

# The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea

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## I. Introduction: The Need for Effective Dispute Settlement Mechanisms

The Third United Nations Conference on the Law of the Sea, which adopted the 1982 Convention on the Law of the Sea, recognized that the interpretation and application of the provisions of the 1982 Convention might give rise to differences of opinion among States and other entities involved in the application of the Convention's provisions. It was accepted that differences could arise, for example, with respect to the interpretation or application of the provisions relating to the powers, rights and obligations of the coastal States *vis-à-vis* other States and other entities in the maritime zones declared to be within national jurisdiction; or those dealing with the powers and responsibilities of the International Sea-Bed Authority in its relations with States Parties and other entities and persons engaged in activities in the international Area. It was the general view of the Conference that, where such disagreements arose, they should be resolved by peaceful means in such a way that the rights of both the powerful as well as the weak are given protection. As the first President of the Conference remarked in this context, "effective dispute settlement would ... guarantee that the substance and intention within the legislative language

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<sup>1</sup> The article is based on an address delivered at the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, in July 1997. The views expressed are solely those of the author, and are not to be attributed in any form to the Tribunal.

of the Convention will be interpreted consistently and equitably".<sup>2</sup> For this purpose, the conference agreed to establish procedures for dispute settlement which would be acceptable to the States.

But the Conference was aware that States are not always willing to submit their disputes for binding settlement to the existing international judicial bodies. The reasons for the reluctance of States to accept compulsory and binding settlement of their disputes by international courts are many and various.<sup>3</sup> Suffice it to say that many States have been unwilling to agree unconditionally to submit all disputes with other states to international courts for binding decision; and many of those who accept the jurisdiction of such courts generally seek to limit the scope of their acceptance. For this reason it was not considered realistic to require all States Parties to agree, without reservation, to submit all disputes under the Convention to a particular international judicial body. Consequently the Conference did not attempt to endow a single judicial body with exclusive jurisdiction to deal with disputes arising in connection with the Convention.

On the other hand, there was general recognition of the need to ensure that all disputes concerning the interpretation and application of the Convention would be settled by peaceful means. In line with the relevant provisions of the United Nations Charter and the general principles of international law, it was accepted that peaceful settlement should involve, as a first step, recourse to procedures mutually acceptable to the parties to the dispute, i.e. through "peaceful means of their own choice".<sup>4</sup> For this reason the Convention specifically states that nothing in the regime established under it would "impair the right of any State Parties to agree at any time to settle a dispute between them concerning the interpretation or

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<sup>2</sup> Statement reproduced in Doc. A/CONF.62/WP.9/Add.1, para. 6. *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. 5, 112.

<sup>3</sup> "... international law is still in large part a system of auto-interpretation in which the unqualified acceptance by States of the obligation to submit their disputes to a binding form of third-party settlement is still highly exceptional", E.D. Brown, "Dispute settlement and the Law of the Sea: the UN Convention regime", *Mar. Pol'y.* 21 (1997), 17 et seq., (18). On the attitude of States to "third-party adjudication" in general see O. Schachter, "International Law in Theory and Practice", *RdC* 178 (1982), 21 et seq. Also R. B. Bilder, "International Third Party Dispute Settlement", *Den. J. Int'l L. & Pol'y* 17 (1989), 471 et seq., (489-490).

<sup>4</sup> Charter of the United Nations, Article 33 para. 1.

application of this Convention by any peaceful means of their own choice".<sup>5</sup>

However, there was consensus in the conference that, where States are not able to settle their disputes through such means of their choice, they should be obliged to submit the disputes for settlement by mechanisms established internationally.<sup>6</sup>

## II. A Flexible Dispute Settlement Regime

To cover all these possibilities, the Convention established what is, in effect, a two-tier system of judicial settlement. This system is contained in Part XV of the Convention which consists of three Sections. Section 1 of this Part<sup>7</sup> deals with settlement of disputes through the "traditional" public international law procedures based on the mutual agreement of the parties to the disputes; while Section 2 of the Part<sup>8</sup> sets out more specific procedures for the cases where agreement between the parties is not forthcoming. Section 3 of Part XV specifies limitations and exceptions to the "mandatory" system set out in Section 2.<sup>9</sup>

### 1. Dispute Settlement by Procedures of Choice of the Parties

Section 1 of Part XV of the Convention provides for the settlement of disputes using the traditional peaceful procedures provided for under general international law and specifically in Article 33 para. 1 of the United Nations Charter, i.e. through negotiation, inquiries, mediation, conciliation, arbitration, exchange of views between the parties or judicial settlement.<sup>10</sup> Where the parties agree to settle the dispute by conciliation, they

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<sup>5</sup> Article 280.

