Denver Journal of International Law & Policy

Volume 10
Number 2 *Winter*

Article 10

January 1981

Dispute Settlement Mechanisms in the Draft Convention on the Law of the Sea

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Keywords
Law of the Sea, Dispute Resolution

STUDENT COMMENT

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I. INTRODUCTION

The tenth session of the Third United Nations Conference on the Law of the Sea (UNCLOS) opened in New York March 9, 1981 marked by the eleventh-hour firing of the United States UNCLOS delegation,[1] and in the shadow of the Reagan Administration's recent decision to prevent the conclusion of negotiations at what had been hoped would be the final session.[2] The document in question is the Draft Convention on the Law of the Sea, Informal Text (the Draft Convention), which has been more than seven years in the making.[3] The Draft Convention contains some 320 primary articles and seven annexes. It is a highly complex and comprehensive codification of both new and customary principles of international law[4] covering a range of activities as vast as the area of the world's surface with which it deals.[5]

Given its complexity and comprehensiveness, it is axiomatic that disputes as to the scope, construction, and efficacy of the Draft Convention will arise. Without appropriate methods of dealing with these disputes, it will become a lifeless document of greatly diminished significance. The purpose of this comment is to suggest a method of analysis of the dispute settlement provisions in the Draft Convention. In light of the recently revived potential for modification of the Draft Convention, the comment

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1. N.Y. Times, Mar. 9, 1981, at 1, col. 1.

2. *Id.*, Mar. 10, 1981, at 4, col. 3.

3. Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/Conf. 62/WP.10/Rev.3/Add.1 [hereinafter cited as Draft Convention]. For a history of previous conferences on the law of the sea, see Sohn, *Problems of Dispute Settlement*, in LAW OF THE SEA: CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION 223 (E. Miles & J. Gamble eds. 1977).

4. *See, e.g.*, Hazou, *Determining the Extent of Admissibility of Reservations: Some Considerations with Regard to the Third United Nations Conference on the Law of the Sea*, 9 DEN. J. INT'L L. & POL'Y 69 (1980).

5. For a survey of the many potential uses of the oceans, see Nanda, *Some Legal Questions on the Peaceful Uses of Ocean Space*, 9 VA. J. INT'L L. 343 (1969).

will also offer an alternative which hopefully will facilitate dispute settlement without destroying the delicate balance of compromise which has been so tediously hammered out over the course of the UNCLOS negotiations.

The comment will begin with a description of the basic structure of the dispute settlement provisions of the Draft Convention. The efficacy of these procedures will then be considered in the context of varying degrees of national sovereignty, ranging from unqualified or absolute sovereign rights to disputes arising in areas over which national sovereignty is specifically precluded. The present form of dispute settlement has grown through compromise and from the fears of what the Group of 77 perceives as the legal chicanery of the developed world. The result is that dispute settlement is being allocated largely to (1) the national forums, where the dispute arises concerning an area over which there is national sovereignty, and (2) the international political forum, regarding disputes in areas over which national sovereignty is impossible. Although this comment is critical of the dispute settlement scheme as it presently exists, the structure appears to be necessary if a workable agreement is ever to be reached. Therefore, a recommendation is made which would leave the delicate balance of compromise upon which the Draft Convention is based intact, while facilitating settlement in what appears to be the least threatening forum to the Group of 77: the international political arena.

II. BASIC STRUCTURE OF DRAFT CONVENTION DISPUTE SETTLEMENT

The Draft Convention imposes a basic obligation on member states to settle disputes by peaceful means,[6] but allows considerable freedom of choice as to the forum or method to be employed.[7] The Draft Convention provides for the following alternatives for the settlement of disputes: the Law of the Sea Tribunal (LOST);[8] the Sea-Bed Disputes Chamber (SBDC) of the Law of the Sea Tribunal;[9] the International Court of Justice (ICJ);[10] an arbitral tribunal;[11] a special arbitral tribunal;[12] conciliation;[13] or any other procedure to which the parties have agreed.[14] Member

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6. Article 279 of the Draft Convention states: "The States Parties shall settle any dispute between them relating to the interpretation or application of this Convention in accordance with paragraph 3 of Article 2, and shall seek a solution through the peaceful means indicated in paragraph 1 of Article 33, of the Charter of the United Nations." Draft Convention, *supra* note 3, art. 279.

7. Article 280 sets forth: "Nothing in this Part shall impair the right of any States Parties to agree at any time to settle a dispute between them relating to the interpretation or application of this Convention by any peaceful means of their own choice." *Id.* art. 280.

8. *Id.* art. 287(1)(a).

9. *Id.* art. 186.

10. *Id.* art. 287(1)(b).

11. *Id.* art. 287(1)(c).

12. *Id.* art. 287(1)(d).

13. *Id.* art. 284.

14. *Id.* art. 280. For a survey of potential means of dispute settlement, see Haubert, *Toward Peaceful Settlement of Ocean Space Disputes: A Working Paper*, 11 SAN DIEGO L. REV. 733, 740-46 (1974).

states may agree to submit to dispute settlement before the LOST, the ICJ, an arbitral tribunal, or a special arbitral tribunal either at the time of signing, or at anytime thereafter.[15] Therefore, maximum flexibility is allowed as to the forum and method of dispute settlement.[16]

Two systems of dispute settlement are included in the Draft Convention. These systems are generally referred to as the general system and the functional system.[17] Prior to bringing a dispute before either a functional or general forum, however, or where a settlement procedure has terminated without a settlement of the dispute, member states are required to "exchange views regarding settlement of the dispute through negotiations in good faith or other peaceful means."[18] Member states also have the option of seeking settlement through conciliation,[19] or other procedures under general, regional, or special agreements.[20] Where these alternatives have failed to bring about a resolution of the dispute involving member states, settlement is referred to the appropriate functional or general forum.

A. *The Functional System*

The functional system is designed to allow the parties to a specific type of dispute access to a forum which is specialized in that field.[21] The functional system is contained in two places, annex VIII on special arbitration procedure, and section 6 of part XI on the SBDC.

Article 1 of annex VIII provides that

> any party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels, may submit the dispute to the special arbitration procedure provided for in this annex by notification addressed to the other party or parties to the dispute.[22]

Annex VIII also provides for separate lists of experts in each of the above four special areas.[23] Special arbitral tribunals are then formed as needed by selecting members from the appropriate list in accordance with the

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15. Draft Convention, *supra* note 3, art. 287(1).

16. *See* Mirvahabi, *Fishery Disputes Settlement and the Third United Nations Conference on the Law of the Sea*, 57 REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 45, 50 (1979).

17. *Id.*

18. Draft Convention, *supra* note 3, arts. 281, 286.

19. *Id.* art. 284.

20. *Id.* art. 282.

