Toward Peaceful Settlement of Ocean Space Disputes: A Working Paper

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I. INTRODUCTION

In June, 1974, the Third Law of the Sea Conference will convene in Caracas, Venezuela to consider the establishment of an Ocean Regime. Although the ostensible scope of this conference is limited to a regime for the seabed and the subsoil of the ocean floor, a glance at the ancillary matters to be considered reveals that machinery could be established with jurisdiction over all matters related to ocean space (i.e. the water surface, water column, the ocean floor, and the subsoil). Irrespective of the scope of matters encompassed by the proposed regime, a necessary component of that machinery is a means of effecting the compulsory peaceful settlement of disputes. The question of whether in fact there should even be a regime of any type is beyond the scope of this inquiry. Numerous commentators, as well as the United Nations, have considered an ocean regime to be both necessary and desirable. The number of proposed drafts for a regime from nations

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2. Id. See also E.B. JONES, LAW OF THE SEA (1972); COMMISSION ON
of all degrees of power and philosophy indicates that the real question is not "whether," but "how"—what form should the regime take?

The manner in which the regime should provide for the pacific settlement of disputes regarding matters within its competence is the focus of this paper. The drafts advanced by parties interested in an ocean or seabed regime provide, in varying forms, mere structures. Few, if any, advance reasons for the particular device chosen. The need is for criteria by which to evaluate these proposals. This article, then, will consist of:

1. The establishment of the criteria for a viable means of dispute settlement.
2. A survey of all the settlement mechanisms available to the international community.
3. Evaluation of the major regime proposals in light of the above.

II. THE CRITERIA

A. Items Related to Jurisdiction

1. Compulsory Jurisdiction

Mandatory jurisdiction of the tribunal is a key element in securing compliance with the provisions of an ocean regime. By bring-


This conclusion is, of course, not unanimous. See Ely, United States Seabed Minerals Policy, 4 NAT. RES. LAW. 597 (1971), wherein Mr. Northcutt Ely considered the American policy "exactly 180 degrees off course." (at 609). He proclaimed the mineral resources of the American continental shelf "exclusively the heritage of the American people." (at 609). In sum, Ely seems to favor the extension of sovereignty to the 200 meter isobath, and believes the proposed regime for the deep ocean floor to be unnecessary and complex: "a floating Chinese pagoda, the S.S. Parkinson." (at 621). At a lesser degree of vituperation, the National Petroleum Council (see NATIONAL PETROLEUM COUNCIL, PETROLEUM RESOURCES UNDER THE OCEAN FLOOR, 69-78 [March 1968]) and the ABA (see American Bar Association Resolution 73: Non-Living Resources of the Sea in 2 NAT. RES. LAW. 440-41 [1969]) agree with Mr. Ely. In light of the ability of current and foreseeable technology to exploit the ocean resources and the attending possibilities for conflict, this viewpoint is at best, parochial. For an excellent survey of the dramatic advance in ocean technology, see Nauda, Some Legal Questions on the Peaceful Uses of Ocean Space, 9 VA. J. INT'L L. 343, 372-82.

ing in one forum all actions relating to ocean space, piecemeal litigation is prevented. As a beneficial by-product, such jurisdiction supplies an incentive to settle by negotiation cases which are relatively weak. Furthermore, the settlement so reached is more likely to be consonant with established legal principles where jurisdiction is compulsory than where it is consensual.

Carte blanche acceptance of the compulsory jurisdiction of an ocean regime tribunal will be unlikely if doing so deprives a nation of other means of settlement. Because negotiation offers an opportunity for the parties to compromise their important interests, it is an attractive alternative to adjudication. Hence, to gain political acceptance, it is necessary to preserve for the parties the option of settlement according to non-judicial means of their own choice, subject to compulsory submission to the tribunal in case such attempt at settlement is fruitless, or if settlement is not reached in a reasonable time.

2. Subject Matter Jurisdiction

Classification

The tribunal shall have both appellate and original jurisdiction. Generally, all prior avenues of redress within the structure of the regime should be exhausted before appeal. For example, a dispute arising under a regulation or decision of an administrative body should be first challenged before that agency. To enforce this provision, the tribunal must refer to the appropriate forum any suit wherein relief was not sought at the lower level. Only when no such lower organ exists should original jurisdiction lie.

Matters Generally

The tribunal should be competent to decide all matters encompassed within the general scope of the regime. This necessarily

4. Merrills, supra note 3, at 252 n.41.
5. Id.
6. Id. at 268.
7. Id. at 246.
implies the power to interpret the document which established the regime and to determine the propriety of all regulations and actions taken by its agencies. To preserve judicial independence, questions of the tribunal’s jurisdiction in a particular case should be decided by the court.

A key factor inhibiting the acceptance of compulsory jurisdiction is the vagueness and uncertainty of the substantive law to be applied. Recourse to third-party adjudication has had only limited success due to the reluctance of nation-states to give to a tribunal power over the nation’s perceived vital interests. It is politically unreasonable to expect a nation to ratify a regime which contains a body with mandatory jurisdiction unless the status of the law is clear. The substantive law of the regime would be formulated by its legislative and administrative organs. By limiting the tribunal’s authority to the body of law so created, the law to be applied would no longer be so uncertain. Questions of international law beyond the scope of the regime could be certified by the tribunal for determination by the International Court of Justice (ICJ). Thus, to gain political acceptance for the regime and for the notion of compulsory dispute settlement, the tribunal should have general jurisdiction limited, however, to ocean law.

