DISPUTE SETTLEMENT AND THE NEW LAW OF THE SEA*

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The aim of this paper is to relate to one another two major themes of current international law. The first theme is the growth of coastal states' jurisdiction, that is the progressive extension by those states of their control over their surrounding seas and seabed. The second is the continuing search for dispute settlement procedures that can work in contentious areas of legal theory where states have competing interests.

I. *Recent Developments in the Law of the Sea.*

Two current trends have focussed attention on the law of the sea and will ensure that it receives even greater attention in the future. These are, first, the rapidly growing uses of the sea both as a source of resources, living and non-living, and for strategic, transport and communications purposes. Secondly, there is the assertion by coastal states of rights of control under national laws over their surrounding seas and seabed as against other potential users of these areas. The era of a narrow three mile belt of territorial sea has passed. Since the Second World War, although the process really began before then, the trend has been for coastal states to claim jurisdiction over: (1) the resources of their continental shelves, extending seaward in some cases as much as 600 miles; (2) extended territorial seas of 12 or sometimes as much as 200 miles; and (3) in addition, or alternatively, fish resources for distances out to 200 miles. Of course, every extended claim by a coastal state conflicts with the desires of other states claiming rights of use in the same area. The resolution of these competing interests is the concern of the Third United Nations Conference on the Law of the Sea.

After six years of preparatory work the Conference held its first substantive negotiating session in Caracas in 1974. Opinions are divided on its prospects for ultimate success, although the coming session is generally regarded as crucial.

The reasons usually advanced for the convening of the Conference are:

1. the fact that the 1958 Geneva Conventions on the law of the sea contain several gaps and are not universally accepted;

2. rapid developments in technology which have made available or drawn attention to new sea and seabed resources; and

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3. the need for a regime to govern the exploitation of the deep seabed beyond national jurisdiction.1

However, much of the impetus for a reformulation of the law of the sea has come from a desire of coastal states, especially developing coastal states with awakened sensitivities on the question of resource sovereignty, to control the exploitation and use of their nearby seas. To these states the often-cited principle of the "freedom of the seas" can only operate for the benefit of developed states. This has led to a complex and lengthy negotiation aimed at striking a balance between competing interests. One version of that balance, although possibly not the final one, is contained in the so-called "Revised Single Negotiating Text" (RSNT) which has been adopted by the Conference as a method of advancing its work. The text has no status as representing any degree of agreement, although it has become clear that many of its provisions command at least majority, if not general, support. On some key questions certain differences still remain and negotiations are continuing.

This paper is concerned with the part of the RSNT that deals with the jurisdiction, rights and obligations of coastal states. In theory, the "bargain" embodied in the existing text represents a compromise between the interests of the three main factions at the Conference, namely the coastal states (who stood to gain most by an extension of jurisdiction), the maritime and fishing powers (whose interests would be threatened by such an extension of jurisdiction), and the so-called land-locked and other geographically disadvantaged states (who would gain nothing at all unless special provision for them was made as the price of their participation in a new convention). Of course, these divisions are not rigid. Some coastal states also have distant water fishing fleets, and a maritime power might also be geographically disadvantaged. With the exception of some land-locked states, it is probably true to say that no two states have identical interests, and it can be argued that economic and strategic considerations put each country in a unique position.

To put it simply, the basic bargain is supposed to represent a compromise between narrow jurisdictional limits and a full 200 mile territorial sea. The compromise is a 12 mile territorial sea together with a resources zone of a further 188 miles. A balance is also sought between coastal state control over "resource uses" of the exclusive economic zone (as the 188-mile zone is called) and "non-resource uses", meaning mainly navigation, communication and non-resource-orientated scientific research. Given the vital national interests at stake, the total package inevitably contains many points where the compromise is very fragile or where actual differences are concealed by the use of necessarily cloudy language. For example, the thorny question of the limits of coastal state powers in the economic zone has been dealt with in the RSNT, after much debate, by this "tie-breaker":

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1. See the statement of the Secretary General of the United Nations in opening the First Session of the Conference on 3rd December 1973. *Official Records* Vol. 1 page 3.

> In cases where the present Convention does not attribute rights or jurisdiction to the coastal state or to other states within the exclusive economic zone, and a conflict arises between the interests of the coastal state and any other state or states, the conflict should be resolved on the basis of equity in the light of all the relevant circumstances taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.2

From the point of view of the coastal states, the compromise is intended to confirm their resource rights within the 200 mile zone. Whether or not this is a major concession by other states depends on one's point of view. Latin American states claiming a 200 mile territorial sea would maintain that they already held resource rights within that area. They would argue that their original jurisdictional claim was made in parallel to the claims of other states to the continental shelf, a claim now well-recognised in international law. They would say that they were merely claiming the right to control resources on which they depend, which occur over a comparable area, and which are linked to the land domain on biological grounds.3 However, without going into the merits of those contentions, it is clear that most small developing coastal states would gain from a convention which relieves them from a dispute or confrontation situation vis-a-vis the distant-water fishing states in the 200 mile area. In particular, small Pacific island countries with little or no enforcement capability and relatively huge economic zones would stand to gain from the compromise in fact if not in law. This is particularly so because of the technology and capital required to exploit fish resources which can only be obtained under arrangements with developed countries or their nationals.