21. For a discussion of the general and functional systems approach, see Adede, *Settlement of Disputes Arising Under the Law of the Sea Convention*, 69 AM. J. INT'L L. 798, 799 (1975); Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495, 506-07 (1975).

22. Draft Convention, *supra* note 3, annex VIII, art. 1.

23. *Id.* annex VIII, art. 2.

procedure set out in article 3.[24] In this way, the treaty allows parties to a dispute of an appropriate nature to submit to settlement by a specialized arbitral tribunal, the members of which are experts in the field of the dispute.

The SBDC is a functional tribunal established for resolution of certain disputes arising within or relating to the area.[25] Basically, the SBDC has jurisdiction over disputes between: (1) member states concerning the interpretation or application of part XI;[26] (2) a member state and the authority concerning acts or omissions of either which are allegedly in violation of part XI or acts of the authority "alleged to be in excess of jurisdiction or a misuse of power";[27] (3) parties to a contract, including member states, the authority, or enterprise, state entities and natural or juridical persons concerning interpretation of the contract and acts or omissions of any party thereto;[28] (4) the authority and a prospective contractor who has been sponsored by a state;[29] and (5) the authority and a state party, a state entity, or a natural or juridical person sponsored by a state party where the authority is alleged to have incurred liability for "wrongful damages arising out of the exercise of the powers and functions of the Authority."[30] The SBDC is composed of eleven members of the LOST who are selected by a majority vote of the LOST.[31]

Provision is also made for an ad hoc chamber of the SBDC to deal with particular disputes which may be submitted thereto upon the request of any party to the dispute.[32] Ad hoc chambers are composed of three members of the SBDC who are selected in accordance with article 37 of annex VI.[33]

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24. *Id.* annex VIII, art. 3. Subparagraph (a) contains the basic provision:

> [T]he special arbitral tribunal shall consist of five members. Each party to the dispute shall appoint two members, one of whom may be its national, to be chosen preferably from the appropriate list or lists relating to the matters in dispute. The parties to the dispute shall by agreement appoint the President of the special arbitral tribunal who shall be chosen preferably from the appropriate list and shall be a national of a third State, unless the parties otherwise agree.

25. *Id.* art. 288(3).

26. *Id.* art. 187(a).

27. *Id.* art. 187(b).

28. *Id.* art. 187(c).

29. *Id.* art. 187(d).

30. *Id.* art. 187(e).

31. *Id.* annex VI, art. 4(5). For a critique of the procedures for election of members to the LOST and the SBDC from the perspective of developed nations, see Bernhardt, *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, 19 VA. J. INT'L L. 69, 71-73 (1978).

32. Draft Convention, *supra* note 3, art. 188(1)(b).

33. *Id.* annex VI, art. 37. The basic provision is contained in paragraph 1, which provides:

> The Sea-Bed Disputes Chamber shall form an *ad hoc* chamber, composed of three of its members, for dealing with a particular dispute submitted to it in accordance with article 188, paragraph 1(b), of Part XI of this Convention. The

As an alternative to settlement by the SBDC, disputes between states parties regarding the interpretation or application of the treaty may be submitted to a Special Chamber of the LOST upon the request of the disputing parties.[34] Special Chambers are composed of three or more members selected from among the members of the LOST. Special Chambers are used for dealing with particular categories of disputes and for determination of which disputes may be resolved by summary procedure.[35]

Binding commercial arbitration provides another alternative to dispute settlement before the SBDC. Disputes involving the interpretation or application of a contract or plan of work may be submitted to binding commercial arbitration at the request of any party to the dispute.[36] The commercial arbitral tribunal, however, has no jurisdiction to determine any question of interpretation of the convention.[37] Questions as to the interpretation of part XI must be submitted to the SBDC for a ruling.[38]

B. *The General System*

In contrast to the functional system of dispute settlement, the general system allows for the settlement of any dispute arising out of the Draft Convention to be settled in the general forum of the parties' choice.[39] General forums include the LOST, the ICJ, and an arbitral tribunal constituted in accordance with annex VII.

The LOST is composed of twenty-one members,[40] no two of whom may be from the same state.[41] Each member state is allowed to submit two nominations for election to the LOST. Two-thirds of the member states are required to establish a quorum for LOST member elections, and "the persons elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of votes of the states parties present and voting, provided that such majority shall

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composition of such a chamber shall be determined by the Sea-Bed Disputes Chamber with the approval of the parties.

34. *Id.* art. 188(1)(a).

35. *Id.* annex VI, art. 15.

36. *Id.* art. 188(2)(a). This article provides:

> Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph c(1), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless at any time the parties to the dispute otherwise agree or have agreed. A commercial arbitral tribunal, to which such dispute is submitted, shall have no jurisdiction to determine any question of interpretation of the Convention. When such a dispute also involves a question of the interpretation of Part XI and the relevant annexes, with respect to activities in the Area, such question shall be referred to the Sea-Bed Disputes Chamber for a ruling.

37. *Id.*

38. *Id.*

39. *See* Mirvahabi, *supra* note 16, at 50.

40. Draft Convention, *supra* note 3, annex VI, art. 2.

41. *Id.* annex VI, art. 3.

include at least a majority of the States parties."[42]

Arbitral tribunals are composed of five members from a list of arbitrators which is compiled and maintained by the Secretary-General of the United Nations.[43] Each member state is entitled to nominate four arbitrators to the list.[44] Arbitrators are then selected for each panel in accordance with the procedures in article 3 of annex VII.[45]

III. NATIONAL SOVEREIGNTY AND DISPUTE SETTLEMENT

It is apparent that a major portion of the dispute settlement procedures of the Draft Convention involve potential conflicts of national interest. Therefore, it is essential to any analysis of the dispute settlement provisions of the Draft Convention to consider changes of national interests brought about by UNCLOS.

One of the dominant characteristics of the Draft Convention is a tremendous increase in the area of ocean space which is made subject to some form of sovereign national jurisdiction.[46] This expansion of national jurisdiction comes about primarily through an increase in the breadth of the territorial sea,[47] the creation of an Exclusive Economic Zone (EEZ),[48] and recognition of the rights of coastal states to the resources of their continental shelves.[49] National jurisdiction over these areas takes the form of varying degrees of sovereign rights, where the term "sovereign rights" has different meanings in different contexts.[50] For the purposes of this paper, the dispute settlement provisions of the Draft Convention will be analyzed in the context of three possible degrees of sovereign rights:

(1) unqualified national sovereignty;

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42. *Id.* annex VI, art. 4.

43. *Id.* annex VII, articles 2 and 3(a).

44. *Id.* annex VII, art. 2.

