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Article 281

*Procedure where no settlement has been reached
by the parties*

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

SOURCES

1. A/CONF.62/L.7 (1974), section 4, III Off. Rec. 85 (Australia et al.).
2. A/CONF.62/WP.9 (ISNT, Part IV, 1975), article 5, V Off. Rec. 111, 112 (President).
3. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), article 5, V Off. Rec. 185, 187 (President).
4. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 5, VI Off. Rec. 144, 145 (President).
5. A/CONF.62/WP.10 (ICNT, 1977), article 283, VIII Off. Rec. 1, 45.
6. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 283. Reproduced in I Platzöder 375, 490.
7. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 283. Reproduced in II Platzöder 3, 118.
8. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 283. Reproduced in II Platzöder 179, 295.
9. A/CONF.62/L.78 (Draft Convention), article 281, XV Off. Rec. 172, 218.

Drafting Committee

10. A/CONF.62/L.75/Add.1 (1981, mimeo.).
11. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).

Informal Documents

12. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 5; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 5 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.

COMMENTARY

281.1. The agreement to allow parties to a dispute relating to the interpretation or application of the Law of the Sea Convention to resort to means of settlement outside of that Convention was based on the assumption that these other means would result in a settlement of the dispute. If, however,

such a settlement is not reached through the procedure chosen by the parties, article 281 makes it clear that in such a case Part XV will become applicable, and any party will be entitled to resort then to the procedures specified in this Part.

281.2. This provision is quite different from certain proposals made at the second session of the Conference (1974), which would have allowed a party to the dispute to resort to Part XV “at any time,” if the procedure chosen by the parties did not entail a binding decision (Source 1, Alternative A). Under article 281, a dispute may be submitted under Part XV only “where no settlement has been reached.”

281.3. The question was then raised as to how it would be determined that no settlement had been reached. Can one party to the dispute determine that important fact on its own, or will it be necessary for the parties to agree that there is no chance for them to reach a settlement? It was considered to be consistent with international jurisprudence that a party may submit a case to the procedures specified in Part XV whenever it considers that the procedure chosen by the parties is no longer likely to lead to a settlement. If, however, the other party objects and claims that there is still a chance to reach a settlement by the chosen procedure, the tribunal or court to which the matter is submitted will have to decide this preliminary objection to its jurisdiction.¹

281.4. Some international agreements solve this problem by establishing a time limit for reaching a settlement by means chosen by the parties. Thus, the Convention on Transit Trade of Land-Locked Countries (8 July 1965), provides that:

Any dispute which may arise with respect to the interpretation or application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration.²

Article 281, paragraph 2, takes account of such provisions and allows resort to Part XV only upon the expiration of the time limit agreed upon in advance, as in the Convention cited above. Alternatively, the parties may agree, after the dispute has already arisen, that they shall try to settle it first by a particular procedure, but if no agreement is reached within a specified time limit, either of them will be free to turn to the procedures of Part XV.

281.5. The last phrase of article 281, paragraph 1, envisages the possibility that the parties, in their agreement to resort to a particular procedure, may also specify that this procedure shall be an exclusive one and that no other procedures (including those under Part XV) may be resorted to even if the

¹ This was done, for instance, by the International Court of Justice in the *North Sea Continental Shelf* cases (F.R.G./Denmark; F.R.G./Netherlands), 1969 ICJ Reports 3, at 47-48, para. 87.

² Article 16(1), 597 UNTS 3 (1967). This text was cited in Source 1, at 87.

chosen procedure should not lead to a settlement. While this may be considered an undesirable result, it is consistent with the basic principle of Part XV, that the parties are free to decide how they want their dispute to be settled, and to agree that even in certain circumstances they prefer to have it unsettled rather than to submit it to the procedures of Part XV. As long as all parties accept this result, the Convention is not trying to force them, against their will, to resort to procedures under Part XV.

SECTION 2 COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

Article 286

Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

SOURCES

1. A/AC.138/97, article 1, reproduced in II SBC Report 1973, at 22 (U.S.A.).
2. A/CONF.62/L.7 (1974), section [5], III Off. Rec. 85 (Australia et al.).
3. A/CONF.62/WP.9 (ISNT, Part IV, 1975), article 8, V Off. Rec. 111 (President).
4. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), article 7, V Off. Rec. 185 (President).
5. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 7, VI Off. Rec. 144 (President).
6. A/CONF.62/WP.10 (ICNT, 1977), article 286, VIII Off. Rec. 1, 46.
7. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 286. Reproduced in I Platzöder 375, 491.
8. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.) article 286. Reproduced in II Platzöder 3, 119.
9. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.) article 286. Reproduced in II Platzöder 179, 296.
10. A/CONF.62/L.78 (Draft Convention, 1981), article 286, XV Off. Rec. 172, 219.

Drafting Committee

11. A/CONF.62.L.75/Add.2 and Corr.1 (1981, mimeo.).
12. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).
13. A/CONF.62/L.152/Add. 25 (1982, mimeo.).
14. A/CONF.62/L.160 (1982), XVII Off. Rec. 225 (Chairman, Drafting Committee).

Informal Documents

15. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 8; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 8 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.

COMMENTARY

286.1. Section 2 of Part XV deals with compulsory procedures entailing binding decisions. While conciliation under section 3 of Part XV is also compulsory (or obligatory), it does not entail a binding decision. The procedures envisaged in section 2 are both compulsory and binding; they confer jurisdiction on the court or tribunal to which the dispute has been submitted to decide the case, and the decision once rendered is binding on the parties to the dispute and must be complied with.

286.2. Once a State ratifies or otherwise expresses its consent to be bound by the Law of the Sea Convention, by that very action it expresses also its consent to the applicability to disputes to which it is a party of the procedures specified in section 2 of Part XV. No further agreement between the parties to a dispute is necessary to submit the dispute to the procedures specified in section 2 of that Part.

286.3. Nevertheless, in application of the basic principle of autonomy of the parties, the provisions of Part XV, section 2, are subject to the provisions of articles 280 to 282 (allowing any party to a dispute to resort to other procedures previously agreed upon by the parties, whether general, regional or special, and giving to those procedures precedence over those specified in section 2 of Part XV), article 283 (requiring the parties to a dispute first to exchange views regarding the means for the settlement of the dispute, thus discouraging immediate resort to section 2 of Part XV), and article 284 (allowing a party to resort first to conciliation, unless the other party refuses to cooperate). This general obligation of the parties to first consider the applicability of section 1 of Part XV is expressly confirmed by article 286, which applies only “where no settlement has been reached by recourse to [the provisions of] section 1.” This provision is also related to the provision in article 281 that the procedures specified in Part XV shall apply only when no settlement has been reached by peaceful means chosen by the parties under section 1 of that Part. (Concerning the determination that “no settlement has been reached” see para. 281.3 above.)

286.4. Article 286 also makes clear another important limitation on its applicability. Since the beginning of the negotiations with respect to the provisions concerning the settlement of disputes relating to the interpretation or application of the Law of the Sea Convention, various States qualified their willingness to accept such provisions by reservations with respect to certain categories of disputes.¹ Consequently, it proved necessary to specify in Part XV, section 3, that in certain categories of disputes

¹ See, e.g., the statements in the Plenary during the fourth session (1976) by the delegates of El Salvador, 58th meeting, para. 10, V Off. Rec. 9; India, 59th meeting, para. 44, *ibid.* 18; Argentina, *id.*, paras. 47-48, *ibid.* 18; Chile, *id.*, paras. 63-65, *ibid.* 19; Iceland, 60th meeting, para. 67, *ibid.* 28; Peru, 61st meeting, para. 37, *ibid.* 33; Madagascar, *id.*, para. 43, *ibid.* 33; Kenya, *id.*, para. 49, *ibid.* 34; Brazil, *id.*, para. 63, *ibid.* 35-36; Mauritius, 62nd meeting, para. 10, *ibid.* 36; Venezuela, *id.*, para. 78, *ibid.* 42; United Arab Emirates, 64th meeting, para. 32, *ibid.* 49; Canada, 65th meeting, paras. 10-11, *ibid.* 5-51; and Senegal, *id.*, para. 20, *ibid.* 51.

there will be no obligation to settle them by the procedures specified in Part XV, section 2. While some of these disputes will be completely exempt from any obligations under section 2 of Part XV (though not from the general obligations under section 1 of that Part), others will be subject to obligatory conciliation (as noted in the Commentary on article 284). It should also be noted that the provisions on the subject in article 297 are automatic and do not require any prior declaration by a party for their application to disputes exempted by that article from the procedures of Part XV, section 2. On the other hand, the exemptions allowed by article 298, paragraph 1, are “optional” and require a specific declaration by the State concerned. While such declaration may be made “at any time,” in order to apply to a particular dispute it must be made prior to the submission of that dispute to the procedures of Part XV (article 298, paragraph 5). Such a declaration can be made only with respect to those categories of disputes which are specified in article 298; a general declaration, or a declaration relating to other categories of disputes, is not allowed.

