The International Tribunal for the Law of the Sea

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Summary

This thesis deals with new developments in the law of the sea which is now widely regulated in the United Nations Convention on the Law of the Sea. Chapter one describes the history of the law of the sea until the Third United Nations Conference on the Law of the Sea of 1982. The main part analyses the newly established International Tribunal for the Law of the Sea. This institution is one of the judicial bodies set up by the Convention on the Law of the Sea to which disputes may be submitted by the States Parties and other appropriate entities for settlement by means of "compulsory procedures entailing binding decisions". It is based in the Free and Hanseatic City of Hamburg and has started its work on the 26 October 1996. The jurisdiction of the International Tribunal for the Law of the Sea is set out in Part V of the Convention as Settlement of Disputes and in Annex VI to the Convention which is called the Statute of the Tribunal.

The Tribunal is just one of several alternative institutions which parties to a dispute may choose for settlement of their disputes. Alternative fora are the International Court of Justice, arbitral tribunals constituted in accordance with Annex VII and special arbitral tribunals for certain categories of disputes constituted in accordance with Annex VIII to the Convention. The Convention also provides in Article 280, that the parties to a dispute may settle the dispute by "other peaceful means of their choice".

Within the Tribunal the Seabed Dispute Chamber has been established. It has jurisdiction to deal with disputes refering to activities in the area. The Convention declares this area to be "the common heritage of mankind". It vests control of all activities involved with that area in the International Seabed Authority, which acts "on behalf of mankind as a whole" The jurisdiction of the Seabed Dispute Chamber is set out in Part X of the Convention.

The principal jurisdiction of the Tribunal and of the Seabed Disputes Chamber, is concerned with disputes about the "interpretation or application" of the provisions of the Convention. The Seabed Dispute Chamber is also in charge of disputes arising in

connection with contracts and related arrangements concerning activities for the exploration and exploitation of the resources of the international area. Additionally, the Chamber may give advisory opinions on legal questions within the scope of the activities of those bodies, at the request of the Assembly or Council of the International Seabed Authority.

In my opinion one of the main tasks of the Tribunal is the proceeding of prompt release of vessels and crews as provided for in Article 292 of the Convention. This provision of the Convention gives compulsory jurisidiction to the Tribunal. It includes hearing and deciding on cases where it is alleged that it is unreasonably refused to release a detained vessel or its crew upon the posting of a suitable bond or other financial guarantee required by the applicable law. The tribunal becomes seized of the case only, if the parties to the dispute are not able to resolve the issue among themselves within ten days of the arrest or detention of the vessel or crew.

Finally, the expenses of the Tribunal and the Headquarters Agreement, which regulates the relationship between the Tribunal and its hosts, are pictured. Unfortunately the practical ability of the Tribunal's functioning could not be examined as until today no cases have been submitted to the Tribunal.

Preface

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Abbreviations

AJIL - *American Journal of International Law*
Art.- *article*
BGBL - *Bundesgesetzblatt*
Chp.- *Chapter*
EEZ - *exclusive economic zone*
e.g. - *exempli gratia*
EU - *European Union*
Fao - *Food and Agriculture Organization of the UN*
GA - *General Assembly*
ibid. - *ibidem*
ICAO - *International Civil Aviation Organization*
ICC - *International Chamber of Commerce*
ICJ - *International Court of Justice*
ICLQ - *International and Comparative Law Quaterly*
ILC - *International Law Commission*
IMC - *International Maritime Committee*
IMO - *International Maritime Organization*
ISBA - *International Sea-Bed Authority*
IWG - *Informal Working Group*
NJW - *Neue Juristische Wochenzeitschrift*
No. - *number*
Off.Rec. - *Official Records*
op.cit. - *opera citater*
para - *paragraphe*
rep. - *report*
res. - resolution
RIW - *Recht der Internationalen Wirtschaft*
sec. - *section*
sent. - *sentence*
UN - *United Nations*
UNCITRAL - *United Nations Conference on Trade and Development*
UNCLOS III - *United Nations Conference on the Law of the Sea 1982*
UNIDROIT - *International Institute for the Unification of Private Law*
Vol. - *volume*
ZaoeRV - *Zeitschrift fuer auslaendisches und oeffentliches Recht undVoelkerrecht*

Introduction

One event in the year 1996 clearly shows that the value of the international law of the sea has risen rapidly, namely the establishment of the International Tribunal for the Law of the Sea. The days are over in which the law of the sea consisted solely of the principle of a dichotomy between the freedom of the high seas and the sovereignty of the coastal states. Our century is characterised by population explosions, urbanisation and industrialisation. These dynamic political and economical developments have brought tremendous changes to all aspects of life. Such changes are also evident in the law of the sea. The old rules of the law of the sea which were used for centuries had been developed on the basis of a different political and economic situation where it was unnecessary to regulate the use of the ocean. It is clearly perceptible that these rules have now become antiquated.

Nowadays the oceans have an essential importance for mankind because they are a source of energy and food. The world is suffering from a shortage of food, minerals and energy, so much so that it has become necessary to develop new technologies to enable nations to intensify and diversify the uses of the oceans. It is possible to gain energy from the tides, the waves and the ocean temperature [1] and the mining of manganese modules has great importance as it will be the purpose of this thesis to show. Furthermore, traditional practices such as fishing and navigation have been transformed and their importance in the world's economy has increased enormously. More and more nations recognise the importance of the oceans and this has led to the necessity of managing these multilateral uses. Without conventions or rules, the actions taken by states would only be governed by their strength in relation to the rest of the world and by moral conscience, a

factor which does not always appear desirable. Therefore, the law of the sea - like any law - must be an expression of balancing divergent interests, an evaluation which pays due regard to the interests of landlocked states as well as short coast and long coast states. A lasting regulation will only be found if a satisfying balance is struck between the position of all states or at least most states.

A number of conferences, workshops and congresses have been organised to discuss and negotiate a possible law of the sea and to find international rules for better handling of the oceans world-wide. The results of these meetings were countless conventions, treaties and agreements to regulate the uses of the oceans.[2] A signal event was the Third United Nations Convention of the Law of the Sea of 1982 (hereinafter the Convention), which it is hoped will satisfy all competing states, and provide a useful form of regulation so that peace can be maintained and disputes settled in a peaceful manner.

One institution to help fulfil these principles could well be the International Tribunal for the Law of the Sea (hereinafter the Tribunal). It is too early to draw conclusions on the position of the Tribunal so it remains to be seen whether this institution is functional and able to facilitate the solving of problems concerning the law of the sea.

This thesis deals with the new era of the law of the sea, especially the recent institution of the Tribunal for the Law of the Sea which is described in Chapter 3. In the first chapter, a brief report is given of the former law of the sea, as well as a short description of each of the three conferences on

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[1] Isaacs J. D. and Schmitt W. R. "Ocean Energy: Forms and Prospects" in: *Science* 207 (1980) p.109-115
[2] Duisberg C. J. "Perspektiven der Seerechtsentwicklung" in: *12 Europa-Archiv* (1985) p. 374

the law of the sea. In the second chapter, the negotiated regulations of the Convention will be explained.

Chapter 1: History

1.1. The history of the law of the sea prior to the first conference

The importance of the law of the sea began to grow during the middle ages, when mankind was first able to build ships and commerce between nations started, which meant that the oceans were used more. The frequent use of the oceans was intensified because the seas were a source of food, navigation and commerce. The nations which gained control over the oceans were able to use the natural materials of other countries this translated into wealth, power and economic growth. In former times, there were no explicitly regulated international rules, but one of the oldest principles and most widely accepted laws was the freedom of the high seas, which meant that the sea belonged to all nations.[3] Freedom of the high seas signified that the high seas could never fall under the sovereignty of any particular state, and that there was absolute freedom of navigation on the high seas for vessels of all nations whether mercantile or naval.[4] The reason given for this principle was, that "the sea can meet the needs of all men. Nature gives man no right to appropriate for himself those things whose use is innocent, inexhaustible and sufficient for all."[5]This principle can also be seen in later times, where another explication was that the nature gives no right to appropriate those things whose use is innocent, inexhaustible and sufficient for all. [6]

This basic principle was stressed during the 17th century by Hugo Grotius who promulgated the

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[3] Anderson J.W. *The Law of the Sea: A Proposal for Projecting State Voting Behaviour*, (1979) p.4
[4] Hall , *International Law* (1929) p.189
[5] de Jouvenel B. *Le Droit des Gents ou Principies de la Loi Naturelle, appliquee a` la conduite et aux Affaires des Nations et des Souverains* (1758) p.54

theory that the sea is certainly common to all persons, and who based the idea of the freedom of the high seas on two main principles. The first of these is that things which are neither seized nor enclosed cannot become property. They are common to all and the whole human race is allowed to use them.[7] The second principle is that the seas are so wide - covering two thirds of the surface of the earth - and its resources so apparently inexhaustible that its usage by one nation does not preclude its use by others, providing clear evidence that the free use of the sea belongs to all men.[8] Freedom of the high seas did not go uncriticised, however. Many commentators responded negatively to *mare liberum*. One of the most famous was the Briton John Selden. He tried to refute the theory of Grotius in his work *Mare Clausum,*[9] by saying that the former practice was the national appropriation of the sea at least near the coast, which indicated that the doctrine of *res communis* had been supplanted in many areas, including that of the sea.[10] These different theories of the law of the sea show that there was no clear agreement about the law of the sea. Nations tried to satisfy their needs and in order to achieve this they each promulgated their own version of the law of the sea. The general interpretation in later times - the international customary law - was that all nations have a right to navigate and fish in the oceans without exception, and that coastal states have sovereignty over limited strips of water adjacent to their coasts.[11]

In 1945, with the Truman Proclamation on the Natural Resources of the Subsoil and Seabed of the Continental Shelf [12] which gave the United States the exclusive right to exploit the natural

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[6] Hall *op.cit.* p.195

[7] Grotius H. *The Freedom of the Seas or the Right which belongs to the Dutch to Take Part in the East Indian Trade* (1916) p.29

[8] Lapidoth R. "Freedom of Navigation - Its Legal History and Its Normative Basis" in: 6 *Journal of Maritime Law and Commerce* (1974-75) p.264

[9] Seldon J. *Mare Clausum seu de Dominio Maris* (1635)

[10] Fenwick C. *International Law* (1965) p.498

[11] Jessup P. *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p.4

[12] Exec. Order No.2667, Sept.28, 1945, Fed. Reg.123031945

resources of the sea-bed,[13] new directions in the law of the sea began to emerge.[14]The United States claimed these rights because no contrary comprehensive international agreement had yet been ratified by all nations, the traditional notion of freedom of the high seas and open access to ocean resources still being customary international law, giving American miners the exclusive right to mine.[15] This claiming of oceanic resources was an incitement for other states to expand their jurisdiction even further into the sea, so that the principle of the free seas was in danger of being disregarded.[16] In spite of this annexation of the oceans, the sudden radical change in the political situation in 1945 also effected the law of the sea because of the close connection between the political background and international law.[17]

With the beginning of decolonisation a great number of newly independent states arose, most of them coastal states, so that their interest in the new law of the sea was increasing.[18] These states also wanted to take part in using the oceans and tried to press for the beginning of a new era of the law of the sea because they hoped for greater benefits as a result of their growing strength and number. They mostly belonged to the Group of 77.[19] It was decided that there should be a progressive development of the law of the sea with regard to the need to contribute to the

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[13] Friedman W. *International Law: Cases and Materials* (1969) p.558

[14] Dupuy J.R. *The Law of the Sea, current problems* (1974) p.4

[15] Knight "Legal Aspects of Current United States Law of the Sea Policy" in: 16 *Texas International Law Journal* (1979) p.87

[16] Anderson *op.cit.* p.6

[17] Brown E.D., "Freedom of the High Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict" in: 20 *San Diego Law Review* (1982-83) p. 529

[18] Since the beginning of decolonisation 44 countries in Africa and the mediterranean region have gained their independence as well as 14 countries in Asia, which means that 58 new countries exist. (Lynch W. C. "The Law of the Sea and the Developing Countries: Cornucopia or Catastrophe?" in: Walsh D. (ed.), *The Law of the Sea Issues in Ocean Resource Management* (1977) p.118

[19] The name "Group of 77" refers to the original 77 developing countries which got together and decided to persue their interests within the UN Conference on Trade and Development (UNCTAD) and which now operates within the UN System as a whole. They now consist of about 115-120 states, but the original name has been retained. (Miles E. L "The Structure and Effects of the Decision Process in the Seabed Committee and the Third UN Conference on the Law of the Sea" in: *31 International Organization* (1977) p. 163

establishment of a New International Economic Order.[20]It can be said that, with the conferences on the law of the sea, a new phase of oceanic affairs is beginning and that the phase of unregulated ocean affairs has come to an end.

1.2 The Geneva Conference on the Law of the Sea of 1958

Article 13 of the Charter of the United Nations imposes upon the General Assembly the responsibility to promote the development of international law, to order the necessary analysis and make suggestions. In the performance of these tasks the ILC was established on the 21st of November 1947. The ILC's task was to examine international law in general and the suitability of different sections for codification and to submit recommendations.[21] The Commission was busy with the law of the high seas and the territorial seas for several years and in 1956 it adopted a report to submit to the United Nations Conference on the Law of the Sea.[22] The United Nations thereupon convened a conference which took place from the 24th of February till the 27th of April 1958 in Geneva. It attracted seven hundred delegates from 86 countries .[23] Four committees were established in order to turn the International Law Commission's work into draft conventions. The first committee was busy with creating a list of four freedoms for the high seas. These were the freedom of navigation, overflight, fishing and the laying of cables and pipelines.[24] The second committee had to deal with the different interests of distant water fishing fleet nations and coastal states concerning fishing. In the end it worked out rules for co-operation in conservation and furthermore agreed on the procedures for a five member arbitral commission. The third committee had to settle questions concerning straight baselines and innocent passage of foreign ships through international straits. A convention was prepared that provided for a twelve-mile contiguous zone in

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[20] ibid.
[21] Jagota S.P. "The United Nations Convention on the Law of the Sea 1982" in: 5 *Ocean Yearbook* (1985) p.13
[22] ibid.

which the powers of coastal states were limited to the prevention of "infringement of its customs, immigration or sanitory regulations within its territory or territorial sea" and the right to punish any such infringement.[25] The fourth committee had to deal with the legal regime for the continental shelf. The main problems facing it were the nature of the rights of coastal states concerning the continental shelf[26] and the delimitation of the continental shelf, which in the end was a combination of a depth of 200 metres with a negotiable limit based on exploitability.

By the time the Conference ended on the 28th of April 1958 after nine weeks of debating a final act was adopted consisting of the following four conventions, nine resolutions and an optional protocol.[27]The major problems the participants encountered were in trying to determine the legal limit of the territorial sea appertaining to coastal states.[28] The Conference was unable to solve this problem because of the controversial ideas it raised as well as perhaps a lack of will to make concessions. A salient point is that the votes were not only influenced by political thinking, but also by national interests which were mostly economic in nature. A further reason for the failure to find a solution was the exceptionally problematic fact that a number of groups with widely differing political interests took part all of which had different expectations from this conference and different ideas on the shape that the law of the sea would take.

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[23] Anand R.P. *Origin and Development of the Law of the Sea* (1983) p.176

[24] Sanger C. *Ordering the Oceans: The Making of the Law of the Sea*, p.15

[25] ibid.

[26] Some preferred full sovereignty in this zone (Latin American) and the most contrary proposal (only "rights" in this zone) came from West Germany

[27] U.N.Doc.A/CONF.13/L.52-57 printed in 38 Dept.of State Bulletin p.834

[28] Dean A. H. "The Geneva Conference on the Law of the Sea : What was accomplished?" in: 52 *AIJL* (1958) p.608

The participating states were divided into four main groups, the seafaring states, the security-conscious states, the sedentary fishing states and other states.[29] They all had divergent ideas concerning the breadth of the territorial sea formed by their political interests.

The rules concerning the settlement of disputes were only contained in an optional protocol because the United States and Soviet Union were not willing to accept binding arbitration. The reason for this lay in the tension between the two superpowers, known as the Cold War. However a number of multilateral and/or bilateral treaties incorporated this system of dispute settlement. The most important provision of the Optional Protocol was that disputes under any of the four conventions had to be referred to the ICJ unless some other form of settlement is provided for in the Convention or has been agreed upon by the Parties within a reasonable period.[30]The Convention on Fishing and Conservation of the Living Resources of the High Seas provides for a special commission of five members "unless the parties agree to seek solution by other methods of peaceful settlement, as provided for in Art. 33 of the UN Charter."[31]No success could be gained concerning fisheries.[32]The Protocol also provides for an arbitral tribunal or conciliation commission, which may be used instead of the ICJ.[33]

1.3 The United Nations Conference on the Law of the Sea of 1960 (UNCLOS II)

The second Conference was already prepared at the end of the first Conference. A resolution was adopted on 27 April 1958 which requested the General Assembly to plan a second conference "for further consideration of the questions left unsettled by the present Conference."[34] The purpose of

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[29] Smith G.P. *Restricting the Concept of of Free seas: modern maritime law re-evaluated* (1980) p.34
[30] Art. I, III and IV of the Optional Protocol
[31] Art. 9 of the Convention on Fishing and Conservation of the Living Resources
[32] Knight, H.G.(ed) *The Future of International Fisheries Management* (1980) p.14
[33] Art. 3 and 4 of the Optional Protocol
[34] UN Conference on the Law of the Sea, Off.Rec. II, Plenary Meetings A/CONF.13/38 p. 145

the second conference was to settle the unsolved questions concerning the breadth of territorial waters and fishery limits.[35] The need to resolve these questions became urgent after naval clashes in the so called "Cod War" between Iceland and the United Kingdom.[36]It was obvious that without a clear and compulsory law of the sea and a functioning system of dispute settlement, the law of the sea would soon become the law of the most powerful.

From 17 March to 26 April 1960 the Second Conference took place and was attended by 88 countries, most of whom had taken part in the First Conference as well.[37] The problem of the scope of territorial waters was not solved. Proposals were from a minimum of 3 miles to a maximum of 12 miles . Most of the participating states were against a breadth of 12 miles. The reason for this aversion to such a broad territorial sea was the fear of relative inability to manoeuvre ships in case of war.[38] Furthermore, some states feared for international transit through the narrowing of major international straits. With a breadth of 12 miles, 116 of such straits would have come under the sovereignty of coastal states and the legal status of those waters would have changed. In the case of a breadth of 6 miles only 52 straights would have been so affected.[39] Against this argument, those in favour of the 12 mile limit argued that in general even warships have the right to innocent passage. Furthermore the term "innocent passage" is difficult to interpret and therefore in order to ensure that the transit would not be restricted, a solution of 6 miles was thought better.[40] Another problem with the extension of the territorial sea to 12 miles was the increased economic burden for

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[35] GA res. 1307 XIII Off.Rec., Thirteenth Session, Suppl. No 18 (A/4090), pp. 54-55

[36] The "Cod War" occured in May 1958, one month after UNCLOS I failed to solve the question of the size of the fishing zones Iceland proclaimed a 12 mile fishing zone giving foreign vessels three months time to move away from this zone. Those fishing boats which did not do this were arrested by Iceland. British fregates wanted to recapture them which led to the dispute. (Bowett D.W. "The Second United Nations Conference on the Law of the Sea" in: 9 *I ICQ* (1960) p. 415

[37] Bowett *op.cit* p.415

[38] United States, A/CONF.19/C.1/SR.17, p. 10

[39] Finchham C.B.H. and Botha L. *Some Highlights of the Law of the Sea Conference* (1980) p.12

[40] Bowett *op.cit* p.418

coastal states which would arise from the need to improve security facilities on their coasts.[41] Others refuted this argument by citing new technical advances in most of the states concerned.[42]

1.4 Results of the two Conferences

The results of the two conferences were the following four conventions

1. the Convention on the Territorial Sea and the Contiguous Zone, which came into force on 10 September 1964;

2. the Convention on the High Seas, which came into force on 30 September 1962;

3. the Convention on Fishing and Conservation of the living resources of the High Seas, which came into force on 20 March 1966;

4. the Convention on the Continental Shelf, which came into force on 10 June 1964

The universal opinion about the Geneva Conferences seems to be that they were failures because the main questions (the extent of territorial waters and jurisdiction over fisheries) could not be solved. However this conclusion appears to be one-sided. It is true that no agreement was reached on two main questions but several other issues were considered and solved at the Conferences, for example baselines, the general regimes of the territorial sea and the high seas, the special position of coastal states and the continental shelf .[43] Even if the Conventions would have been a complete failure by not resulting in any obligatory provisions the significance of the Conferences themselves as a very useful and important event in the history of the law of the sea would not be diminished.

