COMMENT

ANDREAS J. JACOVIDES*

I readily agree with Professor Sohn's basic thesis that the system for peacefully settling disputes which may arise in interpreting and applying the Law of the Sea Convention is an important accomplishment of the Third United Nations Law of the Sea Conference. In light of past experience, agreement on a dispute settlement mechanism is a significant achievement. At the 1958 Law of the Sea Conference there was agreement only to an optional protocol which very few states ratified, despite a majority decision for compulsory reference of disputes to the International Court of Justice.[1] The possibility now exists, as between the parties to the Convention, for effective dispute settlement in the large majority of cases.

It is clear that the international community and the rule of law are better served by this new system than by no system at all or by optional protocol as in 1958. The international community and the rule of law could have been better served, however, by a more streamlined system, subject to fewer and less complicated exceptions.

No other person has done so much to bring about the present monumental "veritable code for the settlement of disputes" than Professor Sohn. Throughout the long period of negotiation, no one demonstrated so much expert knowledge, ingenuity, hard work, and determination to bring about the best possible result under the circumstances. Because no one doubted his good faith and because he deservedly enjoyed universal respect (not least from his many former students who belonged to diverse delegations), Professor Sohn was looked upon not so much as a leading member of the United States delegation, which he was, but as a benevolent and wise independent expert whose constructive ingenuity carried much weight and commanded general attention. In a way, it was like a current television commercial: When Louis Sohn spoke, people listened! Therefore, I want to make clear that any criticism in my remarks is directed at the politically necessary compromises made in the course of protracted negotiations and not at Professor Sohn, whose heart I am convinced has always been in the right place and who—I believe—would have been happier with a more all-embracing system subject to

* Ambassador Extraordinary and Plenipotentiary of Cyprus to the United States of America, Brazil, Ecuador; High Commissioner to Canada, Jamaica, The Bahamas; Member of the U.N. International Law Commission; Former Chairman of the Delegation of Cyprus to the Third United Nations Conference on the Law of the Sea and Vice-Chairman of the Third Committee of the Conference.

1. 1958 Geneva Convention on the Territorial Sea and the Contiguous Zones, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; 1958 Geneva Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; 1958 Geneva Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; 1958 Geneva Convention on Fishing and the Conservation of the Living Resources, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

fewer of the exceptions, qualifications, and uncertainties required by the vagaries of political reality.

Turning to the formative stage of the Conference on this subject, the basic position of many delegations on the settlement of disputes arising out of the Law of the Sea Convention was as follows, and I quote from a statement I made in Plenary on April 6, 1976:

> We are for an effective, comprehensive, expeditious, and viable dispute settlement system entailing a binding decision regarding all disputes arising out of the substantive provisions of the Convention. We are convinced that such a system is a necessary corollary to the substantive rules in the Convention and should form an integral part of it. This position is dictated both by reason of our attachment to the general principle of equal justice under the law and by reason of our national self-interest as a small and militarily weak state which needs the protection of the law, impartially and effectively administered, in order to safeguard its legitimate rights under the Law of the Sea Convention.

This "purist" approach—some critics of it might describe it as too doctrinaire or too simple—was qualified by a series of exceptions and qualifications, in some cases so complex as to require Ariadne's skills to find the way out of the resulting labyrinth. Indeed, some cynics might argue that the dispute settlement system under the Convention, coupled with the vague and imprecise wording of some of the substantive provisions (sometimes misleadingly called "constructive ambiguity"), was deliberately designed to ensure lawyers a busy and presumably lucrative practice—a view to which I, not being a cynic, of course do not subscribe! It was, however, the price paid for consensus.

Professor Sohn has correctly described the dispute settlement system under Chapter XV of the Convention as both "simple and complex." The key feature is that the parties to a dispute can by agreement select any dispute settlement method they wish. The parties have a number of tribunals to choose from: the International Court of Justice (which has already been resorted to in several cases involving law of the sea disputes), the new Law of the Sea Tribunal and its Seabed Disputes Chamber, arbitration tribunals, or special technical commissions. Failing agreement on a tribunal between the states concerned, arbitration is provided for under Article 287 and Annex VII. My own view is that since a special Law of the Sea Tribunal was set up under the Convention, it would have been better to give to it the central role in the overall system because this would ensure uniformity of approach in the interpretation and application of the Convention. Perhaps in practice this will prove to be less of a problem than it seems at first sight.