From the point of view of the superpowers the compromise is supposed to provide guarantees of transit passage through sea areas where it might otherwise be contested. These powers argue that they have no need of a convention to safe-guard resource claims, and that unless the convention safe-guards their essential strategic interests it will be of no use to them. Although it might be argued that these powers need not be bound, in the last resort, by rules of international law that restrict their freedom of action, the fact remains that in a dispute situation they would not wish to be clearly in the wrong as a matter of principle. The problem arises most basically in relation to acceptance of a territorial sea of 12 miles breadth. The concept of "innocent passage", in so far as it permits the free transit of

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2. Article 47, Second Committee RSNT (Document A/Conf. 62/WP.8 Rev. 1 part II).

3. See K. Hjertonsoon, *The New Law of the Sea. Influence of the Latin American States on Recent Developments of the Law of the Sea* (1973); also B. and R. Smetherman, *Territorial Seas and Inter-American Relations* (1974); for examples of position statements, see *Official Records* Vol. 1, p.60 (Brazil); p.121 (Ecuador); p.156 (Peru).

commercial shipping, remains controversial so far as warships or nuclear powered vessels are concerned. The coastal state's powers of regulation or to suspend innocent passage in certain circumstances could well be used to restrict or prohibit the passage of such vessels. Therefore the RSNT, as a possible compromise, provides for a general regime of transit passage where it is most likely to be critical, namely through international straits. Subject to certain agreed exceptions a coastal state may not interfere with vessels exercising a right of transit passage and transit passage may not be suspended. In addition, aircraft, which do not enjoy a right of overflight under innocent passage as described in the 1958 Convention, would enjoy a right of transit passage overflight over international straits.

A similar bargain is sought in relation to archipelagic states. The RSNT lays down criteria for defining such states, which include Indonesia, the Philippines, Papua New Guinea, Fiji and the Bahamas. However, in return for recognition of the special status of the archipelagic waters of these states, a right of archipelagic sealanes passage is provided for, which parallels that of transit passage through straits. Although the archipelagic passage regime is not yet finally settled, the rationale of the bargain may be illustrated as follows:

1. Archipelagic State A will not participate in the Convention unless its rights as an archipelagic state are protected. State A is prepared to offer transit passage concessions in return for recognition of its own special status.

2. Superpower B wishes State A to participate in the Convention to avoid confrontation with State A over passage through its waters.

3. States that are neither superpowers nor archipelagic want the superpowers to particpate in the convention so as to obtain an accommodation of their own interests (resource and other), and therefore wish to see a compromise under which States A and B can achieve their respective objectives within a Convention.

From the point of view of maritime powers the compromise is supposed to offer guarantees of unimpeded transit by merchant shipping. In addition to provisions concerning passage through the territorial sea, international straits and archipelagos, the question of coastal states' powers within the economic zone must be faced. The question of whether the zone is conceptually "high seas" in this regard or a zone of residual national jurisdiction is still under debate. From a practical point of view, the issue of perhaps most importance is the control of vessel-sourced pollution. It would follow from the acknowledgement of coastal states' powers on this aspect that coastal state regulations could regulate such matters as vessel construction, the qualification of officers, equipment and charts that must be carried, and oil discharge standards, as well as compulsory routing and traffic separation schemes. The RSNT seeks to strike a balance with the contrary view that internationally agreed regulations only should govern the field.

From the point of view of distant-water fishing states the compromise is supposed to offer certain concessions which are compatible with the principle of coastal state sovereignty over the resources of the zone. The main such concession is probably acceptance of the principle of "optimum utilisation" of fish resources. This says that a coastal state that does not have the capacity to harvest the entire allowable catch must give other states access to the surplus. However, the coastal state may impose conditions on this right of access. Other concessions to distant-water fishing states relate to historic rights, the return of arrested vessels and crews and a prohibition on imprisonment or corporal punishment for breaches of fisheries regulations. A strong attempt was made by the fishing states to except tuna and other highly migratory species from the jurisdiction of coastal states but, although the RSNT provides for international co-operation regarding these species, the attempt was unsuccessful.

It is the landlocked and other so-called geographically disadvantaged states (LLGDS) who claim that the RSNT is unbalanced in favour of coastal states. On some counts these states could be about 50 in number, and collectively they represent a powerful negotiating body, at least in theory. Spokesmen for this group maintain that the existing RSNT does not contain sufficiently concrete guarantees of access by these states to the resources of the economic zones of coastal states. Unless the text is improved in this direction they have indicated that they will oppose its adoption.

It can be imagined from the above outline that there is considerable scope, to say the least, for differences to arise in the interpretation of a final treaty. The self-interest of states will dictate that states will only participate in the treaty to gain the benefits it might seem to offer. Therefore its language, which embodies delicate compromises, especially in relation to the new concept of the economic zone, will receive the closest scrutiny.