3. Personal Jurisdiction

The subject matter jurisdiction of the tribunal will be co-extensive with the scope of the regime. Therefore, the judicial body must be able to bind any entity that is capable of engaging in operations on which the court’s subject matter jurisdiction is based. An overview of the types of possible disputes shows that they may arise between states, private persons (individual and corporate), international organizations (e.g. the United Nations or the World Bank) and between the regime and any of the above. Personal jurisdiction over each of the above stated parties is essential.

To prevent intrusions on national sovereignty, in the event that

all parties to a dispute are nationals of one state, the courts of that state should retain sole jurisdiction over the matter. However, to ensure uniformity of the interpretation and application of the document establishing the regime, any question of its interpretation or of the validity of a regulation or action made pursuant thereto should be certified to the tribunal for a binding advisory opinion.\textsuperscript{11} Such an arrangement would protect legitimate regime interests while ensuring that purely municipal law is decided in national courts.

B. Membership

1. Adequate Representation of the Various Legal Cultures of the World.\textsuperscript{12}

One of the primary criticisms of the International Court of Justice is its failure to provide a voice to all the world's major legal cultures.\textsuperscript{13} Such inequitable representation is a major factor in undermining confidence in the court.\textsuperscript{14} The result is that the court is little used and resort is made to other forms of dispute settlement, peaceful and otherwise.

In order to secure political acceptance of the regime tribunal, some accommodation of the various legal cultures must be made. The manner of doing so is by no means clear. One viewpoint is that the selection of judges should be de-politicized by placing greater emphasis on the personal and professional capability of the individuals than on a requirement that all legal systems be represented.\textsuperscript{15} It is thus argued that in a less politically charged atmosphere, reference of conflicts to the court would be more common since the parties would have increased faith in the objectiv-

\textsuperscript{11} Sohn, \textit{supra} note 10, at 7.

\textsuperscript{12} The International Court of Justice, as the only major court of global jurisdiction, serves us here as an imperfect guide in developing this criterion—imperfect because its jurisdiction is based on consent rather than on compulsion. Nonetheless, an analysis of the reasons for the inability of the ICJ to command compulsory jurisdiction is valuable in anticipating and overcoming objections to vesting compulsory jurisdiction in the ocean regime tribunal.


\textsuperscript{14} Gross, \textit{Consideration of Requirements}, \textit{supra} note 8, at 254.

\textsuperscript{15} \textit{Id.} at 281–82.
ity and impartiality of the judges. On the other hand, it has been suggested that every effort be made to assure representation of "various legal cultures." 16 In light of the tendency of nations to align into economic, social, or political blocs, 17 it would appear wiser to recognize reality than to pretend that nations would voluntarily submerge their vital interests. By providing a tangible stake of representation in the judicial process, the prospects for international acceptance of the ocean regime would be considerably enhanced.

2. Competence of Personnel

Persons selected to the tribunal should have generally recognized competence and expertise in ocean law, and be well disposed toward the goals and procedures of the regime.

C. Judgment and Enforcement

When it is recalled that the purpose of the tribunal is to provide a forum for dispute settlement, it becomes clear that, in order to achieve that objective, the court should be free to fashion the remedy to the particular case. That is, the court must have the power to declare rules and acts of the regime to be void, to award damages, to order injunctions and other equitable relief, and to declare the status of the parties. It has been suggested that the decision may be made in the form of a recommendation, an advisory opinion, or a binding judgment. 18 It is difficult to see the usefulness of a non-binding recommendation since the parties could ignore it with impunity.

Thus, in order that the dispute be permanently settled, the decision of the tribunal should be final and binding on the parties. 19 In addition, because the court is to be one of special competence (i.e. ocean disputes), to promote uniformity in the law, no appeal may be taken from any decision. 20 To mitigate the harshness of

17. Gross, Consideration of Requirements, supra note 8, at 282.
19. RHYNE, supra note 8, at 295.
20. It is anticipated that objection will be made to this "one-shot" approach. However, original jurisdiction without appeal vested in the highest court of a governing body is not without precedent in international law. Moreover, the alternatives are even more objectionable. Appeal to the International Court of Justice is ill-advised for the reasons discussed in Part III(F) infra. Recourse to the courts of the various nation-states
the finality rule, provisions should be made to reopen the case where material evidence which could not have been discovered earlier by the exercise of due diligence, becomes available after judgment.

Unless a judgment can be enforced, it is of little or no value. To ensure the tribunal’s independence and promote confidence in the judicial process, the judgment should be self-executing. Further, the court should have the power to make all writs to effectuate its decision. Finally, there must be a scheme for providing compulsory recognition of the judgment in the courts of the various nations. Beyond that, enforcement should be left to the executive arm of the regime.

D. General Attributes

1. Expediency

Lawyers and laymen alike pay universal homage to the ancient axiom “Justice delayed is justice denied.” The complaint of judicial delay is as old as the Magna Carta. The culprit is not delay per se, but unreasonable delay caused by a clogged and cumbersome legal system. The judicial process is an intellectual one; it demands time for comprehensive fact finding, development of legal issues, and thoughtful decision making. The passing of time may promote negotiated settlement as the parties’ claims become less speculative and the probability of the outcome more certain. The problem arises when, due to the inadequacies of the structure,

would so fragmentize and detail the authority of the tribunal as to make it powerless.