<sup>6</sup> "The world community's interest in the peaceful settlement of disputes ... has been advanced by the Mandatory System of Dispute Settlement of the Convention": T.T.B. Koh, "A Constitution for the Oceans", Statements of the President of the Conference on 6 and 11 December 1982. Reproduced in: *The Law of the Sea: The United Nations Convention on the Law of the Sea*, United Nations Publication, xxxiii. See also A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea*, 1987, 240 et seq.

<sup>7</sup> Arts. 279 to 285 of the Convention.

<sup>8</sup> Arts. 286 to 296.

<sup>9</sup> Arts. 297 to 299.

<sup>10</sup> Article 279.

can take advantage of the procedure set out in Section 1 of Annex V to the Convention.<sup>11</sup> This involves the use of a Conciliation Commission whose members are selected by the parties to the dispute. The conclusions and recommendations of the Commission are to assist the parties if they wish, but are not binding upon them.<sup>12</sup>

The Convention also provides that a dispute may be submitted to a particular procedure for binding decision if the parties have agreed, pursuant to a general, regional or bilateral international agreement, that such a dispute shall be settled through that procedure.<sup>13</sup>

## **2. Compulsory Procedures Entailing Binding Decision**

However, where the parties were unable to agree on a settlement of the dispute by means of any of the procedures referred to in Section 1 of Part XV, they are obliged to submit the dispute to an appropriate judicial procedure for binding decision. For this purpose the Convention makes provision for “compulsory procedures entailing binding decisions”. These are set out in Section 2 of Part XV of the Convention. They consist of a number of alternative judicial fora from which States Parties are free to choose. These are:

- a) The ICJ;
- b) The International Tribunal for the Law of the Sea;
- c) An arbitral tribunal established in accordance with Annex VII to the Convention; and
- d) A special arbitral tribunal constituted pursuant to Annex VIII to the Convention for disputes falling within the categories specified in the Annex.

## **3. Dispute Settlement through “Standing” International Judicial Bodies**

The ICJ is established under the Charter of the United Nations as the principal judicial organ of the United Nations. The Statute of the Court is annexed to the Charter of the United Nations of which it is an integral part. Although it is a principal organ of the United Nations, the ICJ does

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<sup>11</sup> Article 284.

<sup>12</sup> Annex V, article 7 para. 2.

<sup>13</sup> Article 282.

not have automatic competence to deal with disputes involving all Member States of the United Nations. It can only deal with cases if the states involved have accepted its jurisdiction. However, as is well known, some States have been unwilling or at least reluctant to accept the jurisdiction of the Court, although some others have been quite happy to submit to the Court without hesitation. In the light of such differences in the attitudes of states to the Court, the drafters of the Convention on the Law of the Sea did not consider it realistic to make the Court the sole forum for the settlement of disputes in connection with the Convention. What they did was to make recourse to the Court one of the possible procedures available to States Parties who wish to rely on the Court. For such States the ICJ will have the competence to give binding decisions on disputes in which they are involved.<sup>14</sup>

The other standing judicial body which States may choose is the International Tribunal for the Law of the Sea. This is a new court established by the Convention on the Law of the Sea. The Statute of the Tribunal is contained in Annex VI to the Convention, which is an integral part of the Convention.<sup>15</sup> The Tribunal was created because, as stated above, some states are not willing to accept the jurisdiction of the ICJ without reservation. There was general agreement in the Third United Nations Convention on the need for a standing court, with an established membership and well-known rules and procedure, to which disputes concerning the interpretation or application of the provisions of the new Convention could be submitted for final and binding decisions. The Conference decided, therefore, to establish another tribunal or court which would be available to the States which might wish to have recourse to a standing court but which might, for one reason or another, not be comfortable with the ICJ.