The exceptions in Articles 297 and 198 are where the real complexities arise. Since Professor Sohn has simplified the exceptions to the extent humanly possible, I will discuss one of them. One exception, optional but nevertheless an exception, is under Article 298: "[D]isputes concerning . . . sea boundary delimitations, or . . . involving historic bays or titles" are subject to compulsory conciliation at the request of a party to the dispute.[2] Compulsory conciliation, however, leads only to

---

2. Only one of the four sub-categories created for such disputes leads to compulsory resort to conciliation. That procedure does not apply if the dispute arose before the entry into force of the Convention, if it is concurrent with a dispute concerning sovereignty over continental or insular land territory, or if it was settled by an arrangement between the parties or is to be settled in accordance with an agreement between

the issuance of a report which does not entail a binding decision.

Article 298(1)(a), which prescribes this procedure, was the result of protracted, acrimonious debates and negotiations. It became increasingly clear during the debates in various forums of the Conference, especially in Negotiating Group 7, that a substantial number of states (including at least one major power) were unwilling to submit issues touching upon their national sovereignty to a third party settlement process entailing a binding decision. This view prevailed insofar as it concerns sea boundary delimitation disputes. The hope has been expressed, however, that the procedure of compulsory conciliation will prove in practice to be a binding decision—but this may be no more than wishful thinking.

The fact is that sea boundary delimitation, because of the high stakes involved due to the increase of the zones of maritime jurisdiction under the present Convention (as compared to the 1958 situation), because of its contentious potential since it touches sensitive nerves of national sovereignty, and because of the vagueness of the substantive rules adopted in other parts of the Convention—particularly in the case of Articles 74 and 83 on the delimitation of the Exclusive Economic Zone and the continental shelf between states with opposite or adjacent coasts—especially lends itself to third party compulsory settlement. Thus, solutions would be found peacefully, and actual or potential disputes would not escalate into confrontations, including armed conflict.

Such a situation—the relative vagueness of the substantive rules on the one hand and the absence of compulsory third party dispute settlement procedures of a binding nature on the other—is bound to create problems and work an injustice at the expense of smaller and militarily weaker states because larger and stronger states may be tempted to claim the lion's share, seeing as how they are not obliged to accept third party adjudication. I submit that this is one of the more unfortunate results of the compromises reached during the Conference, even though it may prove to be mitigated by the compulsory resort to the conciliation procedure where this is applicable. Whether the procedure is applicable is in itself, however, subject to argument and procrastination if the state concerned so chooses.

I decided to concentrate on this issue raised in Article 298(1)(a) partly because it is one I have been familiar with and feel strongly about and partly because it illustrates in a vivid way the shortcomings of the dispute settlement system arrived at after so much effort in the Third United Nations Conference on the Law of the Sea. Other shortcomings on other issues made subject to exceptions, automatic or optional, can no doubt also be pointed out.

By saying this, I do not by any means intend to denigrate or to diminish the importance of the work done and the monumental result achieved. It has been said that politics is the art of the possible, and this is also true of international law-making conferences such as the Law of the Sea Conference. From the lawyers' point of view, which expects the rule of law to prevail at the international as much as at the national level, we have not achieved an ideal solution. But what is ideal

---

them. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982) art. 298, *reprinted in* 21 I.L.M. 1261 (1982).

is not always feasible. Compromise was the necessary price to be paid to achieve the objective of reaching an overall consensual agreement.

In my view, while the Convention and more particularly its dispute settlement system is not fully satisfactory, not fully streamlined, and not always logical or fair, I believe the net result is, on balance, constructive and a significant achievement in multilateral lawmaking. As such it deserves general support.