21. To require the further act of another organ of a government to execute a court decision is tantamount to granting to that organ a veto over the power of the court. For a discussion of the debilitating effect of this malady on the International Court of Justice see Deutsch, A Plan for the Reconstitution of the International Court of Justice, 49 A.B.A.J. 537, 543 (1963) [hereinafter cited as Deutsch].


23. Court Congestion and Delay 2-3 (G. Winters ed. 1971) [hereinafter cited as Winters].

24. Id.
the expectancies of the parties are frustrated. In that case, resort to violent self-help may not be uncommon.25

Thus, the proposed regime must provide a means of settling disputes with reasonable dispatch. This criterion has two components:

1. The rules of procedure must not build in delay by permitting excessive and unreasonable interlocutory appeals and continuances.26
2. The structure must be flexible so to provide sufficient personnel and space to maintain a current caseload.27

2. Economy

With the possible exception of discouraging spurious suits, little is gained when the cost of bringing or defending a suit is unreasonably high. If, for example, the cost is too high, it is conceivable that a large private corporation could overreach a smaller party from a developing country merely by threatening suit. Recalling that an ocean regime conceives of global operations, it is easy to see that the cost of transporting litigants, witnesses, and counsel to the tribunal,28 court costs due to the overhead of the tribunal, and loss due to delay29 could be prohibitory. Obviously, then, the proposed mechanism for settling disputes must:

1. provide for low cost appearance before the tribunal.
2. minimize overhead or at least not tax excessive costs. This would imply that if costs to the tribunal exceed the costs charged to the litigants, the ocean regime must have a source of income to support the judicial body.
3. be reasonably expeditious.

III. Survey of the Means of Dispute Settlement

Having established the attributes desired in a system for dispute settlement, the full range of procedures available to the international community should now be considered. The purpose of this survey is two-fold: To ensure that no viable method is overlooked, and to comment on the relative efficacy of each device in light of the criteria developed in Part II of this article.30

25. Id. at 3-4.
26. Id. at 6-7, 13-14.
27. Id. at 4-5.
28. RYNE, supra note 8, at 228.
30. It should be recalled that this inquiry contemplates the establishment of an ultimate means of settlement. Hence, the evaluation of each device is limited to a consideration of its suitability for that particular purpose.
A. Inquiry

In the strictest sense, inquiry is not a means of settlement, but an effort to establish a basis for settlement. This is generally done by reference to a commission which has the sole function of clarifying the facts so that the disputants may resolve their differences on their own. Inquiry has the obvious advantage of not forcing a settlement on the parties. Whether leaving them free to apply and interpret the law as they see fit is likewise advantageous depends on the importance given to uniformity in the law by the regime.

On the negative side, inquiry imposes no duty to settle; the facts may be determined, but there is no guarantee that the conflict will be resolved. The failure of many U.N. fact-finding missions to finally settle disputes is well known. Thus, the inquiry's limited scope and lack of finality makes it unacceptable for the purpose of dispute settlement.

B. Conciliation

Conciliation consists of referral of the case by the disputants to a mutually agreed upon third party who is to make an independent assessment of the facts and to propose a settlement. Generally, the conciliator has no authority apart from that granted to him by the parties. The recommendation of the conciliator has no binding force or legal effect.

While conciliation may be desirable as a preliminary device, its inability to issue binding determinations does not serve the cause of compulsory settlement.

C. Good Offices

For the purpose of calling into existence negotiations between the disputants, states, individuals, or international organizations

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31. 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 946 (1971) [hereinafter cited as WHITEMAN].
32. Id. at 958; RHYNE, supra note 8, at 289. It should be noted that frequently inquiry will give rise to conciliation as the parties assign new functions to what was originally a mere fact-finding commission.
33. WHITEMAN, supra note 31, at 947.
34. Id. at 958; RHYNE, supra note 8, at 266.
35. RHYNE, supra note 8, at 290.
36. Id. at 266; WHITEMAN, supra note 31, at 958.
offer their service and facilities under the term “good offices.” Good offices may be offered by the third party or requested by the disputants.

As an inducement to negotiate, the third party may give advice or make proposals, but may not interfere with talks once started. Good offices may be offered by the third party or requested by the disputants.

This device fails because it is not a means to compel settlement, but a mere proposal to consider a solution. The criteria of compulsory settlement, then, renders good offices superfluous.

D. Mediation

Mediation is the direct conduct by a third party of negotiations on the basis of proposals made by the mediator. Although the mediator has political authority apart from that conferred on him by the disputants, his basic task is to seek a compromise of interests rather than to resolve the legal merits of the claims. The advantages derived thereby are at least two-fold. Since the mediator is independently and directly involved in the talks, he provides input of ideas, interests, and proposals which perhaps might not otherwise be considered by the parties. More importantly, he is not restricted to legal issues; hence, he may be able to achieve a fair accommodation of political and economic interests.

An objection to this latter aspect is that settlements based on interests tend to fragmentize the law. This fear may be overcome if the mediator is impressed with a duty to apply regime law to the facts. There is, however, a more insurmountable quarrel with the concept of mediation—the parties are in no way bound by it. Because it cannot perform the basic function of effecting compulsory settlement, mediation is inappropriate to the needs of the regime.