Apart from the matters referred to above, certain other potential areas for differences of view might be mentioned. The first is the question of delimitation of sea boundaries between neighbouring states. Extensions of maritime jurisdiction will inevitably create serious boundary problems. These will be particularly acute where a small island (or islands) of one state off-lies the coast of another; contiguous states border a concave coast (as in the Gulf of Guinea) or where the physical boundary of the continental shelf does not coincide with the median line.4 There is general agreement that it will be impossible to solve these problems by providing a universal formula in the convention, and the most that can be hoped for is the adoption of a general principle. So far, no more acceptable formulation can be

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4. See R.D. Hodgson and R.W. Smith, "The Informal Single Negotiating Text (Committee 2): A Geographical Perspective" *Ocean Development and International Law Journal* Vol. 3, p.225; R.D. Hodgson, "Islands: Normal and Special Circumstances" in *Law of the Sea: Emerging Regime of the Oceans* (Proceedings of the Law of the Sea Institute) (1974) p.150.

found than one which refers to "equitable principles, employing, where appropriate, the median or equidistant line and taking account of all the relevant circumstances."5 This is intended to be a compromise between equity, pure and simple, and the median or equidistant line regardless of the equities. The debate on this subject so far has shown that states have a clear preference for the formulation which best suits their own circumstances.

Another point of contention concerns the desire of states with broad continental shelves to retain rights to the shelf, or "margin" as it is called, where it extends beyond 200 miles from the coast. There is probably a majority opinion in favour of the "margineers", although there are differences as to what revenue-sharing arrangements should exist in respect of that part of the shelf which lies beyond 200 miles.

A similar kind of controversy existed on the question of whether very small islands should be allowed to generate a full 200-mile economic zone. A number of motives lie behind this issue, but perhaps the easiest to understand arises from the physical fact that a tiny oceanic islet, with no near neighbours, would generate a zone of some 126,000 square nautical miles. The text on this point, which is of particular interest to the Pacific region, now seems unlikely to discriminate against islands, at least inhabited ones.6

Any account of the compromises contained in the RSNT should at least refer to the negotiations in the First Committee of the Conference. This Committee is concerned with the drawing up of a part of the treaty that will break completely new gound. Its province is the so-called "international area", the area beyond the limits of national jurisdiction containing resources which are the "common heritage of mankind." These resources, as far as is known at present, consist chiefly of mineral-rich manganese nodules lying on the ocean floor. The debate on the authority that will control this area and on the terms and conditions on which access should be allowed and regulated has led to deep philosophical and political divisions betwen delegations. This issue represents the immediate obstacle to further progress at the Conference, because it is an issue on which positions are not yet sufficiently close for a productive trading process to begin on all outstanding points in the package.7

Meanwhile, the slow rate of progress at the Conference threatens to undermine the tentative agreements that have already been reached. Many states have already exercised their rights to extend jurisdiction over the sea and seabed, and to some extent this action

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5. Articles 62 and 71, Second Committee RSNT.

6. Article 128, Second Committee RSNT.

7. See Report by Chairman of First Committee of 16 September 1976 (Document A/Conf. 62/L.16).

has been endorsed in bilateral arrangements. Apart from what a convention might say, international practice is moving rapidly towards general acknowledgement of the right of a state to establish a 12 mile territorial sea and a 188 mile resources zone, at least in respect of fisheries. This will inevitably upset any balance that might have seemed fair to the negotiating parties a few years ago. If a developing coastal state may now lawfully, with the approval of the international community, claim and defend its control over a 200 mile zone, there is less incentive for it to acknowledge restraints on its sovereignty with regard to the non-resource uses of the territorial sea and economic zone. The offer which the superpowers were previously prepared to make will have lost its market value. It might be noted, however, that many countries which have moved in recent months to assert extended jurisdiction have done so largely on the basis of the existing RSNT, without necessarily acknowledging that the text possesses any inherent authority.

There is no doubt that the package that has seemed to be emerging at the Conference, providing as it does for at least conditional acceptance of 200 mile jurisdiction, has affected states both as a stimulus and as a guide in the framing of national legislation.

II. *Attitudes to Dispute Settlement.*

The reluctance of states to submit disputes to binding settlement procedures, and the reasons for that reluctance, have been popular topics of discussion among academic writers and seminar participants. It is a field that has been well worked over. Some background is offered here on the general question.

While there is an obligation on states to settle their differences in a peaceful manner, there is no *obligation* on them to accept, either generally, in advance or in a particular case, the decision of a tribunal or of a third party as binding. For practical purposes the basic minimum position of a government is adherence to the obligations expressed in the United Nations Charter:

> *Article 2.3* - All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
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> *Article 33.1* - The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

A reluctance to accept the compulsory jurisdiction of the International Court of Justice (I.C.J.) is sometimes said to mark the attitude of new states, but this attitude is shared no less by the "old" states, and

relates to compulsory arbitration as well as to proceedings before the World Court.8

Except where jurisdiction is grounded on a reference by consent or on some other treaty provision, the compulsory jurisdiction of the I.C.J. is derived from Article 36.2 of its statute. Under that provision, states may declare that they recognise the jurisdiction of the court as compulsory, *ipso facto,* and without special agreement, in relation to any other state accepting the same obligation. Less than one-third of the parties to the statute, who comprise all the Member States of the United Nations, have accepted the jurisdiction of the court under Article 36.2. Many of the declarations that have been made contain conditions or exceptions that limit or destroy their effect. For example, the declaration of the United States does not apply to *inter alia:*

> "(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America ..."9

This exception, which is possibly invalid, has been criticised as disqualifying any United States representative from credibly raising the issue of the lack of success of the contentious jurisdiction of the court.10

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8. The following references constitute a short select bibliography on the general question of states' attitudes:

   R.P. Anand (1), "Role of the "New" Asian African Countries in the Present International Legal Order" (1962) 56 *A.J.I.L.* p.383; R.P. Anand (2) "Role of International Adjudication": *The Future of the International Court of Justice* (1976) Vol.1 p.14; R.P. Anand (3) *New States and International Law* (1972); F.C. Okoye, *International Law and the New African States* (1972) pp. 200-211; T.O. Elias, *Africa and the Development of International Law* (1972) p.51; Leo Gross, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order" (1971) 65 *A.J.I.L.* p.253; C.M. Dalfen, "The World Court in Idle Splendour: The Basis of States' Attitudes" (1967-1968) 23 *International Journal* 124; I.F.I. Shihata, "The Attitude of New States Toward the International Court of Justice" (1965) 19 *International Organisation,* A.W. Rovine, "The National Interests and the World Court" in *The Future of the I.C.J., supra,* p.313; G.J. Terry, "Factional Behaviour on the International Court of Justice" (1975) 10 *MULR* 59.

9. Declaration of 26th August 1946. *1 U.N. Treaty Series* 9.

10. Gross, *supra*, at p.271 (But see Rogers' comment at pp. 286-287 (1970) 64 *A.J.I.L.*).

From time to time circumstances have caused states to display varying degrees of enthusiasm for compulsory jurisdiction. On the 17th March 1975, Australia, which had previously made a declaration fairly heavily weighted with exceptions, terminated that declaration and declared that it made a virtually unconditional acceptance of jurisdiction under Article 36.2. On 10th January 1974 France terminated its existing declaration and did not replace it.

The Soviet Union and its allies, for reasons of political consistency, reject much of the substantive content of traditional international law. They defend the immunity of a state from any dispute settlement proceeding that it does not freely accept. Their acceptance is unlikely to be given to a tribunal employing non-Marxist juridical norms.11

So far as dispute settlement under the terms of multilateral conventions is concerned, the developing states, by reason of their numbers, are clearly in a position to influence the rules of the game, provided that they maintain a united front. The attitude of these states is often said to be coloured by a distrust and dislike of the "old" international law. It might seem natural for newly emerged states, with experience of being "passive objects" of international law, to wish to rebel against the legal system that had authorised that unequal state of affairs.12 Certain features of the traditional law have been inherited from an era which sanctioned colonialism, and are now said to be contradicted by contemporary political thinking and a new-found world conscience. International law today, in the era of the new international economic order, is in a process of rapid growth, and there is doubt whether the I.C.J. is the body to which its explication should be entrusted.13

Some writers have suggested that the cultural traditions of many new states run counter to the concept of a judicial or arbitral body with the power to impose a decision. It has been argued, although the argument has been rebutted, that many Asian nations, for example, are influenced by philosophies that prefer nogotiation and conciliation to adjudication.14 To make a digression on the subject of cultural attitudes, a similar argument to one based on the ideas of Buddhist or Hindu thought could no doubt be put with regard to Pacific peoples, based on such notions as "Melanesian consensus." Papua New Guineans are said to have found it:

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11. A. Dallin, *The Soviet Union at the United Nations* (1962) pp. 3-13; Dalfen, *supra* p.133.

12. Anand (1), *supra* at p. 387, and Anand (2), *supra* at p.14.

13. Anand (2), *supra,* at p.14, Okoye, *supra,* at p. 207; see also, generally, Anand (3), *supra,* especially pp. 53-85.

14. F.S.C. Northrop, *Taming of the Nations* (1952); Q. Wright, "Asian Experience and International Law" (1959-1960) I *Int. Studies* p.84; Anand (1), *supra,* at p.393.

> ... unreasonable that a third party - the government and its courts - against whom the clan or tribe have no grudge should step in and interfere with their tribal or family affairs.15

Others point out that states which did not belong to the old "Hague community", which developed the concept of the World Court, cannot be expected to share the deep faith of that relatively small family in the rule of law and the superiority of the judicial procedure in the settlement of disputes.16 At a more concrete level the performance of the court in the *South West Africa cases*17 has been cited as a further reason for the scepticism of the Third World about the court's capacity for a sensitive response on current issues.18

However, the fact that the Hague docket (to use a transpacific expression) was blank, 25 years after the signing of the Charter, could not be attributed only to the attitude of new states. There is a more basic reason that extends also to any binding third party procedure. At international law a state has an option that is not open to a party at municipal law: a dispute need not be treated as having any legal status or legal consequences at all. As one writer says, referring to the power of the I.C.J. to decide a case *ex aequo et bono* if the parties agree thereto:

> The choice which is open to the parties under the Court's Statute to have a dispute decided on the basis of international law or by reference to equitable consideration assists in understanding more clearly the character of international conflicts. The issue whether a dispute is legal or political, and justiciable or non-justiciable, does not depend on any inherent characteristics of the dispute, but on the attitude taken towards it by the parties. If they are willing to put the emphasis on the legal aspects of the dispute, it is legal and justiciable. If not, it is political and non-justiciable.19

Or, as a United States government legal adviser has said:

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15. John Gawi, "Customs in Criminal Law and Punishment" in *Lo Bilong Ol Manmeri* (UPNG 1975) p.74.

16. Anand (2), *supra,* at p.3.

17. *I.C.J. Reports* (1966) (judgment of July 18, 1966).