#### 4. Dispute Settlement through ad hoc Arbitral Tribunals

But the Conference also recognized that some States might consider the Tribunal equally unacceptable as a compulsory forum for the settlement of all their disputes. This is particularly so in the case of those States which object in principle to a mandatory obligation to submit their disputes to an international judicial body.<sup>16</sup> To cater for such states it was decided to provide other alternative procedures which would give to States Parties a

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<sup>14</sup> Article 296 of the Convention provides that a decision of a court or tribunal having jurisdiction under the Convention "shall be final and shall be complied with by all the parties to the dispute".

<sup>15</sup> Article 318 of the Convention.

<sup>16</sup> See note 3.

greater measure of choice in the composition of the bodies to which their disputes might be submitted.<sup>17</sup> The alternative procedures provided for in the Convention involve the use of arbitral tribunals whose membership will, at least in part, be determined by the parties to the particular dispute. Parties to the Convention which do not wish to use either the ICJ or the International Tribunal for the Law of the Sea can agree to submit their disputes for settlement by arbitral tribunals whose members will be selected by the parties of the particular dispute, in the manner provided for that purpose in the Convention.<sup>18</sup>

Two different types of arbitration are provided for in the Convention. These are:

- a) arbitration in accordance with Annex VII to the Convention; and
- b) special arbitration pursuant to Annex VIII to the Convention.

Arbitration under Annex VII to the Convention is a comprehensive procedure which is available to deal with disputes arising in connection with the provisions of the Convention as a whole;<sup>19</sup> whereas special arbitration under Annex VIII is restricted to specific categories of disputes, namely those relating to fisheries, the protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping.<sup>20</sup>

In each case the dispute is submitted to an arbitral tribunal selected in the manner provided for in the relevant Annex. Normally the tribunal will consist of five members.<sup>21</sup> However, the procedure for the appointment of the members of the arbitral tribunal varies considerably as between the two Annexes.

The members of an tribunal under Annex VII are selected from a general list of arbitrators drawn up and maintained by the Secretary-General of

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<sup>17</sup> "The dispute settlement procedures of the Convention are flexible, in that Parties have options as to the appropriate means and fora for resolution of their disputes, and comprehensive in that the bulk of Conventions provisions can be enforced through binding mechanisms; and accommodating of matters of vital national concern, in that they exclude certain sensitive categories of disputes ... from binding dispute settlement ...", Message from the President of the United States Transmitting the United Nations Convention on the Law of the Sea etc. ... to the Senate of the United States, US Government Printing Office, 1994, Commentary, 83.

<sup>18</sup> Article 287 para. 1, lit. (c) and (d).

<sup>19</sup> Annex VII, article 1.

<sup>20</sup> Annex VIII, article 1.

<sup>21</sup> Annex VII, article 3; and Annex VIII, article 3.

the United Nations. Persons for inclusion in the list are nominated by the States Parties, with each State Party entitled to nominate not more than four persons.<sup>22</sup>

The members of the arbitral tribunal for any particular dispute are selected by the parties to the dispute from among the list: one member each is selected by the party initiating the proceedings and the respondent party. The remaining three members are selected by agreement between the two members, and the president of the arbitral tribunal is selected by agreement between the parties to the dispute. If no agreement is reached on the selection of the three members or the president of the arbitral tribunal, the choice will be made by a person or a third State agreed by the parties to the dispute.<sup>23</sup> Failing agreement between the parties, the choice will be made by the President of the International Tribunal for the Law of the Sea.<sup>24</sup>

Unlike the arbitral tribunals under Annex VII to the Convention, the members of a special arbitral tribunal under Annex VIII are selected from special "lists of experts" maintained by specified international organizations to which responsibility has been assigned by the Convention.<sup>25</sup> Experts for inclusion in the lists are nominated by the States Parties, with each State Party entitled to nominate not more than two experts. The five members of the special arbitral tribunal for any particular dispute are selected by the parties to the dispute from among the appropriate list: two members are selected by the party initiating the proceedings, and a further two by the respondent party. The fifth member, who acts as the president of the special arbitral tribunal, is selected from the same list of experts, by agreement between the parties to the dispute. If no agreement is reached on the selection of the president, the choice will be made by a person or a third State agreed upon between the parties to the dispute. If the parties cannot agree on such a person or third State, the selection will be made by the Secretary-General of the United Nations.<sup>26</sup>

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<sup>22</sup> Annex VII, article 2.