45. *Id.* annex VII, art. 3. Subparagraph (a) sets forth the basic provision:

> [T]he arbitral tribunal shall consist of five members. Each party to the dispute shall appoint one member, who shall be chosen preferably from the list and may be its national. In the case of the party requesting arbitration, such appointment shall be made at the time of the request. The other three members shall be appointed by agreement of the parties and shall be chosen preferably from the list and shall be nationals of third States, unless the parties otherwise agree. The parties to the dispute shall appoint the President of the arbitral tribunal from among these three members.

46. The continental shelf and slope of the United States alone covers an area of 1.2 million square miles. *See Hearings on S.7 and S.544 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st Sess., pt. 4, at 961 (1969).

47. Draft Convention, *supra* note 3, at art. 3. This article sets forth that: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this convention."

48. *Id.* art. 57. This article sets forth that: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

49. *Id.* arts. 76 and 77.

50. *See* Rosenne, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 73 AM. J. INT'L L. 89, 97 (1979).

(2) national sovereignty qualified by or subject to international rights; and
(3) non-sovereignty.

From these three levels of national sovereignty, four possible dispute situations arise:

(1) disputes regarding an exercise of unqualified national sovereignty;
(2) disputes regarding a qualification or limitation of national sovereignty;
(3) disputes arising within, or regarding an area of non-sovereignty; and
(4) disputes regarding the delimitation of boundaries between areas subject to some form of national sovereignty.[51]

A. *Unqualified National Sovereignty*

Dispute settlement provisions relating to an exercise of unqualified sovereign jurisdiction are the least effective of those contained in the treaty. An illustration of this may be found by examination of the sovereign rights of the coastal state over the EEZ. Within the EEZ, the coastal state has

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water currents and winds.[52]

Article 56(2) requires the coastal state to have "due regard for the rights and duties of other States" when exercising its own rights within the EEZ.[53] Although the "due regard" standard of article 56(2) appears to be a qualification upon the unrestrained exercise of sovereign rights to economic exploitation of the EEZ by the coastal states, it clearly is not in the areas of scientific research and fishing rights.

1. *Fishing Rights in the EEZ*

Article 61(1) provides that "the coastal State shall determine the allowable catch of the living resources in its exclusive economic zone."[54] Article 62(2) continues that the coastal state "shall determine its capacity to harvest the living resources" of the EEZ, and where the coastal state does not "have the capacity to harvest the entire allowable catch, it shall . . . give other States access to the surplus of the allowable catch."[55] In the event of an excess allowable catch, reference is specifically made to land-locked states, states with special geographical characteristics,[56] and

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51. Dispute settlement regarding the delimitation of boundaries goes beyond the scope of this paper. Relevant provisions of the Draft Convention are set forth in articles 15, 50, 59, 74, and 83.
52. Draft Convention, *supra* note 3, art. 56(1)(a).
53. *Id.* art. 56(2).
54. *Id.* art. 61(1).
55. *Id.* art. 62(2).
56. *Id.* art. 70(2). This article defines states with special geographical characteristics.

"States whose nationals have habitually fished in the zone, or which have made efforts in research and identification of stocks," as states to receive special preference for the surplus allowable catch.[57]

The allowable catch, and the capacity to harvest however, are both determined solely by the discretion of the coastal state. Under article 296(3)(a) of part XV on dispute settlement, the discretion of the coastal state regarding these matters is not subject to third party review absent its consent.[58] The result is an unqualified sovereignty which allows the coastal state to effectively exclude all foreign exploitation of living resources within its EEZ by establishing an allowable catch which is equivalent to its capacity to harvest.[59]

For the purposes of this Convention, "States with special geographical characteristics" mean coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.

57. *Id.* art. 62(2). This article provides that:

The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

58. *Id.* art. 296(3)(a).

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

59. Article 296(3)(b) of the Draft Convention provides for mandatory submission of disputes to conciliation upon any of the following three allegations:

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

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

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

However, article 296(3)(c) states that: "In any case the conciliation commission shall not substitute its discretion for that of the coastal State." Further, even if the conciliation commission were to make findings, article 7(2) of Annex V on Conciliation provides that:

2. *Scientific Research*

An analogous situation exists with respect to scientific research conducted within the EEZ. Article 238 provides that "all States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this convention."[60] Significant limitations, however, to this basic right are found in article 245 which gives coastal states "the exclusive right to regulate and conduct marine scientific research in their territorial sea,"[61] and in article 246(1), which allows coastal states to "regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf."[62]

Article 246(2) requires the consent of the coastal state to engage in the conduct of marine scientific research in the EEZ and on the continental shelf.[63] However, article 246(5) allows the coastal state to withhold its consent as a matter of discretion.[64] As is the case with fisheries, article 296(2)(a) exempts from third party dispute settlement "the exercise by the coastal State of a right or discretion in accordance with article 246,"[65] and additionally "a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253."[66] The result again is unqualified sovereignty, which is not subject to third party review.[67]

"The report of the Commission, including any conclusions or recommendations, shall not be binding upon the parties." Therefore, there is no effective third party review of the unqualified sovereignty of a coastal state over the fisheries within its EEZ.

60. Draft Convention, *supra* note 3, art. 238.

61. *Id.* art. 245.

62. *Id.* art. 246(1).

63. *Id.* art. 246(2).

64. *Id.* art. 246(5). This article provides that:

> Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if the project:
> (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
> (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
> (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;
> (d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project.

65. *Id.* art. 296(2)(a).

66. *Id.* Article 253 additionally provides that the coastal state may require suspension of any scientific research projects in progress in the EEZ, or on the continental shelf.

67. Article 296(2)(b) provides for submission of disputes concerning scientific research to conciliation. However, as is the case with fisheries (*see* note 59 *supra*), certain discretionary acts of the coastal state are beyond review even by a conciliation commission, and in any

3. *Conclusion and Alternatives*

In areas of unqualified national sovereignty, recourse to third party dispute settlement appears to be possible only upon the consent of the sovereign. The disputing party, therefore, may be forced to seek settlement by some other means. Possible alternatives to third party settlement include:

(1) recourse to the national courts of the sovereign;
(2) diplomatic settlement of disputes; or
(3) settlement by private agreement with the sovereign.

An increase in the jurisdiction of the national courts of most coastal states would probably follow from the expanded sovereignty of the coastal states over their adjacent ocean space. Therefore, resort to a national forum may provide an alternative means of dispute settlement where the sovereign has refused third party dispute settlement. Difficulties which may be encountered by the plaintiff in exercising this alternative, such as standing and partiality, go beyond the scope of this comment. Recourse to a national forum is raised only as a possible alternative which may be useful in certain cases.[68]

A more likely means of dispute settlement where an exercise of national sovereignty is excluded from third party review appears to be resolution through diplomatic means such as direct negotiations between disputing member states, or the use of good offices. Good offices contemplates the involvement of a third party who serves as a facilitator to negotiations but does not interfere with the negotiations or impose a settlement upon the parties.[69] Resolution by diplomacy is encouraged in the Draft Convention, and is generally a prerequisite to settlement before a third party forum.[70]

Private agreements between foreign private industry, and the government or private industries of the coastal state may provide one of the

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event, the commission's decision is not binding upon the parties. Thus, unqualified sovereign rights over scientific research within the EEZ are also beyond effective third party dispute settlement.

