these orders, it has also introduced provisional measures aiming at implementing the obligation to cooperate, and at facilitating the settlement of the dispute through their implementation. In this regard, the Tribunal was fully successful in the recent *Land Reclamation* case between Malaysia and Singapore.²¹

C. Assessment

The dispute-settlement system of the UNCLOS works. Its main feature, compulsory adjudication by a judge or an arbitral tribunal, has been experimented with successful in a number of cases. In some cases the deterrent effect of compulsory adjudication has brought parties to settle their dispute before the dispute-settlement process had run its course. The *Chaseeri Reefer* case, in which the detaining State decided to release the vessel as soon as the request for prompt release was submitted by the flag

¹⁹ In the abundant literature, see the brilliant synthesis by Oxman (2004: 285-296).

²⁰ Judgment of 1 July 1999, *ITLOS Reports 1999*, p. 10.

²¹ The parties, in implementing the provisional measures Order of the Law of the Sea Tribunal, set up a Group of independent experts and agreed to settle the dispute on the basis of the Group's report. Such settlement was then incorporated in the Award on Agreed terms of 1 September 2005 of the Annex VII arbitration Tribunal.

State to the Law of the Sea Tribunal, provides one such example. Another example may be the *Swordfish* case, in which the parties reached a provisional agreement and decided to freeze the continuation of the proceedings through a postponement of them.²² Moreover, the record of compliance with the decisions so far handed down by the Tribunal is positive.²³ The parties have always complied and in most provisional measures decisions, have cooperated in complying.

Some aspects of the system, such as “compulsory” conciliation, preliminary proceedings, Annex VIII arbitration (not to say of Part XI procedures) have not been utilized. While in some cases this may just be by chance or because of the relatively short time that has elapsed since the Convention came into force, in other cases this may result from parties’ reluctance in engaging in procedures, such as conciliation, that are complex, but may not ultimately resolve the dispute.

States have in most cases accepted in full the obligations imposed by the Convention’s provisions on the settlement of disputes by not making the declarations concerning the optional exceptions available under article 298. On the other hand, in most cases they have not made the choice of procedure declaration under article 287, thus implicitly choosing Annex VII arbitration. Among States parties who have expressed a preference, indications in favor of the Tribunal prevail even though there is an important group favoring the ICJ. A growing group of States have expressed their preference for the Tribunal and the Court, thus indicating that they consider pre-established courts preferable to arbitral tribunals.

In abstaining from making the declarations for optional exceptions under article 298, a large majority of States parties has

²² See the Order of 16 December 2003, *ITLOS Reports 2003*, p. 69.

²³ Information on the follow-up of the Tribunal’s judgments and orders is given in the Tribunal’s yearbook. See, for example, International Tribunal for the Law of the Sea (2004a: 137).

shown no concern for the application of the compulsory dispute settlement mechanism even as regards particularly delicate disputes. This means that in most cases disputes on questions such as delimitation, enforcement activities in the exclusive economic zone or military activities may be unilaterally submitted to a court or tribunal.

The basically positive attitude of States as regards the dispute-settlement system of the UNCLOS is confirmed by the high number of States that have become parties to it: 149 as of now. There is no indication that a State has decided not to become party to the Convention because of its system for the settlement of disputes, either because it is not comprehensive enough, or because it is too comprehensive. Nor have States shown concern because of the fact that jurisdiction to settle disputes concerning the interpretation and application of the Convention has been entrusted to two different, pre-established courts and to arbitral tribunals. Current concerns about the fragmentation of international law due to the possibility that different courts and tribunals determine differently the content of international law do not seem to deter States from becoming engaged by the UNCLOS dispute-settlement system as these did not deter States in negotiating and accepting such a system at the Third United Nations Conference on the Law of the Sea.