286.5. The existence of these automatic and optional exceptions is acknowledged in article 286, the applicability of which is “[s]ubject to [the provisions of] section 3” of Part XV.

286.6. In order to accomplish the main purpose of article 286 – the right of a party to a dispute to invoke a procedure entailing a binding decision – that article provides that any dispute (which fulfills the requirements concerning Part XV, section 1, and does not fall under the exceptions of section 3 of that Part) “shall ... be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [section 2].” The two crucial points are that: (1) there is an obligation (“shall,” not simply “may”) to submit the dispute to the procedures under section 2; and (2) any party to the dispute may submit it to the appropriate court or tribunal, without having to obtain consent from the other party (or parties).² Unilateral action is sufficient to vest the court or tribunal with jurisdiction, and that court or tribunal may render a decision whether or not the other party participates in the process.

² By ratifying the Law of the Sea Convention, or otherwise expressing its consent to be bound by it, a State automatically accepts the jurisdiction of a court or a tribunal chosen in accordance with article 287. If a State has not specified a court or tribunal, it is deemed to have accepted an arbitral tribunal to be established under Annex VII (article 287, paragraph 3).

SECTION 3
LIMITATIONS AND EXCEPTIONS TO APPLICABILITY OF
SECTION 2

Article 297

Limitations on applicability of section 2

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
 - (a) when it is alleged that a coastal state has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
 - (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
 - (c) when it is alleged that a coastal State has acted in contravention of 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 this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.
2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
 - (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or
 - (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
- (b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.
3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance

with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

- (b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
- (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
 - (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
 - (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.
- (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
- (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.
- (e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

SOURCES

1. A/CONF.62/L.7 (1974), section 11, Alternative B, III Off. Rec. 85, 92 (Australia et al.).
2. A/CONF.62/WP.9 (ISNT, Part IV, 1975), article 18, V Off. Rec. 111 (President).
3. A/CONF.62/WP.9/Add.1 (1975), paras. 31-34, V Off. Rec. 122 (President).
4. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), article 18, V Off. Rec. 185 (President).
5. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 17, VI Off. Rec. 144 (President).
6. A/CONF.62/WP.10 (ICNT, 1977), article 296, VIII Off. Rec. 1, 48.
7. A/CONF.62/WP.10/Add.1 (1977), VIII Off. Rec. 65, 70 (President).
8. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 296. Reproduced in I Platzöder 375, 494-95.

9. A/CONF.62/L.41 (1979), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 94 (Chairman, Third Committee).
10. A/CONF.62/L.45 (1979), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 110 (President).
11. A/CONF.62/L.50 (1980), XIII Off. Rec. 80 (Chairman, Third Committee).
12. A/CONF.62/L.52 and Add.1 (1980), XIII Off. Rec. 86 (President).
13. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 296. Reproduced in II Platzöder 3, 121-23.
14. A/CONF.62/WS/5 (1980), XIII Off. Rec. 104 (Argentina).
15. A/CONF.62/L.59 (1980), XIV Off. Rec. 130 (President).
16. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 297. Reproduced in II Platzöder 179, 300-01.
17. A/CONF.62/L.78 (Draft Convention, 1981), article 297, XV Off. Rec. 172, 220-221.

Drafting Committee

18. A/CONF.62/L.75/Add.5 (1981, mimeo.).
19. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).
20. A/CONF.62/L.152/Add. 25 (1982, mimeo.).
21. A/CONF.62/L.160 (1982), XVII Off. Rec. 225 (Chairman, Drafting Committee).

Informal Documents

22. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 17; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 17 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.
23. NG5/16 (1978), reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, 120 (Chairman, NG5).
24. NG5/17 (1978), reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, 117 (Chairman, NG5). [The symbol "NG5/17" has been dropped from the reproduction of this document in the English version of X Off. Rec].
25. NG5/18 (1978), reproduced in A/CONF.62/RCNG/2 (1978), X Off. Rec. 126, 168 (Chairman, NG5).
26. SD/3 (1980, mimeo.) (President). Reproduced in XII Platzöder 239.
27. SD/3/Add.1 (1980, mimeo.) (President). Reproduced in XII Platzöder 275.

COMMENTARY

297.1. The acceptance by many participants in the Third U.N. Conference on the Law of the Sea of the provisions for the settlement of disputes relating to the interpretation of the Law of the Sea Convention was, from the very beginning, conditioned on the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision.

There was no doubt that the basic obligations of Part XV, section 1, relating to the settlement of disputes by means agreed upon by the parties to the dispute (articles 279 to 284) should apply to all disputes arising under the Convention. Beyond that, however, there was some opposition to an unlimited obligation to submit a dispute to a procedure entailing a binding decision. When Ambassador Reynaldo Galindo Pohl (El Salvador) introduced the first general draft on the settlement of disputes at the second session of the Law of the Sea Conference (1974), he immediately highlighted the need for exceptions from obligatory jurisdiction with respect to "questions directly related to the territorial integrity of States." Otherwise, a number of States might have been dissuaded from ratifying the Convention or even signing it.¹

297.2. The document presented at Caracas by an informal working group (Source 1) suggested three basic options on the subject, each of which was defended strongly within the group. First, the integrity of the compromise package to be embodied in the Convention was to be preserved at all cost; therefore, an effective dispute settlement system must apply "to all disputes relating to the interpretation and application of this Convention" (*ibid.*, Alternative A). Second, the dispute settlement machinery should have no jurisdiction over specified categories of issues, or its jurisdiction over those issues should be limited to non-binding decisions (*ibid.*, Alternatives B.1 and B.2). The third option contained an "opt-out" system which would allow States to exclude specified categories of disputes completely from dispute settlement or at least from procedures entailing binding decisions (*ibid.*, Alternatives C.1 and C.2). In specifying the categories of disputes that could be excluded, the group listed such categories as: (a) disputes arising out of the normal exercise of regulatory or enforcement jurisdiction (except in cases of gross or persistent violation of the Convention or abuse of power) or, alternatively, disputes arising out of the normal exercise of discretion by a coastal State pursuant to its regulatory and enforcement jurisdiction under the Convention (except in cases involving an abuse of power); (b) disputes concerning sea boundary delimitation between States, including those involving historic bays or limits of the territorial sea; (c) disputes concerning vessels and aircraft entitled to sovereign immunity under international law, and similar cases in which sovereign immunity applies; (d) disputes concerning military activities; and (e) other categories that may be agreed upon.

297.3. On the basis of further negotiations at the third session of the Conference (1975), the informal negotiating group presented a concrete draft of provisions on dispute settlement (Source 22), which in article 17 tried to limit a State's right to make exceptions, by specifying the categories of disputes in which a State can choose not to participate in whole or in part. That text read as follows:

¹ 51st plenary meeting (1974), para. 10, I Off. Rec. 213.

1. When ratifying this Convention, or otherwise expressing its consent to be bound by it, a State may declare that, with respect to any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under this Convention, it limits its acceptance of some of the dispute settlement procedures specified in this Convention to those situations in which it is claimed that a coastal State has violated its obligations under this Convention by:

(a) interfering with the freedoms of navigation or overflight or of the laying of submarine cables or pipelines, or related rights and duties of other States;

(b) failing to have due regard to other rights and duties of other States under this Convention;

(c) not applying international standards or criteria established by this Convention or in accordance therewith; or

(d) abusing or misusing the rights conferred upon it by this Convention (*abus ou détournement de pouvoir*) to the disadvantage of another Contracting Party.

2. If one of the parties to a dispute has made such a declaration and if the parties to a dispute are not in agreement as to whether the dispute involves a violation of this Convention specified in the preceding paragraph, this preliminary question shall be submitted to decision by the tribunal having jurisdiction under Articles 9 and 10 of this Convention.

3. Whether or not it has made a declaration under paragraph 1 of this Article, a State may declare, when ratifying this Convention, or otherwise expressing its consent to be bound by it, that it does not accept some [or all] of the procedures for the settlement of disputes specified in this Convention with respect to one or more of the following categories of disputes:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.

(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

(d) Disputes or situations in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.

(e)

(f)

4. A Contracting Party, which has made a declaration under paragraphs 1 or 3 of this Article, may at any time withdraw all or part of its exceptions.

5. If one of the Contracting Parties has made a declaration under paragraphs 1 or 3 of this Article, any other Contracting Party may enforce the same exception in regard to the Party which made the declaration.

297.4. In revising this text for inclusion in Part IV of the ISNT (Source 2), President Amerasinghe retained its basic concepts, but clarified it by adding a more explicit introductory phrase. In this text, he omitted the reference to abuse or misuse of rights or abuse of power in subparagraphs 1(d) and 3(a); omitted in subparagraph 3(b) the alternative of submitting boundary disputes to some other nonbinding procedure; limited the right to opt out to the four categories specified; and improved the provisions relating to the effect of the declarations. Consequently, the President's text (Source 2) read as follows:

1. Nothing contained in the present Convention shall require any Contracting Party to submit to the dispute settlement procedures provided for in the present Convention any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under the present Convention, except when it is claimed that a coastal State has violated its obligations under the present Convention: (i) by interfering with the freedoms of navigation or overflight, or the freedom to lay submarine cables and pipelines, or related rights and duties of other Contracting Parties; (ii) by refusing to apply international standards or criteria established by the present Convention or in accordance therewith, provided that the international standards or criteria in question shall be specified.