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[41] United States, A/CONF.19/C.1/SR.4, p. 5
[42] Bowett *op.cit.* p.419
[43] Andersen J.W. *op.cit.* p.74

They were seen as a "productive laboratory working experiment in the form of negotiation, multinational decisions and transcultural discourse."[44]

1.5 The Third United Nations Conference on the Law of the Sea

First in 1970 and again in 1973 the UN General Assembly stressed the desire to convene a conference in 1973 which would deal with all matters relating to the law of the sea, including the international regime and machinery for the exploitation of the resources of the international sea-bed area.[45] The first organisational session took place in New York in December 1973. After 93 weeks of meetings in 9 years the work was finally completed in New York on 24th of September 1982.[46] The total number of participating states was 164.[47]

The main aim of the Convention was not only to solve the questions left unsolved by the former conferences but also to develop an extensive regime for the utilisation of two thirds of the earth's surface.[48]It was obvious that such an unregulated law of the sea as then existed was not tolerable. Therefore all states had to work together, to "establish an institutional framework to administer this law."[49] The advantages of a convention were recognised by many experts, one of whom said:

"The 1982 Convention on the Law of the Sea stands out as one of the most significant contributions in the twentieth century to the capacity of a fragile international political and legal

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[44] Andersen H.G. (Ambassador of Iceland) *The Law of the Sea, International Rules and Organization for the Sea:Proceedings of the Third Annual Conference on the Law of the Sea* (1968) p.74

[45] GA res. 2750 (XXV) of 7 December 1970 and GA res. 3067 (XXVIII) of 16 November 1973

[46] Simmonds K.R. *United Nations Convention on the Law of the Sea* Introduction on p. vii

[47] Agrait L.E. "The Third United Nations Conference on the Law of the Sea and Non-Independent States" in: 7 *Ocean Development and International Law* (1979) p. 20

[48] Duisberg *op.cit.* p. 37

[49] Mann-Borgese E. "The IMO and the UN Convention on the Law of the Sea" in: 7 *Ocean Yearbook* (1988) p.12

system to cope with past sources of significant international discord and, perhaps to avoid future difficulties."[50]

The Conference can be seen as combining the creation of new law, the systematisation of old law (codification) and the principle of consensus, which means agreement about existing law or proposals. The creation of new law can be seen in Part XI (Arts. 133-199) regarding deep sea-bed mining. In former times technology was not ready to cope with this issue and therefore an entirely new legal regime had to be developed.[51] Codification can be seen in Part II (Arts.3-33) concerning the territorial sea and contiguous zone. The concept of the territorial sea was probably developed at the beginning of the 18th century by Cornelius van Bynkershoek[52] and was later dealt with at the Hague Conference of 1930[53] as well as by the Geneva Conventions.[54]The principle of consensus on which the Convention is based, was clearly established by the General Assembly's adoption, at its 1973 session, of the "Gentleman's Agreement".[55] It was further reinforced by the Rules of Procedure, which included the "Gentleman's Agreement" adopted at the first session of UNCLOS III at Caracas in 1974.[56] It was established by the UN General Assembly Resolution 2749, "The Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof,

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[50] Burke W.T. "Importance of the 1982 United Nations Convention on the Law of the Sea and its Future development" in: *27 Ocean Development and International Law (1996)* p.4; see also Oppermann T. and Eiselstein C. "Die Bundesrepublik Deutschland vor der Frage der Unterzeichnung der UN-Seerechtskonvention" . in: 18 *Europa-Archiv (1984)* p.560, who see that in comparison with the alternative of a permanent insecureness of jurisdiction caused by national decisions in their juridical zone and conflicting opinions about customary law, the clear provisions of the Convention seem to have much more advantages

[51] Larson D. L."Deep Seabed Mining: A Definition of the Problem" in: *17 Ocean Development and International Law (1986)* pp. 271-308

[52] Larson D.L. *Major Issues of the Law of the Sea* p. 32

[53] ibid. pp.28, 38

[54] ibid.

[55] "Recognizing that the Third United Nations Conference on the Law of the Sea at its inaugural session will adopt its procedures, including its rules regarding methods of voting, and bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will save the widest possible acceptance, the General Assembly expresses the view that the Conference should make every effort to reach agreement on substantial matters by way of consensus, that there should be no voting on such matters until all efforts at consensus have been exhausted, and, further, that the Conference on its inaugural session will consider devising appropriate means to that end."(Adopted by the United Nations General Assembly at its 2169th plenary meeting on 16 November 1973; UN Doc.A/9278 (1973))

Beyond the Limits of National Jurisdiction".[57] This Resolution was voted with 108 in favour, 0 opposed and 14 abstentions. It was later incorporated in Art.136 of the Convention. However the desired aim of accepting the Convention by consensus could not be achieved. The reason for this was controversies about the regime.[58] These differences were not solved until the newly negotiated Agreement of 1994.

In contrast to the former Conferences of 1958 and 1960, the new Conference had no basic proposal (like that of the ILC for the former Conferences), and therefore it could be said that there was much more work to do in shaping the Convention. This provided the opportunity for abundant negotiations and the possibility of a political compromise was considered more promising. The Convention has been described as a "package deal" because the provisions of the Convention are closely interrelated and form an integral package. Therefore a state cannot choose only those provisions which are favourable to it and disregard other provisions.[59] In many instances it seemed that the negotiations were a process for finding the middle ground or equitable solutions rather than one of contractual dealing.[60]

The third Conference represented a wide variety of interests. The developed countries had strong maritime interests because with new techniques they could exploit new resources. They also had a growing interest in environmental issues of which the focus were two major oilspills, the "Torrey Canyon" of England and the "Santa Barbara" oilspill.[61] The developing states were another strong interest group as a result of their majority. They were often referred to as the 'Group of 77"

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[56] Amended July 12, 1974; March 17, 1975; March 6, 1980; UN Doc.A/ CONF.62/30/Rev.3
[57] GA res. 2749
[58] Jaenicke G. "Die Dritte Seerechtskonferenz der Vereinten Nationen" in: *NJW* (1983) p.1936
[59] Jennings and Watts *Oppenheimers International Law* Vol. I (1992) p. 726
[60] Anderson D.H. "Legal Implications of the Entry into Force of the United Nations Convention on the Law of the Sea" in: 44 *ILCO* (1995) p. 323

although at the time the Conference took place their number had grown to include about 115 states.[62] They were a strong force in the negotiations because of their solidarity. Their main aim was to achieve a more equitable distribution of natural resources through the New International Economic Order (NIEO).[63]

The NIEO was also supported by one of the main principles of the Convention, namely the common heritage of mankind. This principle was first mentioned by the ambassador of Malta, Arvid Pardo, who declared in 1967 before the UN General Assembly that ocean resources are the "common heritage of mankind" and should therefore be legally protected.[64] In accordance with this principle, the resources of the sea-bed and the ocean belong to all people and should be used for the benefit for all. It was the first time that the international community was involved in the management of common territory and it could be seen as a sign for the new law of the sea.

Besides these opposing groups of developed and developing countries, other interest groups could be mentioned, such as the coastal states and the land-locked states which also had mostly opposing interests.

The advantages of the Convention were seen in comparison with the alternative of a permanently uncertain legal system caused by national decisions about the extent of sovereignty and conflicting opinions about customary law . The clear provisions of the Convention seem to present a

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[61] Craven J.P. "The Evolution of Ocean Policy" in: *The Law of the Sea in the 90's:A Framework for Further International Cooperation* (eds.) Kuribayaski T. and Miles E.L. (1992) p.383

[62] Miles *op.cit.* pp. 159,163

[63] The New International Economic Order was an active programme for the redistribution of wealth on a global scale. It was mentioned for the first time on the sixth and seventh Special session of the UN Assembly the first time mentioned. They adopted a Declaration on the establishment of a NIEO at a Program of Action (GA res.3202 (S-VI0 of 1 May 1974). The term was also contained in the Charter of Economic Rights and Duties of States (GA res.3281 (XXIX) of 12 December 1974). The Preamble of the Charter declared that it is a fundamental purpose of the present

favourable alternative.[65]There is some criticism concerning the Convention, however. The principle of the common heritage of mankind is only seldom embodied, for example in the regulations of the area but it cannot be said that this principle is actually realised.[66] In favour of the Convention it is mentioned that it not only regulates the already known uses of the ocean such as navigation, overflight, marine scientific research but also the uses for the future such as the economical, practical deep sea-bed mining.[67]Furthermore, as seen contrary to the Convention on the Territorial Sea and the Contiguous Zone of 1958, the mutual rights and duties of coastal states and ships in the sovereignty zones of coastal states are now regulated and binding and the nature of passage does not depend on the indefinite phrase "innocent passage".[68] But in my opinion it has not changed that much because the term of "innocent passage" still exists, the only difference is that it is made a little bit clearer through more details.

The issues to be discussed were divided between three main committees in addition to the sea-bed committee (preparatory commission of 1968 of the UN).

The first committee dealt with the question of the international regime and the machinery for the exploitation of the international sea-bed area and its resources.[69]

Charter to promote the establishment of the NIEO based on equity, sovereign equality, interdependence, common interest and cooperation among all states, irrespective of their economic and political system.

[64] UN Doc.A/C1./PV.1516, 1 November 1967, pp. 1-2

[65] Oppermann and Eiselstein *op.cit.* p.560

[66] Oppermann and Eiselstein *op.cit.* p.564

[67] Wolfrum R."Die Bundesrepublik vor der Frage der Seerechtskonvention" in: 3 *Europa-Archiv* (1983) p. 85

[68] ibid. p. 86; the term "innocent passage" is explained in the next chapter

[69]Stevenson J.R. and Oxman B.H. "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session" in: 69 *AJIL* (1974) p.3

The second committee dealt with other aspects of the law of the sea, including the territorial sea, the contiguous zone, straits, the exclusive economic zone (EEZ), the continental shelf, high seas, land-locked and geographically disadvantaged states, archipelagic states and maritime boundaries.[70]

The third committee had to negotiate about the marine environment, marine scientific research and the transfer of marine technology.[71]

Questions concerning the settlement of disputes, general provisions and final clauses were considered by the informal plenary under the chairmanship of the President of the Conference.[72] Another committee was created for the sole purpose of dealing with the technical aspects of drafting, in order to promote uniformity of language and concordance between texts in different languages.[73]

Chapter 2.: Essential Elements of the United Nations Convention on the Law of the Sea with the exception of the Settlement of Disputes

2.1 Internal Waters, the Territorial Sea and the Contiguous zone (Part II)

UNCLOS differs only in detail from the classical law of the sea. Most of its articles are lifted from the Geneva Convention on the Territorial Sea and the Contiguous Zone either without a change or with only minor changes. A few new articles which describe the rules in more detail were negotiated at the Third Conference but there was no material change from the earlier Geneva

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[70] ibid.
[71] ibid.
[72] ibid. p.29
[73] Nordquist and Shabtai R. (eds.) *op.cit* p.7

Conventions. For example the principal legal definition of internal waters is in Art.5 para 1 of the Convention on the Territorial Sea and the Contiguous Zone. The essential elements of internal waters are that they are located immediately adjacent to the terrestrial territory of a state and that, because of their proximity to the state, the state exercises competence to prescribe and enforce its laws in a manner that is practically identical to its national jurisdictional competence. Practically the same is now ruled in Art.8. The territorial sea is an area wherein the coastal state has full legal competence to prescribe and enforce its laws.[74]Art. 19 gives a more detailed description of those kinds of actions which could disqualify a passage from being innocent. A passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Furthermore such passage shall take place in conformity with these articles and other rules of international law. Art.21 gives coastal states the right to prescribe conditions under which foreign vessels may exercise the right of innocent passage through their territorial sea. Generally merchant ships need no authorisation for the innocent passage. This was mainly accepted "because of a recognition of the freedom of seas for the commerce of all states."[75] Problematic is, whether warships have the same rights as merchant ships concerning innocent passage. The Convention gives no information concerning this. The only provision for warships is contained in Art. 23 providing that "if any warship does not comply with the regulations of the coastal state concerning passage through territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea." This could be understand as a hint that the coastal state may require previous authorisation as it was the general rule in the times before UNCLOS.[76] The legal regime which applies to these waters is substantially unchanged from that of the Geneva Conventions but it now applies to a wider area. The question of territorial waters was debated for a

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[74] Dubner B.H. *The Law of the Territorial Waters of Midocean Archipelagos and Archipelagic States* (1976) p. 4

[75] Colombos J. *The International Law of the Sea* (1967) p. 261

[76] This right of the coastal states was also admitted by the International Law Commission ; see the *Yearbook of the International Law Commission*, Vol. II (1956) p. 277

long time after the world conference in The Hague in 1930. It was obvious that opinions were so diverse that no agreement would be reached. Suggestions ranged from three miles to several hundred miles.[77] In Geneva the delegates failed to reach an agreement about this.[78] at the third Conference there were several opinions about this issue. Some parties suggested at the Conference letting Nations decide on the breadth of their own territorial waters, whereas another group wanted to allow anything between three and twelve miles. Yet another proposal was to allow nations to fix a breadth greater than three miles, but without being able to enforce it against any state which had not adopted an equal or greater breadth.[79] The maximum breadth of the territorial sea which states may claim was increased to twelve miles from the baselines whereas the contiguous zone could be claimed to a breadth of 24 miles.

At the Third Conference, dealing with this issue seemed to be a little bit easier because a large number of States had in the interim adopted a 12 mile limit made up of various combinations of the territorial seas and the contiguous zones.[80] The same problem of 12 miles at former Conferences affected straits at this conference. During the Caracas Session in 1974 the United States clearly showed their position that the acceptance of the twelve-mile limit would depend on whether satisfactory provisions could be made to safeguard freedom of navigation through straits, territorial waters and archipelagos.[81] The Geneva Conventions did not deal extensively with straits used for international navigation. Only in Art. 16 para 4 of the Convention on the Territorial Sea and the Contiguous Zone does one find the principle that

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[77] Reeves J. S. "The Codification of the Law of Territorial Waters" in: 24 *AJIL* (1930) p.492
[78] see chapter I
[79] International Law Commission Report, UN General Assembly 11th Session, Off. Rec., supp. No 9, at 12; Nordquist and Shabtai R. (eds.) *op.cit* Art. 3 (A/3159)
[80] Fincham C.B.H and Botha L. *op.cit* p.10
[81] UN Doc.A/CONF.62/7/Rev.1

"There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial seas of another State".

Therefore the need for a regulation at the Third Conference was obvious. The intention was to alleviate concern that international navigation could be restricted by other regulations in the territorial sea. It was considered that the provisions should be no less favourable to the interests of maritime countries than those embodied in the Geneva Conventions and in customary international law.[82]

Art. 34 is designed to safeguard rights of passage through straits and does not otherwise affect the status of the waters forming such straits, or the exercise by those states bordering them of their sovereignty or jurisdiction over such waters. Nevertheless, it constitutes a limitation of coastal states' sovereignty and has to be accepted as such by parties to the Convention.

Art. 35 safeguards the legal regime where, "the passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

The transit passage in Section 2 of Part III concerns straits which are used for international navigation between one area of the high seas or an EEZ and another. According to Art. 38 "all ships and aircraft enjoy the right of transit passage, which shall not be impeded. The right of transit passage is not identical with the right of innocent passage through the territorial sea in Section 3 of Part II. In Art. 38 the meaning of the term transit passage is given, requiring that the passage be "continuous and expeditious", and that such passage be exercised in accordance with this Part".

Art. 38 para 1 indicates the straits to which the article applies. Transit passage was adopted to secure the undisturbed passage of seafaring states through territorial sea straits because the new 12 mile limit brought many international straits within the territorial sea of other states. The restrictions applying in the territorial seas do not necessarily apply in straits.

2.2 Archipelagic States (Part IV)

The concept of archipelagic states is new. It was not dealt with either in the Geneva Conventions or in any other international instrument. First of all there is a fundamental difference between the term "archipelagic state" and "archipelago". Articles 47 through to 54 only refer to archipelagic states. An archipelagic state means „a state constituted wholly by one or more archipelagos and may include other islands".[83] An archipelago means a group of islands, „including parts of islands interconnecting waters and other natural features" whose interrelationship is such that they form „an intrinsic geographical, economical and political entity", or which historically have been regarded as such.[84] Archipelagic states clearly constitute a special case needing special treatment. The problems arise from their geographical situation. The state's terrestrial territory consists of a scattered group of islands, and it cannot therefore exercise effective sovereignty over its territory unless it controls the waters between the islands. Furthermore this is also essential for the control of fishing and pollution in archipelagic waters, for communication and defence and for the implementation of its law on fiscal, immigration, on wealth and customs matters. In former days the interests of archipelagic states were not safeguarded by the existing rules of international law. Each island could have its own territorial sea usually with a breadth of 3 miles and a zone of high

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[82] Fincham and Botha *op.cit.* p.13
[83] Art. 46 (a) ; all following articles without signs are those of the Convention
[84] Art. 46 (b)

seas could exist between the islands. This was a very important point for maritime states.[85] In adopting the 12 mile limit for the territorial sea, the existing corridors seemed to be in danger and regulation was therefore needed. The Convention provides that archipelagic states can draw their own baselines for the establishment of their territorial waters, by "joining the outermost points of the outermost islands and drying reefs of the archipelago."[86] This was an obvious analogy with the method of straight baselines sanctioned by the ICJ in the Anglo-Norwegian-Fisheries case.[87]

2.3 Exclusive Economic Zone (Part V)

In earlier times fishing activities invited little conflict over national boundaries as a result of the localised nature of such activities and their relatively low exploitation of marine resources. Nowadays, however it is one of the greatest problems which the law of the sea has to cope with as a result of more efficient technology and the exhaustion of living resources. Developing countries have has especial interest in the regulation of activities concerning these resources because they lack the effective technology and therefore foreign states can take the advantage of their resources. Arvid Pardo, Ambassador of Malta, proposed that coastal states should control their own marine resources themselves. This was one of the issues which was negotiated in depth at the third Conference. In the end the following provisions were laid down.

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[85] at the Hague Conference for the Codification of International Law 1930

[86] Art. 41 para 1

[87] The ICJ ruled that the baseline or seaward limit of its internal waters should not follow the "sinuosities" of Northern Norway's deeply indented coast but be drawn directly between the headlands of fjords or around the outside of the furthest islands and reefs. The territorial sea which Norway claimed, therefore, extended four miles beyond these straight baselines (ICJ "The Anglo-Norwegian-Fisheries Case" ICJ Reports, 1951); for further information see Evensen J. "The Anglo-Norwegian Fisheries Case and its Legal Consequences " in: 46 *AJIL* (1958) pp. 609-630

The EEZ shall not extend beyond 200 miles.[88] This breadth was chosen because the vast majority of the seas living resources can be found within an area of not more than 200 miles. Of course this proposal also had its opponents during the negotiations, mostly from countries with lucrative wide-ranging fishing fleets or with interests in coastal mineral, oil and other deposits. But most of the countries seemed to think it a practicable and satisfying solution to the problem. Many countries unilaterally declared a 200 mile EEZ before the Conference was finished, based on the consensus that had been reached. The basic principle of the EEZ is that the coastal state shall not have full sovereignty over the area of the EEZ, but only over its natural resources. In the EEZ the coastal state has sovereign rights for the purpose of exploring, exploiting and managing the natural resources of the sea-bed whether living or non-living as well as in the subsoil and superjacent waters, and with regard to other activities relating to the economic exploitation and exploration of the zone such as the production of energy from the waters, currents and winds.[89]

With respect to the conservation and utilisation of living resources the coastal state shall have full control.[90]It shall prevent an excessive exploitation of stock, but at the same time ensure an optimum of utilisation.[91]Where the coastal state cannot harvest the full capacity of its stock, it shall make the excess available to other countries including landlocked neighbouring states.[92]

The coastal state shall also control and exploit highly migratory species and marine mammals by means of agreements between participating states or through an appropriate international organisation.[93] A further point of negotiation was the question of marine scientific research. In the past any country could send its research vessels wherever it wanted except for the territorial seas of other states.[94] UNCLOS III provides stricter control of these activities through coastal states. The

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[88] Art. 57
[89] Art. 56 (a)
[90] Arts. 61 and 62
[91] Art. 62 para 1
[92] Art. 62 para 2, Arts. 69 and 70
[93] Arts. 64 and 65
[94] Jessup P. *op.cit.* p.4

coastal state can prescribe conditions under which other states are allowed to carry out marine scientific research with the consent of the coastal state. This may only be allowed for peaceful purposes. Because of the limited sovereignty of the coastal state other states may exercise traditional freedoms. Therefore the balance of power between coastal states and other states is ensured.

2.4 Continental Shelf (Part VI)

The Convention contains a new definition of the continental shelf. The shelf comprises the sea-bed and the subsoil beyond the territorial sea of a coastal state "throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 miles from the baselines... where the outer edge of the continental margin does not extend up to that distance."[95] Part VI furthermore sets out the rules for the exercise by the coastal state of its rights over the shelf[96]. Shelf rights are exclusive to the coastal state which means that no other state has the right to exploit them if that state does not.[97] This Part contains provisions relating to the delimitation of the continental shelf between states with opposite or adjacent coasts.

2.5 High Seas (Part VII)

The high seas dealt with by the Convention are all those parts of the sea that are not included in the EEZ, the territorial sea or the internal waters of a state or the archipelagic waters of an archipelagic state.[98] This definition is similar to Art. 1 of the Geneva Convention on the High Seas of 1958. The governing principle of Part VII of the Convention is freedom of the high seas, which means that

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[95] Art. 76 para 1
[96] Art. 77
[97] Art. 2 para 2

every state either on its own or through its citizens has the right to use this area and the airspace above it. Freedom of the high seas comprises *inter alia* freedom of navigation, of overflight, of laying cables and pipelines, of constructing artificial islands and other installations, of fishing and of scientific research.[99] As can be seen from these examples the list is inexhaustible. It is important to notice that the exercise of these freedoms can be limited, for example when the interests of other states are disturbed through the actions of one state. In general, ships on the high seas are under the jurisdiction of that state whose flag they are flying. States are responsible for the control of their ships with regard to administrative, technical and social matters. They also decide on the conditions for the registration of ships in their territories and for granting the right to fly their flag.[100] The Convention provides for some exceptions to the rule that only the flag state has jurisdiction. These provisions concern piracy[101] , illicit traffic in narcotic drugs or psychotropic substances[102] and unauthorised broadcasting from the high seas[103].

2.6 Regime of Islands (Part VIII)

The definition of an island is taken over from the Geneva Convention. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.[104] The provisions governing islands are similar to those governing other land territories. An island may also have a territorial sea, EEZ, a contiguous zone and a continental shelf in accordance with the provisions of the Convention applicable to other land territory. An exception is made in the case of rocks which

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[98] Art. 86
[99] Art. 87 para 1
[100] Art. 91 para 1
[101] Art. 100
[102] Art. 108
[103] Art. 109
[104] Art. 121 para 1

cannot sustain human habitation or economic life of their own. They may have a territorial sea but they may have no EEZ or continental shelf.[105]

2.7 Enclosed or Semi-enclosed Seas (Part IX)

The enclosed or semi-enclosed sea is either an area of water, e.g. a gulf, basin or sea, which is surrounded by two or more states and is furthermore connected to another sea or ocean by a narrow outlet, or an area of water that partially or entirely consists of the territorial sea or the EEZ of neighbouring coastal states.[106]The states bordering these waters are expected to work together to co-ordinate the management of the living resources[107], the implementation of their rights and duties with respect to protecting the marine environment [108]and co-ordination of their scientific research policies.[109]Furthermore they have the option of inviting other interested states and international organisations to take part in these activities.[110]

2.8 Rights of Access of Land-locked States to and from the Sea and Freedom of Transit (Part X)

Before the UNCLOS III, the ships of landlocked countries had equal rights to coastal states in using the high seas as regards resources and the ability to travel as well as being allowed to move through territorial seas the contiguous zone.[111] Since the establishment of the Convention these states are also able to participate in the "common heritage of mankind" , which includes the resources of the sea-bed and the ocean floor beyond the limits of national jurisdiction. Part X does

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[105] Art. 121 para 3
[106] Art. 122
[107] Art. 123 (a)
[108] Art. 123 (b)
[109] Art. 123 (c)
[110] Art. 123 (d)
[111] Fincham *op.cit.* p.15

not deal with these rights, but with access to the sea through transit states . However, such rights are given to these states by certain articles in different parts of the Convention, as follows:

Art. 69 provides that land-locked States shall have the right to participate in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of coastal states in conformity with the provisions of this convention.