III. The United States Objectives in the Making of the Dispute-Settlement System —An Assessment in Light of the Results

The objectives the United States sought to attain at the Third United Nations Conference on the Law of the Sea emerge from a number of documents. The most important are the “Draft Articles for a Chapter on the Settlement of Disputes,” submitted on 21

August 1973 to the Seabed Committee,²⁴ the Statement of Ambassador Stevenson, Head of the U.S. Delegation to the Seabed Committee, at the Main Committee of the Seabed Committee on 22 August 1973,²⁵ and the statement of Ambassador Learson, Head of the U.S. Delegation to the Third United Nations Conference on the Law of the Sea, at the Plenary of the Conference on 6 April 1976.²⁶

The need for a close connection between the solutions to be accepted on substance and the mechanism for the settlement of disputes is clearly spelled out in Ambassador Stevenson's statement:

Our fundamental premise for the achievement of coastal State or flag state jurisdiction, as the case may be, can be met by placing concrete duties on the state exercising such jurisdiction. Since those duties are designed to insure protection for the interests of others, confidence that those duties will be fairly observed is likely to spell the difference between a successful and a unsuccessful conference. For our part, we could not agree to a great many of the things we have ourselves proposed for a new law of the sea convention in the absence of a general system of compulsory dispute settlement for ocean uses. (See also Sohn & Gustafson, 1984: 241)

In the view of the United States, the dispute-settlement system had to be "comprehensive." This meant, to borrow from Ambassador Learson's statement, that it "should apply to all parties

²⁴ UN doc. A/AC.138/97 repr. in 12 *International Legal Materials* 1220 (1973). On the position of the U.S. Delegation at the beginning of the conference, including the reasons for the general proposal here considered, in light of more specific proposals concerning disputes on activities in the area, on the protection of marine environment and marine scientific research, see Stevenson & Oxman (1974: 31-32; in connection with 8, 28, 30).

²⁵ In 69 *Department of State Bulletin*, p. 412 at 414 (1973).

²⁶ Third United Nations Conference on the Law of the Sea, Official Records, vol. V, p. 31.

and all parts of the Convention.” In other words: on the one side, no opting-out and no separate protocol on the settlement of disputes as in the Geneva Conventions could be accepted. On the other side, no part of the Convention could be excepted from the application of the dispute-settlement system. If we look at the UNCLOS, the first objective has been reached: by becoming a party to the Convention a State becomes automatically bound by the rules on the settlement of disputes which are an “integral part” of it and no reservations are allowed on this, as on all other subjects covered by the Convention (art. 309). As regards the second objective, the limitations of article 297 and, to a lesser extent, the optional exceptions of article 298, limit the scope of the comprehensiveness. Nevertheless, the U.S. delegation was ready to accept “limited exceptions.” As stated by Ambassador Learson: “While the dispute settlement system should extend to all parts of the Convention, it would be necessary to provide for certain limited exceptions, which should be defined carefully and as restrictively as possible.” Ambassador Learson added, however, that “His delegation was not prepared to exclude the economic zone from the settlement procedures.” There is no doubt that the exceptions in article 297 do not exclude the whole of the regime of the exclusive economic zone, as some third world delegations would have wished. Whether they correspond to the “limited exceptions” the U.S. considered appropriate is far from certain. The same would seem to apply to proposals made by United States in 1973 on the protection of the marine environment and the prevention of marine pollution²⁷ and on marine scientific research²⁸ which included compulsory settlement for disputes. In light of limitations to compulsory jurisdiction set out in article 297, para 1(c) and para 3, this objective has been reached partially as regards the first subject, and to a minimum extent as regards the second.

²⁷ UN doc. 3. A/AC.138/SC.III/L. 40 of July 13, 1973.

²⁸ UN doc. A/AC.138/SC.III/L. 44 of July 19, 1973.

As is well known, in recent years, starting with the arbitral award of 4 August 2000 in the *Bluefin tuna* case, a discussion is on going as to whether compulsory dispute-settlement is the rule or the exception in the Convention (Treves, 2003: 93-96).

Secondly, the system would be compulsory and the decisions taken would be binding. This is clearly indicated in the U.S. Draft Articles on the Settlement of Disputes of 1973 (art. 2, 7). In this, the mechanism set out in the Convention corresponds to the objectives pursued by the United States. Non-binding procedures agreed to by the parties prevent the functioning of the binding ones only if the latter have excluded by the parties (art. 281, para 1).