2. When ratifying the present Convention, or otherwise expressing its consent to be bound by it, a Contracting Party may declare that it does not accept some or all of the procedures for the settlement of disputes specified in the present Convention with respect to one or more of the following categories of disputes:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention;

(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, providing that the State making such a declaration shall indicate therein a regional or other third-party procedure, entailing a binding decision, which it accepts for the settlement of these disputes;

(c) Disputes concerning military activities, including those by Government vessels and aircraft engaged in non-commercial service, it being understood that the law enforcement activities pursuant to the present Convention shall not be considered military activities;

(d) Disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council has determined that specified proceedings under the present Convention would not interfere with the exercise of such functions in a particular case.

3. If the parties to a dispute are not in agreement as to the applicability of paragraphs 1 or 2 to a particular dispute, this preliminary question may be submitted for decision to the tribunal having jurisdiction under articles 9 and 10 of this chapter by application of a party to the dispute.

4. A Contracting Party, which has made a declaration under paragraph 2, may at any time withdraw it in whole or in part.

5. Any Contracting Party which has made a declaration under paragraph 2 shall not be entitled to invoke any procedure excepted under such declaration in relation to any excepted category of dispute against any other Contracting Party.

6. If one of the Contracting Parties has made a declaration under paragraph 2(b), any other Contracting Party may compel the declarant to refer the dispute to the regional or other third-party procedure specified in such declaration.

297.5. In commenting on this proposal (see Source 3), President Amerasinghe pointed out that he had made “an attempt to compromise the extreme and conflicting views regarding the question of including or excluding certain disputes relating to the economic zone from binding dispute settlement procedures.” He noted that certain drafts presented to the Sea-Bed Committee proposed that “disputes within this zone be dealt with exclusively by the authorities of the coastal State.”² As a possible solution, he suggested the inclusion of “third party dispute settlement procedures for certain types of disputes whilst others are excluded.” He called attention to the view that “it is not an infringement of rights to ensure that the limits of those rights and the corresponding obligations in the context of the interpretation or application of the convention should be [justiciable] be-

² For the President’s remarks see A/CONF.62/WP.9/Add.1 (1976), para. 31, V Off. Rec. 122, 124. According to article F of the draft articles on fisheries presented by Ecuador, Panama and Peru, “[a]ny dispute concerning fishing or hunting activities by foreign-flag vessels within the zone under the sovereignty and jurisdiction of the coastal State shall be settled by the competent authorities of the coastal State.” A/AC.138/SC.II/L.54, reproduced in III SBC Report 1973, Annex II, Appendix V, number 44, at 107.

More elaborately, the draft articles on fisheries presented by Canada, India, Kenya and Sri Lanka proposed in article 13 that the “jurisdiction and control over all fishing activities within the exclusive fishery zone shall lie with the coastal State concerned”; and that “[a]ny difference or dispute concerning the limits of the zone or the interpretation or validity of the terms, conditions or regulations referred to in article 5 [relating to historic fishing rights of neighboring developing coastal States] or the interpretation and application of these [i.e., fishery] articles shall be settled by the competent institutions of the coastal State concerned.” A/AC.138/SC.III/L.38, *ibid.*, number 27, at 82.

For other proposals on the subject, see V SBC Report 1973, SC.II/WG/Paper No. 4, section 21.

fore an appropriate forum.” To the argument that such a provision would leave room “for the exclusive jurisdiction of the coastal State to be questioned,” he replied that it “is not the exclusive jurisdiction that is meant to be questioned but the manner of its exercise.”

297.6. The President’s first draft (Source 2) was subjected to a thorough debate during the fourth session of the Conference (1976). The views of the delegations on the topic of desirable or necessary exclusions covered the whole spectrum.³ In opening the debate Dr. Reynaldo Galindo Pohl (El Salvador), one of the cochairmen of the earlier informal working group on the settlement of disputes, emphasized that “in outlining the exceptions great care should be taken to use language that aptly described the particular situation and to avoid general and abstract terms, for otherwise a wide loop-hole would be provided through which States could evade their obligations.” He suggested that exceptions “should relate only to compulsory jurisdiction, not to other means for the settlement of disputes,” as compulsory resort to conciliation “might be a valid substitute for the tribunal in certain cases.” He pleaded also for equal treatment of the exceptions, and complained that, in the draft before the Conference, boundary disputes were not treated equally, because a State which excluded boundary disputes in accordance with paragraph 2(b) had to accept some other procedure entailing a binding decision.⁴

He was followed by another cochairman of the informal working group, Ambassador Ralph L. Harry (Australia), who stressed the importance of providing “the necessary machinery so that no significant problem of interpretation could long remain without a final and authoritative ruling.” He pointed out that “many provisions of the [C]onvention would be acceptable only if their interpretation and application were subject to expeditious, impartial and binding decisions.” He added that to allow parties to exclude certain types of disputes from a system of binding settlement might lead to difficulties. “If exceptions were too numerous or too broadly defined, the value of the system would be reduced and the possibility of securing agreement on compromises subject to future interpretation would also be diminished.” Any solution would have to “reflect a balance between the rights of the coastal State over its resources and the rights of others.”⁵

Many other speakers took a similar position, emphasizing that they would prefer to have no exceptions, but that if there must be some, every proposed exception should be formulated very clearly, and its scope and application should be interpreted restrictively. In particular, several of these speakers insisted that the novel provisions relating to the exclusive economic zone should not be exempt from the dispute settlement system. For instance, the Soviet delegate considered that an exemption of disputes arising out of the exercise of discretionary rights by the coastal State would considerably diminish the value of the procedures of dispute settlement, as

³ The debate extended from the 58th to the 65th plenary meetings (1976), V Off. Rec. 8-54.

⁴ 58th plenary meeting, para. 10, V Off. Rec. 9.

⁵ *Ibid.* 9-10, paras. 12 and 18-19.

they would no longer “protect the legitimate rights and interests of other States Parties to the Convention.”⁶

Others, with equal vigor, insisted that the hard-won exclusive jurisdiction of the coastal States in the economic zone should not be jeopardized by its submission to third-party adjudication. Ambassador Hans G. Andersen (Iceland) pointed out, for instance, that “many States, although professing to support the concept of the economic zone, were endeavouring in various ways to weaken it”; that, in particular, they “wanted to open up the possibility of disputing the decisions of the coastal State.” He also felt that, if “that were to happen, the concept of the exclusive economic zone would be rendered illusory and meaningless”; and that, to avoid this, “the decisions of the coastal State with regard to the resources within the exclusive economic zone must be considered final.”⁷ Some of the delegates supporting this view, however, were willing to accept mandatory settlement of disputes relating to navigation in, and overflight over, the exclusive economic zone.⁸

⁶ 58th meeting, para. 28, V Off. Rec. 11. See also statements in the Plenary by the delegations of Singapore, *id.*, para. 23, *ibid.* 10; New Zealand, *id.*, para. 35, *ibid.* 11-12; F.R.G., *id.*, para. 41, *ibid.* 12-13; U.K., 59th meeting, para. 17, *ibid.* 15; Switzerland, *id.*, para. 29, *ibid.* 16 (there should be no exceptions); Denmark, *id.*, para. 60, *ibid.* 19 (the proposed exceptions were “so far-reaching as to undermine the whole idea of a mandatory dispute settlement procedures”); the Netherlands, 60th meeting, paras. 11-12, *ibid.* 22 (“[t]here was no justification for any of the exceptions” mentioned in the President’s draft); Colombia, *id.*, para. 18, *ibid.* 23; Spain, *id.*, para. 23, *ibid.* 23; Italy, *id.*, para. 32, *ibid.* 24 (exceptions were contrary to the principle of sovereign equality, as they “would allow one party to impose on the others its interpretation of the rights and obligations it had freely accepted upon becoming party to the convention”); Japan, *id.*, para. 57, *ibid.* 27; Austria, *id.*, para. 62, *ibid.* 28 (as the economic zone was a new legal institution, defined explicitly in the convention, “interpretations concerning it could hardly be left to the discretion of coastal States but should rather be spelt out by an international judicial body”); Republic of Korea, *id.*, para. 73, *ibid.* 29; Yugoslavia, 61st meeting, para. 27, *ibid.* 32; Hungary, 62nd meeting, paras. 60-61, *ibid.* 41 (a landlocked country could not accept a full exemption of disputes arising out of the exercise of discretionary rights by a coastal State, as “the convention should contain adequate safeguards against the abuse of those rights”); Nepal, 63rd meeting, para. 18, *ibid.* 45 (rights were never legal rights unless they were “legally protected rights,” and they “should never be left to the unilateral interpretation of an interested party”); Iceland, 64th meeting, para. 12, *ibid.* 48; Fiji, *id.*, para. 23 *ibid.* 49 (exceptions were “too broad and ambiguous” and would exclude “many disputes which by their very nature should be the subject of prompt compulsory settlement”).