68. Many of the nations which took part in the third UNCLOS expressed the view that disputes arising within an area of national sovereignty should only be amenable to settlement in the national courts of the sovereign. *See* notes 131 and 132 *infra*.

69. *See* Haubert, *supra* note 14, at 741. *See generally* Darwin, *Mediation and Good Offices*, in INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 83 (1972).

70. Draft Convention, note 3 *supra*. Article 281(1) provides: "If a dispute arises between States Parties relating to the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to exchange views regarding settlement of the dispute through negotiations in good faith or other peaceful means." Article 286, referring to section 1 (which contains article 282), states:

> Subject to the provisions of articles 296 and 298, any dispute relating to the interpretation or application of this Convention shall, where no settlement has been reached by recourse to the provisions of section 1, be submitted, at the request of any party to the dispute, to the court or tribunal having jurisdiction under the provisions of this section.

more practical means of dispute settlement, particularly in disputes involving scientific research, or fishing privileges. As is the case with resort to a national forum, the subtleties and difficulties of making private agreements in light of the various regulations imposed by the coastal states go beyond the scope of this paper. They are raised as possibilities that may be useful in certain situations.[71]

B. *Qualified National Sovereignty*

1. *Some Qualifications and Problems*

Paragraph 1 of article 296 sets out several areas of qualified sovereignty with respect to the EEZ. These qualifications are the "freedoms and rights of navigation or overflight or the laying of submarine cables and pipelines and other internationally lawful uses of the sea specified in article 58,"[72] and specified international rules for the protection and preservation of the marine environment."[73]

Disputes relating to these qualified sovereign rights are submitted to the dispute settlement procedures of the Draft Convention without limitation or exception made for coastal state discretion. Therefore, in contrast to unqualified sovereign rights, the third party dispute settlement forum is free to examine the conduct and policies of parties to a dispute concerning qualified sovereignty in total.

This apparently expansive jurisdiction over disputes relating to qualified sovereign rights does not, however, insure access to third party dispute settlement procedure. One major impediment to third party review is article 298. Paragraphs 1(b) and (c) of article 298 allow, respectively, exceptions to settlement procedures for disputes concerning military activities, and disputes in respect of which the United Nations Security

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71. For a discussion of the use of private, or "non-governmental" agreements in the settlement of fisheries disputes, see Mirvahabi, note 16 *supra*. For a discussion of United States legislation regulating private agreements between United States and foreign fishing concerns, see Christie, *Regulation of International Joint Ventures in the Fishery Conservation Zone*, 10 GA. J. INT'L L. 85 (1980).

72. The Draft Convention, *supra* note 3, article 58(1), states:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of the navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

At this point, a logical contradiction in the structure of the Draft Convention should be noted. Article 286 is "subject to the provisions of articles 296 and 298." *See* note 76 *infra*. However, paragraph 1 of article 296 begins with the language "notwithstanding the provisions of article 286." Additionally, section 2 of part XV, which includes article 296, sets forth the compulsory dispute settlement regime of the Draft Convention. Article 296 places limitations on the applicability of section 2, although paragraph 1 does not appear to function as a limitation itself.

73. *Id.* art. 296(1).

Council is involved.[74] A recalcitrant state could thus couch its interference with, for example, the rights of innocent passage, in terms of military activities so as to fit within the escape provisions of article 298(1)(b). The Draft Convention does not define what constitutes a military activity; thus, the claiming state would appear to have unfettered discretion when arguing its actions were military activities. Therefore, even if a member state were to submit to third party dispute settlement in general, the escape provisions of article 298 have the potential of removing a large number of disputes relating to qualified sovereignty from the dispute settlement system.[75]

A second major impediment to third party review is the lack of an effective compulsory settlement procedure for disputes between member states. Article 286 is the basic compulsory dispute settlement provision of the Draft Convention. Under article 286, where diplomacy or conciliation has failed to produce a settlement, any party to the dispute can submit the dispute to the court or tribunal having jurisdiction.[76] Jurisdiction over member states, however, appears to be based upon the consent of parties, with the exceptions of the SBDC[77] and an arbitral tribunal constituted in accordance with annex VII.[78]

There are some serious deficiencies in the use of arbitration for compulsory dispute settlement due to the potential for delay, and the lack of

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74. *Id.* art. 298(1). This article sets forth in pertinent part:

> 1. Without prejudice to the obligations arising under section 1, a State Party when signing, ratifying or otherwise expressing its consent to be bound by this Convention, or at any time thereafter, may declare that it does not accept any one or more of the procedures for the settlement of disputes specified in this Convention with respect to one or more of the following categories of disputes:
> . . . .
> (b) Disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 296, Paragraphs 2 and 3;
> (c) Disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by means provided for in this Convention.

75. *See* Bernhardt, *supra* note 31, at 95-99.

76. Draft Convention, *supra* note 3, art. 286. This article provides:

> Subject to the provisions of articles 296 and 298, any dispute relating to the interpretation or application of this Convention shall, where no settlement has been reached by recourse to the provisions of section 1, be submitted, at the request of either party to the dispute, to the court or tribunal having jurisdiction under the provisions of this section.

77. *Id.* art. 287(2): "Any declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal to the extent and in the manner provided for in section 6 of Part XI."

78. *Id.* art. 287(3): "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."

procedure in the Draft Convention for enforcement of awards. Article 3 of annex VII sets out the procedure for formation of an arbitral tribunal.[79] Each party to the dispute is to select one arbitrator.[80] The other three arbitrators forming the tribunal are then selected by agreement of the parties.[81] In the event a party fails to appoint an arbitrator within thirty days from the date of the receipt of the request for arbitration, or the parties cannot agree upon the other arbitrators to be appointed to the tribunal within sixty days from the date of receipt of the request for arbitration, procedures are available to effect the necessary appointments.[82] In a dispute where prompt resolution is a matter of necessity, a sixty-day, or even a thirty-day delay could well result in a moot controversy.

Even assuming the controversy does not become moot during the delay, there is no effective procedure for enforcement of the award. Rather article 11 of annex 3 merely provides that the award "shall be complied with by all the parties to the dispute."[83] Although article 12 of annex VII does contain procedure for resolution of disputes as to implementation of the award, it does not contemplate enforcement as such.