Thirdly, the mechanism the United States wished to adopt in the Convention was to be, as indicated by Ambassador Stevenson in his 1973 statement: “a system . . . that insures, to the maximum possible extent, uniform interpretation.” This system would not exclude other tribunals, but there would be “a law of the sea tribunal which would be available in cases where states do not agree to settle the disputes through other procedures.” This is clarified in the 1973 Draft Articles. According to article 2: “any contracting Party which is a party to a dispute relating to the interpretation or application of this Convention which is required by this Convention to be submitted to compulsory dispute settlement procedures on the application of one of the parties, may refer the dispute at any time to the Law of the Sea Tribunal (the Tribunal)” article 3 stated that: “Notwithstanding the provisions of article 2, if the parties to a dispute have agreed in any general, regional or special agreement to resort to arbitration, any party to the dispute shall be entitled to refer it to arbitration in accordance with that agreement in place of the procedures specified in this Chapter.”

In these provisions, one can find the idea of establishing a permanent, specialized Law of the Sea Tribunal. The need to ensure uniformity of interpretation is stated as an objective, and implemented in the sense that the Law of the Sea Tribunal is

proposed as the only permanent judicial body having jurisdiction. The objective is not, however, realized fully, as the need to give priority to the will of the parties choosing arbitration (but not the ICJ or another permanent court) is considered to be of greater importance. These two Draft Articles are at the basis, respectively, of articles 286 and 282 of the Convention. The objective of ensuring uniformity of interpretation has been further weakened by the “Montreux” mechanism of article 287 and by the broad formulation, allowing acceptance by the parties of any compulsory settlement system, including that of the ICJ, in article 282. The preference for arbitration entailed by article 287 is hardly compatible with the objective of ensuring uniform interpretation. Uniformity of jurisprudence, not fully pursued in the 1973 Draft Articles, was presented as an objective that could be derogated from in 1976 as Ambassador Learson (alluding probably to the Montreux formula) stated that:

His delegation had consistently stated that a properly constituted law of the sea tribunal would be an effective organ for producing rapid and uniform solutions to disputes and that such a tribunal would contribute to a coherent and uniform interpretation of the Convention. However, it was prepared to consider alternatives that would give parties more freedom of choice among means of binding settlement.

In Draft Article 8, para 2, the United States proposed in 1973 that: “The owner or operator of any vessel detained by any State shall have the right to bring the question of the detention of the vessel before the Tribunal in order to secure its prompt release in accordance with the applicable provisions of this Convention, without prejudice to the merits of any case against the vessel.” If we compare this draft with article 292 of the UNCLOS, it is clear that the substance of the United States’ proposal was adopted. The possibility of submitting an application for prompt release “on behalf” of the flag State set out in article 292, para 2, was a

compromise between direct access proposed by the United States and the wish of other delegations not to give *locus standi* to non-state parties.

Other important aspects of the dispute-settlement provisions of UNCLOS, for which the 1973 proposals of the United States were seminal, concern provisional (or interim) measures. Draft Article 8, para 1, of the U.S. 1973 proposal states: "The Tribunal shall . . . in appropriate cases issue binding interim orders for the purpose of minimizing damage to any party pending final adjudication. The Tribunal may also take such binding interim action in cases which have been submitted to arbitration under articles 1 or 3." The idea that interim measures orders should be binding, set out in article 290 of the Convention, and doubtlessly influential on the ICJ's *LaGrand* judgment of 2001, stating that the provisional measures the Court "indicates" are binding,²⁹ is clearly proposed in this provision. The same applies to the idea, also set out in the proposed provision that, pending the constitution of an arbitral tribunal, interim measures could be issued by the Law of the Sea Tribunal. This idea is now set out in detail in article 290, para 5, a provision which, as mentioned above, has been applied a number of times by the Law of the Sea Tribunal.

In conclusion, the provisions of the UNCLOS on the settlement of disputes clearly show the mark of the leadership of the United States in the negotiations. Notwithstanding certain compromises on items where the United States itself had indicated that it could be flexible, the main objectives pursued were obtained.

²⁹ ICJ Judgment of 27 June 2001, *LaGrand case* (Germany v. United States of America) in <http://www.icj-cij.org>, repr. 40 ILM 1069 (2001), paras 98-107.