⁷ 60th meeting, para. 67, V Off. Rec. 28. See also the statements in the Plenary by the delegations of Kenya, 61st meeting, para. 49, *ibid.* 34 (the obligation to submit the exercise of exclusive jurisdiction to compulsory third-party settlement mechanisms “might be used as a pretext for turning the exclusive economic zone into an international zone,” and would mean that “the coastal State might be subjected to constant harassment by having to appear before international tribunals at considerable loss of time and money”); Brazil, *id.*, para. 63, *ibid.* 35-36 (no binding decisions are acceptable with respect to disputes relating to matters under the jurisdiction of the coastal State, but certain matters might be referred to some type of international conciliation or arbitration entailing only nonbinding recommendations); Mauritius, 62nd meeting, para. 10, *ibid.* 36-37 (the proposed dispute settlement system would lead to “needless tension and bad feeling” among neighboring States; the reasons against it were “overwhelming”); Venezuela, *id.*, para. 78, *ibid.* 42; Pakistan, 63rd meeting, para. 21, *ibid.* 45; and Democratic People’s Republic of Korea, *id.*, para. 31, *ibid.* 46.

⁸ See statements in the Plenary by the delegations of India, 59th meeting, para. 44, V Off.

In responding to some of the stronger statements concerning the untouchable sovereignty of the coastal States, Ambassador Andrew J. Jacovides (Cyprus) pointed out that small and militarily weak States “needed the protection of the law, impartially and effectively administered, in order to safeguard [their] legitimate rights”; that there “was a danger that the substantive articles which the Conference was attempting to formulate might be interpreted arbitrarily and applied unilaterally”; that, in consequence, “the whole system would disintegrate amid complete anarchy”; and that, should too broad exceptions be made from the third-party dispute settlement system, especially regarding matters of delimitation, “small and weak States would be left at the mercy of arbitrary interpretations and unilateral measures by States strong enough to impose their will.”⁹

297.7. As a result of that plenary debate, the President prepared a revision of Part IV of the ISNT (Source 4), in which he tried to find a middle road between the extreme points presented during that debate. He omitted the optional exception relating to the discretionary rights of the coastal State, as the matter was already covered by the obligatory exclusion in article 18(1) of the text. The latter provision was modified in both directions. On the one hand, the scope of the exclusionary clause was broadened by making it clear that it applied to the whole gamut of the rights of the coastal States, namely to “any dispute in relation to the exercise of sovereign rights, exclusive rights or exclusive jurisdiction of the coastal State.” On the other hand, to compensate for this concession to the coastal States, the President made some of the exceptions from the exclusion more explicit by defining more precisely the questions that would remain subject to the jurisdiction of the international courts and tribunals to be established under the Convention. In particular, the revised text provided for submission to international adjudication not only violations of the basic freedoms of navigation and overflight, but also any failure of the coastal States “to give due regard to any substantive rights specifically established by [the Convention] in favor of other States” (article 18, paragraph 1(a)).¹⁰ To balance this extension, the exception permitting the submission to international adjudication of any refusal by a coastal State to apply international standards or criteria established by the Convention, or in accordance therewith, was narrowed down to standards or criteria “which relate to the preservation of the marine environment” (article 18, paragraph 1(c)).

Rec. 18; Argentina, *id.*, para. 49, *ibid.* 18; Chile, *id.*, para. 63, *ibid.* 19; and Senegal, 65th meeting, para. 20, *ibid.* 51.

⁹ 60th meeting, paras. 44 and 49, V Off. Rec. 25-26.

¹⁰ A similar exclusion was contained in the 1975 informal working group’s draft (Source 21, article 17, paragraph 1(b)), which allowed a coastal State to limit its acceptance of jurisdiction to “situations in which it is claimed that the coastal State has violated its obligations under this Convention by ... failing to have due regard to other rights and duties of other States under this Convention” (namely those other than the basic freedoms). The full text of that provision is reproduced in para. 297.3 above.

297.8. As a result of these changes, article 18 of the ISNT, Part IV/Rev.1 (Source 4) read as follows:

1. Nothing contained in the present Convention shall empower any Contracting Party to submit to the dispute settlement procedures provided for in the present Convention any dispute in relation to the exercise of sovereign rights, exclusive rights or exclusive jurisdiction of a coastal State, except in the following cases:

(a) when it is claimed that a coastal State has violated its obligations under the present Convention by interfering with the freedom of navigation or overflight, the freedom to lay submarine cables or pipelines or by failing to give due regard to any substantive rights specifically established by the present Convention in favour of other States;

(b) when it is claimed that any other State, when exercising the aforementioned freedoms, has violated its obligations under the Convention or the laws and regulations enacted by a coastal State in conformity with the present Convention; or

(c) when it is claimed that a coastal State has violated its obligations under the present Convention by failing to apply international standards or criteria established by the present Convention or by a competent international authority in accordance therewith, which are applicable to the coastal State and which relate to the preservation of the marine environment, provided that the international standards or criteria in question shall be specified.

2. When ratifying the present Convention, or otherwise expressing its consent to be bound by it, a Contracting Party may declare that it does not accept some or all of the procedures for the settlement of disputes specified in the present Convention with respect to one or more of the following categories of disputes:

(a) disputes concerning sea boundary delimitations between adjacent or opposite States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure, entailing a binding decision, which it accepts for the settlement of these disputes;

(b) disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, it being understood that law enforcement activities pursuant to the present Convention shall not be considered military activities; and

(c) disputes in respect of which the Security Council of the United Nations, while exercising the functions assigned to it by the Charter of the United Nations, determines that specified proceedings under the present Convention interfere with the exercise of such functions in a particular case.

3. If the parties to a dispute are not in agreement as to the applicability of paragraphs 1 or 2 to a particular dispute, this preliminary question may be submitted for decision to the forum having juris-

diction under articles 9 and 10 of this Chapter by application of a party to the dispute.

4. A Contracting Party, which has made a declaration under paragraph 2, may at any time withdraw it.

5. Any Contracting Party which has made a declaration under paragraph 2 shall not be entitled to invoke any procedure excepted under such declaration in relation to any excepted category of dispute against any other Contracting Party.

6. If one of the Contracting Parties has made a declaration under paragraph 2(a) any other Contracting Party may refer the dispute to the regional or other third-party procedure specified in such declaration.

297.9. The discussion in the Informal Plenary at the fifth session of the Conference (1976) revealed the need to avoid confusion between limitations on international adjudication that would apply automatically and those that would be optional and would require a special declaration. Thus it was suggested that they should be put into separate articles. The President made this change and divided the old article 18 into the new articles 17 and 18 (the numbering being changed because of the omission in the new draft of the article relating to the exhaustion of local remedies – which was later restored).¹¹ In addition, the President accepted the following suggestions for changes: (i) replacing “violations” with the softer expression “contraventions;” (ii) replacing the phrase “failing to give due regard to any substantive rights specifically established by the present Convention in favour of other States” with the expression “other internationally lawful uses of the sea related to navigation or communication,” which was adapted from the provision which later became article 58 of the Convention;¹² (iii) making it clear that the power of the coastal State to enact laws and regulations that would be binding on other States is subject not only to the Convention, but also to “other rules of international law not incompatible with the Convention”; (iv) reformulating the paragraph providing for international adjudication of disputes relating to the contravention by a coastal State of international standards or criteria for the preservation of the marine environment, and adding to that provision a reference to “marine scientific research,” thus broadening the scope of international adjudication; and (v) further broadening the scope of such adjudication by adding

¹¹ The President made that change in the second revision of the RSNT, Part IV (Source 5). From this point on, the texts reproduced in the Commentary to article 297 will discuss only automatic limitations, while the Commentary to article 298 will discuss the optional ones. In view of this separation, it is the Commentary to article 298 that will consider in more detail the drafting history of the optional provisions prior to the separation.

¹² When that expression was later changed in article 58, it was accordingly changed in article 297. The President anticipated this when he stated that “any final formulation [of the provisions relating to limitations of jurisdiction] would have to take into account and be dependent upon negotiations relevant to corresponding provisions of other parts.” RSNT, Part IV, Introductory Note (Source 5, at 145). There are, however, still minor differences between article 58, paragraph 3, and article 297, paragraph 1(b).

a provision relating to a coastal State's rights and duties "in respect of living resources" (as preservation of such resources is of special interests to all States). The President also introduced two new procedural paragraphs, as a consequence of the division of this topic between articles 17 and 18 of the second revision of Part IV of the RSNT.