<sup>23</sup> Annex VII, article 3 lit. (d), (e).

<sup>24</sup> *Ibid.*

<sup>25</sup> These organizations are listed in article 2 of Annex VIII. They are, for fisheries the FAO; for the protection and preservation of the marine environment the UNEP; for marine scientific research the Intergovernmental Oceanographic Commission (IOC); and for navigation, including the prevention of marine pollution from vessels and by dumping the IMO.

<sup>26</sup> Annex VIII, article 3.

## 5. Right of States Parties to Choose their Preferred Dispute Settlement Procedures

The Convention gives to the States Parties the right to choose the procedure acceptable to them. Each State Party has the option to choose one or more of the alternatives listed in article 287. This choice may be made at the time when the State signs, ratifies or accedes to the Convention, or at any time thereafter.<sup>27</sup> This is done by means of a written declaration which may be modified or withdrawn at any time by the State Party concerned. However, proceedings pending pursuant to a declaration will not be affected by any modification or withdrawal of that declaration, unless the parties agree otherwise.<sup>28</sup>

In effect, every State Party is obliged to accept at least one of the procedures enumerated in article 287. For, a State Party which has not made a declaration indicating its choice of procedure will be deemed to have accepted that disputes involving it shall be submitted to arbitration under Annex VII.<sup>29</sup>

## 6. Limitations on the Jurisdiction of “Compulsory Procedures”

But, while each State Party is obliged to accept a “compulsory procedure entailing binding decisions” with respect to disputes in which it may be involved, the jurisdiction of all the respective courts and tribunals is subject to a number of important qualifications and limitations. A court or tribunal referred to in para. 1 of article 287 which has been accepted by a State Party will have competence to deal with a dispute in which it is alleged that the State Party has acted in contravention of the Convention’s provisions relating to the freedoms, rights or obligations in regard to specified “international lawful uses of the sea”<sup>30</sup> or the laws and regulations of the coastal state adopted in accordance with the Convention or other rules of

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<sup>27</sup> Article 287 para. 1.

<sup>28</sup> *Ibid.*, para. 7.

<sup>29</sup> Article 287 para. 3 states that “a State Party which is a party to a dispute not covered by a declaration in force shall be deemed to have accepted arbitration in accordance with Annex VII”; and para. 5 of the same Article states that “If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree”.

<sup>30</sup> Article 297 para. 1, lit.(a).



international law,<sup>31</sup> or applicable international rules and standards for the protection and preservation of the marine environment.<sup>32</sup> However, this competence is subject to a number of limitations and exceptions which are set out in arts 297 and 298 of the Convention.

Thus a coastal State Party is not obliged to accept the submission to a court or tribunal of certain disputes arising out of the exercise by that State of a right or discretion in respect of marine scientific research.<sup>33</sup> The Convention also excludes from the competence of a court or tribunal, disputes relating to the sovereign rights of the coastal State with respect to living resources in the exclusive economic zone or the exercise of such rights.<sup>34</sup>

Apart from these general exceptions from jurisdiction, the Convention also specifies a number of “optional exceptions” which can be activated by States Parties if they so choose. Under article 298, a State Party has the right to exclude from the competence of the Tribunal certain categories of disputes. These include:

- a) (i) disputes concerning the interpretation or application of provisions of the Convention relating to “sea boundary delimitations” (contained in arts 15, 78 and 83) or involving historic bays or titles;<sup>35</sup>
- b) disputes concerning military activities and disputes concerning law enforcement activities “in regard to the exercise of sovereign rights” or jurisdiction excluded from the jurisdiction of the Tribunal pursuant to article 297 para. 2 or 3 of the Convention.<sup>36</sup>
- c) “disputes in respect of which the Security Council of the United Nations is exercising functions assigned to it under the Charter of the United Nations.”<sup>37</sup>

In some cases States Parties are obliged by the Convention to submit disputes referred to in article 297 or 298 to conciliation under Annex V to the Convention.<sup>38</sup> However, as stated in article 7 para. 2 of Annex V, the conclusions and recommendations of a conciliation commission appointed under that Annex are not binding on the parties. Hence even such

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31 *Ibid.*, lit.(b).