IV. The United States' Attitude Regarding the Settlement of Disputes Provisions of the Convention in View of Accession

A. The Attitude Emerging in the 1994 Submission of the Convention to the Senate

The well-known objections raised by the Reagan Administration against the UNCLOS exclusively concerned Part XI. No objection was voiced against provisions dealing with the settlement of disputes in general, or regarding activities in the International Seabed Area. The negotiations promoted by the Secretary-General in order to overcome the difficulties raised by the United States (and on which a number of industrialized States agreed) did not touch on rules concerning the settlement of disputes.

It was consequently easy to forecast that, once the 1994 Implementing Agreement was concluded, and once the United States Government became convinced that the Agreement met the objections of the United States, the U.S. position concerning the provisions on the settlement of disputes would remain unchanged. In fact, these provisions were presented by the U.S. Government as a positive feature of the Convention. In his letter of transmittal of the Convention to the Senate for advice and consent, President Clinton, in listing the "primary benefits" of UNCLOS, underscored that: "[t]hrough its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions."³⁰

In the Commentary to the Convention set out in the same document submitting UNCLOS to the Senate, this point is further developed as follows:

The dispute settlement system of the Convention advances the U.S. policy objective of applying the rule of law to all

³⁰ 103d Congress, Senate, Treaty doc. 103-139 (1994), p. iv.

uses of the oceans. As a State Party, the United States could enforce its rights to preserve its prerogatives through dispute settlement under the Convention, as well as promote compliance with the Convention by other States Parties. At the same time, the procedures would not require the United States to submit to binding dispute settlement matters such as military activities or the right to manage fishery resources within the U.S. EEZ.³¹

So, the general assessment of the dispute-settlement provisions presented by the U.S. Government in submitting the Convention to the Senate is positive. The original objective of “comprehensiveness” has, in the U.S. Government’s view, been sufficiently reached “in that the bulk of the Convention’s provisions can be enforced through binding mechanisms.” Of the other original objectives of ensuring uniformity of interpretation and flexibility, the first is not mentioned, while flexibility (“in that Parties have options as to the appropriate means for resolution of their disputes”) is indicated as another of the main characteristics to be praised.

Often forgotten is the particular importance of the U.S. delegation to the Third United Nations Law of the Sea Conference on the International Tribunal for the Law of the Sea. Notwithstanding the decisive role played by the U.S. delegation in proposing the institution of the Tribunal and in enhancing its role, no credit is claimed. Moreover, without explanation, the U.S. Government recommends that the choice of preferred procedures under article 287 be made in favor of special arbitration tribunals constituted in accordance with Annex VIII, and (in case the dispute would not be encompassed in the specialized competence of these arbitral tribunals) in favor of an arbitral tribunal to be established in accordance with Annex VII.

Notwithstanding the above quoted general remarks about the importance of the dispute-settlement provisions to advance the application of the rule of law to all uses of the ocean, the

³¹ 103d Congress, Senate, Treaty doc. 103-139 (1994), p. 83f.

declaration proposed concerning optional exceptions to be made under article 298 is as wide as the Convention permits, as it would exclude all the categories of disputes listed in the said Article.

One of the achievements of the U.S. delegation, the “prompt release” Article, is mentioned, without insisting, however, on the role of private entities. Another achievement, the binding character of provisional measures is not mentioned, while, in its Commentary, the U.S. Government insists on another aspect of the provisional measures Article, namely on that provisional measures may be prescribed to prevent serious harm to the marine environment. As, in the U.S. view, “the term ‘marine environment’ as used in the Convention includes ‘marine life,’” a competent court or tribunal may, under article 290, “prescribe provisional conservation measures for living marine resources . . . whether or not such measures are necessary to protect the respective rights of the parties.”³²

B. The Attitude Emerging Through the Ratification of the Straddling Stocks Agreement

The choices made in ratifying, in 1996, the 1995 Straddling Stocks Agreement are consistent with the position just illustrated concerning UNCLOS, as the U.S. chose Annex VIII arbitration as its preferred settlement of dispute forum under article 30, para 4. The United States’ ratification of the Straddling Stocks Agreement is remarkable also because it shows an open mind towards the dispute settlement system of the UNCLOS and towards the role played in it by the Law of the Sea Tribunal.