18. See, for example Okoye, *supra,* at pp. 201-204; Elias, *supra,* at pp.88-106.

19. G. Schwarzenburger, *A Manual of International Law* (1967, 5th ed.) p.245.

> Most obviously, but most fundamentally, states resist judicial settlement because they fear losing. Nations are rarely indifferent to suffering loss even in minor disputes, and in most cases would prefer a continuation of a conflict to its resolution in favour of the opponent or by means of what is perceived to be an unsatisfactory compromise. There are exceptions of course, but the general pattern is unlikely to change in the foreseeable future.
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> The non-judicial habit is re-inforced by the nature of the international diplomatic structure. The passage of time does not worry governments as severely as it does individuals, and diplomats much prefer to maintain their grip on a problem than to relinquish it to a third party for final resolution. Generally, foreign policy decision-makers who influence the course of dispute settlement, even though quite possibly trained as lawyers themselves, are much less likely than their legal advisers to be impressed with the value and prospects of international adjudication.20

It might be supposed that legal advisers in the international field have no more desire than their counterparts in domestic litigious practice to attract criticism by recommending going to court when an unfavourable result is likely or the result uncertain, particularly when the international system has not matured to the point where wins and losses can be accepted as they might be in the course of domestic litigation. A United States Secretary of State has said:

> The basic problem is the reluctance of states to refer international disputes to the court. States have not been willing to accept the idea of going to the court on a regular basis, expecting to win some cases and lose others. If the legal adviser of the foreign ministry is not confident of victory he recommends against litigation.21

At this point it might be appropriate to refer to four examples of adjudication on contentious Law of the Sea issues. A 1946 incident involving the sinking of one British warship and damage to another arose out of the laying of mines in the North Corfu Channel.22 Although there was no proof that Albania had laid the mines, it was held responsible for having failed to give notice of the existence of the mine-field. The issue concerned the right of passage, in time of peace, of warships through an international strait. The decision is said to have contributed to the alienation of the eastern bloc by the court.23

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20. Rovine, *supra,* at p.317.

21. W.P. Rogers, "The Rule of Law and the Settlement of International Disputes", (1970) 64 *A.J.I.L.* p.286.

22. Corfu Channel Case *I.C.J. Reports* (1949) p.1.

23. Okoye, *supra,* at 203.

It influenced the provisions of the convention on the territorial sea of 1958. Incidentally, the award of damages of £843,947 has never been paid by Albania, despite every effort by the United Kingdom to collect, short of submitting the matter to the Security Council.24

In 1951, the Court upheld Norway's action in drawing straight baselines for its territorial sea.25 These baselines embraced offshore islands and rocks and enclosed the entrances of several fjords. This decision, which "liberalised the whole law of the marginal sea",26 has been classified as "moderately progressive".27 It, too, is reflected in the terms of the 1958 Convention.

In 1969 the Court considered the dividing up of the eastern part of the continental shelf of the North Sea between the Federal Republic of Germany on the one hand and Denmark and the Netherlands on the other.28 At stake were known seabed petroleum resources. The Court did not give a decision in the strict sense, but declared, in effect, that the parties were under an obligation to reach agreement among themselves on their shelf boundaries. They rejected any single method of delimitation urged by the respective parties. There is a general feeling among critics that the Court might have discharged its function in this case in a rather more positive manner.29

Of course, the cases which attracted most publicity have been the Icelandic fisheries cases. These involved challenges by the United Kingdom and the Federal Republic of Germany to the assertion of a 50-mile fisheries jurisdiction by Iceland.30 In relation to all phases of the proceedings Iceland took the

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24. Schwarzenburger, *supra,* at p.257; G. Weissberg "The Role of the I.C.J. in the U.N. System" in *The Future of the I.C.J.* *supra,* at p.170.

25. Anglo-Norwegian Fisheries Case *I.C.J. Reports* (1951) p.116.

26. D.P. O'Connell, *International Law* (1970, 2nd ed.) p.479.

27. Terry, *supra,* at p.93.

28. North Sea Continental Shelf Cases *I.C.J. Reports* (1969) p.1.

29. Terry, *supra,* p.59; E. Grisel "The Lateral Boundaries of the Continental Shelf and the Judgement of the I.C.J. in the North Sea Continental Shelf Cases" (1970) 64 *A.J.I.L.* at p.592.

30. *I.C.J. Reports* (1974).

position that it did not recognise the jurisdiction of the court and declined to be represented. A majority of the Court (10 votes to 4) decided that on the basis of established historic rights the Icelandic claim was "not opposable" to either the United Kingdom or the Federal Republic of Germany, the reasoning being substantially the same in both cases. It declined, however, to say whether the action of Iceland was contrary to international law. Both the decision and its timing have been criticised, the judgment having been delivered in the middle of the first substantive negotiating session of the Law of the Sea Conference at Caracas.31 Eight of the ten judges forming the majority gave separate opinions. Five of them gave a joint separate opinion expressly denying that there was any rule of customary international law restricting coastal states to a maximum 12 mile fishing limit. They referred to the practice of some 30-35 states in support of a wider limit (the decision was given on 25th July 1974) and to the statements made at the Conference by other states in support of a 200-mile limit.

The 1974 fisheries decision did not inspire developing states with any confidence that the Court would, of its own volition, assist in the development of a new equitable law of the sea. Given the wide belief that this branch of law is in the process of rapid development, these states are now disinclined to entrust that development to the judicial process. Many of the concepts being developed are of a completely new kind. The concept of the economic zone and the common heritage of the deep seabed can hardly be interpreted in terms of pre-1970 law.