32 *Ibid.*, lit.(c).

33 Article 297 para. 2.

34 *Ibid.*, para. 3.

35 Article 298 para. 1 lit.(a).

36 *Ibid.*, para. 1 lit.(b).

37 *Ibid.*, para. 1 lit.(c).

38 See article 297 paras 2 lit.(b) and 3 lit.(b), and article 298 para. 1 lit.(a)(i).

disputes can not be considered as covered by the “compulsory procedures entailing binding decisions” under Section 2 of Part XV of the Convention.

### III. The Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea

An important and innovative feature of the dispute settlement regime of the Convention on the Law of the Sea is the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea. This Chamber is part of the Tribunal, but it has an independent mandate and competence in its own right.<sup>39</sup> In the first place the Sea-Bed Disputes Chamber has compulsory, and near exclusive, jurisdiction with respect to disputes arising in connection with activities in the Area, as provided for in Part XI Section 5 of the Convention. Article 187 of the Convention states that the Chamber “shall have jurisdiction ... in disputes with respect to activities in the Area falling within the following categories”. These categories are specified in paras (a) to (f) of this Article.<sup>40</sup> These categories include

- a) Disputes between States Parties concerning the interpretation or application of this Part and its relevant Annexes;<sup>41</sup>
- b) Disputes between States Parties and the International Sea-Bed Authority as to whether or not the acts or decisions of the Authority are with the applicable provisions of the Convention;<sup>42</sup>
- c) Disputes between parties to a contract. A party to a contract in this context may be a State, the International Sea-Bed Authority, the Enterprise, a state enterprise, a juridical person (such as a corporation), a natural person (individual) or a consortium composed of any of the above; and the disputes between them could involve the interpretation or application

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<sup>39</sup> The jurisdiction of the Sea-Bed Disputes Chamber are set out in the body of the Convention (Part XI, Section 5 — arts 186 to 191) as well as in the Statute of the Tribunal (Annex VI to the Convention).

<sup>40</sup> Para. 2 of article 187 makes it clear that the jurisdiction of the Chamber in respect of these categories of disputes does not depend on the choice of procedure under that article. The paragraph reads: “A declaration made under paragraph 1 shall not affect or be affected by the obligation of the State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, Section 5”.

<sup>41</sup> Article 187 para. (a).

<sup>42</sup> Article 187 para. (b).

of a specific contract or a plan of work or an act or omission of a party to the contract.<sup>43</sup>

d) Disputes between the Authority and a prospective contractor. The dispute could also involve the failure to conclude a contract or a legal issue arising in the negotiation of the contract;<sup>44</sup>

e) Disputes between the Authority and a State Party or any one of the other entities mentioned in article 187 of the Convention. The dispute could relate a claim of liability for a wrongful act or omission pursuant to the relevant provisions of the Convention or a relevant Annex to the Convention.<sup>45</sup>

There are, however, limitations on the competence of the Sea-Bed Disputes Chamber in disputes arising from decisions of the International Sea-Bed Authority. Article 189 of the Convention expressly states that the Sea-Bed Disputes Chamber has “no jurisdiction with regard to the exercise by the Authority of its discretionary powers” under Part XI of the Convention. In particular, the Chamber shall not “substitute its discretion for that of the Authority” and it shall not “pronounce itself” on the question whether any rules, regulations and procedures of the Authority are in conformity with the Convention. The Chamber may also “not declare invalid any such rules regulations and procedures” of the Authority. The jurisdiction of the Chamber in this regard is “confined to” deciding “claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under the Convention”; to claims concerning excess of jurisdiction or misuse of power; or to claims for damages for failure to comply with contractual obligations or obligations under the Convention.