297.10. The President embodied all these changes in the second revision of his draft, which officially became Part IV of the RSNT (Source 5). The new article 17 read as follows:

1. Disputes relating to the exercise by a coastal State of sovereign rights, exclusive rights or exclusive jurisdiction recognized by the present Convention shall be subject to the procedures specified in section 2 only in the following cases:

(a) When it is claimed that a coastal State has acted in contravention of the provisions of the present Convention in regard to the freedom of navigation or overflight or of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation or communication; or

(b) When it is claimed that any State, in exercising the aforementioned freedoms, has acted in contravention of the provisions of the present Convention or of laws or regulations enacted by the coastal State in conformity with the present Convention and other rules of international law not incompatible with the present Convention; or

(c) When it is claimed that a coastal State has acted in contravention of specified international standards or criteria for the preservation of the marine environment or for the conduct of marine scientific research, which are applicable to the coastal State and which have been established by the present Convention or by a competent international authority acting in accordance with the present Convention; or

(d) When it is claimed that a coastal State has manifestly failed to comply with specified conditions established by the present Convention relating to the exercise of its rights or performance of its duties in respect of living resources, provided that in no case shall the sovereign rights of the coastal State be called in question.

2. Any dispute excluded by paragraph 1 may be submitted to the procedure specified in section 2 only with the express consent of the coastal State concerned.

3. Any disagreement between the parties to a dispute as to the applicability of this article shall be decided in accordance with paragraph 3 of article 10.

297.11 In preparation for the sixth session of the Conference (1977), the President held informal consultations on the dispute settlement provisions, on the margin of the informal intersessional consultations on First Committee matters held at Geneva in March 1977. The President's report on

these conversations, which was circulated to all delegations,¹³ contained the following statement on article 17:

2. In relation to articles 17 and 18 one issue was whether the limitations on compulsory dispute settlement (article 17) and the exceptions (article 18) should apply to the “procedures for the settlement of disputes specified in the *whole Convention*” and not merely to the “procedures for the settlement of disputes specified in *section II*.” Article 17 was perhaps the most controversial, the main issue being whether there should be any provision for challenging the exercise of coastal States’ sovereign rights and exclusive rights and jurisdictions, or whether the exceptions to jurisdictions were too many and too wide.

The formulation of article 17.1(a) and (b) according to one view covered all navigation, and the rights of coastal States, by compulsory dispute settlement under section II, could be granted, even as a matter of compromise, whereas the opposite view was that the scope of the subparagraphs was too restrictive.

Another issue was whether article 17.1(b) should be brought in line with article 17.1(a), which reflected the provisions of article 46.1 of WP.8/Rev.1/Part II, by reference being made to the “other internationally lawful uses” too, or whether the language of article 46, which has not been agreed upon, should be used in article 17.

The issue raised in relation to article 17, subparagraph 1(d) dealing with living resources, was whether it should be totally deleted or, as a matter of compromise, whether mandatory recourse to conciliation procedure, where there had been an abuse of power by the coastal State, could be substituted for compulsory jurisdiction. By and large it seemed, that with few exceptions, the delegations representing the two extremes were ready to work out some compromise.

297.12. After a further discussion of these issues at the sixth session of the Conference (1977), the President reported (Source 7) that article 17 became article 296 [297] of the ICNT, and that

The new formulation of article 296 [297] is intended to provide safeguards against an abuse of power by a coastal State and at the same time to avoid an abuse of legal process by other States. In paragraph 1 of this article provision has been made through procedural devices to avoid the abuse of legal process. Constraints have also been imposed on the challenge of discretionary powers in relation to living resources and marine scientific research.

Consequently, article 296 [297] contained several new features. The new text gave a clear indication that section 1 of the new Part XV of the Informal Composite Negotiating Text, containing provisions relating to dispute settlement by various means agreed upon by the parties to the

¹³ “Informal Note from the President of the Third United Nations Conference on the Law of the Sea to All Delegations” (25 March 1977, mimeo.), section 2, UN Job No. (1)-204003.

dispute, would apply to all disputes, including those relating to the exclusive economic zone.

The new text also contained provisions designed to prevent the harassment of the coastal State by submission of disputes that were frivolous or vexatious, or were without any *prima facie* basis. In addition, substitution of the phrase “sovereign rights and jurisdiction” for “sovereign rights, exclusive rights, or exclusive jurisdiction,” was effected in order to conform to the new language of article 56 of the ICNT (replacing article 44 of the RSNT). Also, the text provided for the enforcement against a coastal State of rules for the protection and preservation of the marine environment only if they have been established by “a competent international organization or diplomatic conference” acting in accordance with the Convention. A guarantee was also included for the coastal State that in disputes relating to certain provisions concerning marine scientific research or living resources of the sea, the exercise of discretion by the authorities of the coastal State would not be called into question, and that the international court or tribunal would not substitute its discretion for that of the coastal State. This change and similar later changes reflected parallel developments in the Third Committee, where disputes relating to marine scientific research were also discussed (see Volume IV, article 264 Commentary). Finally, an additional guarantee was added that in disputes relating to living resources the sovereign rights of a coastal State shall in no case be called into question.

297.13. These amendments resulted in the inclusion in the ICNT (Source 6) of the following text of article 296 [297]:

1. Without prejudice to the obligations arising under section 1, disputes relating to the exercise by a coastal State of sovereign rights or jurisdiction provided for in the present Convention shall only be subject to the procedures specified in the present Convention when the following conditions have been complied with:

(a) that in any dispute to which the provisions of this article apply, the court or tribunal shall not call upon the other party or parties to respond until the party which has submitted the dispute has established *prima facie* that the claim is well founded;

(b) that such court or tribunal shall not entertain any application which in its opinion constitutes an abuse of legal process or is frivolous or vexatious; and

(c) that such court or tribunal shall immediately notify the other party to the dispute that the dispute has been submitted and such party shall be entitled, if it so desires, to present objections to the entertainment of the application.

2. Subject to the fulfillment of the conditions specified in paragraph 1, such court or tribunal shall have jurisdiction to deal with the following cases:

(a) When it is alleged that a coastal State has acted in contravention of the provisions of the present Convention in regard to the

freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines and other internationally lawful uses of the sea specified in article 58; or

(b) When it is alleged that any State in exercising the aforementioned freedoms, rights or uses has acted in contravention of the provisions of the present Convention or of laws or regulations established by the coastal State in conformity with the present Convention and other rules of international law not incompatible with the present Convention; or

(c) When it is alleged that a coastal State has acted in contravention of 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 present Convention or by a competent international organization or diplomatic conference acting in accordance with the present Convention.

3. No dispute relating to the interpretation or application of the provisions of the present Convention with regard to marine scientific research shall be brought before such court or tribunal unless the conditions specified in paragraph 1 have been fulfilled; provided that:

(a) when it is alleged that there has been a failure to comply with the provision of articles 247 [now 246] and 254 [now 253], in no case shall the exercise of a right or discretion in accordance with article 247, or a decision taken in accordance with article 254, be called in question; and

(b) the court or tribunal shall not substitute its discretion for that of the coastal State.

4. No dispute relating to the interpretation or application of the provisions of the present Convention with regard to the living resources of the sea shall be brought before such court or tribunal unless the conditions specified in paragraph 1 have been fulfilled; provided that:

(a) when it is alleged that there has been a failure to discharge obligations arising under articles 61, 62, 69 and 70, in no case shall the exercise of a discretion in accordance with articles 61 and 62 be called in question; and

(b) the court or tribunal shall not substitute its discretion for that of the coastal State; and

(c) in no case shall the sovereign rights of a coastal State be called in question.

5. Any dispute excluded by the previous paragraphs may be submitted to the procedures specified in section 2 only by agreement of the parties to such dispute.

297.14 At the seventh session of the Conference (1978), the settlement of disputes relating to the exercise of the sovereign rights of the coastal State was identified as a “hard-core” issue, and Negotiating Group 5 (NG5) was

established to deal with that issue, under the chairmanship of Ambassador Constantin A. Stavropoulos (Greece), former Special Representative of the Secretary-General to the Conference.¹⁴ In his report to the Conference (Source 24), the Chairman noted that some members of the group were worried that they might not be able to effectively exercise their sovereign rights and discretions if they were to be harassed by an abuse of legal process and a proliferation of applications to dispute settlement procedures, and were not willing, therefore, to accept compulsory recourse to adjudication. Others wanted to ensure the effective protection of all their rights, and therefore insisted on compulsory recourse to adjudication. The concept of compulsory recourse to conciliation (that is, an obligation to submit to conciliation in certain cases, but no obligation to accept as binding the report of the commission) then emerged, and the group reached a consensus (conditional on an overall package deal) on the categories of issues that should be subject to compulsory conciliation. The group also agreed on the separation of the procedural provisions contained in article 296 [297], paragraph 1, of the ICNT, and drafted a new article 296 *bis*, which later became article 294 (see paras. 294.1 and 294.3 above). Finally, the group agreed that a general provision on abuse of rights, proposed by the delegation of Mexico, be included in the Convention. That provision was later included, in a modified form, in article 300.