The only compulsory forum for dispute settlement in the Draft Convention is arbitration. However, the escape provisions of article 296, the potential for delay, and the lack of enforcement procedures may render arbitration ineffective in many situations.

2. *Other Potential Problems: Land-locked States and the Territorial Sea*

Part X of the Draft Convention qualifies national sovereignty by providing land-locked states a right of access to the sea in the form of freedom of transit through the territory of transit states.[84] Paragraph 3 of article 125, however, provides that "Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all necessary measures to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interest."[85]

Article 125 appears to provide a balance between the rights of the land-locked states, and those of the transit state whose sovereign rights are qualified. Regrettably however, it is doubtful that the legal character of the balance will be allowed to develop through any means other than direct negotiations between the parties. Any attempt by a land-locked state to resolve a dispute through the settlement procedures of the Draft

79. *Id.* annex VII, art. 3.

80. *Id.* annex VII, art. 3(a). *See* note 45 *supra.*

81. *Id.*

82. *Id.* annex VII, art. 3(c)-(d).

83. *Id.* annex VII, art. 11.

84. Draft Convention, *supra* note 3, at art. 125(1). Transit states are defined by article 124(1)(b) as "a State, with or without a sea-coast, situated between a land-locked State and the sea through whose territory 'traffic in transit' passes."

85. *Id.*

Convention would meet with the same stumbling blocks of a lack of effective compulsory jurisdiction, and application of an article 296 escape mechanism as were discussed above.[86]

Article 2 of the treaty subjects the sovereign rights of the coastal state over the territorial sea to qualification by "this Convention and to other rules of international law."[87] The principal qualifications to the sovereignty of the coastal state over its territorial sea are the right of innocent passage,[88] transit passage,[89] immunities of warships,[90] the right of land-locked states to access to the oceans,[91] obligations imposed upon the coastal state regarding civil jurisdiction over foreign ships within its territorial sea,[92] and qualifications based upon principles of generally recognized international law.[93]

Disputes which can be defined in terms of one of the above qualifications come under the general system of dispute settlement of the treaty. Therefore, the parties to a dispute are left to their own devices to agree upon an acceptable third party dispute settlement forum, or are relegated to arbitration. In either case, the Draft Convention is less than fully adequate.

C. *Dispute Settlement Alternatives*

Although there is a provision for "compulsory" arbitration, the Draft Convention does not provide an effective dispute settlement system for any dispute involving the qualification of a sovereign right. The parties again appear to be left largely to their own means to find an acceptable and effective forum. Therefore, as is the case with disputes relating to sovereign rights, the parties may often be relegated to seeking resolution in either a national forum, by diplomatic means, or through private settlement.

IV. NON-SOVEREIGN DISPUTES

Those portions of the ocean space which have not been relegated to some form of national sovereignty are the high seas and the "regime of the area."

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86. For a discussion of the interests of land-locked states relative to the UNCLOS, see Comment, *UNCLOS III: Last Chance for Landlocked States?*, 14 SAN DIEGO L. REV. 637 (1977); Hassan, *Third Law of the Sea Conference Fishing Rights of Landlocked States*, 8 LAW. AM. 686 (1976); Childs, *The Interests of Land-Locked States in Law of the Seas*, 9 SAN DIEGO L. REV. 701 (1972).

87. Draft Convention, *supra* note 3, art. 2.

88. *Id.* art. 24. The coastal state, however, may regulate innocent passage in accordance with article 21.

89. *Id.* art. 34. The coastal state may, however, as with innocent passage, regulate transit passage in accordance with articles 41 and 42.

90. *Id.* art. 32.

91. *Id.* art. 125(1).

92. *Id.* arts. 28 and 292.

93. *Id.* art. 2(3).

A. *The High Seas*

The regime of the high seas is contained in part VII of the Draft Convention. At present no international body has been established to deal with criminal acts committed upon the high seas; hence the treaty defers to national jurisdiction for criminal punishment.

National jurisdiction over criminal acts includes penal jurisdiction in matters of collision,[94] jurisdiction over acts of piracy,[95] over the transport of slaves,[96] regarding unauthorized radio broadcasts,[97] and the right of hot pursuit.[98] The most significant of these provisions is article 97 on penal jurisdiction in matters of collision, which is a legislative reversal of the *Lotus* case.[99] However, the Draft Convention appears to do little else beyond a codification of customary international law regarding criminal jurisdiction on the high seas other than to reduce the spatial area of the high seas.[100]

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94. *Id.* art. 97.

95. *Id.* art. 105.

96. *Id.* art. 99.

97. *Id.* art. 109(2).

98. *Id.* art. 111.

99. The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10, at 32. The *Lotus* case illuminates the significance of article 97:

> [F]ollowing the collision which occurred on August 2nd, 1926, on the high seas between the French steamship Lotus and the Turkish steamship Boz-Kourt, and upon the arrival of the French ship at Stamboul, and in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish nationals, Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the Lotus at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction.

In contrast, article 97(1) provides:

> In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of which such person is a national.

For a discussion of the *Lotus* case, see C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 304-05 (1967).

100. Article 91(1) may potentially effect the present customary international law regarding nationality of ships. It provides that:

> Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship.* (Emphasis added.)

A genuine link requirement would significantly affect the use of "flags of convenience," however, given the weak dispute settlement provisions of the Draft Convention, it is doubtful that any stringent genuine link requirement will develop.

For discussions of the flag of convenience problem, see B. BOCZEK, FLAGS OF CONVENIENCE (1962); Dempsey & Helling, *Oil Pollution by Ocean Vessels—An Environmental Tragedy: The Legal Regime of Flags of Convenience, IMCO Multilateral Conventions, and*

Disputes falling outside of national jurisdiction include those related to the basic freedoms of navigation,[101] overflight,[102] laying of submarine cables and pipelines,[103] construction of artificial islands,[104] fishing,[105] and scientific research.[106] All states are required to exercise these freedoms with due consideration for the interests of other states, and rights under the UNCLOS with respect to activities in the area.[107] Disputes regarding the exercises of these freedoms are relegated to the general dispute settlement system.

B. *The Area*

The regime of the area is contained in part XI of the Draft Convention. Part XI comprises a major amount of the Draft Convention, and deals with that portion of the ocean floor which is not subject to some form of national sovereignty under provisions relating to the EEZ,[108] or continental shelf.[109]

Jurisdiction over the area is relegated to the Authority, which exercises exclusive control over the administration of the area's resources.[110] This control is exercised primarily by two of the administrative organs of the Authority, the Assembly and the Council.[111]

The Assembly is the supreme organ of the Authority to which all other organs are held accountable.[112] The Assembly exercises the power

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Coastal States, 10 DEN. J. INT'L L. & POL'Y 37 (1981); Herman, *Flags of Convenience—New Dimensions to an Old Problem*, 24 McGILL L.J. 1 (1978).