Art. 87 para 1 provides that the high seas are open to all states, whether coastal or landlocked.

Art. 112 para 1 gives the right to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf for all states (the same in Art. 79 for the continental shelf).

Art. 161 states that land-locked or geographically disadvantaged states must be represented in the composition of the Council, and this is reinforced by the provisions of Art. 161 para 2 that, in electing the members of the Council, the Assembly shall ensure that those states are represented to a degree which is reasonably proportionate to their representation in the Assembly.

2.9 The Area (Part XI)

The Area is that part of the international sea-bed that lies seaward of the continental shelf.[112] The reason why this issue is dealt with in such detail, is the increasing economic interest in mineral deposits of polymetallic nodules which cover the area and which contain commercially significant amounts of nickel, cobalt, manganese and copper as well as other minerals.[113] In the days before the Convention, the principle of freedom of the seas also governed the sea-bed. This meant that the ocean floor could be used by all. This right also extended to the appropriation of natural resources

[112] Art. 1 para 1 (1)
[113] Wolfrum R. *UN: Law, Policies and Practices* (1995) p. 844

on the ocean floor.[114] Nowadays, to achieve the aim that all states should have the possibility of profiting from the "common heritage of mankind", an international management regime has been created with the task of overviewing and organising the exploitation of these resources. The principle of the common heritage has been defined specifically in the "Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction"[115] as well as of course in the Convention itself. The principle was open to different interpretations. One side for example was stressed by the Americans. The principle permits sea-bed mining by corporations or other entities as a freedom of the seas if there is no interference with the rights of other users of the sea.[116] The United States and other industrialised states wanted the Authority to have minimal powers to act as a licensing agency and a registration office. The conditions for mining should be liberal in order to encourage mining companies and the necessary investments. The motivation of the industrialised states for supporting this proposal were the fact that only Canada and Australia were exporters of the minerals, which could be won from the seabed, as land-based producers. If states are allowed to use the seabed they would no longer need to import.[117] A totally different interpretation was preferred by the developing countries after the model of the Moratorium Resolution[118] that called for the suspension of from the exploitation of the sea-bed or the making of claims to sea-bed areas beyond the limits of national jurisdiction prior to the establishment of an international regime. Sea-bed resources should be only exploited by a

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[114]Graf Vitzthum W. *Der Rechtsstatus des Meeresbodens* (1972) p. 247;. Arrow D. W. "The Proposed Regime for the Unilateral Exploitation of Deep Sea-Bed Mineral Resources by the United States", in: 21 *Harvard International Law Journal* (1980) p. 364

[115] GA res. 2749 (XXV) of 17 December 1970

[116] Juda L. "UNCLOS III and the New International Economic Order" in: *7 Ocean Development and International Law Journal*, (1979) p.226

[117] Sanger C. *op.cit.* (1986) p.158

[118] GA res. 2574 D; the resolution provides that

(1) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and the ocean floor, and the subsoil thereof beyond the limits of national jurisidiction; and
(2) No claim to any part of the area or its resources shall be recognised.

special institution to realise the ideals of the New International Economic Order.[119] The proposal of the United States would lead to colonisation of the international sea-bed and its resources by those who have the technology and the financial capacity to do so. The principle of common heritage would thus not be fulfilled by the proposal of the industrialised states.[120] Not only the disagreement over the sea-bed regime but also the ideological problem of the North-South conflict prevented a fast solution.[121] During the following years, the UN General Assembly adopted a resolution that no ocean mining would occur in the seas until after an authority had been created by an international convention.[122] The Authority would organise and control activities in the international seabed area beyond the limits of national jurisdiction, particularly with a view to administering the resources of that area. It would be a totally new institution in the international law of the sea and therefore much work and negotiations would be needed to create it.[123]Finally, a compromise was found which created a "parallel system of exploitation" in which both state entities and corporations on the one hand and the Enterprise on the other hand would be involved.[124] The parallel system contained "banking provisions", which meant that the mining companies or the state enterprise hoping to start ocean mining are required to put in an application covering a total area "sufficiently large and of sufficient estimated commercial value to allow two mining operations". The applicant then has to draw the lines between the two parts and furthermore has to share all the data collected through mapping and sampling with the ISBA. Within 45 days the ISBA has to choose which part it will keep as an area reserved by the Enterprise. The ISBA is comparable to existing institutions[125] in its task of implementing rules and regulations governing conduct in the exploitation of the sea-bed. The novel provision was that the ISBA could take part

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[119] Chile, Zambia and Guatemala pp. 57-58 in Off.Rec. IV
[120] Djalal H."Law of the Sea Conference: Other Alternatives for Seabed Mining" in: 3 *ILCQ* (1981) pp. 43-44
[121] Grolin J. "The Deep Seabed: A North-South Perspective", in: Finn Laursen (ed.), *Towards a New International Marine Order* (1982) p. 119
[122] GA res. 2574 D
[123] Jaenicke in *NJW* (1983) p. 1940
[124] See for explanation Friedheim R. L. *Managing Ocean Resources* (1979)

in exploitation not only as supervisor but as participant on behalf of mankind.[126] To organise the structure of this authority a UN Sea-Bed Committee was founded.[127] But a satisfying compromise could not be found because a number of mainly industrialised[128] countries expressed difficulties with the Convention's seabed mining provisions and were not willing to ratify or accede the convention because of these provisions.[129]It was inconsistent with their ideology in such a wide gap that they were not willing to sign the Convention.[130] But it was clearly evident that this part of the Convention could not work without the participation of the industrialised states through funding and other factors. For this reason the "Agreement on the Implementation of Part XI of the Convention "(hereinafter the Agreement) was negotiated within a four year period to facilitate universal participation in the Convention. Some regulations had to be changed to secure and realise the other rules achieved by the Convention. The Agreement based on a proposal called the "Boat Paper"[131] and consists of three elements which are a resolution adopted by the General Assembly, the procedural framework of the Agreement and the substantive provisions which are contained in an Annex to the Agreement. The Agreement was adopted on 28 July in 1994 by a resolution of the UN General Assembly[132] with a majority of 121 votes in favour, none against and 7 abstaining.[133] From this day on there is only the possibility of accepting the Convention and the Agreement

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[125] Similar institutions are for example the IMO and the ICAO

[126] Adede A.O."The Group of 77 and the Establishment of the International Sea-Bed Authority" in: *31 Ocean Development and International Law Journal* (1979) p. 59

[127] The General Assembly wanted the UN Sea-Bed Committee to prepare a study "of the legal principles and norms which would promote international cooperation in the exploitation and use of the sea-bed and the ocean floor" (UN Press Release SEA/255, 19 May 1974 p.4)

[128] The strongest opposers were the United States, but also Germany and some other countries

[129] Statement by Ambassador James L. Malone, Special Representive of the President, before the House Foreign Affairs Committee, August 12, 1982), Department of State Bulletin 82 (October 1982), p. 61-63

[130] Many states were now convinced that only the free market could bring success in the deep sea-bed mining. See for a more detailed explanation : De Marffy de Mantuani A. "The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea" in: *89 AJIL (1996) p. 815*

[131] For the text of the Boat Paper, see the annex to Mangone G.J."Negotiations on the 1982 Law of the Sea Conference Given Extra Urgency by the 60th Ratification" in: 9 *International Journal of Marine and Coastal Law* (1994) p.57

[132] GA res. 48/263 of 28 July 1994

[133] UN Doc.A/48/PV.101, 28 July 1994

together.[134] They shall now be interpreted together as a single instrument and if some inconsistency provisions appear, the Agreement shall prevail.[135] In the Agreement there are different methods of accepting the Agreement contained.

(1) This could be the method of signing and ratification,[136] which is the most common procedure.

(2) it could be a simplified procedure according to Art. 5 of the Agreement

(3) to accede without signing it first

(4) without expressing to Agreement

It exists the possibility of a provisional membership until 16 November 1998, under the condition that the Agreement enters into force before 16 November 1996. This condition is fulfilled with the entering into force at the 14 August 1995. The Agreement should have entered into force 30 days after 40 states have established their consent to be bound, provided that such states include at least 7 of the states referred to in para 1 (a) of res II[137] and five developed states. [138]

The reasons for the Agreement were mainly expressed by America which was one of the most stubborn fighter for the Agreement because they saw in the common heritage some kind of international socialism where the developed states have to do the work and then share the results with the developing countries.[139] The Reagan administration saw it as an unwieldy, politically disadvantageous and economically monopolistic treaty. Furthermore they feared that the principles contained here would not be confined to this area but could also influence other areas of economic

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[134] Agreement Art. 4 (1) and 4 (2)
[135] ibid. Art. 2 para 1
[136] ibid. Art. 4 para 3 (b)
[137] res II "Governing Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules" in: Platzoeder R. and Grunenberg H. *Internationales Seerecht*. (1990) p. 492
[138] Agreement Art. 7 para 3

life.[140]The United States of America also wanted a seat in the Council with the explanation that they would be the largest investor and financial contributor of the Authority. Without a seat in the Council they would have no influence on economic and political interests and they would have no veto to stop decisions with which they would not agree.[141] With the modifications of the Agreement the industrialised mining states gained influence within the Authority. The United States of America is guaranteed a seat in the Council. This is not expressly stated in the Agreement but there is a seat guaranteed for the state having the largest economy in terms of gross domestic product.[142] The United States is qualified as that state. There were further changes in decision-making by the Authority. The Assembly cannot act independent of the Council's recommendations anymore. The general policy of the Assembly is that they can act only after consultation with the Council and the aim is to reach consensus. [143] If the Council has competence over certain matters or matters concerned with administrative, budgetary or financial affairs and if the recommendations of the Council are rejected by the Assembly then the matter shall be remanded back to the Council.[144]

In the Agreement there is created a new Finance Committee which is responsible for the rules and regulations concerning the Authority's budget.[145] It will be composed of 15 members elected by the Assembly and includes the five largest contributors as well as representatives of each of the four chambers identified in Section 3 para 15 of the Agreement. The Financial Committee has to make

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[139] see Goldwin R.A. "Common Sense vs the Common Heritage" in: Oxman B. H., Caron D.L., Buderi, C. L. (eds.) *Law of the Sea: U.S. Policy Dilemma* (1983) p. 59-78

[140] Report of the Secretary-General on his consultations on outstanding issues related to the deep sea-bed mining provisions of the UN Convention on the Law of the Sea, Annex (9 June 1994), UN Doc.A/48/950, (9 June 1994)

[141] see Malone J. "Who needs the Sea Treaty?" in: 54 *Foreign Policy* (1984) p.44-64

[142] Agreement, Annex Sec.3 para 15 (a)

[143] ibid. Annex, Sec. 3 para 2

[144] ibid. para 4

[145] Agreement Sec.9

decisions on substantive issues by consensus.[146] The states got an indirect veto right because the decisions could not be made without consensus.

No obligation to fund one mine site for the Enterprise now exists and the member states are no longer obligated to finance any operation in a mine site of the Enterprise under a joint venture arrangement.[147] If the contractor has contributed an area to the Authority there shall be no right of refusal.[148]

The provisions in the Convention that would require compulsory transfer of technology "do not apply".[149] Therefore there is no pressure for the transfer to the enterprise and developing states shall seek deep sea-bed mining technology on "fair and reasonable commercial terms" or through joint ventures. The Authority is allowed to invite contractors to cooperate on commercial terms consistent with effective protection of intellectual property rights.[150]

To protect the interests of land-based producers the Authority had the power to limit the production from the deep sea-bed . This power was eliminated by the Agreement. The production policy is now based on "sound commercial principles".[151]

The Agreement changed the annual fee of $1000000 which should be paid by the miners to the Authority to the sum of $250,000 for processing ..... for exploitation and exploration.[152]

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[146] ibid. para 8
[147] Agreement Sec.2 para 3
[148] ibid. para 5
[149] Agreement Sec.5 para 2
[150] Agreement Annex Sec. 5 para 1
[151] Agreement Sec. 6 para 1 (a)
[152] Agreement Sec. 8 para 3 (changed Art. 13 para 3-10 of Annex III)

But the Agreement does not neglect the principle of common heritage. For the benefit of the poorer countries the Authority shall establish an economic assistance fund from the portion of funds that exceed its administrative expenses. These funds come from payments made by contractors, the Enterprise and voluntarily contributions.[153] But Assistance is provided for developing landbased producer states seriously affected by the production of minerals from the deep sea-bed.[154]

The Agreement can be seen as a satisfactorily solution for all states. For the industrialised countries it contains free market principles and changed the socialistic impression neated by the previous regulations. The Enterprise is now standing on an equal basis to private contractors who do not get the impression that they are treated disadvantageously to it and the incitement is given to invest in deep sea-bed mining. This also helps developing states which now get the chance to be involved in deep sea-bed mining through the money and technology of developed states. Without the help of these strong states it would have been a really unsafe project. Advantages for the poorer states lie in the possibility of using certain funds to their benefit. Also some developing countries confirmed the need for some changes to give the developed countries an incentive to accept the Convention. The reason for this can be seen in the developing states' lack of money and technical ability. Without this deep sea-bed mining would be difficult to realise.[155]Among other things the functions, management and membership of the Authority have been affected by the adoption of the Agreement.

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[153] ibid. Sec. 7 para 1 (a)
[154] ibid. Sec. 7 para 1 (b)-(d)
[155] Remarks of Ambassador Jose Luis Jesus of Cape Verde, President of the Preparatory Commission, at the Qatar International Law Conference (1994) at 29

2.9.1 Organisation and Competence of the ISBA

The ISBA has three major organs, the Assembly, the Council and the Secretariat. [156]

a) Assembly

All States Parties belong to the Assembly[157] and each has one vote. It is considered the supreme organ of the Authority and has the power to establish general policies in conformity with the relevant provisions of the Convention and the Agreement.[158] Among the functions of the Assembly are the election of members of the Council, the election of the Secretary-General of the Authority, the assessment of contributions of members to the administrative budget of the Authority, and the approval of the annual budget of the Authority as submitted by the Council.

b) Council

The Council has a limited membership of 36 states which are elected by the Assembly.[159] It acts as the executive organ of the Authority with the power to establish, in conformity with the Convention and the Agreement, specific policies to be pursued by the Authority on any matter within its competence.[160] Although the Assembly is called the "supreme organ", the UN is of the opinion that closer examination shows that these powers are somewhat limited by those given to the Council, which recommends the states elected from the Assembly, drafts rules for exploring and exploiting the seabed and distributes benefits. Furthermore, the Agreement has introduced substantial modifications to decision-making within the Authority as a whole, and in particular as regards the Council. For example, the decisions of the Assembly on any matter for which the Council also has

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[156] Art. 158
[157] Art. 159 in connection with Art. 156 para 2
[158] Art. 160 para 1
[159] Art. 161

competence, or on any administrative or financial matter, are now to be based on the recommendations of the Council. Should the Assembly disagree with these recommendations, it cannot force a contrary decision, but must remand the matter to the Council for further deliberation.[161] In the Council, the rule as to consensus applies. Should attempts to achieve consensus fail, then the Council may resort to voting, with the provision that a decision must be approved by a majority within each of four chambers of countries represented in the Council. Those chambers are comprised as follows.

aa) The composition of the Council

The Assembly has to choose from the following five groups of states

(1) four states from the group of the most significant consumer or importing countries (more than two per cent of the world consumption or import), including at least one Eastern European state, as well as the largest consumer[162];

(2) four states from the eight most active sea-bed mining states (which made the largest investments in sea-bed activities or in preparation for such activities), again including a state from Eastern Europe;

(3) four states from the group of major exporting states, including at least two developing countries;

(4) six developing states, representing special interests (states with large populations, landlocked or geographically disadvantaged states, or major importing states);

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[160] Art. 162 para 1

[161][161] *A Quiet Revolution: the United Nations Conventions on the Law of the Sea* p. 45; Art. 162

[162] The addition of the "largest consumer" guaranteed the United States of America a seat if they would accept the Convention

(5) eighteen states elected according to the principle of ensuring an equitable geographical distribution.

bb) Subsidiary organs

As subsidiary organs of the Council two commissions have been created, the Legal and Technical Commission and the Economic Planning Commission.

(1) The Legal and Technical Commission

The Legal and Technical Commission was originally envisaged as having 15 members, but now has 21 members. It has to calculate the ceiling for overall seabed production, based on the formula of the Convention, and issue production authorisation for individual contractors. Furthermore it assists the Council with the taking on of important functions in the preparation of the Assembly's and the Council's decisions, as well as recommending to the Council the approval or rejection of the work plans submitted for seabed mining[163] e.g. by making recommendations concerning, among other things, the approval of plans for work in the deep sea-bed area, preparing the assessments of the environmental implications of activities in the area, making recommendations on the protection of the marine environment, and playing an important part in the enforcement of the Authority's regulations.[164]

(2) The Economic Planning Commission

The Economic Planning Commission was to be comprised of 15 members, which were to watch the trends in metal prices and the supply and demand situation in order to secure the land-based

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[163] Arts. 165 and 163 para 1

producers.[165] However, under the terms of the Agreement, the functions of the Economic Planning Commission are to be carried out by the Legal and Technical Commission until such time as the Council decides otherwise or until the approval of the first plan for establishing of a mining site in the deep sea-bed area.

c) Secretariat

The Secretariat of the International Seabed Authority is headed by a Secretary-General, Mr Satya N. Nandan, who was elected for a four year term on 21 March 1996 upon the recommendation of the Council. The Secretary-General, assisted by members of the secretariat, will perform all functions entrusted to him by the organs of the Authority and is required to make an annual report to the Assembly on the work of the Authority. The secretariat is to take over the administrative duties of the Authority.[166]

d) Enterprise

According to the Convention, the Enterprise was to have been the organ through which the Authority would carry out its own deep seabed mining activities. However, the Agreement has substantially altered the character and functions of the Enterprise [167] by providing, among other things, that the functions of the Enterprise would be carried out by the secretariat of the Authority. Further, the Agreement mandates that the Enterprise carry out its initial deep seabed mining operations through joint ventures and releases states from their original obligation to fund one mining site for the Enterprise.

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[164] Arts. 164 and 165
[165] Art. 164
[166] Arts. 166, 167, 168
[167] see Agreement, Annex, Section 2

2.10 The Protection and Preservation of the Marine Environment (Part XII), Marine Scientific Research (Part XIII) and Marine Technology (Part XIV)

The basic principle of Part XII is contained in Art. 192. States have the obligation to protect and preserve the marine environment. The Convention requires minimisation of any kind of pollution and is strict on monitoring pollution and environmental assessment.[168] Furthermore the Convention deals extensively with marine scientific research and the development and transfer of marine technology.

Chapter 3. Essential Elements of the regulation on Settlement of Disputes particularly the statute of the International Tribunal for the Law of the Sea

3.1 Seat and foundation

3.1.1 Development of the institution

The main aim of the negotiators was to find a way to settle disputes in a peaceful manner. This system, which was ultimately achieved, can be described as very complex and unwieldy as a result of the necessity of satisfying all states taking part in the Conference. In the end, the Convention did not achieve all the aims and wishes of all the participating states, but most of the issues relevant to the delegates are reflected in the Convention and it was been described as „the most flexible,

[168] Arts. 204 - 206

States[177] and prepared draft provisions. The result was a document consisting of 17 draft articles on the settlement of disputes. [178]With the beginning of the official debate, there was no single group responsible for dealing with the settlement of disputes, as it formed part of the general handling that concluded other subjects. The subject of dispute settlement was dealt with during the informal plenary meetings of the Conference, chaired by the President (at this time, Shirley Amerasinghe). This IWG proposal contained a wide range of modes of dispute settlement in addition to the institution of the Law of the Sea Tribunal. With the help of these informal meetings, the President then produced official conference documents known as the "President's Text"[179].The President stressed four fundamental principles in regard to his work:

(1) To avoid economic and political pressure and to preserve the equality of states, an effective system for the settlement of disputes must have its basis in law;

(2) The greatest possible uniformity in the interpretation of the Convention is desirable.

This point was also stressed by Secretary Kissinger, who said that the insertion of the dispute settlement procedures in the Convention was very important in maintaining the delicate balance of rights and duties achieved in the Convention. The possibility of choosing the form of settlement would provide the opportunity for unilateral interpretation, which should be avoided.

(3) Any exceptions to the obligatory dispute settlement provisions had to be drafted carefully.

(4) Dispute Settlement provisions had to form an integral part of the convention.

The President's Text was proposed during the first official debate concerning the settlement of disputes which took place from the 5th to the 12th of April 1976 in which delegates from 72

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[177] Adede *op.cit.* (1977) p..255

[178] The document was first circulated as UN.Doc.SD/Gp/second session/No.1/Rev.5,1st May1975; later as U.N.Doc.A/CONF.62/Background paper 1,August 6,1976

[179] UN Doc.A/CONF.62/WP.9

countries taking part.[180]During the negotiations, it was established that the dispute settlement procedures should be included in the Convention, and should not be an extended part of it.[181]

Another point of discussion was the shaping of dispute settlements. Great encouragement was given to the idea of a binding settlement procedure, but a minor group favoured the opposite idea of non-binding dispute settlement, at least in areas of national jurisdiction (e.g., economic zones). These zones should not be fully excepted by the international settlement of dispute, though, when navigation rights or pollution are concerned.[182] The main problem was the relationship between the exercise of coastal state`s resource jurisdiction and the acceptance of dispute settlement procedures, and this raised the question whether comprehensive dispute settlement mechanisms or the separate handling of each particular issue should be the system adopted by the Convention. The group tried to develop a single system to deal with all manner of disputes rather than a "functional approach" that would have established special procedures relating to binding decisions arising from each different part of the convention. Furthermore, it was unclear which institution should be considered competent to handle these problems.