These limitations on the Chamber’s jurisdiction are significant and they were included in the Convention to ensure that, to the extent compatible with the requirements of fairness and accountability in the exercise of its powers and prerogatives, the International Sea-Bed Authority would be afforded the freedom, powers and discretion it needs to discharge its important and innovative responsibilities on behalf of “mankind as a whole”.<sup>46</sup> However, they give to the Sea-Bed Disputes Chamber considerable power of oversight on the decisions and actions of the Authority where they impact on the rights and interests of States and other entities

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<sup>43</sup> Article 187 para. (c).

<sup>44</sup> Article 187 para. (d).

<sup>45</sup> Article 187 para. (e).

<sup>46</sup> Article 137 para. 2.

operating in the international Area. And they also endow the Chamber with the necessary competence to pronounce on the rights and responsibilities of the various parties to contracts, and on their entitlement to compensation and other appropriate remedies when their rights have been unjustifiably infringed upon.

The Sea-Bed Disputes Chamber is also empowered to give advisory opinions, at the request of the Assembly or Council of the Authority, on legal questions arising within the scope of the activities of these organs of the Authority.<sup>47</sup> This jurisdiction, which is exclusive to the Chamber, can have important implications for the procedures adopted in the Authority with regard to the powers and discretions which the Assembly or Council of the Authority may exercise, both in relation to each other and also *vis-à-vis* States and other entities which enter into relations with the Authority in connection with activities in the international sea-bed Area.

#### IV. Competence of the Tribunal to Prescribe Provisional Measures

Finally certain aspects of the International Tribunal for the Law of the Sea need to be mentioned. The first of these is the jurisdiction with regard to the prescription of provisional measures. In addition to its general power to prescribe provisional measures in disputes submitted to it, the Tribunal is also given the competence to prescribe, modify or revoke provisional measures in a dispute over which the Tribunal would not otherwise have jurisdiction, e.g. where the parties involved have agreed to submit a dispute to arbitration in accordance with the Convention's provisions. The Convention provides that the Tribunal shall have the power to prescribe provisional measures in a case being submitted to arbitration by agreement between the parties to the case. This jurisdiction of the Tribunal is subject to certain conditions. These are that:

- a) the parties have agreed to submit the case to an arbitral tribunal;
- b) the constitution of the arbitral tribunal has not yet been completed;
- c) one of the parties to the dispute has requested provisional measures; and
- d) the parties have failed to agree, within *two weeks* from the date of the request for provisional measures, on a court or tribunal to which the request should be submitted.

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<sup>47</sup> Article 191.

Where these conditions are met, the Tribunal will have the competence, at the request of the party concerned, to prescribe, modify or revoke appropriate provisional measures. Paragraph 5 of article 290 stipulates that, in prescribing provisional measures, the Tribunal must satisfy itself, firstly, that *prima facie* the Tribunal which is to be constituted would have jurisdiction to deal with the dispute and, and secondly, that the urgency of the situation requires the prescription of the measures requested. Such measures may be modified, revoked or affirmed by the appropriate tribunal when it is constituted. Until so modified or revoked, provisional measures prescribed by the Tribunal are binding on the parties.<sup>48</sup>

The Sea-Bed Disputes Chamber has a similar competence jurisdiction to prescribe, revoke or modify provisional measures in respect of disputes relating to activities in the international sea-bed area. That competence is subject to the same conditions and limitations.

## V. Jurisdiction of the Tribunal with Respect to the “Prompt Release” of Vessels and Crew

The International Tribunal for the Law of the Sea also has a form of “compulsory jurisdiction” in cases involving the prompt release of vessels and crews. Article 292 of the Convention gives to the Tribunal the competence to determine the question of the release of a vessel flying the flag of a State Party, or the crew of such a vessel, if they have been detained by another State Party. The article provides that, if it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of the release from detention may be submitted to any court or tribunal agreed upon by the parties concerned. However, if the parties are not able to agree on such a court or tribunal within ten days from the date of the detention, the question of the release of the vessel or its crew may be submitted to the Tribunal.<sup>49</sup> The application for release may be made by or on behalf of the flag State of the vessel detained.<sup>50</sup>

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<sup>48</sup> Article 290 para. 6. This is another area in which the jurisdiction of the Tribunal differs from that of the ICJ. See S. Rosenne, “The International Tribunal for the Law of the Sea and the International Court of Justice: Some Points of Difference”, in: R. Platzöder and P. Verlaan (eds), *The Baltic Sea: New Developments in National Policies and International Cooperation*, 1996, 200 et seq.