It is well known that the provisions of Part XV of the UNCLOS apply to disputes concerning the Straddling Stocks Agreement as well as to disputes concerning the interpretation and application of specific sub-regional, regional or global fisheries agreements (art. 30, paras 1-2). So, through the Straddling Stocks

³² 103d Congress, Senate, Treaty doc. 103-139 (1994), p. 85.

Agreement, the U.S. has become bound by the dispute-settlement provisions of the UNCLOS.

As a non-party to the UNCLOS, the U.S. could however take advantage of article 31, para 3, of the Straddling Stocks Agreement. This provision permits to parties to the Agreement that are not parties to UNCLOS to declare that article 290, para 5, of the UNCLOS does not apply to them. Through this declaration a non-party to the Convention would avoid being submitted to the admittedly limited and provisional jurisdiction of the Law of the Sea Tribunal. It is remarkable that the U.S. has not made this declaration, showing that it has no preconceived hostility against the Tribunal. It may be added that, in case provisional measure proceedings involving the U.S. were brought to the Tribunal under article 290, para 5, the U.S. would be entitled to designate an *ad hoc* judge.

C. The Attitude Emerging in the Senate Hearings in 2003 and 2004

The position taken by the G. W. Bush Administration in the hearings held in the Senate, before the Foreign Relations and other Committees in 2003 and 2004, follows, as regards the provisions on the settlement of disputes, that taken by the Clinton Administration in submitting the Convention to the Senate in 1994. There is, however, a change of emphasis and some significant additions have been made.

In the testimonies of Assistant Secretary of State John F. Turner³³ and of the State Department Legal Adviser William H. Taft IV,³⁴ the arguments contained in the 1994 document of

³³ Testimony before the Senate Foreign Relations Committee on 21 October 2003 (State Department Press release of 22 October 2003); testimony before the Senate Environment and Public Works Committee on 23 March 2004 (State Department Press release of the same date).

³⁴ Testimony before the Senate Foreign Relations Committee on 21 October 2003.

submission to the Senate underlining that the dispute-settlement system of the UNCLOS is “flexible” and “comprehensive” are repeated. The U.S. policy objective of applying the rule of law to all uses of the oceans is not repeated, however, lessening the emphasis on the settlement of disputes. This change of emphasis is further evidenced in that neither Mr. Turner nor Mr. Taft, in summarizing the “reasons to join” the Convention, lists, as President Clinton had done in summarizing the benefits of the Convention, the fact that the dispute-settlement mechanisms “enhance compliance by Parties with the Convention’s provisions.” They only include an oblique allusion to this in their list of “reasons to join” when they stress that: “While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, *it is desirable to establish additional methods of resolving conflict*” (emphasis added).

The declarations under articles 287 and 298 already proposed in 1994, were proposed again and accepted by the Senate Foreign Relations Committee. The Administration made, however, two additions to the declaration based on article 298. Moreover, two of the 24 declarations and understandings under article 310, proposed and again accepted by the Foreign Relations Committee, concern provisions on the settlement of disputes.³⁵

The just mentioned declarations would seem of minor importance in assessing the general attitude of the United States towards the settlement of disputes system of UNCLOS. In Declaration No. 17 the U.S. understands that disputes concerning the determinations by the coastal State of allowable catch in its EEZ, of whether it has capacity to harvest the entire allowable catch, and of the terms and conditions for access of foreign states “are, by virtue of article 297(3)(a), not subject to binding resolution under the Convention.” This interpretation does not seem to be contested. In Declaration No. 22 the U.S. “declares,

³⁵ See S2712: Congressional Record, Senate, March 11, 2004, Executive Report of Committee, repr. in Duff (2004: 214).

pursuant to article 39 of Annex VI, that decisions of the Seabed Disputes Chamber shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such decisions shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States.” This declaration cannot modify the international obligation set out in article 39 of Annex VI that the decisions of the Seabed Disputes Chamber be enforceable in the territories of States Parties “in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought”. It nevertheless points to the need of implementing legislation, consistently with the fact that article 39 of Annex VI is not listed in Declaration No. 24 as one of the few self-executing provisions of the UNCLOS.