101. Draft Convention, *supra* note 3, art. 87(1)(a).

102. *Id.* art. 87(1)(b).

103. *Id.* art. 87(1)(c).

104. *Id.* art. 87(1)(d).

105. *Id.* art. 87(1)(e).

106. *Id.* art. 87(1)(f).

107. *Id.* art. 87(2).

108. *Id.* art. 56.

109. *Id.* art. 77. Article 137(1) provides: "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized."

110. *Id.* art. 137(2):

> All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this Part and the rules and regulations thereunder.

111. *Id.* art. 158(1). In addition to an assembly, and a council, article 158(1) provides for a secretariat. Article 158(2) provides for an operational organ referred to as the Enterprise.

112. *Id.* art. 160(1):

> The Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in this Convention. The Assembly shall have the power to establish general policies in conformity with the relevant provisions of this Convention on any question or matter within the competence of the Authority.

to establish general policies of the Authority,[113] and among its specific powers elects members of the Council.[114]

The Council is the executive organ of the Authority, and establishes the specific policies of the Authority.[115] The Council is composed of representatives from various interest groups in a complex and balanced scheme which is designed to insure that no one group is capable of gaining control, or at least the ability to overly manipulate the Council to its own ends.[116] The interest group structure of the Council is of tremendous significance in light of the limited possibilities for judicial review of the Authority's actions.[117]

The SBDC is established as a functional forum with dispute settlement jurisdiction over the area. All member states are obligated to accept the jurisdiction of the SBDC.[118] However, jurisdiction of the SBDC regarding decisions of the Authority is limited to determination of whether application of rules, regulations, or procedures made by the Authority conflict with the obligations of the parties under the treaty or contract; claims concerning lack of competence or misuse of power by the authority; and claims for damages or any other legal remedy for failure to comply with the terms of the contract or the treaty.[119] The SBDC is foreclosed from review of the discretionary acts of the Authority, and "in no case shall it substitute its discretion for that of the Authority."[120] The SBDC is also foreclosed from deciding whether the rules, regulations, or procedures adopted by the Authority are in conformity with the provisions of the treaty.[121]

The Draft Convention does not appear to contemplate judicial review of the Authority, other than regarding contracts by the Authority which may be submitted to commercial arbitration,[122] in any forum other than the SBDC.[123] The result of these exclusions to SBDC jurisdiction thus is a complete preclusion of judicial review in the excluded area. Therefore, disputes regarding matters which are not within the jurisdiction of the

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113. *Id.*

114. *Id.* art. 160(2).

115. *Id.* art. 162(1).

116. *Id.* Article 161(1) sets out the various interest groups which compose the Council. For a discussion of the development of interest groups in the Council in relation to the Group of 77, see Adede, *The Group of 77*, 7 OCEAN DEV. INT'L L.J. 31, 56 (1979).

117. Draft Convention, *supra* note 3, art. 190: "The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority." While it is unclear which acts of the Council are considered as discretionary acts of the Authority, were the Council to be dominated by any one interest group, the potential for unchecked abuse is obvious.

118. *Id.* art. 283(2).

119. *Id.* arts. 187 and 288(3).

120. *Id.* art. 190.

121. *Id.*

122. *Id.* art. 188(2)(a).

123. *Id.* art. 288(3).

SBDC may only be resolved in the political forums of the organs of the Authority.

V. THE INFLUENCE OF THE GROUP OF 77

One of the most significant influences on the UNCLOS has been from the group of developing and less developed countries.[124] This group is referred to as the Group of 77, and as of 1978 was composed of 122 countries,[125] the majority of which are located in Africa, Asia, and Latin America.[126] The Group of 77 was founded in Algiers in October 1967 "as an ad hoc grouping of 77 developing countries of the world which found it useful to harmonize their negotiating positions on matters of trade and development, particularly in relation to the sessions of the United Nations Conference on Trade and Development."[127]

It would be a mistake to attempt an analysis of the dispute settlement provisions of the Draft Convention, or indeed of the UNCLOS as a whole, from the perspective of a simple "Group of 77 versus developed nations" dichotomy. The Group of 77 is in many respects more diverse than coalescent, and as such is subject to internal conflict and compromise.[128] Therefore, while no precise formulation of "Group of 77 policy" can safely be made, certain generalizations are possible and may prove useful.

The Group of 77 has exhibited two general characteristics which are significant with respect to dispute settlement under the Draft Convention. First, a main source of Group of 77 unification is derived from what one commentator has referred to as "western intransigence," or "the common enemy principle."[129] Second, there is a strong commitment to the development of a New International Economic Order (NIEO).[130] The influence of these characteristics on the dispute settlement provisions of the Draft Convention appear to have been manifested in three ways:

> (1) a tremendous increase in the jurisdiction of national courts over areas of the ocean subject to national sovereignty;

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124. *See* Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555 (1979). *See generally* Ferreira, *The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference*, 7 OCEAN DEV. INT'L L.J. 89 (1979); Pohl, *Latin America's Influence and Role in the Third Conference on the Law of the Sea*, 7 OCEAN DEV. INT'L L.J. 65 (1979).

125. [1978] Y.B. INT'L ORG. No. B0728. In comparison, as of 1978, there were 149 member states of the United Nations.

126. *See* Friedman & Williams, *supra* note 124, at 559.

127. [1978] Y.B. INT'L ORG. No. A3383f.

128. While a comprehensive analysis of Group of 77 internal dynamics is beyond the scope of this paper, the reader is cautioned that statements herein regarding Group of 77 positions are generalizations which are subject to the same degree of error as all generalizations regarding a complex sociological entity. For an analysis and model of Group of 77 internal dynamics, see Friedman & Williams, *supra* note 124, at 570-73.

129. *Id.* at 573-74.

130. *See* Juda, *UNCLOS III and the New International Economic Order*, 7 OCEAN DEV. INT'L L.J. 221 (1979).

(2) the lack of a strong compulsory third party dispute settlement procedure in areas of qualified sovereignty; and
(3) a steadfast insistence on total non-sovereignty of the area, along with limited judicial review of the authority.

The common element of all three of these manifestations is that they serve to optimize the control of the Group of 77 over the vast resources of the ocean.

A. *National Courts*

The expansion of national sovereignty over the EEZ and continental shelf was accompanied by the expectation of many Group of 77 nations of a subsequent increase in the jurisdiction of their national courts to resolve disputes arising within these areas.[131] Consistent with the desire to expand competence of the national courts is the view that immunity from third party compulsory dispute settlement regarding matters within national competence is the only way in which the integrity of both the national courts, as well as that of the national sovereignty may be insured.[132] It is submitted that prohibitions on review of coastal state discretion in the areas of fishing rights and scientific research within the EEZ are manifestations of this Group of 77 attitude.