E. Arbitration

“The basic difference between arbitration and judicial settlement is the composition of the two adjudicating bodies.” (emphasis original) In the broadest sense then, arbitration is the binding determination of disputes by one or more umpires chosen by the

37. 2 L. Oppenheim, International Law 10 (1906) [hereinafter cited as Oppenheim]; Rhyne, supra note 8, at 267; Whiteman, supra note 31, at 995.
38. Oppenheim, supra note 37, at 11.
39. Id. at 1011; Rhyne, supra note 8, at 267.
40. Rhyne, supra note 8, at 290.
41. Id. at 267.
42. Id. at 267; Oppenheim, supra note 37, at 11.
parties.\textsuperscript{44} Frequently, an arbitral tribunal is established on an ad hoc basis, to settle a single dispute.\textsuperscript{45} However, as evidenced by the existence of the Permanent Court of Arbitration,\textsuperscript{46} such tribunal need not be temporary.

The arbitral process usually begins with the execution of a compromis, which is the basic agreement between the parties to submit to arbitration. It usually contains a statement of the subject matter of the dispute, the method of selecting the arbitrators, and the procedure to be followed.\textsuperscript{47} Other provisions may include: stipulation of agreed upon facts, relief sought, choice of applicable law, language to be used, place of meeting, and conferral on the arbitrators of the right to decide ex aequo et bono.\textsuperscript{48} Pursuant to the compromis, the parties then select the arbitrator (s). Decision making among the arbitrators is usually done in one of two ways. By one method, the arbitrators chosen by the parties make recommendations to the umpire (the “neutral” member chosen by the arbitrators) who then decides alone. In the alternative, all members of the panel participate equally with the decision of the umpire being final if the panel is otherwise unable to agree.\textsuperscript{49} The decision thus rendered is final and terminates the dispute without appeal.\textsuperscript{50}

Because arbitration and adjudication are the only processes capable of binding the parties, comparison between them is inevitable. On the international level, the International Court of Justice is evaluated with arbitration of several types—commercial, non-commercial, institutional and ad hoc. In considering the relative merits of arbitration, then, it is necessary to particularize the subject matter and the degree of institutionality of a given arbitral board.

One of the more recurrent claims is that arbitration is faster and

\textsuperscript{44} Oppenheim, supra note 37, at 15; Rhyne, supra note 8, at 266.
\textsuperscript{45} Rhyne, supra note 8, at 266.
\textsuperscript{47} Whiteman, supra note 31, at 1048.
\textsuperscript{48} Id. at 1048–49.
\textsuperscript{49} Cohn, The Rules of Arbitration of the International Chamber of Commerce, 14 INT’L & COMP. L.Q. 132, 143 (1965) [hereinafter cited as Cohn].
more economical than the International Court.\textsuperscript{51} In one analysis of 300 commercial cases handled under the Court of Arbitration of the International Chamber of Commerce, the average cost of the proceedings was one-half percent of the total amount at stake, the time consumed was seven months, and enforcement was denied in only two instances.\textsuperscript{52} In another survey, however, 13 major non-commercial \textit{ad hoc} arbitral awards were compared with 30 ICJ contentious cases and 12 ICJ advisory opinions. The average duration of the proceedings was graphic: 343 days were consumed by the arbitral tribunals; 550 days in the ICJ contentious cases, and 203 days for the advisory opinions.\textsuperscript{53} Delay in such arbitral proceedings is attributed to the time needed to pick the arbitrators and settle the rules of procedure.\textsuperscript{54} Moreover, it is noted that in non-commercial cases, the arbitrators will most likely have outside interests which make a speedy decision impossible.\textsuperscript{55} Finally, it is noted that the cost of litigation before the ICJ is less than that of submission to arbitration because all expenses including salaries of the arbitrators and staff are borne by the parties.\textsuperscript{56} Thus, it appears that while arbitration may be expeditious and economical in a commercial context, an \textit{ad hoc} tribunal to decide a non-commercial question (e.g. interpretation of a treaty or a boundary dispute) is less likely to share those attributes.

Undoubtedly the main advantage of arbitration is the ability of the parties to choose the arbitrators. Lack of confidence in the impartiality of third party decision-making is the primary obstacle to political acceptance of compulsory adjudication of disputes.\textsuperscript{57} By placing control over the selection of the arbiter in the hands of the disputants, it is asserted that such fears of bias will be allayed.\textsuperscript{58} Moreover, it is a means familiar to and understood by most of the legal systems of the world.\textsuperscript{59} On this score, then, arbitration could possibly generate much needed political support.


\textsuperscript{52} Cohn, \textit{supra} note 49, at 132 n.1.


\textsuperscript{54} Jully, \textit{supra} note 43, at 396-97.

\textsuperscript{55} Id. at 397.

\textsuperscript{56} Id. \textit{See also} Gross, \textit{Review of Role, supra} note 13, at 486.

\textsuperscript{57} Eubanks, \textit{supra} note 51, at 135.

\textsuperscript{58} Id. \textit{See also} Henry, \textit{A Plea for Compulsory Arbitration of International Disputes}, 54 \textit{A.B.A.J.} 1187, 1189 [hereinafter cited as Henry].