More significant are the two additions to the declaration excluding from compulsory jurisdiction all the categories of disputes listed in article 298.

First, the proposed declaration states that the procedures provided for in Section 2 of Part XV, from which are excluded the categories of disputes set out in article 298, include “inter alia, the Sea-Bed Disputes Chamber procedures referred to in article 287 (2).” Independently of the question as to whether the jurisdiction of the Sea-Bed Disputes Chamber is limited by articles 297 and 298, it seems highly unlikely that disputes falling within the jurisdiction of the Sea-bed Disputes Chamber—which as indicated in article 187 of UNCLOS all concern “activities in the Area”—could in a concrete case concern the matters listed in article 298, namely: delimitation of the territorial sea, of the EEZ, of the continental shelf, disputes involving historic bays or titles military and fisheries and marine research enforcement activities, matters submitted to the Security Council.

Secondly, and this is certainly the most significant addition, the declaration under article 298 is completed by the addition of the following sentence:

The United States further declares that its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were 'military activities' and that such determination is not subject to review.

As underlined in a number of statements made by representatives of the State Department, of the Department of Defense and of the U.S. military, the "military activities exception" has been, and is of vital importance for the United States. In the U.S. view, through this exception "the Convention recognized that such activities involve vital national security interests that are not an appropriate matter for mandatory dispute resolution."³⁶ That an international arbitrator or judge could determine whether a certain activity (such as intelligence gathering) deemed by the United States to be a military activity is not such an activity for the purposes of article 298 might, in some circumstances, have a major impact on military operations and on U.S. military security. "[i]n this light the Administration closely examined the Convention, its negotiating history, and the practices of the tribunals constituted under the Convention. Based on this examination, the Administration believes that it is clear that whether an activity is 'military' is for each State to determine for itself."³⁷

What is the view of the U.S. of the effects this declaration might have is not indicated. In a statement anticipating the objection that "other parties will reject the U.S. 'military activities' declaration as a reservation," Assistant Secretary of State Turner stated that: "The U.S. declaration is consistent with the

³⁶ Statement of M. T. Esper, Deputy Assistant Secretary of Defense for Negotiations Policy, before the Senate Foreign Relations Committee on 21 October 2003.

³⁷ M. T. Esper's statement quoted above. See also the statement by W. H. Taft IV, quoted above, and the statement of Admiral M. G. Mullen, Vice Chief of Naval Operations before the Senate Foreign Relations Committee on 21 October 2003.

Convention and is not a reservation.”³⁸ This of course is consistent with the prohibition of reservations set out in article 309 of UNCLOS. It would be imprudent, in the present situation of the internal discussions in the United States, to raise, and also very difficult to answer, other legal question that come to mind in light of this declaration.

V. Assessment

It would seem that the Clinton Administration, in submitting the UNCLOS to the Senate, and, even more so, the G. W. Bush Administration in defending the Convention before it, have chosen to adopt the most defensive attitude they could as regards the dispute settlement procedures. This attitude might be summarized as one seeking minimum commitment together with maximum control.

A far as maximum control is concerned, the preference, in lieu of the Law of the Sea Tribunal (or of the ICJ) of arbitration tribunals may be explained in light of that the U.S., when involved in a dispute, would have a bigger say in the composition of the adjudicating body. In fact, as regards Annex VIII tribunals, the first choice, the U.S. would be entitled to designate two out of five members,³⁹ while as regards Annex VII arbitration, the subordinate choice, it would be entitled to designate one out of five members of the tribunal.⁴⁰ This has to be compared with having on judge, permanent or *ad hoc*, in the 21-member Law of the Sea Tribunal or in the 15-member International Court of Justice. To this must be added recent and less recent disappointments of the U.S. with decisions of the International Court of Justice.⁴¹

As regards minimum commitment, the United States does not

³⁸ Testimonies quoted above at note 36.

³⁹ UNCLOS, Annex VIII, art. 2(3).

⁴⁰ UNCLOS, Annex VII, art. 3(b).