B. *Third Party Dispute Settlement*

The reluctance of the Group of 77 to submit to compulsory third party dispute settlement is apparent in other multinational conferences as well. As one commentator recently observed regarding the Group of 77 position on the dispute settlement provisions of a Code of Conduct for the Transfer of Technology being negotiated by the United Nations Conference on Trade and Development (UNCTAD):

> A major difference in the techniques is found in the extent to which the parties are willing to give up their flexibility and right to control

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131. Statement by Mr. Gayan (Mauritius), 5 UNCLOS Off. Rec. 36, U.N. Doc. A/Conf.62/WP.8/WP.9/Add.1 (1976). Mr Gayan succinctly stated this position:

> Disputes could be expected to arise in two areas: first, the exclusive economic zone or the continental shelf of a State; and secondly, all areas beyond the limits of national jurisdiction.
>
> Since the coastal State exercised sovereign rights over the first area, it was natural that the national tribunals of that State should be the only forums for the settlement of disputes arising in that area; that principle was intrinsic to the basic notion of State sovereignty.

132. Statement by Mr. Njenga (Kenya), 5 UNCLOS Off. Rec. 34, U.N. Doc. A/Conf.62/WP.8/WP.9/Add.1 (1976):

> All matters relating to that zone were exclusively within the competence of the coastal State, and to accept the possibility of compulsory third-party settlement would mean that the coastal State might be subjected to constant harassment by having to appear before international tribunals at considerable loss of time and money. Similarly, where the coastal State had been given clearly defined jurisdiction by the convention, particularly with respect to the preservation of the marine environment, its power would be negated if it could be subjected, each time it exercised such power, to compulsory dispute settlement systems on matters which could be dealt with through the local courts.

> the outcome of a dispute. . . . The developed countries advocate almost complete party autonomy as to means of dispute settlement; the developing countries, on the other hand, take the position that only the technology-receiving country should exercise legal jurisdiction. These positions reflect the basic ideologies involved and illustrate the difficulty of hypothesizing a mutually acceptable method of settlement.[133]

As is the case with the UNCTAD Code of Conduct, a basic difference in the position of the Group of 77 and the developed nations has necessitated compromise.[134] The compromise taken appears to be submission of disputes in areas where some form of national sovereignty is exercised to compulsory arbitration rather than compulsory judicial determination.[135] Compulsory arbitration allows the disputing states parties a degree of control over the composition of the arbitral tribunal.[136] However, in the event the parties to a dispute are unable to agree upon the composition of an arbitral tribunal either the president of the LOST or, if the president is a national of one of the parties to the dispute, then the next senior member of the LOST will appoint the members.[137] The numerical superiority of the Group of 77 allows these nations significant control over election of the LOST and its president,[138] therefore leading one publicist to conclude: "Because less developed States generally control the election of

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133. Christie, *Techniques for Settlement of Transaction Disputes Involving Transfer of Technology*, 14 TEXAS INT'L L.J. 264, 266 (1979).

134. *See Geneva Session of the Third United Nations Law of the Sea Conference: Hearings Before the National Ocean Policy Study of the Comm. on Commerce*, 94th Cong., 1st Sess. 5 (1975):

> The basic problem is an ideological gap between those possessing the technological ability to develop deep seabed minerals and those developing countries which insist that the international Authority directly and effectively control all deep seabed mining and associated activities, and ultimately become the exclusive operator on the deep seabed. The developing countries' position in this area is reflective of their general concern expressed in other international forums for reordering the economic order with respect to access to and control over natural resources, particularly with respect to their price and rate of development.

Id.

135. In contrast to the positions of Mr. Gayan, note 131 *supra*, and Mr. Njenga, *supra* note 132, consider the position of Mr. Learson (United States), 5 UNCLOS Off. Rec. 31, U.N. Doc. A/Conf.62/WP.8/WP.9/Add.1 (1976):

> A comprehensive system for third-party settlement of disputes was an indispensable part of the future convention . . . . While the dispute settlement system should extend to all parts of the convention, it would be necessary to provide for certain limited exceptions, which should be defined carefully and as restrictively as possible. His delegation was not prepared to exclude the economic zone from the settlement procedures.

See also 62 DEP'T STATE BULL. 737 (1970); 67 DEP'T STATE BULL. 382, 384 (1972).

136. Draft Convention, *supra* note 3, annex VII, art. 3(a).

137. *Id.* annex VII, art. 3(e).

138. *See* note 31 *supra*. Provisions for election of the members of the LOST and its president are contained respectively in Draft Convention, *supra* note 3, annex VI, articles 3 and 12.

the President, they also indirectly influence the President's choices regarding arbitral tribunals. Again, developed States are in jeopardy under the current scheme."[139]

A final example of the Group of 77 reluctance to accept third party dispute settlement may be found in the escape provisions which are available to avoid even compuslory settlement by arbitration, along with specific exceptions from review of certain exercises of national sovereignty.[140] The result therefore is to maximize national control over the outcome of disputes involving some form of qualified sovereignty.

C. *Nonsovereignty of the area*

The Group of 77 has consistently insisted that the area remain not subject to any form of national sovereignty.[141] Nonsovereignty is essential to Group of 77 control of the area due to the inadequate technological position of the Group of 77 nations to exercise sovereign rights. In contrast to the EEZ and continental shelf, where the technology to exploit the resources located therein is either already possessed by Group of 77 nations or is comparatively easy to obtain, technology necessary to exploit the resources of the area is enormously expensive and presently still in the developmental stage.[142] Further, many Group of 77 nations derive a substantial portion of their gross national product from the export of minerals.[143] Therefore, any regime allowing national sovereignty over the area would have the following detrimental effects on Group of 77 nations:

> (1) A potential for reduction of the GNP of certain mineral exporting Group of 77 nations if technologically advanced nations were allowed to mine the deep seabed as a sovereign right.
> (2) Even if Group of 77 nations were given sovereign rights over certain portions of the area, they would not be able to directly exploit them due to their inferior technological position, and would again be in a position of foreign exploitation of their national resources.
> (3) It would probably be beyond the technological capabilities of most Group of 77 nations even to detect intrusion into any part of the area over which they were given sovereign rights, or to defend these sover-

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139. Bernhardt, *supra* note 31, at 76.

140. Draft Convention, *supra* note 3, at art. 296.

141. Letter dated April 24, 1979 from the Chairman of the Group of 77 to the President of the Conference, 11 UNCLOS Off. Rec. 80, 81-82, U.N. Doc. A/Conf.62/77 (1979):

> The principle that the sea-bed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction and the resources of the area are the heritage of mankind, and the complementary principles according to which the area is incapable of being appropriated, the need for an international regime including international machinery which would guarantee the activities carried on in the area for the benefit of all mankind and not only for that of some States, its peaceful use and other principles contained in the Declaration — all these form a normative unity that is indivisible and applicable to the area.