Perhaps a comment should be made about the specific question of *ad hoc* arbitration. A President of the I.C.J. has remarked about arbitration (as distinct from recourse to the Court) that "what has been called its golden age is considered by some to have faded away" and "while it is flourishing in the field of international commerce, this is not true of relations between states."32

In theory, a distinction can be drawn between "adjudication" by a court, which necessarily involves a pre-determined legal basis for a decision, and "arbitrating", which merely involves third-party settlement of a dispute on any basis - legal, semi-legal or other - on which the parties agree to put it. Arbitrators in this sense do not make or even expound the law; a "successful" arbitration is merely one after which the parties accept the result. Although more acceptable to some states, pure arbitrations do not necessarily encourage uniform practices or assist in the general acceptance of principles. At best, arbitration of this kind can prevent conflict; it will not assist in the development of an effective new law of the sea. But the true position is that every international arbitration today is likely to contain an element of adjudication (and, one might think, *vice versa* - consider the latter two cases referred to above). Therefore in a contentious legal area states might well regard *ad hoc* arbitration as the thin end of the judicial wedge.

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31. R.R. Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the I.C.J. to the Debate on Coastal States' Fisheries Rights", (1975) 24 *I.C.L.Q.* p.82.

32. Judge M. Lachs, "Some Reflections on the Settlement of International Disputes", *Procs. 68th Meeting A.S.I.L.*, April 1974, p.326.

The concept of compulsory third-party settlement, then, is by no means a widely accepted ideal, quite apart from proceedings at the Law of the Sea Conference. When the question has arisen in previous multilateral negotiations, the device of an optional protocol has sometimes been used to separate the question of participation in the treaty from the option of commitment to binding dispute settlement procedures. In those instances, to have made the settlement procedure an integral part of the treaty would have obstructed its adoption or, at least, made it less widely acceptable.

III. *Dispute Settlement at the Law of the Sea Conference.*

Most delegates publicly commenting on prospects for a new widely accepted, comprehensive law of the sea treaty have assumed that it must necessarily be a "package", in the sense that each party would gain benefits in return for accepting obligations. While there would be something for everyone, no-one would be entirely accommodated. "All must feel equally unhappy" is the comment sometimes made. It follows from the package approach that reservations to the treaty should not be permitted, at least in relation to the main limbs of a general treaty. In theory, it should not be open to a state to participate only in those parts of the treaty from which it would derive an advantage. The question of reservations has been assigned, somewhat misleadingly, to the formal clauses section of the treaty, and has not yet been debated.

Dispute settlement, in the view of some, raises similar issues for the package approach. The argument is that if a state is immune from procedures to enforce its obligations in key areas the balance of the treaty will be lost. Hence the main thrust of the debate during the Fourth and Fifth Sessions of the Conference tended to shift from the substantive Second Committee Text, on which there is a large measure of consensus, to the issue of dispute settlement.

Work began on the dispute settlement chapter at Caracas in 1974 in an informal group convened on the initiative of the United States. In effect, that delegation took the position that certain substantive provisions could be accepted along-side strong dispute settlement obligations, but would be unacceptable in their absence. Proceedings in the informal group provided a welcome outlet for those delegations who had in their ranks a surplus of lawyers. Work in the group continued at the 1975 Geneva Session and resulted in the production of an informal draft, not necessarily representing any agreement, which was submitted by its joint chairmen to the President of the Conference. It was apparent from this contribution that dispute settlement, for the reasons given above, could become a central issue in negotiations. Accordingly, the President took the step of preparing and submitting his own draft, based in part on the informal draft, to the Fourth Session of the Conference in New York in the spring of 1976.33

There followed a formal debate in the plenary of the Conference on the proposal that the President's paper should be given a status

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33. Document A/Conf. 62/WP.9.

corresponding to that of the single negotiating texts of the three main committees. In the records of that debate34 are summarised the general positions of the participants. These reveal some degree of pre-occupation with the more technical issues, such as whether local remedies must be exhausted before procedures commence at the international level, whether private persons or corporations should have access to the procedures, and whether the regime for the international area should encompass its own tribunal. There was also much discussion on preferred methods of dispute settlement: negotiation, conciliation, an elaboration of Article 33.1 of the Charter, the I.C.J., a special law of the sea tribunal, special conciliation or arbitral procedures, or various combinations of these. Different ways of allowing parties a choice between these methods were also canvassed.

Some states, mainly West European, registered a vote of confidence in the I.C.J., for example Switzerland said that the Court "had proved itself sensitive to the trends and tendencies of contemporary international law."35 Contrary views were expressed by developing countries who generally favoured a new tribunal. Eastern European states tended to favour the so-called "functional" approach under which a dispute would be dealt with by a special body, possibly an expert panel, according to its subject matter (for example fisheries or marine pollution). France expressed a clear preference for arbitrators rather than judges on the ground that the former did not lay down the law, thereby avoiding "government by judges".36

However, predictably enough, the most divisive issue which emerged was whether binding compulsory procedures should be provided, especially in relation to the rights and obligations of the coastal state within its economic zone. In his introduction the President had said on this point:

> This is not merely a procedural or marginal issue but a substantive one and any final formulation of treaty provisions on the subject must take into account the decision arrived at within the committee concerned and be the result of negotiation.37

In essence the issue was whether the coastal state should be ultimately liable to such procedures in respect of matters occurring within its zone. On this question the basic interests of states rather than their dispute settlement philosophies tended to determine national positions. Perhaps the frankest and most illuminating contribution was made by one delegate who is recorded as saying:

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34. *Official Records* Volume V pp.8-54.