During the negotiations, four institutions were developed:

(1) the International Court of Justice

(2) the International Tribunal for the Law of the Sea

(3) or an arbitral body and

(4) a special tribunal for matters relating to the deep sea-bed

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[180] Adede *op.cit.* (1977) p.268

[181] *Reports op.cit.* p.84

[182] *op.cit.* Australia p.5

a) Principle of compulsory settlement

From the beginning of the third conference the principle of compulsory settlement was accepted by most of the participating states. The need for compulsory jurisdiction was agreed by several states to "cement the delicate accommodation of interests which the new convention would represent".[183] This was strongly supported by the developing countries because they saw in the compulsory jurisdiction a safe protection against the pressure of stronger states.[184]Other delegates were of opinion that dispute settlement should be an extended part of the convention because the parties should be able to settle disputes by agreement, or by any peaceful means of their own choice, and a compulsory jurisdiction or settlement would not allow this .[185] Without a system of dispute settlement included, several problems were anticipated, such as uncertainty over the correct understanding of the norms,[186] different interpretations of the rules,[187] and unilateral extensions of concessions, reflected in the rules, all of which would lead to the destruction of the political balance[188] thus placing the objective of the Convention, which is to ensure peaceful activities in oceanic spaces, in danger.[189] States had to be assured that their interests were adequately protected. This was only attainable by means of a compulsory settlement, because otherwise the Convention would be open to too many different interpretations and a danger could arise of the right of the strongest state being dominant.[190] Compulsory settlements would ensure a certain degree of uniformity in the interpretation of the convention, applicable only when diplomatic attempts to settle disputes failed.[191] Owing to the widespread support it received the compulsory settlement

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[183] *Off.Rec.* Vol.V p.11 at31.
[184] *Off.Rec.* Vol. V p.10
[185] ibid. p.9
[186] ibid. p.8 at 3.
[187] ibid.
[188] ibid. p.10 at 20.
[189] ibid
[190] ibid. p.25
[191] ibid.

was included in the first negotiated texts.[192] Here can be seen one of the great differences to the Geneva Conventions of 1958 and 1960, which could not insert a compulsory settlement system but only an optional protocol giving states the option of not ratifying the Convention and thus not being exposed to the international juridical settlement .

The ruling on dispute settlements by the third convention could be called a success because of its clearer and less complicated norms and the neutral interpretation achieved by the compulsory settlement. Most of the developing states voted for the compulsory settlement because they were afraid of the greater economic strength of the industrialised nations, which could have led to pressures and injustice through expensive processes.[193] Even the Soviet Union and the eastern nations were willing to accept compulsory settlement [194] in contrast to their former behaviour, which was characterised by the fear that their self determined rights could be diminished through international settlement. This change was caused by the Soviet Unions' increased interests in protecting its fishing and navigational rights in foreign seas. Thus far the negotiations were successful.

Another question concerning the compulsory settlement was not as simple to deal with. On the contrary, this question seemed to be the most elaborate part of the negotiations: the exceptions to compulsory settlements. Of great interest was the question if and if so to what extent measures taken by coastal states in the economic zone should fall under international jurisdiction.
Three different views emerged during the debate on this subject.

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[192] (part IV ISNT, part IV RSNT, Art. 286 ICNT)
[193] *Off. Rec.* Vol. V p.11
[194] ibid. p.32 (Poland); p.40 (Hungary)

The first of these was not to allow any exceptions to the system of compulsory settlement.[195] Most of the seagoing states tried to reach an effective international juridical protection against national decrees with help of compulsory settlement.[196]

A second group wanted to allow reservations, but only in a limited number of contexts, which should be clearly described during the convention.[197] The Autralia delegation described the desired balance in the following words:

"A solution to the problem of settlement of disputes has to reflect a balance between the rights of the coastal state over its resources and the rights of the others. Where the rights of other states are not involved, the coastal state might well be accorded the exclusive right to enforce decisions made in the exercise of absolute descretion. Where there are alternative or competing issues of an area, and where the rights of the international community or other States are involved the implication of the revolutionary new legal concept of the economical zone has to be considered."[198]

That the compulsory settlement is not inconsistent with national sovereign rights is demonstrated by the ICJ.[199] That states should have the option of choosing their favoured method of settlement is stated in Article 33 of the United Nations Charter, but if they failed to reach an agreement then compulsory settlement should intervene.[200]

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[195] ibid.p.27 (Japan); p.24 (Italy)
[196] ibid.p.41 (Hungary)
[197] ibid. p.17 (India); p.23 (Spain)
[198] ibid. p.10 (Australia)
[199] ICJ in the North Sea Continental Shelf Judgment (1969) ICJ 3.Rep.
[200] *Off.Rec.* Vol. V p.30 (Sweden)

A third proposal was that zones which are under national sovereignty should be excluded.[201]

In the end, the principle of compulsory settlement was contained in the convention. Without this system, which ensures uniformity of interpretation, the long process and many efforts towards compromise in the various areas of the law of the sea might quickly fall apart. However, as can be seen in the negotiations for reaching a consensus on settlement of disputes, it was a necessary procedure to define the exceptions from compulsory settlement. Particularly since they all touch on sensitive political issues. [202] These exceptions can be divided into automatic exceptions and optional exceptions.

aa) Automatic exceptions

The exercise by coastal states of their sovereign rights or jurisdiction in the maritime zone alongside its coast is excluded from compulsory settlement,[203] as are disputes concerning the management and exploitation of resources in these zones. Nevertheless, the option is given of controlling coastal states' behaviour through international jurisdiction if one of the following three cases of Art.297 para 1 (a)-(c) is given:

(1) if it is obvious that a coastal state has acted against the provisions of the Convention concerning the freedoms and rights of navigation, overflight or the laying of submarine cables or pipelines or other internationally lawful uses of the sea specified in Art.58;[204]

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[201] Ecuador, Peru in 28 UN GAOR, Supp.(No21) Vol.III at 30 and 82; U.N.Doc./A.9021 (1973); Off.Rec. Vol.V p.18 (India)

[202] Jaenicke "Dispute Settlement under the Convention on the Law of the Sea" *in 43 ZaoeRV* (1983) p.820

[203] Art. 2

[204] Art.297 para 1 (a)

(2) if a state, while exercising the above mentioned freedoms, rights and uses, acts against the Convention or against laws or regulations adopted by the coastal state in conformity with the Convention or other rules of international law which are not incompatible with the convention;[205]

(3) if a coastal state acts against specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal state and which have been established by the Convention or through a competent international organisation or diplomatic conference in accordance with the Convention.[206]

The main question, though, concerning the interpretation of Art.297 para 1, is whether the three above mentioned groups only refer to issues happening in the EEZ. A positive reason for such a narrow interpretation could be that Art.297 para 1 (a) refers explicitly to Art.58 which deals with the rights and duties of other states in the EEZ. Against such a narrow interpretation it could be said that Art.297 para 1 in general refers to the fact that the exercise of the sovereign rights and competence of the coastal state "provided for in this Convention" and not the formula "provided for in Part V" was chosen.[207] Furthermore the rights and freedoms specified in Art.58 are mentioned in Art.297 para 1 (a) but without stating "as provided for in Art.58". This shows that only rights and freedoms written in Art.58 fall under the compulsory system and so a spatial border to the EEZ is not intended. Art. 297 para 1 deals with the disputes concerning the sovereign rights or jurisdiction of a "coastal state". The coastal state is defined as a state adjoining the sea in connection with the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf and enclosed or semi-enclosed seas.[208] This term is not used in the rules about straits used in international navigation (Art. 34-45) or about archipelagic states (Art. 46-54). Therefore the term "archipelagic states" or "states bordering the straits" are used. This different

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[205] Art.297 para 1 (b)
[206] Art.297 para 1 (c)
[207] Platzoeder R. *Der Internationale Gerichtshof* (1985) p.27
[208] ibid.

use of words is intended to stress that those states that are archipelagic or that border straits have another sovereignty or jurisdiction as a result of the different conditions of their area, which mostly consists of a group of islands and the water between them, functioning as a unity of land, water and people. The use of only the term "coastal state" in Art. 297 para 1 does not imply a narrow interpretation of the compulsory settlement. The different use of terms is only a result of the above mentioned reason and it is not clearly foreseeable that disputes concerning archipelagic states or states bordering the straits, if the facts of Art. 297 para 1 (a)-(c) are given, should be exempted from these regulations.[209] A narrow interpretation of the compulsory settlement cannot be explained by using different designations and therefore, if the facts are given in Art. 297 para 1 (a)-(c), disputes concerning straits and archipelagic states could be dealt with by the Tribunal. It follows from this, that the rights of third party states concerning the transit passage and the overflight of the straits (Art.37- 44) and archipelagic sea lanes passages (Art.53 and 54) can be inspected by the Tribunal in the compulsory settlement system. This rule is not transferable to innocent passage through the territorial sea (Art. 17- 32), international straits (Art.45) or archipelagic waters (Art.52), however, because the right of innocent passage is not comparable with the rights and freedoms of Art.58. The Convention defines the transit passage as "freedom of navigation and overflight" (Art.38 para 2) and the archipelagic sea lanes passage as "rights of navigation and overflight" (Art.53 para 3). The regime of innocent passage is not based on a "right of navigation", but limited to a "right of innocent passage" (Art.17,18,45 and Art.52). The coastal state of an international strait or an archipelagic state can submit the question if a state while practising its freedoms or rights, has broken the coastal or adjoining states' to international straits or archipelagic States' laws or regulations or other international law. With regard to disputes over the interpretation and application of the Convention concerning the practising of sovereign rights and jurisdiction of the coastal state, which do not refer to one of the three groups of Art.297 para 1

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[209] ibid.

(a)-(c), only the general rules of the settlement of Art.279-285 are applicable, if the parties of the dispute do not agree on another system of settlement (Art.299 para 1). A further exception to compulsory settlement is that of a coastal state acting in accordance with article 246 or article 253 of the Convention with regard to marine scientific research.[210] If it is alleged that the coastal state does not act in accordance with the Convention, then the other state has the option of requesting a conciliation under Annex V section 2 of the Convention.[211]

Article 294 of the Convention, which says that unfounded claims will not be treated, was established to keep down costs.

bb) Optional exceptions

The optional exceptions are described in Article 298 of the Convention. According to this, a State Party is entitled to exclude in written form the procedures provided for in section 2, when one of the following categories of dispute is affected:

(1) Disputes concerning the interpretation or the application of articles 15, 74 and 83 where certain delimitations between states with opposite or adjacent coasts are regulated.[212]

(2) Disputes concerning military activities and law enforcement activities of a coastal state in regard to the exercise of sovereign rights in the EEZ and the continental shelf [213]

(3) Disputes which are generally settled by the Security Council of the United Nations, if it does not either decide to remove the case from its agenda or request the parties of the dispute to settle it by the means provided for in this Convention.[214]

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[210] Art. 297 para 2. (a)
[211] Art. 297 para 2 (b)
[212] Art.298 para 1 (a)

cc) Other exceptions

Art. 298 para 3 prohibits any state which makes a declaration under Art.298 para 1 to submit any dispute falling within the excepted category of disputes to any procedure in the Convention as against another State Party, without the consent of that party.[215] A State Party may withdraw such a declaration at any time[216] or may agree to submit a dispute which was excepted by making a declaration to the procedures of the Convention.[217]

b) The comprehensive versus the functional system of dispute settlement

There was no agreement about the system of dispute settlement . Two different opinions emerged as well as a variety of differently pronounced opinions.

The functional system was supported by most of the eastern states.[218] The nature of the special procedure should be determined by the nature of the dispute and this should be clearly written in the convention. One delegation made the proposal of settling some disputes with the help of functional procedures. This should apply to disputes arising from highly technical issues such as matters concerning fisheries, pollution or scientific research and they would be dealt with only by one body if the parties do not agree otherwise.[219] If these disputes were dealt with through the comprehensive system, the problem was foreseen that only lawyers would decide about it. A better solution would be to select experts primarily from a proposed list of technically competent agencies (e.g. the Inter-Governmental Maritime Consultative Organisation for disputes concerning

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[213] Art.298 para 1 (b)
[214] Art.298 para 1 (c)
[215] Art.298 para 3
[216] Art.298 para 2
[217] Art.299 para 2
[218] *Off.Rec.* VoL.V p.29 (Bulgaria); p.32 (Poland)
[219] ibid. p.11 (New Zealand)

navigation, or the Food and Agriculture Organisation for disputes concerning fisheries).[220] Some delegates preferred that distinctions should not be made between technical questions concerning the convention and questions about the interpretation of the convention, because in most of the disputes such distinctions would be difficult to distinguish.[221] Furthermore, there should be no chance of appeal where a case of the special system was concerned, because this would lead to unnecessary complications of the settlement of disputes.[222]

The comprehensive or general approach was proposed in the Working Group's document and in the President's Text.[223] The only point on which those delegates favouring the general system reached an agreement was the concern over the uniformity of the jurisprudence.[224] Some delegations did not want to allow any exceptions to the comprehensive system.[225]

A more moderate opinion favoured the comprehensive system, but held that certain issues should be dealt with in special procedures, the nature of which should be clearly outlined by the convention.[226] A flexible combination of general and functional procedures should be worked out. The United States stressed that special exceptions to the general system were entirely compatible with the comprehensive system, when clearly defined in order to avoid other points of discussion which could arise together with the uncertainty as to which procedure is applicable.[227] Only a limited number of these exceptions should exist otherwise they could weaken the system of dispute settlement.[228]

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[220] ibid. p.20 (German Democratic Republic); p.29 (Bulgaria); p.38 (Trinidad and Tobago)
[221] ibid. p.32. (Poland)
[222] Ibid.
[223] U.N.Doc.A/CONF.62/L.7
[224] *Off.Rec.* Vol.V p.19 (Chile); p.22 (Colombia) and p.23 (Spain)
[225] ibid. p.18 (Argentinia); p.36 (Bahrain)
[226] ibid.p.27 (Japan)
[227] ibid. p.32 (United States of America)
[228] ibid. p.11 (New Zealand)

c) Mode of settlement

A particularly hotly contested part of the settlement of disputes revolved around which institution should be responsible for disputes arising from the law of the sea. From the beginning of the conference, the possibility of a new tribunal specially competent to deal with matters concerning the law of the sea was considered by the delegates. In the end the institution of the ICJ as well as arbitrational forums received great favour.

aa) General court

Some of the delegates stressed the idea of giving the main task of the settlement of dispute forums to the ICJ. The reason given for this was that the ICJ had produced several important judgements on disputes relating to the sea.[229] Therefore, the ICJ seemed able to deal with matters concerning the law of the sea in a satisfactory way.[230] Creating a plurality of jurisprudence because of the multilateral interpretation and application of the convention was to be avoided. The Establishment of a new tribunal was considered by some delegations of the Conference as an undesirable and wasteful duplication of the functions of the ICJ.[231] The ICJ is not so overworked that it cannot handle matters concerning the law of the sea.[232]

The opinions favouring a general court could be divided in two differently expressed views of the settlement of dispute with the ICJ as main court.

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[229] e.g. Corfu Channel (U.K./ Albania), 1949 ICJ Reports 4; Fisheries (U.K./ Norway), 1951 ibid. 116; North Sea Continental Shelf (F.R.G./ Denmark; F.R.G./ Netherlands) 1969 ibid. 3

[230] Nordquist and Shabtai R. (eds.) *United Nations Convention on the Law of the Sea 1982, A Commentary* (1983) Vol.V p.41; Off. Rec.V p.27 (Japan)

[231] *Off. Rec.* Vol.V p.40 (Israel)

(1) only the ICJ with special chambers

The delegates who were in favour of dealing with sea-bed matters in a special chamber of the court, brought forward the argument that, in establishing two courts, one for sea-bed matters and the other for general questions arising from the convention, several problems would be created. The courts could fail to reach different decisions.[233]

The strongest criticism against the establishment of another special tribunal for the law of the sea came from the president of the ICJ, after the Convention was ready to be signed. He stated that the institution of another tribunal for the law of the sea in addition to the ICJ, would separate the law of the sea from the main body of public international law within which the law of the sea hitherto (and in the future) was entwined. The role of the ICJ as the primary judicial organ of the United Nations would be diminished, because the law of the sea was in former times a very meaningful part of disputes settled by the ICJ. He proposed that instead of a new tribunal, only those disputes concerning the law of the sea which involve highly technical or nonjudicial matters should be submitted to special law of the sea dispute settlement forums, and that all other disputes concerning the law of the sea should be resolved by the ICJ.[234]

The creation of two separate chambers in the ICJ would stress the importance of sea-bed matters, but it would also lead to a harmonisation of decisions because these decisions would be made by the same court.[235]

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[232] ibid. p.32 (Poland).
[233] ibid. p.19 (Denmark); p.24 (Italy): Sohn (1972) p.258
[234] Oda S. "Dispute Settlement Prospects in the Law of the Sea" in: 44 *ICLQ* (1995) p.867
[235] *Off.Rec.* Vol.V p.38 (Tunisia), p.49 (Arab)

(2) the ICJ and a special tribunal for the sea-bed area

Most of the special problems would deal with the subject of deep seabed mining. Thus it would be totally sufficient to create a tribunal only for this area, where the jurisdiction, powers and functions are clearly defined by the convention.[236] The disputes arising from this special area need special treatment, because of the variety of persons who have to deal with deep seabed mining. Not only should states have the option of suing before a court but so too should natural or juridical persons, as well as intergovernmental organisations.[237] Furthermore, the court would deal with questions of a highly technical as well as commercial nature, so that it would be an advantage to have a special tribunal which could build up its own jurisprudence and therefore handle the disputes expediently and swiftly.[238]

The jurisdiction should be limited to three categories of disputes, firstly those concerning the exploration and exploitation of the area, secondly those concerning the interpretation and application of the Authorities' rules, and thirdly those concerning the legality of the measures taken by the members of the Authority.[239]

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[236] ibid..p.6 (Sweden) ; p.59 (Nigeria)
[237] ibid. p.17 (Sri Lanka)
[238] ibid. p.39 (Trinidad and Tobago)
[239] ibid.

bb) Special tribunal

The establishment of a special tribunal for the law of the sea was first proposed by the United States of America and Belgium.[240] It was first included in the Informal Single Negotiating Text presented by the chairman of the First Committee[241] in article 24, paragraph 1. It states that the tribunal should be the principle organ for the settlement of disputes. It was first named the Law of the Sea Tribunal, but later given the title " International Tribunal for the Law of the Sea" by the President of the Conference, because "the former title was pedestrian and did not adequately describe the international status and the dignity of the tribunal to be established under this convention".[242]

Some states preferred the establishment of the new Law of the Sea Tribunal, because a special tribunal would have the necessary technical and practical knowledge, disputes would be settled expediently and the convention would be interpreted uniformly. Also the judges which would be elected to the new tribunal would probably be more closely involved in the existing law of the sea than the judges of the ICJ, because they would probably have taken part in the former negotiations. [243] Furthermore, the new tribunal would lead to greater justice as a result of an equitable geographical distribution.[244] Most of the developing states were of the opinion that the existing institutions and the ICJ in particular are products of their former colonial settlers.[245] They lost confidence in the jurisdiction of the ICJ because they did not agree with some of its decisions (e.g. South West Africa case ICJ Rep.1966,6 and Northern Cameroons case ICJ Rep.1963,12). In the

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[240] *Off. Rec.* Vol. III pp.169,173
[241] A/CONF.62/WP.8/part I in: Off.Rec. Vol. IV
[242] *Off. Rec.* Vol.XIV President pp.130,132
[243] Peru 61st meeting at 38.
[244] Surinam 63rd meeting at 4., Group of 77 at
[245] *Off. Rec.* V p.39 (Ecuador); p.37 (Zaire); p.44 (Surinam); p.47 (Ireland)
[245] 29 August, 1977 Doc.A/CONF.62/58 in: Off. Rec.Vol.VII p.51

Tribunal they would have more importance because of more seats and the equitable geographical distribution.[246] It were not only the developing states that showed an antipathy towards the ICJ being the main forum for settling disputes concerning the law of the sea, though. Some developed states had changed their attitudes towards the ICJ (e.g. Jurisdiction and Admissibility 1984, ICJ Rep.392 (Nov.26); United States: Statement on the United States Withdrawal from the Proceedings, Initiated by Nicaragua in the ICJ (Jan.18,1985)).[247] Another problem would also arise if the only forum of dispute settlement was the ICJ. In the exploitation and exploration of the ocean floor, not only would states be involved but so too would investing companies and natural or juridical persons. If a dispute arose in this area, there would be no chance for entities other than states to sue before the ICJ, because only states have access to it. Thus, it would be better to create a new tribunal with the possibility of access for such persons.[248]

In opposition to the criticism of the president of the ICJ, it could be said that the international trend is not a static one but one which should be adapted to the circumstances. The modern trend is a belief in not only one forum for the settlement of disputes but in several such forums, the reason being that a multiplicity of different states deal with matters relating to the law of the sea. These all want the chance to choose their favoured forum or system of dispute settlement (as can be seen by the statements of the developing states quoted above).[249] The other point of criticism that the ICJ would loose its status as the main forum of dispute settlement of the United Nations can be refuted with the argument that the Tribunal is not an organ of the United Nations but an independent organ for dispute settlement between the parties of the Convention. The ICJ will also be the main organ

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[246] Guillaume G. "The Future of International Judicial Institutions" in: 44 *ICLQ* (19 95) p.854

[247] Charney , J. "The Implications of Expanding International Dispute Settlement Systems:The 1982 Convention on the Law of the Sea" in: 90 *AJIL* (1996) p.71
Lagoni R. *Ewartungen an den neuen Seegerichtshof in Hamburg im Rahmen des Seerechtsuebereinkommens der Vereinten Nationen* (1995)