\textsuperscript{59} Eubanks, \textit{supra} note 51, at 130; Henry, \textit{supra} note 58, at 1189.
In general, it appears that arbitration has had its greatest success in the commercial world. The Resolutions of the Fourth International Congress on Arbitration deal exclusively with trade, scientific and technical development, and contract disputes. Indeed, this method is well suited as a convenient, economical, and familiar forum for private parties. However, in the public sphere, the mere inclusion of an arbitral clause in a treaty is no indication that arbitration will in fact be employed. In short, the closer a dispute comes to involving important national interests, the less susceptible it is to settlement by arbitration.

F. International Court of Justice

Although the ICJ is competent to hear only cases in which a state is a party, its subject matter jurisdiction embraces virtually any international legal dispute. The court does not have compulsory jurisdiction unless a nation specifically grants it. In deciding a case, the judges may apply general principles of international law, custom, or convention. Further, if the parties agree, the court may decide a case ex aequo et bono. The court may award final judgments, defaults, and non-binding advisory opinions, from which there can be no appeal. Under the U.N. Charter, each party is obliged to comply with the decision, subject to enforcement by the U.N. Security Council.

The ICJ has been criticized as expensive, time-consuming, inaccessible, unrepresentative of the world’s legal cultures, incapable of enforcing a judgment, and unable to demand compulsory jurisdic-

60. Done at Moscow, Oct. 6, 1972 in 27 ARB. J. (n.s.) 225 (1972).
62. Kennan, Arbitration and Conciliation in American Diplomacy, 26 ARB. J. (n.s.) 1, 6-7 (1971); see also Gross, Consideration of Requirements, supra note 8, at 88.
64. I.C.J. Stat. art. 36, paras. 1-2, 3 T.I.A.S. 1179, 1186-87; Rhyne, supra note 8, at 194.
71. U.N. Charter art. 94.
Irrespective of the merits of these objections, the fact remains that the court does not have the confidence of the world community. It would be a grave disservice to the future of an ocean regime to plunge it into the controversy over the ICJ. Nonetheless, even if all the above contentions could be overcome, the limitation of the court's jurisdiction to nation-states makes it unacceptable for regime purposes. The range of operations contemplated by the regime reveals that international organizations and private persons, as well as states, will be parties to disputes. The inability of the ICJ to provide a forum for all necessary parties renders it inappropriate for the settlement of ocean space disputes.

IV. EXAMINATION OF THE DEVICES FOR DISPUTE SETTLEMENT IN THE MAJOR PROPOSALS FOR AN OCEAN OR SEALED REGIME

Analysis of the major proposals for a seabed or ocean regime discloses that the provisions for dispute settlement contained therein may be roughly grouped into three categories:

1. Referral to United Nations machinery (including the International Court of Justice)
2. Settlement by arbitration
3. Creation of a court of maritime jurisdiction

A. Referral to United Nations Machinery

In varying forms, this recommendation is the position of the Soviet Union, Tanzania, the United Kingdom, many Latin American states, and the Commission to Study the Organization of

72. See Rhyne, supra note 8, at 228; Gross, Consideration of Requirements, supra note 8, at 253-55; Deutsch, supra note 21, at 543.
73. Gross, Consideration of Requirements, supra note 8, at 253-54.
77. Chile, Columbia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay, and Venezuela: Working Paper on the Regime for the Sea Bed and Ocean Floor
Peace. Briefly, Britain advocates either referral to the ICJ or creation of an arbitral tribunal. Tanzania calls for submission to the ICJ upon failure of negotiation, mediation, or arbitration, as does the Commission to Study. Russia would place on the regime's executive arm the duty of applying Article 33 of the United Nations Charter, a position which the several Latin American states adopt by default.


79. U.K. Seabed Proposals, supra note 76; §§ 24-25; Oda, supra note 10, at 141.

80. Tanzania Draft Statute, supra note 75, art. 39, 10 INT'L LEGAL MATERIALS 982, 992; Oda, supra note 10, at 123.

81. Commission to Study Draft Statute, supra note 78, art. 18; Oda, supra note 10, at 243. The Commission proposal is the more restrictive; it mandates referral to the ICJ upon failure of negotiation alone, without providing for mediation or arbitration.

82. Soviet Draft Articles, supra note 74, art. 22(2) (i), 10 INT'L LEGAL MATERIALS 994, 1000 (1971); Oda, supra note 10, at 129.

83. Latin American Working Paper, supra note 77, ch. IV, 10 INT'L LEGAL MATERIALS 1003, 1010 (1971); Oda, supra note 10, at 148. By making no provisions under Chapter IV, parties to a dispute are obliged to settle according to Article 33 of the U.N. Charter. See discussion at note 84, infra.

84. The text of Article 33 of the U.N. Charter is:
   1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
   2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.
than the above mentioned drafts. For example, disputes arising under the U.N. Fisheries Convention are settled by arbitration. Likewise, signatories of the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes are obliged to either arbitrate or submit to the compulsory jurisdiction of the ICJ any dispute regarding the interpretation of the Geneva Law of the Sea Conventions of 1958. Even the regime proposals that call for referral to the International Court do not clearly state that such jurisdiction is compulsory.

Evaluation of propositions which employ present U.N. concepts and machinery consists of a balancing process between the efficacy of these measures and political acceptability of alternative methods. Applying the criteria developed in Part II, it is clear that the U.N. route is not effective. The mere incantation without more of a duty to peacefully settle does not guarantee that result. The prolonged and violent history of the Anglo-Icelandic and U.S.-Peru fishery disputes is sufficient proof of that point. Moreover, despite recent moves by the ICJ to improve its efficiency, the limitation of its jurisdiction to nation-states only, renders it unable to fulfill the needs of the regime.