142. *See generally Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Comm. on Interior and Insular Affairs, United States Senate*, 93rd Cong., 1st Sess. (1973).

143. *See* Juda, *supra* note 130, at 239-43.

eign rights if infringed upon.

Therefore, Group of 77 control over the area is conceived in political terms rather than sovereign rights.

Here, the integrity of national sovereignty is not in question; rather there is a fear of abuse or misuses of power which may result if a smaller judicial body were to control the authority through judicial review.[144] Limited judicial review of the actions of the Authority, therefore, is consistent with maximization of Group of 77 control over the Authority, and consequently, the area.

VI. CONCLUSION

The dispute settlement provisions of the Draft Convention are inadequate. Significant areas of ocean space are given over to national sovereignty, without meaningful compulsory third party review of national actions. An even greater area of the ocean floor is placed under the exclusive control of a politically charged body whose members may well be concerned more with their own national interests than with the faithful administration of the vast resources of the area as the common heritage of mankind. The Draft Convention is the result of the peculiarites of the democratic process wherein the members acting in their own self-interests purport to reach an agreement which is to the benefit of all.

It is important, however, to recognize the arguments against a strong compulsory dispute settlement system in criticizing the dispute settlement provisions of the Draft Convention. There appear to be two major problems—the creeping jurisdiction problem and the self-destruct problem.

A. *The Creeping Jurisdiction Problem*

There is a substantial likelihood that a significant number of the Group of 77 nations would not ratify the Draft Convention if it contained a strong third party compulsory dispute settlement system. The alternative of including a strong compulsory dispute settlement as an optional protocol is contrary to the concept of the "package deal," and would also be unacceptable to a large number of the Group of 77 nations.[145] Therefore, the issue becomes whether the other benefits to be derived from the Draft Convention outweigh the detriments of a weak dispute settlement system.

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144. *See* Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1, 18 (1980). *See also* Statement by Mr. Ranjeva (Madagascar), 5 UNCLOS Off. Rec. 33, U.N. Doc. A/Conf.62/WP.8/WP.9/Add.1 (1976).

145. *See* Letter dated March 23, 1979 from the Chairman of the group of African States to the President of the Conference, 11 UNCLOS Off. Rec. 77, 78, U.N. Doc. A/Conf.62/72 (1979):

> The African States reaffirm their determination not to accept any convention on the Law of the Sea, unless the package of all issues, without exception, have been satisfactorily resolved in a comprehensive treaty. They will not recognize any piecemeal agreements and consider that no customary law would be established by the provisions of these agreements.

Perhaps the most significant benefit of the treaty is the establishment of firm limits on the amount of ocean space which is subject to national sovereignty. A gradual but relentless expansion of national claims to, or "creeping jurisdiction" over the ocean space has taken place in recent years.[146] As world population grows, so does the demand on the finite resources of the planet. Without a stable regime of the sea, the probability of continuously expanding national jurisdiction by unilateral action is tremendous. Perhaps the clearly defined limits to national sovereignty in the Draft Convention can stop, or at least retard further extensions of national claims to the oceans.

B. *The Self-Destruct Problem*

Another argument against a strong compulsory dispute settlement provision in the Draft Convention is that in certain situations nations clearly would disregard an adjudication if it were sufficiently contrary to their national interests. In this regard, the escape provisions of article 298 are of great significance. Disobedience of a series of judgments could literally cause the Draft Convention to self destruct, and its efficacy to be diminished with every judgment that is ignored. Therefore, strong compulsory dispute settlement could prove a greater detriment than aid to the international community.

VII. RECOMMENDATION

The recent decision of the Reagan Administration to prevent conclusion of the UNCLOS negotiations has prompted both concern and opposition in the international community.[147] The dangers in delay include potentially diminished chances of ratification by the already skeptical Senate,[148] as well as the possible destruction of the delicate web of compromise which holds the Draft Convention together. However, the Draft Convention in its present form is essentially devoid of any procedure for modification.[149] Without the ability to adapt to the inevitable political and technological changes of the future, what today is a viable package of compromise may tomorrow become a lifeless document which decreases in significance with every change of conditions.[150]

There are basically two ways in which the Draft Convention might be

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146. *See* Friedman & Williams, *supra* note 124, at 561. *See also* Morin, *Jurisdiction Beyond 200 Miles: A Persistent Problem*, 10 CALIF. W. INT'L L.J. 514 (1980); Martens, *Evolution of Coastal State Jurisdiction: A Conflict Between Developed and Developing Nations*, 5 ECOLOGY L.Q. 531 (1976).

147. *See* N.Y. Times, Mar. 5, 1981, at 6, col. 1; *id.*, Mar. 8, 1981, at 4, col. 1.

148. *See id.*, Mar. 9, 1981, at 18, col. 1; 66 A.B.A.J. 1192 (1980).

149. Although the Draft Convention, note 3 *supra*, provides in articles 154 and 155 for periodic review and for a review conference, this is only with respect to portions dealing with the area, not the Draft Convention in its entirety.

150. *See* Oxman, *supra* note 144, at 18-19: "Article 295 repeats the traditional rule in the Statute of the International Court of Justice that a decision has no binding force except between the parties and in respect to that particular dispute." Therefore, the Draft Convention could not be altered through judicial construction as that any adjudication would not set a binding precedent for future disputes of that nature.

altered so as to avoid this pitfall. The first alternative is to provide for change through judicial construction and interpretation. This would, however, necessitate a strong system of compulsory third party dispute settlement which, at present, is foreclosed by political circumstances. Also, reliance on judicial construction as a primary vehicle of change would appear to be contrary to generally accepted principles of customary international law.

The second and better alternative is to provide for an amendment procedure. In this way, the Draft Convention could be given the adaptability needed to remain effective over the long run, without risking destruction of the present agreement.

Ideally, a permanent convention should be established which could meet at regular intervals to review and amend the text. Amendment should only be possible with a large number of affirmative votes of the member states, and should be self-executing. This procedure would satisfy the Group of 77, as their control would remain substantial, and within a political rather than a judicial forum. A high vote threshold would also satisfy the developed nations because the Group of 77 could not amend the Draft Convention without the approval of the developed nations. However, to avoid allowing a single nation the power to block amendment, a unanimous affirmative vote should not be required.

The most positive feature of an amendment procedure would be to keep lines of communication and negotiation open at the multilateral level. The present Draft Convention substantially places the burden of finding an acceptable means of dispute settlement on the parties. While the recommended amendment procedure would not change this, it should facilitate communications between disputing parties, and therefore be an aid to dispute settlement, if not a means of resolution of issues which are otherwise excluded from any other form of settlement.