297.15. The compromise proposal by NG5 (Source 23) read as follows:¹⁵

Article 296

Limitations on applicability of this section

1. Notwithstanding the provisions of Article 286, disputes relating to the interpretation or application of the present Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the present Convention, shall be subject to the procedure specified in Section 2 of this part in the following cases:

(a) When it is alleged that a coastal State has acted in contravention of the provisions of the present Convention in regard to the freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines and other internationally lawful uses of the sea specified in article 58; or

(b) When it is alleged that any State in exercising the aforementioned freedoms, rights or uses has acted in contravention of the provisions of the present Convention or of laws or regulations established by the coastal State in conformity with the present Convention and other rules of international law not incompatible with the present Convention; or

¹⁴ See A/CONF.62/63 (1978), section III, IX Off. Rec. 173, 174.

¹⁵ Footnotes are omitted.

(c) When it is alleged that a coastal State has acted in contravention of 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 present Convention or by a competent international organization or diplomatic conference acting in accordance with the present Convention.

2. No dispute relating to the interpretation or application of the provisions of the present Convention with regard to marine scientific research shall be brought before such court or tribunal unless the conditions specified in Article 296 bis have been fulfilled; provided that:

(a) when it is alleged that there has been a failure to comply with the provisions of articles 247 and 254, in no case shall the exercise of a right or discretion in accordance with article 247, or a decision taken in accordance with article 254, be called in question; and

(b) the court or tribunal shall not substitute its discretion for that of the coastal State.

3. (a) Unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2 of Part XV of this Convention, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management regulations.

(b) Where no settlement has been reached by recourse to the provisions of Section 1 of Part XV of this Convention, a dispute shall, notwithstanding paragraph 3 of Article 284, be submitted to the conciliation procedure provided for in Annex IV, at the request of any party to the dispute, when it is alleged that:

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

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

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

(c) In any case the conciliation commission shall not substitute its discretion for that of the coastal State.

(d) The report of the conciliation commission shall be communicated to the appropriate global, regional or sub-regional intergovernmental organizations.

(e) In negotiating agreements pursuant to Articles 69 and 70 the parties, unless they otherwise agree, shall include a clause on measures which the parties shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how the parties should proceed if a disagreement nevertheless arises.

4. Without prejudice to the provisions of paragraph 3, any dispute excluded by the previous paragraphs may be submitted to the procedures specified in section 2 only by agreement of the parties to such dispute.

Article 296 bis
Preliminary proceedings

1. A court or tribunal provided for in Article 287 to which an application is made in respect of a dispute referred to in Article 296 shall determine at the request of a party, or may determine on its own initiative, whether the claim constitutes an abuse of legal process or whether it is established *prima facie* to be well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.

2. On receipt of such an application, the court or tribunal shall immediately notify the other party or parties to the dispute of the application, and shall fix a reasonable time-limit within which the other party or parties may request such a determination.

3. Nothing in paragraph 1 or 2 affects the right of any party to a dispute to raise preliminary objections in accordance with the applicable rules of procedure.

General provision on abuse of rights

Article...
Abuse of rights

All States shall exercise the rights and jurisdictions recognized in this Convention in such a manner as not to harm unnecessarily or arbitrarily the rights of other States or the interests of the international community.

297.16. During the discussion of the proposed text at the seventh session of the Conference (1978), some delegations reluctantly accepted the proposed compromise. A few expressed preference for the original text of the ICNT, but others considered the ICNT text totally unacceptable and believed that the new text could bring the group of coastal States closer

to consensus.¹⁶ The text prepared by NG5 was included by the Collegium in the ICNT/Rev.1 (Source 8) as articles 296 [297] and 297 [294], with only minor drafting changes and changes in cross-references to the revised text of the ICNT.

297.17. During the ninth session of the Conference (1980), the Chairman of the Third Committee prepared a new text with respect to disputes relating to marine scientific research, and it was incorporated in the ICNT/Rev.2 (Source 13) as article 296 [297], paragraph 2,¹⁷ in the following form:

2. (a) Unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with this section, except that the coastal State shall not be obliged to submit to such settlement any dispute arising out of:

(i) the exercise by the coastal State of a right or discretion in accordance with article 246; or

(ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.

(b) Disputes arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with the provisions of this Convention shall be submitted, at the request of either party and notwithstanding article 284, paragraph 3, to the conciliation procedure described in annex V, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in paragraph 6 of article 246 or of its discretion to withhold consent in accordance with paragraph 5 of article 246.

297.18. In consequence of the restructuring of Part XV at the resumed ninth session (1980), and its discussion in the Informal Plenary at that session, President Amerasinghe presented a number of amendments to article 296, which became article 297 in the ICNT/Rev.3 (Source 16). Together with new articles 298 and 299 it constituted a new section 3 of Part XV, while article 297 of the ICNT/Rev.2 was moved to section 2 and became article 294 (see Source 15).¹⁸ As a result of these changes, the restrictive word “only,” which appeared in earlier drafts of article 297, paragraph 1 (see para. 297.10 above), and was moved to the abuse of legal process paragraph in 1977 (see para. 297.13 above), was completely omitted in the final text of article 297, paragraph 1. This was probably due to

¹⁶ See 105th and 106th plenary meetings (1978), IX Off. Rec. 81-86.

¹⁷ See ICNT/Rev.2 (Source 13), Explanatory Memorandum by the President of the Conference, para. 12. Reproduced in II Platzöder 18, 21.

¹⁸ For an explanation of these changes see para. 294.2. For the actual text of the amendments see informal documents SD/3 and SD/3/Add.1 (Sources 25 and 26).

the fact that additional recourse to third-party dispute settlement procedures was provided in other paragraphs of that article (see para. 297.19 below).

297.19. Subject to further minor drafting changes made in the Draft Convention (Source 17), and by the Drafting Committee (Source 18), this text of article 297 aims at balancing the interests of the coastal States and those of the States with major navigational interests, as well as those of the landlocked and geographically disadvantaged States. The two latter groups wanted to ensure, in particular, that the few rights they were able to salvage in the tough bargaining with the coastal States would be protected by the availability of recourse to third-party dispute settlement procedures. The basic freedoms and rights of the sea – navigation, overflight and the laying of submarine cables and pipelines – as well as other internationally lawful uses of the sea related to these freedoms (such as those associated with the operation of ships, aircraft and submarine cables and pipelines, as specified in article 58) retained the complete protection of the compulsory adjudicative procedures provided in Part XV, section 2. Such protection was also extended to the marine environment in cases involving contravention of international rules and standards established for the protection and preservation of that environment. Under a parallel provision, non-coastal States acting in contravention of the Convention, or of the laws or regulations enacted by a coastal State, were made subject to adjudication under section 2 of Part XV, as long as those laws and regulations were adopted in conformity with both the Convention itself and with “other rules of international law not incompatible with the Convention.”

Disputes relating to marine scientific research and fisheries were divided into three categories: those that would remain subject to adjudication (namely all those that do not fall into the other two categories), those that would be completely excluded from adjudication (and, like all other disputes, would remain only subject to section 1 of Part XV), and those that would be subject to compulsory resort to conciliation. To the second group belong primarily disputes relating to the exercise by a coastal State of those powers with respect to which the substantive provisions of the Convention granted such State complete discretion. The third group includes disputes involving clear cases of abuse of discretion, where a State manifestly or arbitrarily has failed to comply with some basic obligations under the Convention. In a case relating to such an abuse of discretion, the conciliation commission shall, in accordance with Annex V, section 2, examine the claims and objections of the parties and make recommendations to the parties for an amicable settlement, provided that the conciliation commission shall not substitute its discretion for that of the coastal State. The report of the conciliation commission is to be communicated to the appropriate international organization.

Finally, the coastal States accepted a provision requiring that their agreements with the landlocked and geographically disadvantaged States, with respect to their access to coastal fisheries, shall include sufficient

measures for minimizing the possibility of disagreements concerning the interpretation or application of these agreements, as well as measures for dealing with disagreements should they arise nevertheless.

Despite the complexities of article 297 and some dissatisfaction with various details, the balance of this arrangement was generally accepted early in the Conference. This enabled article 297 to be maintained throughout the Conference and refined, thereby contributing to the integrity of the Convention by making possible agreement on article 309.

ANNEX VIII. SPECIAL ARBITRATION

SOURCES

1. A/CONF.62/L.7 (1974), III Off. Rec. 85 (Australia et al.).
2. A/CONF.62/WP.9 (ISNT, Part IV, 1975), Annexes II A, II B and II C, V Off. Rec. 111, 120 (President).
3. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), Annex II, V Off. Rec. 185, 197 (President).
4. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), Annex IV, VI Off. Rec. 144, 155 (President).
5. A/CONF.62/WP.10 (ICNT, 1977), Annex VII, VIII Off. Rec. 1, 62.
6. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), Annex VII. Reproduced in I Platzöder 375, 535.
7. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), Annex VIII. Reproduced in II Platzöder 3, 169.
8. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), Annex VIII. Reproduced in II Platzöder 179, 354.
9. A/CONF.62/L.78 (Draft Convention, 1981), Annex VIII, XV Off. Rec. 172, 239.

Drafting Committee

10. A/CONF.62/L.152/Add.20 (1982, mimeo.).
11. A/CONF.62/L.152/Add.26 (1982, mimeo.).
12. A/CONF.62/L.152/Add.27 (1982, mimeo.).
13. A/CONF.62/L.160 (1982), XVII Off. Rec. 225 (Chairman, Drafting Committee).