⁴¹ See *supra* footnotes 8 and 9 and text relating thereto.

seem to consider relevant that compulsory jurisdiction provisions are a double-edged sword. In excluding from compulsory jurisdiction all categories of disputes mentioned in article 298, the Committee U.S. has chosen to avoid, as far as feasible, the risk of becoming a defendant even paying the price of losing the right to bring foreign States to a court or tribunal in order to obtain binding decisions in its favor stating correct interpretations of the Convention. In light of that the U.S. is a coastal and at the same time a long distance fishing nation, and of its broad interests in conducting scientific research all over the world, it would seem at least questionable whether, as regards the exclusion of disputes concerning enforcement activities in fisheries and research matters mentioned in article 298 (1b), this choice really corresponds to American interests.

As regards the “military activities exception” and its further development concerning the claim that the right of defining military activities belongs to each State Party and is not subject to review, the reasons why they are seen as vital by the most powerful military power of the world are evident. Some discussion of the consequences that could ensue were the U.S. example to be widely followed by other States Parties would, nevertheless, have been highly instructive.⁴²

The apparent lack of enthusiasm, or the enthusiasm reduced as compared with the time of the Third UN Conference of the Law of the Sea, for the provisions on the settlement of disputes, and the defensive, maximum control/minimum commitment attitude emerging from the declarations and statements examined, must, however, be put in the right perspective.

This attitude may reflect a typical big power attitude according to which such powers do not need courts and tribunals to obtain the results they wish if they feel their right has been violated, while they are keen to avoid to be brought to court when other States feel their rights have been infringed. The U.S. attitude

⁴² See the remarks by Song (2005: 267f.).

seems far from isolated if one considers that other big powers have taken a similar attitude. The Russian Federation has also chosen arbitration under Annexes VII and VIII and excluded all the categories of disputes mentioned in Committee article 298; France has made the same exclusions, and through its silence, has chosen Annex VII arbitration. It is also noteworthy that neither China nor India have made declarations under articles 287 and 298.

The need to take into account the traditional reluctance of the Senate as regards accepting commitments to compulsory settlement of disputes, the need to please the military, which are among the strongest advocates of the Convention, and the enhanced concerns for security issues following 11 September 2001, can certainly be valid explanations of the U.S. position. A more open attitude has been shown by the U.S. as regards the Straddling Stocks Convention, which has linked, since 1996, the United States to the legal fold of the UNCLOS disputes-settlement system. Especially, the relatively narrow scope of the optional exceptions of article 298 makes the choice of becoming a party more significant, from the point of view of the settlement of disputes provisions, than the decision to utilize the exceptions. It remains true that, as stated by representatives of the U.S. Administration, the provisions on the settlement of disputes subject “the bulk of the Convention’s provisions to enforcement through mechanisms that are binding under international law.”⁴³ Let me express the hope that the fact that advice and consent of the Senate has not yet been given is not connected with this last remark.

⁴³ Statement of Assistant Secretary of State Turner of 23 March 2004, quoted above. The same observation is made, almost with the same words, in the document of the Clinton Administration submitting the Convention to the Senate: 103d Congress, Senate, Treaty doc. 103-139 (1994), p. 83.

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海洋法公約有關爭端解決規定 ——美國所持立場之探討

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摘 要

第三次聯合國海洋法會議召開期間，美國代表團主導了有關爭端解決條款的協商。美國認為，爭端之和平與強制解決方式乃通過一個具全面、完整性海洋法所欲達致的主要目標之一。儘管會議中有必要透過妥協交換以達致共識，但美國對公約之協商，以及對公約最終獲得通過之約文的影響仍然十分明顯。雖然在一九九四年之前的美國歷任政府都支持加入一九八二年聯合國海洋法公約，在柯林頓政府時期視為公約之主要，且吸引人之處，亦即有關爭端解決之條款，卻被小布希政府認為不重要，也不具吸引力。小布希政府的提議之中，有一項是美國意圖去利用的，亦即將軍事活動視為管轄例外的排他性解釋權保留給美國。目前美國的態度可概述為尋求最少的承諾，爭取最大的控制。美國現在的立場可由美國參院傳統上不願接受爭端強制解決的承諾、討好軍方的必要（此乃最支持公約者所提出之兩個理由）、以及二〇〇一年九一一事件後美國對安全議題更加關切等三方面去解釋。

關鍵詞：海洋法、爭端解決、美國