[248] *Off. Rec.* Vol.V p.38 (Tunisia)

[249] Charney *op.cit.* 90 AJIL p.69

of the United Nations to settle disputes in future as contained in Article 92 of the United Nations Charter.[250] Furthermore, the establishment of a new tribunal could encourage negotiating states to accept the system of compulsory settlement, which as described above would be an important achievement.

cc) Arbitration

Some of the delegates supported the traditional *ad hoc* arbiting tribunals as they were the only form they would trust and would be exposed to the third party settlement.[251] They expressed the fear that standing tribunals would be too rigid, because parties would not be able to choose the judges and would have to accept procedures which might be ponderous and slow. This could jeopardise the relationship between the disputing parties, a phenomenon which often results from protracted disputes.[252]The system of settling disputes by arbitral institutions can be considered the most flexible of the three methods, as it allows the parties to the dispute to design the membership of the arbiting Tribunal according to their particular needs.[253] The delegations, however, also foresaw the problem that the *ad hoc* system alone was not suitable for cases which were urgent and needed to be dealt with immediately, such as the protection and accelerated release of detained vessels, because the *ad hoc* tribunal has first to be established by the disputing parties.[254]

dd) The Final Solution

No consensus could be reached for or against either of the institutions. At a session in Montreux in 1976, however, a Professor Riphagen made the proposal that each party to a dispute should have

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[250] Lagoni *op.cit.* p.152
[251] *Off. Rec.* Vol.V p.27 (Japan); p.29 (Bulgaria); p.20 (GDR)
[252] ibid.p.14 (France); p.34 (Madagascar)
[253] Sohn L.B. "A Tribunal for the Sea-Bed or the Oceans" in: 32 *ZaoeRV* (1972) p. 258

the option of choosing one of the institutions. If one of the parties did not choose any institution, then the other party's choice would prevail.[255] This possibility of choosing one of the institutions was mentioned both in the Montreux Formula and in Article 9 of the text prepared by the Informal Dispute Settlement Group.[256] This proposal gained a great deal of consent and, by the end of the negotiations, it was decided (and included in the final text of the Convention) that when the parties sign, accede or ratify the Convention, they would be allowed to choose between the three different systems of dispute settlement which were, the International Tribunal for the Law of the Sea,[257] the International Court of Justice[258] and the system of arbitration.[259] Furthermore, the parties have the option of choosing the institution of special arbitration[260] for special subjects (e.g. fisheries, marine environment, navigation and marine scientific research).[261] This concept was chosen because it was the most acceptable to the majority of states and had strong advantages.[262] It also conformed to

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[254] Adede *op.cit.* (1977) p.258

[255] *Off. Rec.* Vol.V p.22 (Riphagen)

[256] SD/GP/2nd Session/No.1/Rev.5

[257] Art. 2 of Statute

[258] Annex VII

[259] Annex VII

For the possibility of the arbitral tribunals a list of experts shall be constituted from which the parties may choose the arbitrators. To constitute this list each State Party shall nominate four arbitrators.(Art. 2 para 1 of Annex VIII) Normally such an arbitral tribunal consists of five members, from whom each party may choose one of their own choice and agree together on the remaining three persons, which must be nationals of third states unless the parties otherwise agreed.(Art. 3 (b)-(d) of Annex VII). But it is no duty to choose the arbitrators from the list it is only provided that they should be "chosen preferable from the list" (Art. 3 of Annex VII).The majority of the votes make the decisions (Art. 8 of Annex VII) and the decision is final if the parties have not agreed to an appelate procedure (Art. 11 of Annex VII)

[260] Annex VIII

[261] Annex VIII

For the special arbitration there are four lists of experts from which the specila arbitral tribunals may be constituted to hear particular cases (Art. 2 (1) of Annex VIII). Each State Party may nominate two experts in each od the fields concerned and these nominated persons will constitude the list.(Art. 2 (3) of Annex VIII). The lists are to be established and maintained by specified and international institutions as

1) on fishing by the FAO

2) on protection and preservation of the marine environment by the UNEP

3) on marine scientific research by the IOC

4) on navigation, including pollution from vessels and by dumping, by the IMO (Art. 2 para 2 of Annex VIII)

Normally a five member tribunal is appointed. The parties may choose each two members and have to agree about the fifth member who will act as President. The parties shall choose the members preferably from the list. The special arbitral tribunals also have a fact finding role. The parties may agree at any time to request a tribunal "to carry out an inquiry and establish the facts giving rise to the dispute" (Art. 5 para 1 of Annex VIII). They further can ask the tribunal to formulate non-binding recommendations which "shall constitute the basis for a review by the parties of the questions giving rise to the dispute." (Art. 5 para 3 of Annex VIII)

[262] Off.Rec.Vol.V p.12 (Germany)

normal practice in international law, where (in most disputes) one can choose the institution and where there is no chance to manipulate any controversial situation because it is not known which institution will be chosen.[263] If the parties to a dispute choose the same forum, then this forum has jurisdiction over the dispute.[264] If the parties choose different fora to settle the dispute, an earlier proposal provides that the choice of the defendant should be decisive because this would prevent a state being dragged before a court or tribunal which it does not consider acceptable.[265] Against this proposal it was argued that there is a danger that the defendant seems to be in a favourable position and it could therefore happen that everybody concerned tries to achieve the aim of getting the other party to claim to be the defendant.[266] In such cases, therefore the system of arbitration will be set to work.[267]The dispute will also be settled by arbitration in the event of one of the parties not choosing.[268] Therefore a preference of arbitration is in the disputes settlement system is given. The compulsory binding settlement will not come into play until other efforts at negotiation, conciliation or other chosen systems have failed. All decisions which are made by the chosen forum or by other systems of the Convention are compulsory and therefore binding for the parties concerned.[269]

3.1.2. Seat of the Tribunal

Art.1 para 2 of Annex VI provides that "the seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany."

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[263] ibid. p.15 (United Kingdom)
[264] Art.287 para 4
[265] Art. 9 para 7 of Part IV of the Informal Single Negotiation Text (6 May 1976). UN Doc.A/CONF.62/WP.9/Rev1 (Off.Rec. V p. 185)
[266] Jaenicke *op.cit.* p. 823
[267] Annex VI, Sec. 2 Art.287 para 5
[268] Ibid. Art. 287 para 3
[269] Art. 296

During the negotiations of the Conference, four states made offers to serve as host country for the seat of the Tribunal. The first offer came from the Socialist Federal Republic of Yugoslavia, which cited as reasons in its favour its convenient geographic location between Eastern and Western Europe and along the Adriatic Sea.[270] Furthermore, it stressed as did the other three states, its long tradition as a sea-faring country and its active participation in the Convention.[271] Another offer was made by Portugal, which offered facilities for the seat of any one of the later institutions but especially the Tribunal. It stressed among other reasons, its friendly collaboration with the peoples of all continents and that its history and culture have been continued to be strongly affected by the sea.[272] The other offers came from Bermuda and from Germany.[273] Bermuda's offer was withdrawn, after Germany offered Hamburg as host city for the Tribunal as Bermuda never really wanted to provide the host city for the Tribunal but simply intended for tactical reasons, to gain influence upon the choice of seat.[274] Germany's intention to apply was mentioned for the first time on the 25 August 1980 by ambassador Herbert Dreher in the following words:

" My delegation wished to submit the candidature of the city of Hamburg as the seat of the Law of the Sea Tribunal."[275]

After multiple consultations with other delegations and the Secretariat of the United Nations, which resulted in Germany having a good chance of success, the German offer was repeated in a written statement by the German delegation.[276] Hamburg furthermore made and distributed a

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[270] 29 August, 1977 Doc.A/CONF.62/58 in: Off. Rec. Vol.VII p.51
[271] ibid.
[272] ibid. 8 July, 1977
[273] UN Doc. A/CONF.62/114, 25 August 1981, Off. Rec. Vol.XV p.100
[274] Daven A. and Jenisch U. "Hamburg als Sitz des Internationalen Seegerichtshofs" in: 37 *Europa-Archiv* no.13 p.416
[275] UN Doc. A/CONF.62/L.78, 28 August 1981; UN Doc. A/CONF.62/114, 25 August 1981, *Off. Rec.* Vol.XV p.100
[276] Statement by the Delegation of the Federal Republic of Germany, UN Doc.A/CONF.62/WS/16, 10 March 1981, *Off. Rec.* Vol.XIV p. 157

pamphlet containing the reasons why it would be a good choice. These reasons included Germany's high priority to participate in the work of the UN and its constant recommendation of the most comprehensive range of instruments possible for the peaceful settlement of disputes, especially through international tribunals. A further reason was that Germany, although deriving little benefit from the Convention as a country belonging to the group of landlocked and geographically disadvantaged states, had always played a constructive role in the Conference. Furthermore, Hamburg is a city of high international standards. This would make it a representative seat for the institution, offering all facilities to guarantee the effective and successful functioning of the Tribunal. Other positive reasons included its long tradition of arbitral jurisdiction, the excellent reputation of its courts in commercial matters as a result of their experience and its regular choice by contracting parties as a place of settlement. As a result of these different offers a decision could only be reached by election. After consultations between the President and the six offering states (not only the States offering a seat for the Tribunal but also those offering a seat for the International Sea-bed Authority[277]), it was decided that secret ballots should be held under rule of 46 and 47 of the Third United Nations Conference on the Law of the Sea's Rules of Procedure.[278]

Rule 47 stipulates that the majority of the representatives and voting states decide the issue but if a majority is not achieved in the first ballot then another ballot will be held containing only those two

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[277] The states were Fiji, Jamaica and Malta

[278] Third United Nations Conference on the Law of the Sea, Rules of Procedure, UN Doc. A/CONF.62/30/Rev.3, 6 March 1980

Rule 46

All elections shall be held by secret ballot unless otherwise decided by the Conference.

Rule 47

1. If, when one person or delegation is to be elected, no candidate obtains in the first ballot the votes of a majority of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest number of votes shall be taken.

If in the second ballot the votes are equally divided, the President shall decide between the candidates by drawing lots.

2. In the case of a tie in the first ballot among more than two candidates obtaining the largest number of votes, a second ballot shall be held. If on that ballot atie remains among more than two candidates, the number shall be reduced to two by lot and the balloting, restricted to them, shall continue in accordance with the preceding paragraph.

candidates who obtain the highest number of votes. The winner is the candidate who obtains most of the votes in the second ballot.

On 21 August 1981 it was decided that the Free and Hanseatic City of Hamburg would be the host city for the International Tribunal for the Law of the Sea.[279] In the first ballot, the Federal Republic of Germany obtained 67 votes, Yugoslavia 59 and Portugal 15 votes.[280] Germany thus did not achieve the necessarily majority. In the second ballot the majority was for Germany with 78 votes against 71 votes for Yugoslavia.[281] The decision was made with the expectation that Germany would become a party to the Convention as soon as it came into force. It was a further condition (stated by the President with the agreement of the Conference in an informal meeting) that the Assembly of the Authority would be able to select another seat if it did not become a party.[282] This condition was in accordance with the general practice. All states that host international institutions are generally members. The necessity for the State which is to be the seat of the Tribunal to be a party was originally contained in a single sentence in a Conference document:

" It should be noted that the decisions on the sites of the Authority and the Tribunal were taken by the informal plenary subject to the requirement that the State specified should have ratified the convention by the time of its entry into force and should remain Parties thereafter."[283]

The decision on the site was contained in Art. 1 para 2 of Annex VI of the Draft Convention.

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[279] UN Press Release SEA/145, 21 August 1981

[280] Press Release SEA/145 in: Platzoeder R. *Third United Nations Conference on the Law of the Sea: Documents* (1988) p. 599

[281] ibid.

[282] ibid.

[283] Introductory note August 28 1981

Owing to economic concerns about deep sea-bed regulation, Germany allowed the two-year signature period to elapse so that only its accession was possible. This led to criticism in the international press which questioned whether Germany be host if it would not sign.[284]Sharp criticism also came from the Group of 77, which wanted a clear commitment towards the Convention by Germany:

"It is not possible to claim the headquarters of an organ established in connection with the Law of the Sea Convention and at the same time to conduct activities contrary to it."[285]

The German delegation, however, was of the opinion that the decision on the site of the Tribunal was not linked to the signing of the Convention . It was only dependent on ratification on entry into force. Germany still had the option to accede to the Convention at any time.[286] These differences ended abruptly with Germany signing the implementation Agreement in New York on 29 July 1994. After this, its accession to the Convention was unhindered. It accordingly deposited its instrument of accession with the Secretary-General of the United Nations. The last hurdle for the establishment of the Tribunal was thus overcome. After hearing the decision of the Conference, that Hamburg would be the seat of the Tribunal, the City organised a number of meetings in which experts and other interested persons took part to deal with questions pertaining to the establishment of the Tribunal.[287] A new building for the Tribunal is currently being built and should be ready in 1999. At the laying of the cornerstone, the Secretary-General of the United Nations, Boutros Boutros-Ghali stressed the significance of this new institution by saying that the building is "more than bricks and mortar. It is a foundation-stone for the continuing construction of an edifice of

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[284] *Financial Times*, 28 November 1984; ***Le Monde***, 29 November 1984
[285] UN Doc.A/39/PV.99, 21 December 1984
[286] ibid.
[287] Chitty G. "Opening Statement" in: 11 *International Marine and Coastal Law* (1996) p. 144

international law that the world of the future simply cannot do without."[288] Until completed another building will serve as a substitute for it.

3.2. Organisation

The Tribunal consists of 21 independent judges who are competent in the law of the sea and have the reputation of being fair and impartial.[289] The number of members was increased from the proposed 15 [290] by the RSNT Part IV because of the need to ensure the smooth working of the Tribunal in different matters (e.g. ad hoc chambers, Sea-Bed Disputes chamber) and also to secure the appropriate geographical distribution of its members.

Five geographical groups are represented at the tribunal in order to represent the principle legal systems of the world. These five geographical groups are the African Group (with 10 members), the Asian Group (with 9 members), the Latin American and Caribbean Group (with 6 members), the Eastern European Group (with 3 members) and the Western European and other States Group (with 7 members).

At least three judges from each nation shall be engaged at the Tribunal in order to guarantee that the Tribunal will be "truly international and its decisions will reflect its composition".[291] The nomination of the judges began in May 1996, when the states could make their proposals, and continued until June 1996. The nomination of each state was not to go beyond two proposals and the candidates should have the qualities described above.[292] A state which is in the process of

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[288] *Hamburger Abendblatt*, 19 October 1996
[289] Annex VI Sec. 1 Art.2 Doc.A/CONF.62/WP.8; ISNT Annex I c, Art.2 para 1
[290] Doc.A/CONF.62/WP.8; ISNT Annex I c, Art.2 para 1
[291] Annex VI Sec. 1 Art.3
[292] ibid. Art.4

becoming a party to the Convention might also nominate members, but their nominations would only be provisional, until the state accessed or ratified the Convention before 1 July 1996.[293] In order to fulfil the aim of equal geographical distribution, the election of the judges was rearranged because at that time many industrialised states had not yet signed the Convention and thus the principle of equal geographical distribution could not be fulfilled among to a majority of developing states.[294] The only developed states involved were Germany and Australia, which was not sufficient for an equal distribution.[295] In Article 4 of the Statute of the Convention it was stated that the election would begin six months after the Convention was in force. The participants in the Convention reached a consensus that the election should start on 1 August 1996 because this would give the industrialised states the chance to sign the Convention and become parties to it.[296] In May 1995 the States' Parties organised a meeting to complete the rules of procedure and to discuss financial questions concerning the Tribunal. In the end, it was ruled that the remuneration would consist of three elements:

1. an annual allowance;
2. a special allowance for each day that the judge is engaged in the business of the Tribunal; and
3. a subsistence allowance for each day the member attends meetings at the seat of the Tribunal or elsewhere.[297]

The President receives an annual as well as a special annual allowance and the Vice-President is paid an annual and a special allowance for each day he is working as a representative of the

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[293] Report of the Meeting of States Parties, prepared by the Secretariat, UN Doc.SPLOS/3 (1995)
[294] Lagoni R. "Erwartungen an den neuen Seegerichtshof in Hamburg im Rahmen des Seerechtsuebereinkommens der Vereinten Nationen" p.5
[295] ibid.
[296] Leutheusser-Schnarrenberger S."The Establishment of the Tribunal" in: 11 *International Journal of Marine and Coastal Law* (1996) p.140
[297] Annex VI Sec.1 Art. 18 para 1

President.[298] It is no unjustice that the president receives both allowances, because he as well as the Registrar are obliged to have their residence at the seat of the Tribunal, and therefore in Hamburg[299] and has to be available on a full-time basis. As a clue for the total annual remuneration paid to all members, the practice and level of remuneration of Judges of the ICJ and other international tribunals was considered appropriate and should therefore not exceed $100,000.[300] The members of the Tribunal will also receive retirement benefits, which is based on the practice of the United Nations for its staff. It should be the full amount of the annual allowance and 50 per cent of the maximum special daily allowance.[301] The members ad hoc and the experts will not receive an annual allowance but a special allowance for every working day.[302] The members elected for working at the Tribunal have not to give up their former activities or employment if these are not certain specified activities and unless they are actively engaged in the business of the Tribunal.[303] As certain specified activities the members of the Tribunal are not allowed to exercise any political or administrative function. Furthermore, they are not allowed to be involved actively or financially in any operation or enterprise which is concerned with the exploration or exploitation of the resources of the sea or the sea-bed or other commercial use of the sea or sea-bed,[304] and the participation of any member in special cases is not allowed if he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or tribunal, or in any other capacity.[305]

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[298] ibid.
[299] ibid.
[300] Based on 1990 costs and levels of remuneration
[301] para 63 of LOS/PCN/SCN.4/WP.16/Add.6 (15October 1993)
[302] Art. 17 of Part VI for members ad hoc, ibid. Art. 18 para 4 for experts
[303] para 83 of LOS/PCN/SCN.4/WP.16/Add.6
[304] Annex VI Sec.1 Art.7
[305] ibid. Art.8

The ceremonial meeting and the swearing-in by the Secretary-General of the United Nations, Boutros-Ghali, took place on 18 October 1996 in Hamburg.[306] From the day of the swearing-in, the judges began their work to create a functional tribunal able to settle disputes. Seven of the members elected for the first time will have to stop their work at the Tribunal after a period of three years, and a further seven members will have to stop after six years but may be re-elected.[307] The general period of office of the members of the Tribunal is nine years. The first organisational session of the judges began in October 1996. The members of the Tribunal elected Thomas Mensah of Ghana to be President and Ruediger Wolfrum of Germany as Vice-President for a period of three years.[308] They have also to appoint a Registrar and as many other officers of the Registry as may be necessary.[309]

3.3. Competence : development and existing regulations

It was ruled in Article 13 No.4 of the President's Text that states, intergovernmental organisations and natural or juridical persons should have the right of access to the Tribunal.[310] This extended access to the Tribunal was the direct result of the president's giving definite prominence to the Tribunal in his text. In general, as regulated in the ICJ, only states have access to international courts or tribunals. However, a major part of the convention deals with sea-bed matters, which are also of great meaning for entities other than states. Therefore, the institutions of settlement are also available for persons other than states. By thus increasing the scope of access, the president tried to achieve widespread favour for this system of settlement. The majority of participants were opposed to this wide scope of access at the tribunal in the case of disputes relating to the interpretation and

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[306] *Frankfurter Allgemeine Zeitung* 19 October 1996
[307] Annex VI Sec.1 Art.5
[308] ibid. Art.12

application of the Convention. In such cases, they argued, it should only be the right of states to sue before the Tribunal. The delegation from the Union of Soviet Socialist Republics therefore stated that:

To allow private companies and various intergovernmental organisations to resort to the dispute settlement procedures would be unwarranted both from the standpoint of substance and from the juridical point of view. An abnormal situation would arise if a private company could start a dispute with States by trying to impose upon them an interpretation of the provisions of the convention which was most favourable to the company. The right of private companies to take a sovereign State to court would violate the principle of sovereignty. Private companies should not be given direct access to the dispute settlement procedures. If the state whose nationality the private company possesses were not involved in the dispute, no international dispute should arise under the terms of the convention. With respect to international organisations, the Charter of the United Nations did not authorise the United Nations to participate in disputes with States in matters relating to the interpretation and the application of any convention, and it was therefore unreasonable to include in the convention a general rule of law granting such a right to other international organisations.[311]

As a result of the great antipathy to the right of access to entities other than states, it was decided by the Convention that in general only states should have the right to sue before the Tribunal, but that, in some categories of dispute, intergovernmental organisations (e.g. the EU in Art. 7 of Annex IX) as well as natural or juridical persons should also have the right of access to the Tribunal. To cope with these different persons taking part in disputes, it seemed useful to develop two separate

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[309] ibid.

[310] Doc.A/CONF.62/WP.9 in:*Off. Rec.* Vol.V p.114

dispute settlement systems: one system appertaining to matters concerning the seabed area, and another system concerning other parts of the convention.

The question of access to the Tribunal is described in Article 20 of the Convention (and in Article 291 paragraph 2). The right of access to entities other than member states is only admitted in connection to part XI of the Convention. Since the draft Text of the Convention was drafted in 1977, the right to sue at the Tribunal has generally been limited to member states. In former negotiations, a proposal existed for a limited time to allow natural persons to sue before the Tribunal in cases concerning the prompt release of vessels, but this extraordinary case of access was later abandoned. On the contrary, the proposal to grant access to the Tribunal to entities other than states, in disputes concerning the deep sea-bed, was included in the Convention, in so far as the other party to the dispute is the International Sea-Bed Authority and not another State. The assumptions of right of access are bound to get an approval in cases of mining or direct influence to its legitimate interest.[312] As can be seen in Annex VI, Article 20 of the Convention, other cases of right of access for entities other than states is only possible if this right is dealt with particularly in a special agreement which is accepted by all parties to the dispute. The result is that the jurisdiction of the Tribunal can not only be confirmed by the Convention, but also by other agreements which are related to the purposes of the Convention.[313]

A further case of special competence at the Tribunal, described in Article 292 of the Convention, is the prompt release of vessels and crews. As a consequence of the remarks under Article 292, paragraph 2 of the Convention, the application for release may be made only by or on behalf of the state to which the vessel belongs.