Informal Documents

14. SD.Gp/2nd Session/No.3 (1975, mimeo.). Reproduced in XII Platzöder 134 (France).
15. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), Annex II; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), Annex II (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.

COMMENTARY

A.VIII.1. Annex VIII reflects two concerns. On the one hand it recognizes the importance of scientific and technical considerations in the settlement of certain disputes. On the other hand, and of no less importance, it recognizes that the establishment of facts can serve as the basis for the settlement of a dispute. Thus, machinery for the establishment of facts can constitute a preliminary step toward the settlement of a dispute. The first consideration leads to an appropriate international procedure making use of experts, and the second to procedures of inquiry and fact-finding. In both instances the procedures are residual. A judge is never bound to accept the opinions of experts, while article 35 of the First Hague Convention of 1907

stipulates that the report of a commission of inquiry “which is confined to the determination of the facts, has by no means the character of an arbitral award. The parties are left at full liberty as to what action they are to take on the facts thus determined.”¹

The importance of giving adequate consideration to scientific and technical data is particularly felt in connection with conservation measures in relation to fisheries, and this has led to the inclusion, in treaties dealing with that matter, of special provisions for the settlement of disputes. Thus, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas² included a particular set of provisions for the settlement of disputes which might arise under that Convention, and these, being obligatory, did not come within the scope of the 1958 Optional Protocol for the Settlement of Disputes.³ The procedure was based on a special commission of five members named by agreement between the parties. Failing agreement, the commission members would be named by the Secretary-General of the United Nations in consultation with the States in dispute, the President of the International Court of Justice, and the Director-General of the Food and Agriculture Organization of the United Nations (FAO). The members would be drawn “from among qualified persons being nationals of States not involved in the dispute and specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled.” The decisions of the special commissions would be binding on the States concerned.

Article 10 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas listed a series of scientific and technical criteria that were to be applied by the special commissions, and the Convention specifically provided that no reservations could be made to those articles. Among those scientific criteria may be mentioned the requirements that scientific findings demonstrated the necessity for conservation measures, that the specific measures were based on scientific findings and were practicable, and that the measures did not discriminate, in form or in fact, against fishermen of other States.

This double concern, to have a more conclusive fact-finding procedure and to squarely face the problem of disputes which involve scientific or technical questions, led the Informal Working Group on the Settlement of Disputes at Caracas in 1974 to examine the relationship between what it termed “general and functional approaches” to the settlement of disputes (see Source 1). Section 6, alternative B.1, of that working paper suggested that before resorting to the dispute settlement procedure entailing a binding decision, disputes relating to fishing, pollution or scientific research should

¹ Hague Convention on the Pacific Settlement of International Disputes (1907), 205 CTS 233 (1907); 1 Bevens 575 (1968); 2 Am. J. Int'l L., Supp. of Official Documents 43, 56 (1908).

² A/CONF.13/L.54 (1958), UNCLOS I, II Off. Rec. 139; 559 UNTS 285 (1966); 17 UST 138 (1966); TIAS 5969.

³ Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, A/CONF.13/L.57 (1958), UNCLOS I, II Off. Rec. 145; 450 UNTS 169 (1963).

be referred to a special fact-finding procedure, in which the findings of the machinery utilized would be considered conclusive.

Several alternatives were also proposed. Noteworthy in that regard is alternative C.2 of the working paper, according to which a dispute submitted to the Law of the Sea Tribunal which involved scientific or technical questions would be referred by the Tribunal to a special committee of experts. If the experts' opinion did not settle the dispute, the Tribunal would proceed to consider the other aspects of the dispute "taking into consideration the findings of the Committee and all other pertinent information." A note stated that the Group envisaged that special provisions might be required in such functional fields as fishing, the seabed, marine pollution and scientific research, and that the Convention would deal with these specifically.

A.VIII.2. At the third session of the Conference (1975), this Group reconvened and was presented with an informal French proposal concerning three categories of dispute, namely those relating to fisheries, pollution and scientific research (Source 14). Annex II of the report of the Working Group (Source 15), entitled "Special Procedures," contained three chapters, on fisheries, pollution, and scientific research, respectively. In each of these the formation of a special committee was envisaged, closely following the informal French proposal (Source 14), with appropriate differences between the three commissions. In the chapters on pollution and scientific research, for example (but not in that on fisheries), a more tentative suggestion was made, reading:

[7. The parties concerned may agree to request the committee to carry out an investigation and establish the facts giving rise to any dispute concerning the interpretation or the application of the provisions concerning this chapter. In this case, the findings of the committee shall be considered as conclusive. The committee may, on this occasion, formulate recommendations which, without having the force of a decision, shall constitute the basis for a review, by the parties concerned, of the question giving rise to the dispute.]

The omission of a similar suggestion from the chapter on fisheries is explained by the general uncertainty which existed at the time regarding the future of the exclusive economic zone. In this connection it will be noted that the ISNT, Part II (Second Committee), article 137, left the whole question of the settlement of disputes open. On the other hand, in Part III (Third Committee), proposals for the settlement of disputes were included in the chapter relating to the protection and preservation of the marine environment (article 44) and in the chapter on marine scientific research (article 37).⁴

⁴ A/CONF.62/WP.8/Part II (1975), IV Off. Rec. 152, 171; Part III (1975), *ibid.* 171, at 176, 177 and 180. See further the Commentary on article 264 in Volume IV. On this matter, see also the letter of 23 May 1980 from the Secretary-General of IM[C]O to the Chairman of the Drafting Committee, especially Annex 3 thereof. Copy on file in the Law Library Archives at the University of Virginia School of Law.

That laid the basis for the ISNT, Part IV (Source 2), which contained a series of annexes on special procedures, namely Annex II A – Fisheries, Annex II B – Pollution, and Annex II C – Scientific Research. Article 8 of each Annex stated that the decisions of each special committee would be binding on the parties to the dispute, and article 9 provided that if the special committee had been requested to undertake fact-finding, its findings would be considered as conclusive. This was repeated in the revision of the ISNT (Source 3). In this revision, a fourth annex (II D) was added to cover special procedures relating to navigation disputes.

In the RSNT (Source 4) the presentation was changed. The four chapters of the previous Annex II were amalgamated into one – now Annex IV – which was renamed “Special arbitration procedure.” The list of special fields was amalgamated into one article (article 2) and included fisheries, protection and preservation of the marine environment, marine scientific research, and navigation. The text was more closely aligned on that of Annex III (now Annex VII), eight of the provisions of which were incorporated by reference (article 4). These related to general questions of procedure. In fact, Annex IV of the RSNT closely resembles the present Annex VIII.

A.VIII.3. These changes resulted from the formal debate on the settlement of disputes held in the Plenary at the fourth session of the Conference (1976) and the subsequent discussion in the Informal Plenary at the fifth session (1976), where Poland and the USSR submitted an informal proposal⁵ for special procedures on fisheries, as amendments to Annex II A of the ISNT, Part IV/Rev.1 (Source 3).

The proposals to establish these special institutions for the settlement of disputes caused difficulties for several delegations. In fact, those institutions would have jurisdiction with regard to matters over which a coastal State would be claiming to exercise sovereign rights or to have exclusive jurisdiction. At that time the scope of what is now Part V of the Convention (articles 55 to 75), on the exclusive economic zone, was far from settled – in fact it was not fully clarified until 1978 – so that progress was difficult. In the debate on the settlement of disputes at the fourth session (V Off. Rec. 8-54), different delegations expressed anxiety about, if not outright rejection of, the proposals for special procedures, not so much because of their fact-finding aspects or their appreciation of scientific or technical facts, but because the special commissions were liable to act with regard to matters which the coastal States would consider as coming within the scope of their sovereign rights or exclusive jurisdiction.

In consequence, more time was needed to complete the various provisions of Annex VIII in their application to the settlement of the different types of dispute then being envisaged. For example, in the case of fisheries it became necessary to limit compulsory settlement only to certain kinds of disputes, while for other disputes nothing more than a form of compulso-

⁵ Platzöder, *Dokumente*, IV New Yorker Session 1976, at 1060 (Poland and USSR). Also reproduced in XII Platzöder 231.

ry recourse to conciliation could be acceptable (see article 297 Commentary above). This notwithstanding, and once the issues of substance had been settled, the negotiation and drafting of Annex VIII itself proceeded relatively rapidly and did not give rise to many proposals or controversies.

Article 1

Institution of proceedings

Subject to Part XV, any party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping, may submit the dispute to the special arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

A.VIII.4. Article 1 has the same structure and the same scope as article 1 of Annexes V and VII, and refers not to the seizing of a tribunal but to initiating a three-stage process (cf. paras. A.V.5 and A.VII.3 above). The proceedings are instituted by written notification accompanied by a statement of the claim and the grounds on which it is based. What is specific about this provision is the type of dispute to which it relates, namely a dispute concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and dumping (for definitions of some of those terms see Volume II, article 1 Commentary).