On the other hand, acceptance of a more compulsory structure is arguably unlikely. It is no accident that the Soviet Union advocates utilization of Article 33; she did not approve the Fisheries Convention principally because all disputes arising thereunder are subject to the mandatory determination by an ad hoc arbitral board. However, as a practical matter, Russia has maintained a record of cooperation with and de facto acceptance of the machinery of the various conventions and treaties to which it is a party. This, coupled with the Soviet's obvious acceptance of international commercial arbitration, leads to the not unreasonable expectation that Russia would find an alternative, such as arbitration, acceptable.

88. 450 U.N.T.S. 169.
89. The proposals of Tanzania and The Commission to Study merely state that upon failure of prior attempts to settle, referral “shall” be made to the ICJ.
90. See Note by the Registry Indicating the Rules of Court Amended on May 10, 1972 in 11 INT'L LEGAL MATERIALS 899 (1972).
91. See discussion in text following note 73, supra.
93. Id. at 193-94.
94. Id. at 194.
It is possible that other nations may be similarly persuaded.

In short, utilization of existing U.N. procedures is the de minimis approach. It provides the least in terms of effective compulsory settlement but the greatest acceptability. By leaving the thorny political questions (e.g. seaward limit of national sovereignty) to other organs of the regime and by emphasizing familiar settlement devices (e.g. arbitration), it appears possible to effectuate a more desirable alternative for dispute settlement.

B. Arbitration

Settlement by arbitration is the means favored by France,95 Poland,96 Japan,97 and Senator Claiborne Pell.98 The Japanese propose a three member ad hoc board wherein parties plaintiff and defendant each choose a member from a standing panel. The two members so designated then choose the third.99 The tribunal is empowered to render a final and binding decision on matters within the scope of the regime unless the parties otherwise agree to submit the case to the ICJ.100

Although primarily relying on Article 33 of the U.N. Charter, Poland envisages a special Arbital Tribunal for certain kinds of disputes.101 The Pell proposal is not technically arbitration at all; it is a standing review panel of three members appointed by the ICJ with appeal to the International Court.102 Finally, the French

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100. Japan Outline, supra note 97, at § 38; ODA, supra note 10, at 217.
call for arbitration in limited circumstances, and then only if prior negotiations completely fail.103

The Japanese proposal most nearly satisfies the criteria set out in Part II. In giving the parties the power to name the arbitrators, the proposal strides toward providing due regard for the various legal systems, hence acceptability. Likewise, subject matter jurisdiction co-extensive with the scope of the regime, together with the absence of restrictions on personal jurisdiction, ensures the tribunal’s power to decide all justiciable controversies arising in the regime.

One ancillary question which the delegates to the Caracas Conference should consider is the extent to which the decisions of the judicial organ should reflect a desire for uniformity and predictability in the law. The more desirable this objective becomes, the less attractive is the Japanese model. By not promulgating any guidelines regarding the number and manner of electing members to the panel, it is conceivable that successive tribunals could render contradictory decisions. Because of the potential for instability inherent in a system of completely ad hoc arbitration, it is suggested that some institutional means of control exist over the selection of the panel from which the arbitrators are chosen.

C. Creation of a Court of Maritime Jurisdiction

The enactment of an entirely new judicial body, competent in regime matters, is suggested by Malta,104 Canada,105 the U.S.A.,106 The World Peace Through Law Center,107 Mrs. Elizabeth Mann Borgese,108 and Mr. Christopher Pinto.109 Under the U.S. proposal,

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103. France: Draft Proposal, supra note 95, Part II, Sec. B, ¶ 5; ODA, supra note 10, at 112.
the court would have jurisdiction to decide all disputes concerning interpretation and application of the Convention,110 the legality of or compliance with measures taken by regime agencies,111 and "any dispute connected with the subject matter of this convention" submitted pursuant to a license or contract.112 It may declare actions of the regime null and void, impose fines, and award damages.113 Members of the Tribunal are to be elected for nine year terms and with regard to the world's principal legal systems.114 By carefully enunciating the court's powers of review and decision, the U.S. has proposed a tribunal of delegated authority. While such circumscription may placate those who fear an all-powerful court, the tribunal may later find itself embroiled in jurisdictional disputes. Furthermore, by deferring enforcement to the Council,115 the U.S. plan in effect provides a veto over the judgments of the tribunal. This may be well received as a further check on the power of the court; or it may be viewed as a serious impediment to the tribunal's ability to effect an end to conflicts.

The competence of the Maltese proposed court is limited to parties other than states116 and then only where prior attempts at settlement have failed.117 Again, such restriction may gain initial acceptance for the court, but may prove problematic in attempting to resolve disputes between states.