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[311] ibid. p.11 (Soviet Union)
[312] Art. 187 (c) ii)

All of these procedures are compulsory and the results are binding to the parties concerned.[314]

3.3.1 Disputes between the Sea-bed Authority and other parties (sea-bed matters)

The Tribunal can act as a body of appeal for jurisdiction in problems relating to the utilisation and exploitation of the deep sea-bed. A new institution named the International Sea-Bed Dispute Chamber has been established as a qualified jurisdictional organ of the Tribunal to deal with all activities taking place on the sea-bed and the ocean-floor and the subsoil thereof, beyond the limits of national jurisdiction (the Area), and has to implement the concept of the common heritage of mankind.[315] The independence of the Sea-Bed Disputes Chamber is ensured by the method of electing members from among the Tribunal judges. They are elected by other members of the Tribunal, and thus the States Parties have no influence on the election of judges, and therefore political motives will play a minor role in the election.[316] Causes of dispute can be of a varied nature. Article 186 of the Convention lists situations in which the Chamber has jurisdiction over sea-bed disputes. Examples include the differing interpretations or controversial applications of sea-bed mining contracts, or disputes between the ISBA and prospective contractors whose proposed mining contracts the authority refuses to approve. Moreover, a State Party can sue in the Sea-Bed Disputes Chamber for compensation from the ISBA if it does not feel fairly treated in regard to the allocation of mining licences. It is peculiar that, apart from States Parties to the Convention, State enterprises and natural persons may bring proceedings before the Tribunal, if they have been affected by a measure of the ISBA and they are of the nationality of a State Party or

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[313] Art .288 para 2
[314] Art .296
[315] Art. 187
[316] Jenisch U. "Die Seerechtskonferenz vor der 9. Session" *Aussenpolitik* (1980) p.46

under its control.[317] In any case, the Sea-Bed Disputes Chamber will have jurisdiction over all preliminary issues which arise from the scope of the interpretation of the Convention. Thus, if any of the parties involved submit a sea-bed dispute to an arbitral tribunal, the tribunal shall refer the question to the Sea-Bed Disputes Chamber for ruling and the arbitration award must be based on the Chamber's decision.[318]The only exception to the otherwise exclusive jurisdiction of the International Sea-Bed Disputes Chamber relates to disputes of an essentially commercial or technical nature between the ISBA and natural or juridical persons as well as states operating in the Area under a contract with the ISBA. Such disputes will be decided by commercial arbitration under the Rules of the United Nations Commission of International Trade Law (UNCITRAL). [319]

a) UNCITRAL

The United Nations Commission for Trade Law was founded on 17 December 1966.[320] The need for such a centralised body to co-ordinate the work of a plurality of organisations[321] was obvious because international trade was beginning to grow through rapid innovations in transport and communication facilities after a period of economic disintegration between the global economic crisis of the 1930s and World War II .[322] Indeed several states had trade law, but only for their own economic interests and not in the context of international relations. Furthermore, decolonisation also played an important role for the establishment of UNCITRAL because the newly arising independent states made it clear that the developing countries should enjoy adequate conditions

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[317] Art. 187 in connection with Art. 153 para 2 (b)

[318] The reason for the exclusive jurisdiction can be seen in the consideration of the developing states that the exclusive jurisdiction of the Chamber in these issues is indispensable in order to guarantee the consistent interpretation and development of the enduring basic principles of the deep sea-bed regime (Jaenicke in Boeckstiegel, p. 123; A/Conf.62/C.1/L.27 (Part V), 27 March 1980

[319] Art. 188 para 2 (c)

[320] GA res. 2205 (XXI)

[321] e.g. International Maritime Committee (IMC), founded 1896; International Chamber of Commerce (ICC), founded 1920; International Institute for the Unification of Private Law (UNIDROIT), founded 1926 ; only particular areas were dealt with by certain organizations

when taking part in international trade. The function of UNCITRAL was to stop the economic exploitation of developing states by more industrialised states.[323]

UNCITRAL was preceded in 1964 by the United Nations Conference on Trade and Development (UNCTAD) but it was considered necessary to create a special UN organ particularly for that purpose.[324]The task of UNCITRAL is to simplify increasing trade, to ensure the "promotion of the progressive harmonisation and unification of the law of international trade" and, furthermore, to promote the interests of developing countries on their way towards increasing involvement in world trade.[325] UNCITRAL initially had a membership of 29 people, elected by the General Assembly, but later the number of members increased to 36.[326] In 1973 UNCITRAL adopted its own draft articles concerning international arbitration and conciliation[327] and these rules are those to which Art. 188 refers. The reference to the UNCITRAL Arbitration Rules is often seen in international treaties because of their appropriateness for world-wide use. They are prepared with the assistance of arbitration experts from all over the world, and are therefore well-balanced and up to

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[322] Wolfrum *op.cit.* (1995) p.1267

[323] ibid. p.1268

[324] General assembly 19th session, Hungarian delegate based on Art.13 para 1(a) of UN Charter

[325] Wolfrum *op.cit.* (1995) p.1267

[326] GA res. 3108 (XXVIII)

[327] The UNCITRAL Arbitration Rules foundation can be found in a proposal of Ion Nestor who was Special Rapporteur of UNCITRAL. He included the reccommendation that UNCITRAL should consider the drawing up of a model of set of arbitration rules which arbitration centers could incorporate in their own rules of procedure. (Ion Nestor, "Problems concerning the application and interpetation of existing multilateral conventions on international commercial arbitration and related matters", Report by Ion Nestor (Romania), Special Rapporteur (A/CN.9/64 of 1 March 1972 para 180; III Yearbook 247 (pp.190-250)). Most of the member States agreed on this proposal (Report of the Secretary- General: " Summary of comments by members of the Commission on the proposals of the Special Rapporteur on international commercial arbitration" (A/CN.9/79), paras. 20, 63; IV Yearbook 129, 130, 134). In 1973 the Secretary- General then requested:
(a) In consultation with regional economic commissions of the United Ntions and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economics Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;
(b) to submit the draft to the Commission at its eighth session or a report, should his studies and consultations with the above mentioned organizations indicate that the drawing up of such rules is not desirable (UNCITRAL, Report Sixth Session (1973) para 85; IV Yearbook 11, 21

date.[328]Their use is also recommended by the General Assembly in a Resolution.[329] The UNCITRAL Arbitration rules may also be used in purely domestic trade transactions. There is no limitation that only international trade transactions may use these rules. The exclusion of a limitation can be seen in the fact that the interpretation of "international" would be too complicated and could lead to problems.[330] To avoid uncertainty as to whether the parties have agreed to adopt the Arbitration Rules, the agreement must be in written form. Concerning this option, a broad interpretation is derived from the New York Convention of 1958 which states that the "agreement in writing may be contained in an exchange of letters or telegrams".[331]This is further supported by the Geneva Convention of 1961 where it is stated that the agreement may be contained "in an exchange of letters, telegrams or in a communication by teleprinter".[332]

The rules regulate almost the entire arbitral proceedings, although in some cases they are not sufficient and therefore assistance is required. In the following cases, in connection with the appointment of arbitrators, the rules provide for the assistance of a third party known as the Appointing Authority, who will appoint either the second arbitrator or the sole or presiding arbitrator:

1. where the parties are unable to agree upon a sole arbitrator[333]

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[328] Sanders P. "Procedures and Practices under the UNCITRAL Rules" in: 27 *AJCL* (1979) p.453

[329] GA res. 31/98, VIII Yearbook 7.; see also Yearbook: Commercial Arbitration Vol. II (1977), p. xi
1.recommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the UNCITRAL Arbitration Rules in commercial contracts;
2.Requests the Secretary-.General to arrange for the widest possible distribution of the Arbitration rules.

[330] Sanders,p. 454 . As example for a potentially arising problem could be seen the question if a transaction between a subsidiary of an Indian enterprise incorporated in the United Kingdom, and a British firm is an international transaction.

[331] Art. 11 para 2 of the Convention on the Recognition of Enforcement of Foreign Arbitral Awards, signed at New York , 10 June1958, 330 U.N.T.S. 38 (1959); II UN Register of Trade Law Texts 24.

[332] Art. 1 para 2 (a) of the European Convention on International Commercial Arbitration, signed at Geneva, 21 April 1961, 484 U.N.T.S. 364 (1963-1964); II UN Register of Trade Law Texts 34.

[333] Art.6 of the Arbitration Rules

2. where, in the case of an arbitral tribunal, the respondent does not proceed with the appointment of an arbitrator[334]

3. where, after the appointment of the second arbitrator, the two arbitrators cannot agree on the choice of the presiding arbitrator [335]

A similar procedure is provided for challenges to arbitrators. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, then the Appointing Authority has to decide the challenge.[336]Furthermore, the Appointing Authority is allowed to assist in connection with the arbitration tribunal's fixing of fees[337]and with the fixing of deposits for costs or supplementary deposits.[338] The assistance of the Appointing Authority is seen by some people to be of great importance and they are of the opinion that parties to a contract providing for the UNCITRAL Arbitration Rules should designate an Appointing Authority who will act in case of need, because reaching an agreement about such a designation after the dispute has arisen may be difficult.[339] Either an institution as Appointing Authority or a person whom the parties trust may be chosen.[340] With regard to institutions, the choice of existing arbitral institutions seems favourable and most of these institutions have already expressed their willingness to serve as appointing authorities under the UNCITRAL Rules.[341] If the parties to a dispute cannot not reach an agreement about the appropriate authority to be chosen each party may request the Secretary-General of the Permanent Court of Arbitration at the Hague [342]to designate the appropriate

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[334] Art.7 para 2 of the Arbitration Rules; In appointing the second arbitrator the appointing authority is left entirely free, whereas it has to follow in the other cases the list-procedures

[335] Art.7 para 3 of the Arbitration Rules

[336] Art. 12 para 1 of the Arbitral Rules

[337] ibid.Art. 39

[338]ibid. Art. 41

[339] Sanders *op.cit.* p. 456

[340] Art.6 para 1 Arbitration Rules

[341] Sanders *op.cit.* p. 457

[342] The Permanent Court of Arbitration was established by the Convention for the Pacific Settlement of International Disputes which was concluded at the Hague Peace Conference of 1907. The name „Permanent Court" is in fact a misnomer. The Court consists only of a panel of names of persons who are prepared to function as arbitrator. The

authority.[343] The fees and expenses of the Appointing Authority are provided under Art. 38 para 1 (f) of the Arbitration Rules.

The procedure of appointment begins (in section II of the Arbitration Rules) with the number of the Arbitrators to be appointed, which should be three unless the parties have agreed to only one Arbitrator or, at the latest, within 15 days after the receipt by the respondent of the notice of arbitration from the claimant.[344] Normally there would be three Arbitrators in international commercial arbitration because very often the parties to the dispute are from different countries and therefore each of them would appoint one arbitrator of their own nationality.[345] The two appointed arbitrators then choose a third as the presiding arbitrator of the tribunal.[346] If the parties cannot agree on a sole arbitrator, the list-procedure (which is contained in Art. 6 para 3 of the Arbitration Rules) will be set in motion. The list-procedure also applies where three arbitrators are to be appointed and the two arbitrators chosen by the parties cannot agree on the third arbitrator.[347] The list-procedure is as follows:

> (a) at the request of one of the parties, the Appointing Authority shall communicate to both parties an identical list containing at least three names;[348]
>
> (b) within fifteen days after the receipt of this list, each party may return the list to the Appointing Authority, after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;[349]

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only permanent feature of the Court is the Bureau which administers the arbitration and which is located in the Peace Palace, The Hague (where the International Court of Justice is also situated). At present 72 states from all parts of the world have adhered to the Convention.

[343] Art. 6 para 2 Arbitration Rules

[344] Art. 5 Arbitration Rules

[345] Sanders *op.cit.* p. 457

[346] Art. 7 para 1 Arbitration Rules

[347] Art. 7 para 3 Arbitration Rules

[348] Art. 6 para 3 (a)

(c) after the expiration of the above period of time, the Authority shall appoint the sole arbitrator from among the names approved on the lists returned to it, in accordance with the order of preference indicated by the parties;[350]

(d) if for any reason the appointment cannot be made according to this procedure, the Appointing Authority may exercise its discretion in appointing the sole arbitrator.[351]

The procedure, which is developed from the practice of the American Arbitration Association, seems to have several practical advantages. Although the Appointing Authority appoints the arbitrator in this procedure, the parties are indirectly participating in that they have agreed to this through their designations on the initial list. It often happens in fact that the parties have designated the same person, and the parties also have the opportunity to specify objections to certain candidates. This could prevent the parties from making use of the challenge procedures after the appointment. Thus a process free from friction is guaranteed.[352] The arbitrators shall be independent and impartial and the Appointing Authority "shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and the authority shall furthermore consider the advisability of appointing as arbitrator a person from a country other than those of the parties."[353] This does not exclude the possibility of appointing someone who is of the same nationality as one of the parties, but this will probably not occur frequently.[354]The choice of an arbitrator may be challenged if it seems possible that the candidate is not independent or impartial but this is only possible when the grounds for challenge first appear subsequent to the appointment.[355] It is furthermore of interest where the arbitration takes place. The arbitral tribunals

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[349] Art. 6 para 3 (b)
[350] Art. 6 para 3 (c)
[351] Art. 6 para 3 (d)
[352] Sanders *op.cit.* p.458
[353] Art. 6 para 4
[354] Sanders *op.cit.* p. 458
[355] Art. 10 Arbitral Rules

have neither seat nor site, they decide from case to case. Normally this decision is made by the parties by means of an agreement in their arbitration clause or by means of a separate agreement. If they fail to reach an agreement about this, the arbitrators will make the decision with "regard to the circumstances of the arbitration"[356].One aspect that lends importance to the choice of place where arbitration will take place, is that the award "shall be made at the place of arbitration"[357]. Normally the law of the country in which the arbitration takes place is applicable to the procedures. This means that the recognition and enforcement of the award depends on the law of this country. Normally this would not lead to any problems, because the applicable law mostly allows the parties to regulate the composition of the arbitral tribunal and the arbitral procedures, but in some cases the applicable law sets forth mandatory or compulsory provisions "from which the parties cannot derogate".[358] Another important aspect can be seen in Art. V para 1 (e) of the New York Convention 1958, where it is written that recognition and enforcement of the award may be refused if the award has been set aside or suspended "by a competent authority of the country in which the award was made." This shows that it is also an important factor for the choice of place to acknowledge the law of the country concerned because the law of that country will govern the setting-aside procedure and determine the grounds for setting aside. In general, arbitration can be considered a form of juridicial settlement because juridicial procedures are involved and in the end a decision is made, on the basis of law, which is binding for the parties.[359] The arbitral tribunals if working in Hamburg may use the building and the facilities of the International Tribunal for the Law of the Sea. [360]

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[356] Art. 16 para 1 Arbitration Rules
[357] ibid. Art. 16 para 4
[358] ibid. Art. 1 para 2
[359] Erasmus G. "Dispute Settlement in the Law of the Sea" in: *Acta Juridica* 1986 p. 16
[360] Lagoni *op.cit.* (1995) p.9

The parties also have to reach an agreement upon the language to be used during the course of the arbitration.. If they have not chosen a language, the arbitrators have to decide on one promptly after their appointment.[361] It is also possible to use several languages, e.g. the parties use their normal language and the award is made in a third language.

Another interesting article in the rules on arbitration is Art. 21, which regulates two issues. The first deals with the question whether the arbitrators can rule upon their own competence. It is said that "the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."[362] The plea concerning jurisdiction shall be made no later than the statement of defence or, with respect to a counterclaim, in the reply to the counterclaim.[363] The arbitral tribunal then has to deal with this plea as a preliminary question, but it may also proceed with the arbitration and rule on the plea in the final award.[364] The rule is built on conformity with the regulations to be found in the international conventions on arbitration[365] and reflects the law of arbitration and practice of a number of countries.[366] Although this article provides that arbitrators have competence, however, the final decision obliges the court, which means that if one of the disputing parties is not satisfied with the arbitrators decision, he can still sue at the Tribunal. The jurisdiction of the courts cannot be excluded because it would be an unendurable situation if the arbitrators, who are private persons, could decide this question alone. In practice however, the

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[361] Art. 17 para 1
[362] Art. 21 para 1 Arbitration Rules
[363] ibid. para 3
[364] ibid. para 4
[365] Geneva Convention 1961 states in art. V para 3:
"...the arbitrator whose jurisdiction is called in question shall be entitled ... to rule on his own jurisdiction and to decide upon the existence or validity of the arbitration agreement."
The Convention on the Settlement of Investment Disputes between States and Nationals of other States(signed at Washington, 18 March 1965. 575 UNTS 160 (1966), II UN Register of Trade Law Texts 46.) states in Art. 41 para 1.that "the tribunal shall be the judge of ist own competence."
[366] Sanders *op.cit.* p.462

decisions of the arbitrators are generally final.[367] The other issue dealt with by Art. 21 of the Arbitration Rules is the separability of the arbitration clause from the contract in which it is contained. The arbitration clause shall be treated as an agreement independent of the other terms of the contract.[368] In principle, the decisions of the arbitrators could not be subject to the court if the main contract was valid, but there are special provisions in some countries against this .[369] This question was at issue in many decisions and arbitral awards. The tenor of most of them was towards the recognition of the separability doctrine.[370] The UNCITRAL Rules give the possibility of separating the arbitration formula from the main contract to allow the arbitration to be useful and functional and to prevent it being destroyed by simply contesting the validity of the main contract.

In arbitration the possibility exists of an award on agreed terms, which means that the parties to the arbitral proceeding agree on a settlement during the process. The award may be rendered at the request of both parties "if accepted by the tribunal".[371] Although it is a useful provision, because the settlement may be enforced like any other arbitral award, it is not often mentioned in arbitration rules and is seldom provided for in arbitration law.[372] The arbitrator is allowed to formulate the agreement and help the parties with the settlement, although his duty is concerned more with deciding than with mediating or conciliating but no objection can be found if both parties agreed to this.

The Arbitration Rules suggest a Model Arbitration Clause in Art.1 note 3, whose usefulness is provided by more detailed provisions.[373] This however, applies only to disputes for which

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[367] ibid.
[368] Art. 21 para 2 Arbitration Rules
[369] For example in the United Kingdom where in the arbitration procedure a question of law may be dealt with by the court as a "special case"
[370] e.g. "Trends in a field of International Commercial Arbitration" in: 27 *IICQ* p.278 supra note 109
[371] Art. 34 para 1 of Arbitration Rules
[372] Sanders *op.cit.* p. 465
[373] Model Arbitration Clause

provisions are made expressly by the Convention, e.g. disputes arising out of the undertaking of a contractor to transfer technology under fair and equitable commercial terms and conditions,[374] disputes about the calculation of payments due to the ISBA under contracts for exploration and exploitation.[375]

The arbitration procedures are furthermore applicable if the interpretation and application of a contract is questioned. This raises the question in what cases the interpretation of a contract or of the Convention is given. To interpret a contract it has to be determined what should be contained in the contract. The Convention mentions the following mandatory terms:

- the right of the contract holder to explore and exploit the named resources on a fixed site;[376]
- during the lasting validity of the contract, the holder shall have security of tenure;[377]
- the contractor must accept the rules, regulations and procedures of the Authority[378] and also the control of the Authority.[379]

The contractor is furthermore obliged to report data to the Authority to the extent necessary for the exercise of the regulatory functions of the Authority's principal organs.[380] The contract must at least contain provisions with respect to operational requirements,[381] technology transfer and financial obligations of the contractor.[382]Other important elements of the contract must be regulated

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Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof,shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force....

[374] Art. 5 para 4 of Annex III
[375] Art. 13 para 15 of Annex III
[376] Art. 3 para 4 (c) of Annex III, Art.16 sent. 1 of Annex III
[377] Art. 16 sent. 2 of Annex III, Art. 153 para 6
[378] Art. 4 para 6 (a) of Annex III
[379] ibid. Art. 4 para 6 (b)
[380] Art. 14 para 1 of Annex III
[381] Art. 6 para 3 of Annex III
[382] Art 5 para 3 of Annex III, Art. 6 para 3 of Annex III

in the Authority's rules and regulations, on which the Convention does not give details but only some criteria to guide rule-making.[383]

b) Overlapping of Convention and Contract

A further problem could be the overlapping of the contents of the Convention and the contract with reference to provisions of the Convention or to something regulated in the contract which counteracts the provisions of the Convention . In this case, the Convention's provisions take precedence over contract provisions.[384] Another way to solve this problem is as follows. The parties to the contract may set out principles of interpretation and definitions. Such provisions in the contract make interpretation contractual and subject to arbitration.[385]

It is conspicuous that the jurisdiction of the Sea-Bed Disputes Chamber does not include the possibility of complaints between Authority organs. This leads to the fact that the Chamber in internal Authority relationships is unable to function as an integrating factor. The Authority organs have to stabilise and balance the mutual relationship themselves.[386] The Chamber has jurisdiction in the following disputes:

-disputes between member states about the interpretation and the application of sea-bed mining[387]

- disputes between member states and the ISBA about acts of the Authority alleged to be a misuse of power or violating the Convention[388]

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[383] Art. 17 para 1 of Annex III
[384] Wolfrum *Die Internationalisierung Staatsfreier Raeume* (1995) p.938
[385] Hauser W. *The Legal Regime for Deep Seabed Mining under the Law of the Sea Convention* (1983) p. 57
[386] ibid. p.53
[387] Art. 187 (a)
[388] Art. 187 (b)

Authority has the duty to avoid discrimination in the exercise of its powers and functions.[394] This is so even if it loses a case. This implies the possibility of review of the rules and regulations under this formula.[395] Another limitation of the Chamber's judicial review power exists in relation to discretionary decisions of the Authority.[396] A complaint is possible against the misuse of discretion, although "in no case shall it substitute its discretion for that of the Authority" in cases of lack or misuse of competence.[397] These decisions are made by the majority . Whereas procedural questions require a simple majority,[398] substantive questions require two-thirds of the majority of the members present and voting.[399] The developing countries therefore have an advantage because they can dominate the decisions by their numbers. The industrialised states seek to protect their mining interests in the Council where no domination by developing countries can take place. During the negotiations, a compromise concerning the decision-making procedure was achieved at the Geneva Session of 1980. For very important questions consensus would be needed .The legal definition of consensus is the "absence of any formal objections"[400] and corresponds to UN practice. Positive consent is therefore not required, but the submission of reservations or declarations is permitted.[401]

3.3.2 Disputes between States concerning their rights in the various maritime zones (other parts)

Conflicts may arise between the sovereignty of a coastal states` rights or other national rights in the maritime zone contiguous to their coastlines and free navigation , overflight and other uses of the

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[394] Art. 152

[395] Jaenicke in Boeckstiegel p. 121; see also for the same result Oxman, Bernhard H., The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979) p. 18; Wolfrum R. *op.cit.* (1995) p. 935 ; Bernhardt P. A. *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, p. 103

[396] Art. 189 sent. 1

[397] Art. 189 sent. 3

[398] Art. 159 para 7

[399] ibid. para 8

[400] Art. 161 para 8 (e)

sea which other States are allowed to do in these zones.[402] In this category of dispute access to the Tribunal only granted to States which are parties of the Convention.