<sup>49</sup> Article 292 para. 1.

<sup>50</sup> *Ibid.*, para. 2.

Here too, the competence of the Tribunal to deal with such a case is conditional on the failure of the parties to agree on a mutually acceptable procedure for resolving the dispute. Where there is no such agreement, the jurisdiction of the Tribunal is mandatory i.e. the Tribunal becomes competent to deal with the dispute upon a request by or on behalf of the flag State concerned. The detaining State is then obliged to submit to the jurisdiction of the Tribunal and to comply with its decision, as provided for in para. 4 of article 292. This states that “upon the posting of the bond or other financial security determined by the (Tribunal) the authorities of the detaining State shall comply promptly with the decision of the (Tribunal) concerning the release of the vessel or its crew”. Thus, where the specified conditions exist, the jurisdiction of the Tribunal in this case is “compulsory” and is independent of the choice which the detaining State or the flag State in the case might have made under article 287 of the Convention.

## VI. Access to the Tribunal by “Non-State” Entities

One of the most important aspects of the jurisdiction of the Tribunal is that it has competence to deal not just with disputes between States Parties to the Convention on the Law of the Sea. Unlike the ICJ, whose Statute provides that “only states may be parties in cases” before it,<sup>51</sup> the Tribunal is open to cases involving “entities other than states”.<sup>52</sup> As already indicated, the Sea-Bed Disputes Chamber has competence to deal with disputes between the Authority and “other entities” involved in activities in the international sea-bed Area. These “other entities” may be state enterprises, natural or juridical persons sponsored by a State Party or consortia composed of such enterprises or persons.

This is also true of the Tribunal itself. For the Tribunal has, in principle, the competence to deal with disputes in which all or some of the parties may be non-state entities. Article 20 of its Statute states that the Tribunal “shall be open to entities other than States Parties” in any case submitted to it pursuant to any other agreement conferring jurisdiction on the Tribunal.

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<sup>51</sup> Article 34 para. 1 Statute of the International Court of Justice.

<sup>52</sup> On the general subject of the differences between the Tribunal and the ICJ reference may be made to Rosenne, see note 48. Also A. Boyle, “The Proliferation of International Jurisdictions and its implications for the Court”, in: Bowett and others (eds), *The International Court of Justice: Process, Practice and Procedure*, The British Institute of International and Comparative Law, Public International Law Series, 1997, 124 et seq.

Two important consequences follow from these provisions. The first is that the jurisdiction of the Tribunal is not confined to disputes regarding the interpretation or application of the Convention on the Law of the Sea. The Tribunal will be competent to deal with any dispute submitted to it if the dispute arises in connection with an agreement which confers jurisdiction to the Tribunal to hear such disputes. The only condition stipulated for the Tribunal's jurisdiction in such a case is that the agreement conferring the jurisdiction should be "related to the purposes" of the Convention on the Law of the Sea.<sup>53</sup> Given the very comprehensive scope of the Law of the Sea Convention, it is unlikely that any agreement in the "maritime domain" can be excluded from the jurisdiction of the Tribunal on the grounds that the agreement is "not related to the purposes" of the Law of the Sea Convention. Thus, by virtue of the provisions in the Convention and in its Statute, the Tribunal is potentially competent to deal with disputes arising in the context of "maritime agreements" other than the Convention on the Law of the Sea, if any such disputes are submitted to it pursuant to the provisions of such agreements.

The second conclusion to be drawn from the provisions of the Convention and Statute mentioned above is that the Tribunal may have jurisdiction in cases involving a private commercial corporation or an inter-governmental organization, or even a non-governmental organization, as a party. This would be the case where an agreement which confers jurisdiction on the Tribunal also provides that such an organization may be a party to a dispute before the Tribunal.