35. *Ibid,* at p.15.

36. *Ibid,* at p.14.

37. Ibid, at *p.124.*

> his delegation's position on the question of the settlement of disputes depended largely on the nature of the compromises to be achieved in the final text of the convention ... If its basic interests were taken into account in the final text it would be able to consider stronger dispute settlement provisions.38

The superpowers clearly did not wish to see the transit rights (for which they thought they had fairly bargained) rendered meaningless by the possibility of unilateral coastal state action. The United States delegate said, flatly "his delegation was not prepared to exclude the economic zone from the settlement procedures."39 Maritime states, such as Japan and the Federal Republic of Germany take a similar view. The delegate of the F.R.G. said:

> his delegation was ... unable to accept such sweeping exception clauses ... which would have the effect of leaving a major part of the most likely disputes outside the scope of the settlement procedure, particularly those disputes in which legal protection was sought against a one-sided interpretation of the rights of coastal states vis-a-vis other states ...40

On the other hand, developing coastal states, particularly those of the "territorialist" camp, regard the economic zone provisions as representing sufficient concession on their part without the added requirement that action by them within their area of sovereignty be subjected to third-party scrutiny. Brazil said that the provision of the President's text endorsed "the view of certain major maritime Powers that all disputes should be subjected to some form of compulsory dispute settlement and that his delegation could not accept it as a basis for negotiation." He said that the premise that matters falling within the exclusive jurisdiction of the coastal state should be subjected to compulsory procedures would, if accepted, mean that the national economic zone was merely part of the high seas.41 Similarly, the delegate of Kenya was opposed to "inadvertently creating a system of compulsory settlement which might be used by the developed states to impose their will on the developing states through constant international adjudication."42

The third force in this debate are the land-locked and geographically disadvantaged states who gain certain privileges, which they at present claim to be inadequate, under the terms of the existing package. They maintain that even those rights would become meaningless if subjected to unilateral interpretation by the coastal state. Singapore, for example, referred to the "finely balanced package"

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38. *Ibid*, at p.41.

39. *Ibid*, at p.31.

40. *Ibid*, at p.12.

41. *Ibid*, at p.35.

42. *Ibid*, at p.34.

and said that "exceptions to dispute settlement should be kept to a minimum in order to ensure that the rights negotiated and incorporated in the convention were not negated by subjective interpretation."43

Although numbers tallies can be misleading, because many states deliberately chose not to participate in the general debate, it is interesting to note that there was a fairly equal division on the question of exceptions. Some 27 states which favoured the exception of the area of coastal state jurisdiction comprised 26 developing coastal states together with Iceland. On the other side were the superpowers and allies, the maritimes, and some 17 LLGDS. Of this latter number it is significant that 13 were developed and only 4 developing states - a very high "abstention" rate among the numerically significant developing LLFDS. About a dozen states were non-committal, and five - Australia, New Zealand, Canada. Ireland and Fiji - deliberately sought to play a mediating role.

As a result of the general debate in plenary, a revision of the President's paper was issued at the end of the Fourth Session as Part IV of the RSNT.44 This text was discussed in detail at informal meetings of plenary during the Fifth Sessions with little change being apparent in national positions. As a result of that further discussion, a subsequent revision was issued in November 1976 after the end of the Fifth Session.45 The President noted in relation to this revision that where "sharp disagreement with divided views existed, the thrust of the text was maintained where it appeared to provide a compromise." There the matter rests until negotiations conclude.

Far too much uncertainty surrounds the possible outcome of the Law of the Sea Conference for any reliable prediction to be offered as to what will happen to the dispute settlement chapter. One possibility is a trading process that might involve all parts of the convention. This kind of approach led to a sort of limited acceptance of compulsory dispute settlement at the Vienna Conference on the Law of Treaties.46 However, it is possible that compulsory dispute settlement will itself be the item that is traded off. One authority has commented on treaty negotiations generally:

> Those who have not been deeply involved in treaty-making may overlook the fact that dispute-settlement provisions are often a highly expendable pawn in treaty negotiations. If insistence on a dispute-settlement clause may jeopardise securing a substantive item on the negotiating list, the decision is often to sacrifice dispute-settlement.

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43. *Ibid,* at p.10.

44. Document A.CONF. 62/WP.9 REV.1.

45. Document A/CONF. 62/WP.9 REV.2.

46. Gross, *supra,* at p.265; R.D. Kearney, "Amid the Encircling Gloom" in *The Future of the I.C.J., supra,* at pp.113-115.

> The same result normally occurs if a swap is possible. Consequently the higher the level at which dispute-settlement is proposed in any negotiation in which it will be controversial, the greater the likelihood it will be traded off or jettisoned.47

IV. *Postscript.*

There has never been an international negotiation quite as large or as complex as the Law of the Sea Conference. Not only is there a huge number of participants but each feels that a vital practical interest is at stake. Each state can be expected to be constantly reappraising its position to determine whether it would be better off with or without a Convention or, if there *is* a Convention, whether it would be better off in it or out of it.