With minor differences, the Pinto and Danzig drafts provide for general jurisdiction co-extensive with the parameters of the regime. Pinto would have the parties first seek self-resolution. If

110. U.S. Draft Convention, supra note 106, at art. 46, 9 INT'L LEGAL MATERIALS 1060; ODA, supra note 10, at 83.
112. U.S. Draft Convention, supra note 106, at art. 57, 9 INT'L LEGAL MATERIALS 1062; ODA, supra note 10, at 86.
115. U.S. Draft Convention, supra note 106, at art. 58, 9 INT'L LEGAL MATERIALS 1062; ODA, supra note 10, at 86.
the dispute remains unresolved after two months, any party may invoke the court's jurisdiction, unless all the disputants agree to arbitration.\textsuperscript{118} Danzig has no similar provision. Both drafts provide, in different language, that full faith and credit be given to the judgment in the courts of the member states.\textsuperscript{119} On selection of the judges, however, there is wide divergence. Pinto calls for election by the regime Assembly\textsuperscript{120} while Danzig prefers designation by the U.N. General Assembly.\textsuperscript{121} In the interest of acceptability, and considering that it is probable that not all nations will initially subscribe to the regime, the judges should not be elected by a means over which the regime has no control.

V. Recommendation\textsuperscript{122}

The delegates to the Caracas Conference will have to reconcile acceptability with viability. In practical terms, the former means adequate representation of the world's legal cultures, clarification of the law to be applied, and possibly, some degree of direct control over the selection of judges by the disputants. Viability is simply the ability to actually compel peaceful settlement of disputes. This necessitates the competence to issue a binding and enforceable decision on the parties to any dispute arising under the regime. Finally, parties should not be discouraged from using the agreed upon means due to high cost or unreasonable delay.

Those who advocate utilization of existing U.N. procedures quite rightly point out that the regime should not be inflexible. Accordingly, the provisions of Article 33 of the U.N. Charter should be retained as a preliminary step, subject to compulsory determination by a third party if settlement is not reached in a reasonable time. In choosing whether that third party should be in the form of an arbitration board or a court, the major concern is the extent to which the tribunal should provide for predictability by creating a uniform body of law. This must then be weighed against the par-

\begin{itemize}
  \item \textsuperscript{118} Pinto Preliminary Draft, supra note 109, at art. 75 § 2; ODA, supra note 10, at 325.
  \item \textsuperscript{119} Pinto Preliminary Draft, supra note 109, at art. 77; ODA, supra note 10, at 326. Danzig Draft Treaty, supra note 107, at art. XIV(B) (ii); ODA, supra note 10, at 250.
  \item \textsuperscript{120} Pinto Preliminary Draft, supra note 109, at art. 42; ODA, supra note 10, at 317-18.
  \item \textsuperscript{121} Danzig Draft Treaty, supra note 107, at art. XIV(B); ODA, supra note 10, at 250.
  \item \textsuperscript{122} At this point, the reader's attention is called to the Appendix which follows this article. Most of the provisions contained therein are self-explanatory in light of the criteria evolved in part II of this comment. Accordingly, this Recommendation shall discuss only those problems which have not heretofore been examined in this paper.
\end{itemize}
ties' need for confidence in the fairness of the court (i.e. the twin problems of adequate representation and selection control).

An arbitral tribunal and a court can be created to be very much alike. Both can be granted identical jurisdiction, ability to issue judgments and enforcement decrees, and means of taxing costs. The sole difference, then, is the manner of selecting judges. In the interest of achieving maximum political acceptability, this commentator would urge the adoption of an arbitral tribunal. By limiting the choice of arbitrators to a panel of nine to fifteen persons selected by the legislative organ in a manner calculated to assure adequate representation, it is hoped that the interaction among the members of the panel would promote uniformity of interpretation. Finally, arrangements could be made for the panel (or a portion thereof) to sit en banc when successive judgments on the same point are in substantial conflict.

A note on enforcement of judgments is in order. Many of the draft treaties which provide for enforcement do so through internal machinery, such as referral to the executive branch or deprivation of certain privileges. Such measures need to be supplemented. To guarantee security and predictability of enforcement and to protect the regime from being undermined by the activities in non-party states, a system of full faith and credit should be established. This contemplates imposing a general duty upon the courts of member states to give recognition to regime decisions. Likewise, the regime should negotiate with non-member states for similar recognition. The effect of these measures would be to place a priority on rights derived from the regime and to provide a means of substitutive enforcement when one against whom a judgment has been rendered is unwilling to comply. It is therefore sug-

123. Greater uniformity in the interpretation of the law will more likely result from the efforts of a small group than from determinations made by persons selected from the world at large.


125. Id. at 916.

126. Reisman, The Enforcement of International Judgments, 63 AM. J. INT'L L. 1, 6-8 (1969) [hereinafter cited as Reisman]. Substitutive enforcement is the well-known procedure whereby a party who is unable to execute a judgment obtained in state A seeks execution in state B where the judgment debtor has assets. This, of course, assumes the duty of the courts of state B to give full faith and credit to the judgment from state A.
gested that signatories to the regime be required to extend full faith and credit to all tribunal decisions.

To recapitulate, optimum harmonization of the divergent world interests recommends the creation of an arbitral tribunal which would have compulsory jurisdiction over all persons having disputes arising under the regime. To provide flexibility the disputants should be permitted to first seek a solution according to means of their own choice. Should such attempt fail, the tribunal should be chosen from a small panel of persons elected by the regime. To adequately resolve the conflict, the tribunal should not be limited in the type of relief which it may grant. Finally, enforcement is to be assured by obliging the member states to accord full faith and credit to the judgment.

What is the likelihood that such a structure will ever come into existence? It is conceded that not all states will initially ratify a regime treaty. Likewise, the Soviet Union is well known for its doctrinal antipathy toward international adjudication. However, we have seen that Russia may not be totally intransigent. Moreover, arbitration is universally recognized and employed. In thus selecting an approach which is familiar to the major legal cultures of the world, an arbitral tribunal such as the one herein proposed is the one device most likely to be adopted which will effectively settle ocean space disputes.