The great sum of disputes will deal with the following matters:

a) Fishing

The freedom of the fishing industry has been of paramount importance to all coastal States. Nothing has changed in this regard, despite, or perhaps as result of diminishing quantities of fish. Therefore this concern has found special attention in the Convention , according to which coastal States have the right to utilise the living resources within their exclusive economic zone .[403] On the other hand, these rights relate directly to protection and conservation duties.[404] Within their exclusive economic zone, nations can dictate fishing quotas, as well as determining the permitted catch for any other State.[405] In addition, the coastal State will have to ensure, through proper management, the maintenance of the living resources within the exclusive economic zone. The jurisdiction of the Tribunal, however, is qualified in this respect, as the coastal State is not obliged to submit itself to its jurisdiction, if the dispute relates to its sovereign fishing rights or duties regarding the maintenance of the living resources within its exclusive economic zone. One cannot exclude fishing issues, because each of the disputing parties can demand an obligatory conciliation at the Tribunal, if no settlement has been reached.

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[401] Petersmann E.U. "Rechtsprobleme der deutschen Interimsgesetzgebung fuer den Tiefseebergbau" in: 41 *ZaoeRV* (1981) p. 285
[402] siehe Chp. II other parts of Convention
[403] Art. 62
[404] Art. 61
[405] ibid.

b) Marine Scientific Research

In principle, the jurisdiction of the Tribunal also applies to disputes which concern the conduct, regulation and the authorisation of marine scientific research within nations` exclusive economic zones. In the exercise of their sovereignty coastal States, have the exclusive right to regulate, authorise and conduct marine scientific research within their territory. The Convention, however, under normal circumstances obliges the coastal State Parties to grant their consent to other States, , for marine scientific research projects within their exclusive economic zones. An obvious precondition for such projects is their peaceful undertaking as well as the researching State`s wish to increase scientific knowledge thereby. The sovereign coastal State is not obliged to submit itself to the jurisdiction of the Tribunal, in order to decisions about regulation, consent and the conduct of marine scientific research within its exclusive economic zone. The researching State, retains the right, however, to demand an obligatory conciliation (according to Art.11-14 of annex V), in which it maintains that the denial of consent or suspension of a research project already in progress, by the coastal State, contravenes the Convention mainly the Art.246 and 253.[406]

c) General Utilisation of the Sea

Apart from disputes in connection with the fishing industry and marine scientific research, issues about the general utilisation of the sea may also occur. These include the right to innocent transit passages by third party States as well as the overflight of a strait of the coastal State and the laying of submarine cables or pipelines. The third party State also can appeal to the Tribunal for a decision, e.g. when it feels hindered by the coastal State during innocent or transit passage or an innocent overflight. Likewise the coastal State can appeal to the Tribunal when a third party State, while exercising its right to conduct innocent or transit passages, violates either the Convention or

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[406] Art. 297 para 2 (b)

the regulations of the coastal State. In such cases the Convention does not allow for a refusal of jurisdiction of the Tribunal

3.3.3 Those cases in which parties agree about jurisdiction of the Tribunal [407]

3.4 Procedure

3.4.1 In general

First of all it should be mentioned that the system of the Convention for the settlement of disputes will in general consist of three stages, which are: negotiation, conciliation and judicial settlement. If a solution is not found through negotiations, the next step is that of conciliation.

From the beginning of the Conference, it was obvious that that the procedure of conciliation should be a part of the new Convention. In order to facilitate thus a special conciliation procedure is provided for in Annex V. The conciliation procedure contained in the Convention has to be divided into two parts. The first procedure is a process of mutual agreement between the parties. This procedure is not dictated by the Convention as a step which has to be made. It is a voluntary step which can be made by the parties of the dispute if they both agree to do so;[408] if one of the parties does not agree, the conciliation will be deemed to be terminated.[409] If the parties agree on the conciliation procedures, a Conciliation Committee consisting of five members will be set up. The disputing parties have to appoint two members each and a neutral chairman, who, in the event of a disagreement between the parties, is appointed by the Secretary-General of the United Nations.[410] It will end with a report which should contain, as the case may be, the conclusions on fact and law

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[407] Art. 21 of Statute
[408] Art. 284 para 2
[409] Art. 284 para 3
[410] Art. 3 of Annex V

as well as recommendations for a settlement, and is not binding for the parties but does require acceptance by the disputants.[411] If no settlement is reached on the basis of the report, this leads into the "compulsory procedures entailing binding decisions"[412] which means that the judicial settlement is set in force and judicial proceedings may then be instituted.[413] The second procedure of conciliation is obligatory in some categories of dispute. This means that each party must submit to this procedure, although the conciliation does not entail a binding solution. However, the parties will have to accept the solution in the case of certain types of disputes. These includes disputes which arise in areas where compulsory judicial settlement is totally excluded, the coastal state therefore having full sovereignty. In the Convention`s former negotiations this proposal of this was at first not supported by a number of states but by the end of the conference, the coastal states agreed to a compromise, accepting a limited obligation for conciliation.[414] The following categories of disputes have an obligation for conciliation:

(1) Disputes relating to the conservation and management by the coastal state of the fishery resources in the EEZ.[415] The Convention provides that conciliation will be mandatory if it is alleged that the coastal state has "manifestly" failed to comply with its obligations for the proper management of the fisheries in its EEZ or has "arbitrarily" failed to determine the allowable catch and the surplus which might be available for other states or has "arbitrarily" refused other states access to the surplus which it has admittedly declared to exist.[416]

(2) Disputes relating to the control of the coastal state over research activities of other states or their nationals in the EEZ, if the researching states have requested this and it is alleged that the coastal state, in withholding consent or requiring the cessation of the

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[411] Art. 7 of Annex V
[412] Part XV section 2
[413] Arts. 284 para 4 and 286; Art. 8 of Annex V
[414] Nordquist and Shabtai R. (eds.) *op.cit* V, p. 312
[415] Art. 297 para 3 (a)

research, has not acted in a manner compatible with the relevant provisions of the Convention.[417]

(3) Disputes relating to the delimitation of maritime boundaries if a State party to the Convention avails itself of the option, as indicated above, to exclude such disputes from compulsory judicial settlement.[418]

The applicable law includes the rules of the Convention and those rules of international law not incompatible with the Convention. As ruled in the ICJ, however, the parties may apply for the Tribunal to decide a case *ex aequo et bono* (Art. 293 in connection with Art. 24 of Annex VI).[419]

The disputes should be heard by the Tribunal in the presence of all of its members. However, a quorum of 11 members is sufficient to constitute the Tribunal.[420] The members of the Tribunal, are of equal status, irrespective of age priority of election or length of service.[421] Generally the disputes are decided by the Tribunal, but if the dispute concerns matters relating to the sea-bed area the disputes will be referred to the Sea-Bed Disputes Chamber.[422] This chamber consists of 11 members, who are selected from the Tribunal by the majority of its members to serve for three years but with the possibility of their being re-elected.[423] The Sea-Bed Disputes Chamber is able to reach decisions with seven members.[424] Furthermore, some disputes are dealt with by special chambers consisting of at least three members, if the parties so request and if the Tribunal considers

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[416] Art. 297 para 3 (b) and (c)
[417] Art. 297 para 2 (b)
[418] Art. 297 para
[419] von Wedel H"Der geplante Seegerichtshof der Vereinten Nationen" in: 9 *RIW* (1982) p.638
[420] Annex VI Sec.1 Art.13
[421] Art. 4 para 1 of the Final Draft Rules of the Tribunal (UN Doc.LOS/PCN/SCN.4/WP.16/Add.1)
[422] ibid.; see infra
[423] Annex VI Sec.4 Art.35
[424] ibid.

it necessary for dealing with particular categories of disputes.[425] The chambers are constituted by the Tribunal with the approval of the parties.[426] In the proceedings before special chambers the same rules are valid as for the Tribunal.[427]

One chamber is formed annually by the Tribunal to hear and determine disputes by summary procedures. This chamber consists of five members elected from among the members of the Tribunal.[428] This chamber is also competent when the Tribunal is not in session, therefore a number of sufficient members are not available.

The disputes are submitted to the Tribunal either by notification of a special agreement, or by written applications addressed to the Registrar.[429] The application shall indicate the disputing parties, the legal ground for the jurisdiction of the Tribunal and the facts and grounds on which the claim is based.[430] If a member of the Tribunal is of the nationality of one of the parties in the dispute, this need not lead to his non-participation. It gives the other party the right, to nominate a member of the Tribunal provided that no member of the Tribunal be of that particular nationality.[431] If no member is of the same nationality as one of the parties, then each party may propose a candidate to participate at the settlement.[432] If the President is of the nationality of one of the disputes' participants he is not allowed to exercise the functions of the presidency in respect of that case.[433] Instead of him the Vice-President or a Senior member according to Art. 14 para 1 will act.

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[425] Annex VI Sec.1 Art.15
[426] ibid.
[427] Art. 107 of the Final Draft Rules of the Tibunal
[428] ibid.
[429] Annex VI Sec.3 Art.24
[430] Art. 44 para 1 and 2 of the Final Draft Rules of the Tribunal
[431] Annex VI Sec.1 Art.17
[432] ibid.
[433] Art. 37 para 1 of the Final Draft Rules of the Tribunal

Both the Tribunal and the Sea-Bed Disputes Chamber are authorised to prescribe provisional measures in accordance with Article 290 of the Convention.[434] If the court or the tribunal has jurisdiction *prima facie* then it may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment until the final proceedings begin. The Tribunal or the Sea-bed Dispute Chamber has the right to prescribe provisional measures if the parties fail to reach an agreement about the jurisdiction of another court and the constitution of an arbitral tribunal is not finished within 14 days. Furthermore the tribunal which is to be constituted must have jurisdiction over the dispute, and the situation must be urgent in order to require this.[435] The prescription of the provisional measures is binding for the parties to the dispute.[436] The parties themselves may also request for provisional measures. If the request was successful, this case has priority over all cases, except those concerning the cases of Art. 292 which shall be dealt with without delay.[437] If the Tribunal is unable to gather the required number of members or if the Tribunal is not in session, then the required measures will be prescribed by the chamber of summary procedures. Such measures are subject to review and revision by the Tribunal.[438] The hearings of the Tribunal will be controlled by the President or, in his absence, by the Vice-President. If the President or the parties in the dispute give their consent, the hearing will be made public.[439] The Convention allows State Parties which are not involved in the dispute to take part in the proceedings in the following cases:

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[434] Annex VI Sec.3 Article 25
[435] Art. 290 para 5
[436] Art. 290 para 6
[437] Art. 84 para 1 of the Final Draft Rules of the Tribunal
[438] ibid.
[439] Art.26 of Statute

(1) If a state considers that is has an interests of a legal nature which could be affected by the decision, it may submit a request to the Tribunal to be permitted to intervene.[440] The Tribunal has to decide upon the request.[441]

(2) Every member state has the right to intervene in the proceedings if the dispute is about the interpretation and the application of the Convention or of an international agreement where it is agreed upon by jurisdiction of the Tribunal.[442]

(3) If a dispute according to Art.187 should be decided by the Sea-bed Dispute Chamber and if a natural or juridical person is party to the dispute, then the sponsoring state (Art.153 para 2 (b)) has the right to participate in the proceedings by submitting a written or oral statement.[443]

(4)The sponsoring state has the right to participate in disputes relating to the interpretation and application of a contract and disputes relating to the acts or omissions of such a contract.[444]

If an action is brought against a State Party by a natural or juridical person, the respondent state may request the state sponsoring the person to appear in the proceedings on behalf of that person.[445]

The right of participation and intervention and the duty to appear in a proceeding are only given to states which are party to the Convention. It is evident from the wording of the above mentioned rules that entities other than States Parties (according to Art. 305 para 1 (a)-(f) and Art. 306 which could be members of the Convention) have no right to participate or intervene in the proceedings of other members. International organisations including those which have duties concerning the Convention (e.g. FAO[446], IMO[447]) have no right to participate. Art. 190 para 1 and 2 and Art. 31

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[440] Art.31 para 1
[441] Art.31 para 2
[442] Art. 32 para 2 and 3
[443] Art.190 para 2
[444] Art. 190 para 1
[445] Art.190 para 2
[446] The FAO is the Food and Agriculture Organization of the United Nations founded on the 16th October in 1945

and 32 of Annex VI limit participation to States Parties. It is only in connection with other international agreements, (mentioned in Art. 32 para 2 of Annex VI) that such organisations may be parties to the agreement. It is said in Art. 7 para 3 Annex IX, however, that international organisations and one of more of its member states could be joint parties to the dispute or be parties in the same interest. In the case of intervention in a proceeding about the interpretation or application of the Convention or an international agreement the interpretation will be binding to such states as well.[448] In the case of intervention because of affected interest the decision is binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.[449] It is the duty of the Registrar to inform the State Parties of such a dispute.[450]

The Tribunal's decisions will be determined by the majority of its members who are present.[451] If a majority does not exist caused by an equality of votes, the vote of the President, or of the member acting as his deputy, will be decisive.[452] The judgement shall be read at a public sitting[453] and the reasons on which it is based have to be stated.[454] Generally all the members taking part in the decision should be present at the reading of the judgement but in a matter of urgency if not all members are available the president alone is allowed to read it. The judgement will be binding on the day of the public reading.[455] Every member of the Tribunal participating in a case has the right to deliver a separate opinion if it does not agree with the decision. [456] Besides this, it is also

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[447] IMO is the International Maritime Organization which is a specialized agency in the field of shipping.The IMO was established by the Convention on the Intergovernmental Maritime Consultative Organization (IMCO) adopted by the UN Maritime Conference in Geneva on 6th March 1948. On the 14th November 1975 the 9th Assembly adopted a Resolution A.358 (IX) changing IMCO's name to IMO. The IMO enterd into force on 22nd May 1982.
[448] Art.32 para 3 of Statute
[449] ibid. Art. 31 para 3
[450] ibid.
[451] ibid. Art. 29 para 1
[452] ibid. Art.29
[453] Art. 110 of the Final Draft Rules of the Tribunal
[454] Art.30 para 1 of Statute
[455] Art. 110 para 2 of the Final Draft Rules of the Tribunal
[456] Art. 30 para 3 of Statute

possible to deliver individual opinions and declarations.[457] The decisions of the Tribunal being final, this means that no remedy can be used, and shall be complied with by all parties to the dispute.[458] But a revision is possible, although there are no rules contained in the Statute of the Tribunal. The revision is only acceptable when it is based upon the discovery of facts of such a nature that it has to be a decisive factor and it has had to be unknown to the Tribunal as well as to the party claiming revision whereas the ignorance of these facts may not be due to negligence.[459] The application for a revision must be made at the latest within six months of the discovery of the new facts[460] and it is not allowed after ten years from the day of the judgement.[461] The revision shall be dealt with by that institution which made the first judgement, which could be either the Tribunal or a special chamber.[462] In general, the decisions are only binding between the parties to the dispute and in respect of that particular dispute.[463] It is only for the parties directly involved in the particular dispute (according to Art. 31 para 3 and Art. 32 para 3 of Annex VI) that the decisions are also binding.

The judgements of the Tribunal (like those of the ICJ) are not enforceable unless they are decisions of the Sea-Bed Disputes Chamber. The members of the United Nations are obliged to comply with the judgements of the ICJ.[464] If a member does not comply with the judgement, the other party has the option of informing the Security Council of the United Nations. The Council can give recommendations or decide about measures to be taken to give effect to the judgement .[465] Art. 94 of the UN Charter, however, is only applicable to judgements of the ICJ and not those of the

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[457] Art. 106 para 2 of the Final Draft Rules of the Tribunal
[458] Art. 296 para 1 and Annex VI, Art. 33 para 1
[459] Art. 115 para 1 of the Final Draft Rules of the Tribunal
[460] ibid. Art.115 para 3
[461] ibid Art. 115 para 4
[462] ibid. Art. 117
[463] Art. 296 para 2 and Annex VI, Art. 33 para 2
[464] Art. 94 para 1 UN Charter
[465] Art. 94 para 2 UN Charter

Tribunal. Contrary to this, the decisions of the Sea-Bed Disputes Chamber are enforceable according to Art. 18 para 1(b) of Annex III. The Authority can suspend or terminate the contractor's rights, if the contractor has failed to comply with a final binding decision. This is not an enforcement for judgements, but it is a penalty for the contractor. Pursuant to Art. 39 of Annex VI, the Sea-Bed Disputes Chamber's decisions shall be enforceable in the territories of the States Parties in the same manner as judgements or orders of the highest court of the State Party in whose territory the dispute arose.

The costs of the dispute settlement should be shared by the disputing parties, provided that the Tribunal does not decide otherwise.[466]

If a dispute according to Art.297 is submitted to the Tribunal or another court according to Art.287 para 1, the possibility exists of a preliminary proceeding before the main proceedings begin. The Tribunal or court has to decide at the request of a party or has to determine *proprio motu* whether the claim constitutes an abuse of legal process or whether *prima facie* is well founded. If the court or Tribunal then determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, the proceedings shall be interrupted immediately.[467]

3.4.2 Special case: prompt release of vessels

Proceedings relating to the prompt release of vessels and crews could become a very important task of the Tribunal. It plays another role here than in the general settlement of disputes. In the general proceedings [468] parties to the dispute have to choose one of four mentioned fora. If they cannot

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[466] Art. 34
[467] Art. 294 para 1
[468] Art. 287

reach an agreement, the arbitral forum in Annex VII will be competent to hear the dispute. Art. 292 provides that the parties can choose the competent forum , and if no agreement can be reached the detained party can choose between the forum chosen by the detaining state or the Tribunal.[469] This means that after ten days, if no other choice is made and the parties also make no choice under Art. 287, the Tribunal will have jurisdiction over this case of detention.[470] It can also be seen as an important result of the third Conference because it is a strong counterpoise to coastal states' rights against foreign ships. Generally a flag state has jurisdiction over a vessel, it may control its physical condition, movement and operations completely by prescription and enforcement.[471] However, jurisdiction over crimes committed on a ship at sea is not of a territorial nature. It depends upon the law which for convenience and by common consent is applied in the case of chattels of such a very special nature as ships.[472] If a ship for example pollutes the zones of another state, it is not the flag state that is damaged but the other state. Thus it must be possible not to wait for measures to be taken by the flag state but to prevent such damage itself. It was therefore concluded that each state is under an obligation to prevent harm to the marine environment of the EEZ of any other state and of the high seas beyond any such zones.[473] Under Art. 73 for example (regarding the enforcement of laws and regulations of the coastal state), the coastal state has the option to take measures (including boarding, inspection, arrest and judicial proceedings) in connection with the exercise of

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[469] The GDR, the Soviet Union, the Ukraine and Belorus explained after signing the Convention that they preferred the jurisdiction of the Tribunal under Art.292 (Law of the Sea Bulletin No.5, July 1985, p.7,12 and 23

[470] Art. 292 para 1

[471] Smith B.D. State Responsibility and the Marine Environment: The Rules of Decision (1988)p. 150

[472] The *SS Lotus Case* (France v. Turkey), (1927) PCIJ Ser A., no.10, at 53

[473] Smith B.D. *op.cit.* p. 76-77; See also selected judgements with the same result: The opinion of Judge de Castro in the 1974 Nuclear Tests Cases directly confirmed the status of the obligation to prevent transbopundary harm as an operative principle of international law (The Nuclear Tests Cases (Australia v. France), 1974 ICJ 253 (Judgement), (Dissenting Opinion Judge de Castro), at 388-389; the obligation further acknowledged in an unequivocal *dictum*, in the decision in the *Lac Lanoux* arbitration (The Lac Lanoux Arbitration (Spain v. France), 1957, 12 R.International Arbitration Awards 281; the tactical agreement of the United States of America, in response to Mexican protests, to control stockyard fumes in El Paso, Texas, causing injury in Cinidad, Mexico,constituting further evidence of the obligation to prevent environmental injury (see Harris 'The Law on Air Pollution: International Aspects in Environmental Pollution Control 77, at 79

its sovereign rights of managing the living resources in the EEZ to ensure compliance with the adopted laws and regulations.

Proceedings for the prompt release of vessels and crews are very important for shipowners and charterers since they have a special economic interest in the fast release of ship or crew. This interest can be explained by the enormous costs which are incurred by container ships daily (35.000 to 50.000 DM).[474] So the economic interest can be a private one but the dispute is always an international one because only states can be parties to it.