Much depends on progress in the area of the First Committee. If there is a continued lack of progress in that area, hopes of an agreed regime for the international area in the near future will disappear. This will possibly give rise to consideration of splitting the package to the extent of adopting texts in respect of the Second and Third Committees by themselves. This would call for a reassessment on the part of all participants. It is quite likely that Latin American states who regard a 200 mile territorial sea as an accomplished fact, and African states who regard it as an attainable goal without a treaty, would lose their incentive to participate in the convention. This is particularly likely in view of the general trend towards establishment of 200-mile resources zones, and even more so if the superpowers and maritimes maintain their position on navigation and refuse to give ground on the question of reservations or dispute settlement. The newly-appointed United States negotiator, Mr. Elliot Richardson, reiterated the United States position in an early public statement:

> The very interests which lead us to seek a treaty are also interests that we cannot allow to be sacrificed to a treaty. This business is clear, it seems to me, with respect to freedom of navigation. If one of the consequences of failure to achieve a treaty over time may be the progressive assertion of coastal states sovereignty in ways that impair freedom of navigation, and if the prevention of increasing sovereignty is in itself a reason for us to seek a treaty, it makes no sense for us to enter into a treaty which in itself impairs freedom of navigation.48

On the other hand, if a limited package could be agreed that would satisfy the majority of coastal states, it is unlikely that the LLGDS would be attracted. Those with some maritime capacity would possibly retain their interest, depending on the terms of the package, but in that case the remainder would regard the deal as a benefit for the coastal states first, and the maritimes second, with nothing at all for them.

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47. Kearney, *supra*, at p.123.

48. Remarks to American Oceanic Organisation, 17 February 1977.

The question must therefore be faced of what will happen in the absence of a convention. The steady trend in favour of extended coastal state jurisdiction to 200 miles can be expected to be confirmed by state practice. When a number of states with large zones, such as the United States, Canada, Norway, Iceland and some African States expressed the intention of joining Latin America in the 200-mile club it became inevitable that the remaining fishing powers, such as Japan, would be forced to come to terms with them and ultimately to follow suit. Regional action such as that by the European Community can even be expected to carry along some of the LLGDS. The result is that except for some or most of the LLGDS, the 200 mile zone is about to become, if it is not already, an accepted fact of international practice and therefore of international law. The difficulty arises because unilateral action, unlike action under an agreed convention, is bound to lead to differences on major details.

It can be expected that 200 mile jurisdiction, of one kind of another, will be in force throughout the Pacific region fairly soon. Apart from the action already taken in respect of mainland territory by Latin American states, Canada and the United States, island territories under the administration of France and the United States will no doubt generate a zone in accordance with the terms of the respective national legislation. The United States legislation which came into force on 1st March 1977, is expressly applied to Guam, American Samoa and other possessions. Its non-application to Micronesia was apparently designed to enable the Trust Territory to make its own policy in this field, a necessary expedient in view of potential differences on the question of highly migratory species which under the United States Act are not subject to coastal state control.

For varies reasons the other South Pacific countries have been slow to act on the 200 mile limit, but it is clearly only a matter of time before they do so. In their declaration of October 1976, the Forum members state that they:

1. *Take note* of the broad consensus of views in the Conference in support of the establishment by coastal states of 200 mile exclusive economic zones.

2. *Declare* their intention to establish 200 mile exclusive economic zones at appropriate times and after consultation with one another.49

A uniform approach by Forum countries would help to relieve what would otherwise be a fairly chaotic situation in the South Pacific if a multilateral convention does not come into force.

The general acceptance of 200 mile jurisdiction might lay to rest, for practical purposes, the question of the maximum distance limit of coastal state control. From that point of view it will dramatically narrow the differences in position over fishing limits between the United States on the one hand and states such as Peru and Ecuador on the other. Those differences have resulted in a curious

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49. Declaration by South Pacific Forum Members at Suva, Fiji, 14th October 1976.

"ritual" of vessel seizures, followed by the payment of United States government compensation to the fishermen and retaliatory action at various levels.50 A general 200 mile limit might also lay to rest the uncertain status of the "semi-sedentary" species inhabiting the continental shelf, a matter on which the United States has adopted the reverse role of coastal state enforcer.51 Nonetheless, general acceptance of 200 mile limits will not, by itself, lay to rest a number of other questions arising from differences in the respective national regimes applying within the 200 mile zone. There are fundamental differences between a 200 mile fishing zone, a 200 mile economic zone and a 200 mile territorial sea. Even so far as fisheries are concerned there remains the question of what kind of regime may be justifiably enforced.

For example, controversy could arise out of a claim by a fishing state to access to the zone of another state on the basis of alleged historic rights or the highly migratory species or optimum sustainable yield arguments. At the same time it now appears that no agreed procedure might exist for the resolution of differences. The coastal state might well take the position that it is simply not amenable to any such procedures.

Perhaps the aim of the conference for an agreed all-encompassing seas regime together with mandatory dispute settlement procedures is too ambitious, and a more realistic aim would be either of those goals, but not both at once. While the latter might present a workable alternative it is perhaps the less easily attainable goal of the two.

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50. Smetherman, *supra*, at p.18.

51. See E.R. Fidell, "The Case of the Incidental Lobster: United States Regulation of Foreign Harvesting of Continental Shelf Fishery Resources", (1976) 10 *International Lawyer* p.135.