These aspects of the Tribunal have already been addressed in many learned papers and articles since the adoption of the Law of the Sea Convention, and particularly since the entry into force of the Convention in November 1994.<sup>54</sup> I shall not, therefore, dwell on them further in this context. I call attention to them here because they serve to underline the comprehensive scope of the dispute settlement procedure in the Law of the Sea Convention.

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<sup>53</sup> Article 288 para. 2. But even this limitation is questioned by some commentators. See Boyle, see note 52, 129: "... the conclusion I have to come to is that there is a potential for the Tribunal, by agreement of the parties, ... to hear a relatively broad range of disputes, not necessarily or exclusively concerned with Law of the Sea".

<sup>54</sup> See note 52.

## VII. Implications of the Special Jurisdiction of the Tribunal

By giving access to the Sea-Bed Disputes Chamber (and, in appropriate cases, the Tribunal itself) to entities other than States Parties, the Convention breaks important new ground in the international settlement of disputes arising in connection with the use and management of ocean space and the resources of the seas and oceans. Recognition of the legal standing of such non-state entities does not merely afford them the right and opportunity to seek redress against States and other international persons in ways which might not have been available to them hitherto. Bringing these entities within the jurisdiction of a standing international judicial body also imposes controls on their activities in an area where the impact of these activities on the use of ocean resources, and on the quality and viability of the marine environment as a whole, can be significant and serious.<sup>55</sup>

By giving the Tribunal and the Sea-Bed Disputes Chamber residual but mandatory jurisdiction in cases where the parties are unable to agree on mutually acceptable procedures for settlement, the Convention provides a reasonable guarantee that there will be an identifiable avenue for peaceful settlement of disputes without in each case requiring the agreement of all the parties to the disputes, which may be difficult, if not altogether impossible, to obtain in some cases. This helps to advance the paramount interest of the international community in the settlement of international disputes "in such a manner that international peace and security, and justice, are not endangered".<sup>56</sup>

Finally, by making the Tribunal available to deal with disputes arising from other agreements, the Tribunal offers to the world maritime community a standing judicial body which is recognized as competent and internationally representative to deal with other disputes, if the parties involved are not able to agree on a mutually acceptable procedure for settling such disputes. This opens a new, and hopefully widely acceptable, opportunity for future international conferences which adopt new conventions and agreements on issues related to the purposes of the Law of the Sea Convention. Instead of revisiting the often complex and confrontational arguments as to which dispute settlement procedures should be

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<sup>55</sup> On the need to bring "non-state actors" in the international arena within the jurisdiction of international courts, see J. Crawford, "The International Court of Justice, Judicial Administration and the Rule of Law", in: Bowett, see note 52.

<sup>56</sup> United Nations Charter, Article 2 para. 3.



adopted for the respective conventions or agreements, the conferences will have the option of merely agreeing to confer jurisdiction on the Tribunal which is already established with specified membership and easily ascertainable procedures.

### **VIII. Concluding Remarks**

From the foregoing it may be concluded that the dispute settlement regime of the Law of the Sea Convention has many undeniable merits; although it does, of course, have many shortcomings. It is flexible because it makes it possible for States to choose from a reasonably wide range of options; but it is comprehensive in that it ensures that, for the most part, its provisions can be enforced by means of mandatory procedures which result in binding decisions. And the regime is “user-friendly” in the sense that it takes due account of, and accommodates, the legitimate concerns of States which wish to exclude issues of vital and sensitive national interest from the ambit of the mandatory judicial procedures. In sum, the regime of the Convention advances the principle of the rule of law in international relations, while recognizing the necessary limits of that principle in a world of sovereign states, most of which are still jealous of their sovereign rights and prerogatives. It may of course be argued by the purists that the regime does not have “enough teeth” because it does not subject every possible dispute to the compulsory judicial process. That is indeed true. However, it is equally true that anything more radical would probably not have been acceptable to many of the States which have now accepted the 1982 Convention and its dispute settlement regime.