The application to the Tribunal (or other competent court according to Art.292) for release is an exception to Art. 295. It is unnecessary - as required by Art. 295- to exhaust local remedies, as this would undermine the purpose of Art. 292.[475]

The parties to the Convention are able to exclude proceedings for the prompt release of vessels and crews when they agree about this.[476]The agreement on exclusion can be permanent or *ad hoc*.[477] A further question is in how far Art. 292 proceedings affect a detained vessel and crew. It does not cover cases of detention, based exclusively on domestic law and regulations (e.g. customs or immigration rules) or the detention of a ship as prize or angary in armed conflict. Here Art. 292 will not apply.[478]

Other exclusions of Art. 292 are in Art. 99 (concerning slaves), Art. 105 (concerning the seizure of a pirate ship or aircraft), Art. 108 (concerning illicit traffic in narcotic drugs or psychotropic substances), Art.109 (concerning unauthorised broadcasting from the high seas) and marine

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[474] Taeglicher Hafenbericht 23 August 1996

[475] Treves T."The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16 1994" in: ZaoeRV (1995) p. 430

[476] art. 292, para 1

[477] Lagoni R. "The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea" in: 11 *International Journal of Marine and Coastal Law* (19 96) p.150

[478] Lagoni ibid. p. 153

scientific research in the territorial sea (Art. 245) as well as in the EEZ and on the continental shelf (Art. 246) without the consent of the coastal state. Article 292 refers to other provisions of the Convention as well as to respective provisions of international agreements.[479] The provisions of the Convention are as follows:

(a) Art. 226 para 1 (b) concerns the detention for pollution, dumping or discharge from a vessel. Under this a coastal or port state may investigate a vessel on the basis of its enforcement jurisdiction over foreign ships. These powers, as regulated in Art. 226 para 1 (a), exist in cases of dumping (Art. 216), pollution from vessels outside the detaining states internal waters, territorial sea or EEZ (Art.218) inside its territorial sea or EEZ (Art. 220).The right to detain is expressly provided by Art. 220, para 2 (in the territorial sea) and Art.220, para 6 (in the EEZ). The port state's right to detain a vessel can be inferred from Art. 218, para 1 where the state has the right to "institute proceedings". Art. 218 and Art.220 have express references to the possibility of posting a bond or other appropriate financial security, while this is not expressly mentioned in Art. 216. This does not mean that there is no possibility of these procedures, however.

(b) Art. 226 para, 1 (c) gives enforcement jurisdiction and the right of detention to the coastal or port state for unseaworthiness. The release of the vessel may be refused if it "presents an unreasonable threat of damage to the marine environment".[480] Art. 219 also relates to Art. 226 para 1 (c)[481] as a reasonable threat of damage to the marine environment, therefore this also gives enforcement jurisdiction. In these cases the flag state may engage the prompt release procedures of Art.292.

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[479] Articles 237 and 311 para 2
[480] Art.226 para 1 (c)

(c) Art. 220 para 7 deals with measures taken by coastal states to prevent and control pollution from vessels. The different paragraphs describe the measures which should be taken in certain situations regarding the violation of international rules and standards in the EEZ. Referring to prompt release proceedings, Art. 220 para 6 allows a coastal state to institute proceedings -which includes the detention of vessels- if clear objective evidence exists that the coast or related interests of the coastal state will be damaged as a result of a discharge. Art. 220, para 7 orders the detaining state to allow the vessel to proceed "whenever appropriate procedures have been established, either through the competent international organisation" or, as otherwise agreed, if the posting of a bond or other financial security has been assured.[482]The competent international organisation mentioned in Art.220 is the "International Maritime Organisation" (IMO).[483]

The appropriate procedures on bonding or other financial security binding coastal states are established under the auspices of IMO mainly in Art.V and Art. VI of the International Convention on Civil Liability for Oil Pollution Damage of 1969 and in Art. 13 of the Convention on Limitation for Maritime Claims of 1976 Others are contained in Art.5 of the International Convention for the Unification of certain Rules Relating to the Arrest of Seafaring Ships of 1952. There are two main substantive requirements for the release, firstly the detention of a vessel of a State Party to the Convention by another State Party, and secondly that the detaining state has infringed the Convention and the flag state has well-founded evidence of this.

The procedure for the prompt release of vessels and crews begins with the application for release to the Registrar of the Tribunal "by or on behalf of the flag State of the vessel".[484] The formula "on

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[481] Art. 219 in the beginning said that this paragraph also is subject to section 7 in which Art. 226 is contained
[482] Art. 220 para 7
[483] Treves *op.cit.* p. 183: Anderson J.W. *op.cit.*p.170
[484] Art. 292 para 2

behalf of the flag State" raises the question whether the flag state may allow the shipowner to apply for release himself or whether it only allows the flag state to do so. If private persons are allowed to apply they have the chance to defend their interests without needing a formal exception to the principle that only states have access to the Tribunal. Not every private person is allowed to start these procedures, however. The flag state has to determine who qualifies as an authorised person. There are two ways of determining such a person. On the one hand, the state can give the authorisation if the dispute has arisen . The authorisation will indicate the precise person who is entitled to initiate the proceedings. Another way of authorisation is determination before a dispute arises. In this case, only certain groups of persons will be determined and not a particular person. These groups can be for example shipowners, ship operators or associations of such which are in immediate contact with the detained ship.[485] A better solution can be seen in authorisation before the dispute because this would ensure the possibility of quick result. In the case of subsequent determination, bureaucratic decision making could slow down the process of prompt release and it could be difficult to get authorisation within of ten days. Furthermore, in many states legislation would be needed, which also takes time.[486] If a state does not want to be represented by other persons, it should be prepared to act within a short time in proceedings for prompt release. For this purpose, to facilitate a prompt response a permanent office would be useful.

The proceedings of prompt release begin with an application, which shall contain the time and location where the detention commenced, furthermore the reasons for the request of release and the relevant information concerning the vessels and crews as well as information of posting a bond or other financial security.[487] After the Registrar receives the application from the flag state or

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[485]Treves *op.cit.* (1995) p.188-189
[486] Treves ibid. p.189
[487] Art. 89 para 4 of the Final Draft Rules

authorised person, he sends a certified copy to the detaining state.[488] The detaining state then has to answer in the form of a statement. Within ten days of the application, a date will be fixed for a hearing open to both parties.[489] In the course of the hearing, the parties are allowed to give written or oral statements . The application for release has to be dealt with without delay. [490] and the Convention does not contain a process for the main issues of discussion, such as the breach of a rule or the condemnation of the owner. These disputes can be dealt with by national courts.[491]In the Tribunal's rules it is furthermore essential to clear the question of the Tribunal's dealing with the proceedings relating to the prompt release of vessels, if the vessel-release applications are referred to the full Tribunal or the Chamber of Summary Procedures of the Tribunal (as is ruled for provisional measures). The solution of the Chamber could be seen as more readily available and appears therefore as the better solution. In the Final Draft Rules, the requirement is laid down that the applicant must have requested that the case be heard by the Chamber of Summary Procedure. Within ten days, the detaining state may apply to the full Tribunal if it does not agree with the other choice.[492]Against this proposal, a proposal for a redrafting of this article can be made, with the justification that the other solution makes it possible to delay treaties. This would act against the purpose of the prompt release of vessel procedures which should be dealt with rapidly.[493]

It is also not clearly stated in the Convention what constitutes a "reasonable bond or other financial security". The purpose of posting a bond or other financial security is to give the coastal state

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[488] Art. 90 para 5 of Final Draft Rules
[489] ibid. Art.90, para 2
[490] Art.292, para 3; The Final Draft Rules make this concept more precise by stating in Art. 90, that 'the Tribunal shall give priority to applications for release of vessels and/or crews ... over all cases"
[491] Art.292, para 3
[492] Art. 90 para 3 of the Final Draft Rules
[493] Proposal of Professor Oxman during a workshop held in Munich in the spring of 1995 which is as follows:
"If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum and, after consultation with available members of the Tribunal, the President determines that the Tribunal cannot otherwise deal without delay with the application for release as required by Art. 292 para 3 of the Convention and related provisions of these rules, the President shall order the application *mutatis mutandis* of Art. 25 para 2 of the Statute unless the Parties agree otherwise.

something of value to ensure that reparation by way of damages or monetary penalties will be paid.[494]Therefore the amount of damages, monetary penalty and the value of the detained vessel has to be taken into consideration . The bond may not be higher than the value of the ship, however, because this could press the flag state to leave the ship in detention in lieu of paying the monetary penalty. Other proposals are based on cargo capacity.[495] In the Final Draft Rules in Art.91 para 1, it is said that "the tribunal or the Chamber may determine that the nature, terms and amounts of any bond or other financial security that may have been imposed by the detaining State are reasonable". The posting of the bond according to the Final Draft Rules generally rests with the Tribunal but the detained state can expressly request to post it with the other state.[496]

The decisions of the Tribunal or other chosen fora should be definitive and binding to all parties to the dispute.[497] Unfortunately, the Convention does not give a clue what is to occur if the defeated party does not observe the decisions made by the forum or arrived in negotiations. One could suggest the classic instruments of an undeveloped jurisdiction: retorsion or non-violent reprisals. Nowadays, however, such instruments will probably not be used by states as a result of their mutual economic and political commitments.[498] Another way to enforce the decisions could be with help of the Security Council of the United Nations as in Art. 94 para 2 of the Charter for the judgements of the ICJ. The Tribunal is not an organ of the United Nations however, but it is on the contrary an independent authority with its own jurisdiction to settle disputes of involving parties to the Convention.[499] Therefore it does not follow that the Tribunal can rely on the United Nations'

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[494] (LOS/PCN/SCN.4/WP.2/REV.1) Part I of 30 June 1986, Art. 91 para 1 reprinteed in Platzoeder R. *The Law of the Sea: Documents 1983-1989* vol.VII, p. 209 ff.
[495] (LOS/PCN/SCN.4/L.10, paras 37-45), Platzoeder *ibid. p.* 132 ff.
[496] Art. 91 para 2 of the Final Draft Rules
[497] Art. 296 para 1
[498] Lagoni op.cit. (1995) p.15
[499] Lagoni ibid. p. 3

Charter.[500] The law of the sea is part of international law and generally losing states will observe decisions owing to the fear of being isolated by other states - which would be detrimental to their economic or political aims. If the state does not comply with decisions this violates international law (Art. 296 para 1) and a new dispute would arise.

3.5 Expenses of the Tribunal

The expenses of the Tribunal will be divided between the States Parties and the Authority. At meetings of the States Parties the expenses as well as conditions of paying will be decided.[501] If, in a case submitted to the Tribunal, the Authority or an entity other than a State Party participates, the Tribunal will fix the amount to be paid by this party towards the expenses of the Tribunal.[502] Each party pays its own costs if the Tribunal does not decide otherwise.[503]

The expenses could probably be estimated at about 4,6 Million US-Dollars for salaries and compensations for the expenses of the judges alone.[504] The annual sum (for the annual salaries of the judges) should not exceed about $100 000. From this $60000 are planned for the Annual allowance and §40 000 could be used for the special allowance. The annual costs for the working of the Tribunal on the assumption that it will have two official languages, could be in total $8 886.300 [505] To achieve economies the Tribunal will begin its work on a reduced scale with a view to gradually increasing its size in parallel with its increasing workload. The Tribunal will not have that much work in the beginning because deep sea-bed mining will not commence for some years. So it may utilise a limited number of members who serve actively on a continuing basis for a fixed

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[500] ibid.
[501] Annex VI, Art.19
[502] ibid. Art.19 para 2
[503] ibid. Art. 34
[504] for an explicit treatise see: Potential Financial Implications for States Parties to the Future Convention on the Law of the Sea, UN Doc. A/ CONF.62/ L. 65, 20 February, 1981; Off. Rec. UNCLOS-III, vol. XV, p. 102

period of time, while other members should be available in reserve. A system of rotation on an equitable basis will be used which will ensure geographical distribution and representation of the principal legal systems (the minimum of active members therefore would be five).[506] The favoured number of members is eleven because a quorum would be possible without the members in reserve. The possibility of only two active members will probably not materialise as recent trends show that disputants tend to resort to pre-constituted or ad hoc chambers, composed by more than two members. If more members than the active ones are needed then the members in reserve will be called. The judges salaries will be calculated according to the example of ICJ salaries and the usual UN calculations. The expenses for the building in which the Tribunal is housed and also the area where it is situated will be paid by the host country Germany. In accordance with the decision of the Government of the Federal Republic of Germany in 1987, the necessary financial resources are available.[507] Some of the delegates questioned the economic usefulness for the City of Hamburg and for the Federal Republic of Germany.[508] An economic advantage would be that the salaries and costs for the building, furniture and other things will probably be spent in Germany. If the building is ready, tourists will come to visit the new institution. But the Tribunal is not an organ of the UN but rather an independent body[509] with a close relationship between it and the UN. A document was drafted to secure these connections. It provides that the Tribunal and the UN shall cooperate on matters of mutual concern and shall consult each other to be effective and to avoid overlapping and duplication of activities.[510] For a satisfactory co-operation a regular exchange of information about certain topics like the proceedings of the Tribunal, the Convention, etc. is required through

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[505] Annex 3 of Financial Implications
[506] para 84 of Financial Implications
[507] Report of German Delegation (LOS/PCN/SCN.4/L.16, 9 March 1992) in: Documents 1983-1992, Vol XV, p. 396
[508] Deutscher Bundestag, Stenographischer Bericht, 10. Wahlperiode, Plenarprotokoll 10/109, 109. Sitzung, 7 December 1984, p.8141
[509] Art. 1 para 1 of the Draft Agreement on Cooperation and Relationship between the UN and the Tribunal
[510] Art. 2 of Cooperation Agreement

regular reports as well as maximum co-operation in analysis and statistical information.[511] They also agreed upon common personnel standards, methods and arrangements as were practical to avoid discrepancies in terms and conditions of employment to enable the interchange of personnel and to secure uniformity in matters of appointments, salary scales and retirement and pension rights.[512] They would also cooperate in administrative matters of mutual interest [513] and to realise the effective working of joint efforts they would have a close relationship on budgetary and financial matters.[514] These close ties between the Tribunal and the UN would apply also to offices away from Headquarters and regional offices.[515] The similarity of the Tribunal to an organ of the UN could also make it attractive for people to visit. This could lead to the creation of jobs as guided tours could be offered for which guides would be needed. It is a fact that cities with UN facilities are attractive to people visiting them. Another economic factor could be bonds or other financial security posted with the Tribunal in Hamburg which money would probably be put to work in Hamburg.

3.6 Headquarters agreement

For the smooth functioning of the Tribunal it was necessary before its coming into force to have a headquarters agreement. This is an agreement which sets out the relations between the Tribunal and its hosts. Issues include immunity of members, rights and duties. Under Art. 10 of the Statute members of the Tribunal enjoy diplomatic privileges and immunities. The detailed privileges and immunities must be negotiated in the headquarters agreement.

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[511] ibid. Art. 6 para 5
[512] ibid. Art. 8
[513] ibid. Art. 10
[514] ibid. Art. 12
[515] ibid. Art. 14 para 2

On the 25 July 1996 the meeting decided to authorise the Tribunal, as a matter of priority to undertake negotiations with Germany on a headquarters agreement. The meeting of the States Parties decided to create a working group to discuss the draft Agreement on the Privileges and immunities of the Tribunal .[516] The President stated that if a country submitted itself as host for an international body, it also assumed certain obligations in respect of that body. The host country was required to provide the same level and standard of privileges and immunities for the members of the Tribunal and its functionaries as were established in international practice. The privileges and immunities of members are not for their personnel benefit but to secure the independent exercise of their functions although some privileges were certainly given by the host city to better its chances to be chosen as the site of the Tribunal. To enable the Tribunal to function according to its statute before the conclusion of the agreement it was necessary to make provisions for the members of the Tribunal until this would be regulated by the headquarters agreement. These provisions are contained in the Final Draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany .[517] The following provisions were negotiated.

To secure a smooth working of the tribunal and to prevent it from being disturbed, the Headquarters district shall be inviolable.[518] No officers or officials of the host country are allowed to enter and discharge any official duty unless the President expressly requests this and the acts are in accordance with conditions approved by the President. Agents representing parties as well as counsel and advocates appearing before the Tribunal shall enjoy privileges and immunities and facilities necessary for the independent exercise of their duties during their journey to and from the headquarters district and while exercising their functions. To ensure travel without interference they

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[516] SPLOS/WP.2 Add. 1

[517] LOS/PCN/SCN.4/WP.16/Add.2 , 14 October 1993 (herein cited as Headquarters Agreement)

shall have the privilege of "laisser-passer", which shall be accepted by the authorities of the member states as a valid travel document.[519] There should be no personal arrest, search, detention or seizure of personnel baggage unless there are good reasons for believing that articles are not for personal use. The members shall have immunity from legal process of every kind in respect of words spoken and written in discharging their duties. To secure free speech and independence in the discharge of their functions they continue to enjoy this immunity even after retirement but continue to function until the next member takes over.[520] But the immunity may not be misused as a refuge from justice for convicted persons.[521] The Tribunal shall enjoy immunity from legal process as long as the immunity is not expressly waived.[522] States parties to litigation have the duty to waive the immunity of their representatives if their conduct would be against the course of justice.[523] The immunity also can be waived by the Tribunal in an unanimous decision .[524]In the Headquarters Agreement there is a safeguard against interference with the property, assets and funds[525] of the Tribunal as well as the archives[526], through search, requisition, control or regulation.[527] The financial affairs of the Tribunal are exempt from all direct taxes.[528] Members do not pay taxes on their salaries and emoluments according to Art. 18 para 6 of the Statute. They do not pay compulsory contributions to the German social security scheme if they are covered by one with international practice.[529] Even spouses and dependent relatives of members and officials of the

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[518] Art. 5 of the Final Draft Agreement
[519] Art. 19 para 1
[520] Art. 12 para 4 of the Final Draft Protocol of the Privileges and Immunities of the International Tribunal
[521] Art. 5 para 1
[522] Art. 8 para 1
[523] Art. 18 para 2
[524] Art. 18 para 3
[525] Art. 15 gives the Tribunal the allowance to receive and hold funds in any currency and wherever it wants to and also can work with the money
[526] Art. 9 of the Headquarter Agreement
[527] Art. 8 para 2 and 3 and Art. 9
[528] Art. As an example for a direct tax may be mentioned the income tax or the corporate tax, the trade tax , the property tax as well as the land tax
[529] Art. 13 para 1

Tribunal receive the same treatment [530] as do domestic staff, if they are not permanent residents or nationals of the host country. They do not pay dues and taxes on emoluments from their employment.[531] In the event of an international crisis the members, their dependent relatives and spouses will have the same repatriation facilities as diplomatic agents.[532] The privileges and immunities of members and officials continue even if the term of office is expired but they continue to exercise their functions.[533] A further advantage for the Tribunal and its members is exemption from customs duties, prohibitions and restrictions on import and export of articles used by the Tribunal.[534] The privileges and immunities of the members can be compared to those of diplomats and are governed by the Vienna Convention on Diplomatic Relations of the 18 April 1961. The members and the Registrar have the same privileges as heads of diplomatic missions are given by the host country.[535] The Deputy Registrar has the same as counsellors attached to diplomatic missions in the host country and the other officials receive the same as officials in a comparable rank in diplomatic missions.

In the transition period until the Headquarters Agreement is in force there is another legal basis for the members to enjoy privileges and immunities. This is the "Verordnung ueber Vorrechte und Immunitaeten des Internationalen Seegerichtshofs".[536] The Verordnung authorises the Bundesregierung to apply provisions of the "Gesetz zu dem Uebereinkommen vom 13. Februar 1946 ueber die Vorrechte und Immunitaeten der Vereinten Nationen"[537] also to organisations

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[530] Art. 17 para 2 of the Draft Headquarter Agreement
[531] ibid. Art. 17 para 3
[532] ibid. Art. 17 para 6
[533] Art. 17 para 4 of Headquarter Agreement
[534] Art. 8 of the Final Draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.16/Add.3)
[535] Art. 17 para 1 (a) of the Headquarter Agreement
[536] Auswaertiges Amt Datenblatt-Nr. 13/0504301
[537] Germany decided at the 16 August 1980 to agree with this (BGBL Teil II Nr.34, 23 August 1980 p.941)

which are not organisations of the UN.[538] With the entry into force of the Headquarters Agreement between the Tribunal and Germany the Verordnung will terminate.[539]

Conclusion

Between 15 October 1995 and 31 August 1996 27 more States deposited their instruments of ratification or accession to the Convention bringing the total number of States Parties to 108.

The Convention can be seen as advantageous for all men because it gives guidelines for the behaviour of national governments, whose actions are more predictable for other states thus reducing tension because of misunderstanding. Furthermore it is easier to govern common areas if all states willing to participate in the benefits of these areas. Of course every state has to make concessions but they also gain something because other states make concessions also for these states. The widespread ratification of the Convention will narrow the scope for maritime disputes (which does not mean that there are no unsolved questions anymore) but it will be easier to handle new disputes because ways are proposed to solve them. Because of the principle of consensus most of the different interests are considered to be well balanced for all states. The achievements are considerable but not sufficient. There are continual changes in technology, the environment, needs and this does not allow the institution of a rigid treaty. It must be a treaty with flexible regulations to allow adaptation to new circumstances. One of the most important tasks of the Convention will

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[538] "Artikel 3" said:

Die Bundesregierung wird ermaechtigt, mit Zustimmung des Bundesrates, soweit dies im Interesse der Pflege internationaler Beziehungen erforderlich ist, Rechtsverordnungen zu erlassen
1. ueber die Anwendung des Abkommens auf
b) durch zwischenstaatliche Vereinbarungen geschaffene Organisationen, die nicht Sonderorganisationen der Vereinten Nationen sind.

[539] Art. 2 para 2 of Verordnung ueber Vorrechte und Immunitaeten des Internationalen Seegerichtshofs

be regulating the marine environment to secure the possibility of living on earth. Developed states have the duty to help and encourage developing states even if these have other problems.

One of the main tasks of the Tribunal will be the prompt release of vessels. The Tribunal is not the only possible institution for this procedure but also the ICJ and the arbitral tribunals (in Annex VII and VIII) . To secure the fast and effective treatment of these problems the creation of certain special procedures applicable in these cases is needed. The rules are as yet unfinished and in the Final Draft Rules of the Tribunal there is no special chamber designate for prompt release procedures. These cases will be dealt with by the "Chamber of Summary Procedure".[540] Only five judges are needed who could shortly arrive in Hamburg. There are already two of them with experience in such cases, the other three not.

It will take some time that we can see wether the newly established Tribunal represents a functioning alternative for solving disputes concerning the law of the sea. The fact that the participants of the third Conference besides other alternatives voted for the establishment of this Tribunal shows that they are willing to use this institution and submit cases to it.

[540] Art. 90 para 3 of the Tribunal Rules Jan.1994