WM. H. HAUBERT II

APPENDIX

Draft Provisions for the Compulsory Peaceful Settlement of Ocean Space Disputes

Art. 1. Jurisdiction of the Tribunal

§ 1. The Tribunal shall have jurisdiction over:

(a) All disputes of any nature whatsoever arising out of the Regime Treaty;

(b) Disputes arising out of activities undertaken in connection therewith or pursuant thereto;

(c) Disputes connected with the subject matter of the Regime Treaty and submitted to the Tribunal pursuant to an agreement, contract,

127. Note, supra note 124, at 914.
128. Reisman, supra note 126, at 10 n.30.
129. See text accompanying note 94 supra.
130. In drafting the provisions contained in this Appendix, this commentator has drawn heavily from the Danzig Draft Treaty, supra note 107, and the Pinto Preliminary Draft, supra note 109. The proposal under Art. 4 § 4 of this Appendix for enforcement is taken almost in toto from the Draft Protocol for the Enforcement of I.C.J. Judgments, in Reisman, supra note 126, at 27.
or license which provides for referral of such disputes to the Tribunal.

§ 2. Any question relating to the Tribunal's jurisdiction in a particular instance shall be determined by the Tribunal.

§ 3. Submission to the Tribunal of any dispute enumerated in § 1 of this Article is compulsory and may be made by application of any party to the dispute, subject to:

(a) the prior exhaustion of all administrative remedies which may be provided by the Regime;

(b) the prior inability of the parties to achieve a solution through negotiation, conciliation, or other means of their own choice.

§ 4. The jurisdiction and process of the Tribunal shall extend to all Nation-states, private persons (individual or corporate), international organizations, and Regime institutions. If, however, all parties to a dispute are nationals of one state, the dispute will lie within the jurisdiction of that state, subject to the power of the Tribunal to issue a binding advisory opinion regarding the interpretation and application of the Regime Treaty and/or the validity of any regulation made or action taken pursuant thereto.

§ 5. The Tribunal shall apply the body of law created by or pursuant to the Regime Treaty. In addition, the Tribunal shall apply those relevant principles of international law which are agreed upon in the form of stipulation by the parties. If, in the judgment of the Tribunal, there exists a substantial unresolved question of international law which is relevant to the decision of the case, the Tribunal may submit the same to the International Court of Justice for an advisory opinion, binding upon the parties.

Art. 2. Composition of the Tribunal

§ 1. The Tribunal shall be arbitral in form. Disputants shall be grouped into parties complainant and respondent. Complainant and respondent shall each choose one arbitrator from the panel described in § 2 of this Article. The two arbitrators so designated shall then select a third member from the panel. Decisions by the arbitral board thus selected shall be by majority vote, all members participating equally.

§ 2. The Tribunal shall consist of a panel of (nine to fifteen) members elected for nine year terms by the legislative organ of the Regime. All members of the Tribunal shall be persons of recognized competence in matters within the scope of the Regime, well-disposed toward the goals and procedures of the Tribunal, and capable of exercising independent judgment. Election of members to the Tribunal shall be made with due regard to assuring adequate representation of the principal legal cultures of the world.

Art. 3. Procedures and Remedies

§ 1. The Tribunal shall establish its own rules of procedure. These rules shall de-emphasize form and shall be designed to bring about speedy resolution of issues. These rules of procedures, once established, shall be applicable to every case brought before the Tribunal.

§ 2. Parties shall not be restricted in seeking any form of relief which
will adequately resolve the dispute. Nor shall the Tribunal be restricted in fashioning any remedy, provisional or ultimate, to a particular case.

§ 3. In the interest of economy, any arbitral board convened under Article 2 § 1 may sit at a location agreed upon by the parties.

Art. 4. Judgment and Enforcement

§ 1. All decisions and opinions of the Tribunal are final, binding upon the parties, and without appeal. The decision of each arbitral board convened under Article 2 § 1 is deemed to be the decision of the Tribunal. If, within a reasonable time, not to exceed one year, any party discovers material information, the discovery of which could not have been made earlier by the exercise of due diligence, the Tribunal, upon application, may re-open the case for further proceedings.

§ 2. When, upon application, and in the opinion of a majority of the Tribunal, successive arbitral boards have rendered substantially conflicting decisions, the following procedure is to be employed. The applying party shall choose three members from the panel, and the applying party's opposition in the prior decision shall choose three members from the panel. The six so designated shall select three more members from the panel, with due regard for assuring adequate representation of the world's principal legal cultures. The nine man board so selected shall then resolve the conflicting decisions.

§ 3. All decisions and judgments of the Tribunal are self-executing. In the event that a party fails to comply with a decision, the Tribunal, upon application, shall decide upon measures to give effect to the decision and shall be competent to issue any and all writs necessary to effectuate the decision.

§ 4. (a) The enforcement of a Tribunal judgment is the obligation of all states party to the Regime.

(b) A judgment of the Tribunal creates rights and duties, automatically enforceable in municipal law.

(c) A judgment of the Tribunal is final and binding and enforceable in the territories of states party to the Regime as though it were the decision of the highest court of that state.

(d) No claim of sovereign immunity can avail against the execution, in any forum, of a judgment of the Tribunal.