Thus, disputes relating to whole series of provisions of the Convention can be brought within the scope of Annex VIII. It is difficult to delineate the parameters of this, except to note that the provisions of Annex VIII are brought into play through the operation of article 287. (However, article 297, paragraph 1(a), uses the expression “freedoms and rights of navigation” and thus differs from the language of Annex VIII, articles 1 and 2.) Furthermore, this article must always be read subject to Part XV, as is expressly stated in the opening words of article 1. Consequently, the operation of Annex VIII will always be subject to the limitations on the applicability of articles 286 to 296. These limitations are different for marine scientific research and for fisheries in the exclusive economic zone.

Prior to June 1976, in an effort to meet the wishes of some delegations favoring special arbitration proceedings, it was suggested to add a residuary class of dispute broadly conceived as “any field not falling within the four categories.” As this did not attract sufficient support, however, the RSNT (Source 4) did not pick it up.⁶

⁶ Enclosures in letters from D. Vignes to Sh. Rosenne, 24 November 1986, and 5 December 1986. Copies on file in the Law Library Archives at the University of Virginia School of Law.

Article 2
Lists of experts

1. A list of experts shall be established and maintained in respect of each of the fields of (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping.

2. The lists of experts shall be drawn up and maintained, in the field of fisheries by the Food and Agriculture Organization of the United Nations, in the field of protection and preservation of the marine environment by the United Nations Environment Programme, in the field of marine scientific research by the Inter-Governmental Oceanographic Commission, in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization, or in each case by the appropriate subsidiary body concerned to which such organization, programme or commission has delegated this function.

3. Every State Party shall be entitled to nominate two experts in each field whose competence in the legal, scientific or technical aspects of such field is established and generally recognized and who enjoy the highest reputation for fairness and integrity. The names of the persons so nominated in each field shall constitute the appropriate list.

4. If at any time the experts nominated by a State Party in the list so constituted shall be fewer than two, that State Party shall be entitled to make further nominations as necessary.

5. The name of an expert shall remain on the list until withdrawn by the State Party which made the nomination, provided that such expert shall continue to serve on any special arbitral tribunal to which that expert has been appointed until the completion of the proceedings before that special arbitral tribunal.

A.VIII.5. Article 2, elaborating lists of experts, first appeared in the report of the Informal Working Group (Source 15) even before it was considered for arbitration under Annex VII. Annex VIII, article 2, differs only slightly from the corresponding provision in Annex VII, article 2. Instead of one list there are four, one for each category of disputes. The lists are shorter, with only two experts nominated by each State Party. The lists are not maintained by the Secretary-General of the United Nations but by an appropriate functional body:

Fisheries	Food and Agriculture Organization of the United Nations (FAO)
Protection and preservation of the marine environment	United Nations Environment Programme (UNEP)
Marine scientific research	Intergovernmental Oceanographic Commission (IOC)
Navigation, including pollution from vessels and dumping	International Maritime Organization (IMO – formerly IMCO).

(The fourth category, formerly titled simply “navigation,” was changed to

its present formulation at the request of the International Maritime Organization and was included in the informal draft convention (Source 9) after consultation between the President and the Chairman of the Third Committee.⁷) In each case the list may also be maintained “by the appropriate subsidiary body concerned to which such organization, programme or commission has delegated this function.”

The criteria for nomination are not the same as in Annex VII. The nominees are designated “experts” and not “arbitrators,” and paragraph 3 stresses that they should be persons “whose competence in the legal, scientific or technical aspects” of the respective fields “is established and generally recognized and who enjoy the highest reputation for fairness and integrity.”⁸ Vacancies are filled in the same manner as under Annex VII.

Although the persons here are designated “experts” and not “arbitrators” they must be distinguished from the experts with whom article 289 deals. By article 289, however, a court or tribunal requiring the services of experts may make use of the lists maintained by virtue of Annex VIII.

In the ISNT (Source 2), for fisheries disputes each party could designate six duly qualified persons specializing in the (a) legal, (b) administrative, or (c) scientific aspects of fisheries. For pollution disputes, however, only two persons could be designated whose competence in matters of pollution control and conservation of the marine environment is established and generally recognized; and similarly for scientific research. As a result of the deliberations in the Informal Plenary during 1976, however, this was considerably reduced in the RSNT (Source 4), in which each party was entitled to nominate two experts in each of the designated fields. It is this formula which has prevailed.

Article 3

Constitution of special arbitral tribunal

For the purpose of proceedings under this Annex, the special arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

- (a) Subject to subparagraph (g), the special arbitral tribunal shall consist of five members.
- (b) The party instituting the proceedings shall appoint two members to be chosen preferably from the appropriate list or lists referred to in article 2 of this Annex relating to the matters in dispute, one of whom may be its national. The appointments shall be included in the notification referred to in article 1 of this Annex.

⁷ Report of the President on the work of the Informal Plenary on the settlement of disputes, A/CONF.62/L.54 (1980), para. 10, XIV Off. Rec. 130. Article 297, paragraph 1, was not adjusted in line with this.

⁸ The fact that the persons concerned are designated “experts” has no effect on their power to act as members of an arbitral tribunal. Cf. the special agreement between Canada and France of 23 October 1985 regarding the settlement of the dispute concerning *Filleting within the Gulf of St. Lawrence*, French text reproduced in 90 RGDIP 713 (1986); English text not yet published. Similarly, that designation does not bring the persons concerned within the scope of article 289 of the Convention.

- (c) The other party to the dispute shall, within 30 days of receipt of the notification referred to in article 1 of this Annex, appoint two members to be chosen preferably from the appropriate list or lists relating to the matters in dispute, one of whom may be its national. If the appointments are not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointments be made in accordance with subparagraph (e).
- (d) The parties to the dispute shall by agreement appoint the President of the special arbitral tribunal, chosen preferably from the appropriate list, who shall be a national of a third State, unless the parties otherwise agree. If, within 30 days of receipt of the notification referred to in article 1 of this Annex, the parties are unable to reach agreement on the appointment of the President, the appointment shall be made in accordance with subparagraph (e), at the request of a party to the dispute. Such request shall be made within two weeks of the expiration of the aforementioned 30-day period.
- (e) Unless the parties agree that the appointment be made by a person or a third State chosen by the parties, the Secretary-General of the United Nations shall make the necessary appointments within 30 days of receipt of a request under subparagraphs (c) and (d). The appointments referred to in this subparagraph shall be made from the appropriate list or lists of experts referred to in article 2 of this Annex and in consultation with the parties to the dispute and the appropriate international organization. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.
- (f) Any vacancy shall be filled in the manner prescribed for the initial appointment.
- (g) Parties in the same interest shall appoint two members of the tribunal jointly by agreement. Where there are several parties having separate interests or where there is disagreement as to whether they are of the same interests, each of them shall appoint one member of the tribunal.
- (h) In disputes involving more than two parties, the provisions of subparagraphs (a) to (f) shall apply to the maximum extent possible.

A.VIII.6. Article 3, on the constitution of a special arbitral tribunal, closely follows Annex VII, article 3 (see paras. A.VII.5 to 9 above). One major difference is that under Annex VIII each party shall appoint two members chosen preferably from the appropriate list, only one of whom may be its national. Consequently, only the President is appointed by agreement between the parties.

This composition could have the effect of putting the President of the special arbitral tribunal in a minority vis-à-vis the other four members of the special tribunal. But it seems that the strong desire for each party to be able to nominate one of its named experts as a specialist in the legal and administrative aspects, and another as a specialist in the scientific and technical aspects, was the principal factor influencing this decision.

Subject to those remarks, the procedures for the nomination of the national members for the other party in case of default, and of the President, and the fixing of the time limits for those processes, are the same as those contained in Annex VII, article 3. The difference is that the Secretary-General of the United Nations, and not the President of the International Tribunal for the Law of the Sea, is the appointing authority, and he must consult both with the parties (as in Annex VII), and with the appropriate international organization.

Article 4
General provisions

Annex VII, articles 4 to 13, apply *mutatis mutandis* to the special arbitration proceedings in accordance with this Annex.

A.VIII.7. Article 4, on general provisions, simply provides that *mutatis mutandis* articles 4 to 13 of Annex VII apply to special arbitration proceedings under Annex VIII (see paras. A.VII.6 to A.VII.17 above).

This extremely attenuated formulation, which stands in sharp contrast to the detailed texts presented in the ISNT and its revision (Sources 2 and 3), took shape in the RSNT (Source 4). Many of the earlier detailed provisions have been transferred to the Convention itself and are applicable to all the methods of dispute settlement enumerated in the Convention.

The ISNT, Part IV/Rev.1 (Source 3) contained a provision for the case of complex disputes involving several series of provisions of the Convention. It would have enabled a special committee (as it was then called) to require the parties to submit those questions to another appropriate procedure under the Convention. This idea was dropped in the RSNT (Source 4). While this provision, taken together with article 287, may have greatly simplified the text, nevertheless the problem of the extent of the jurisdiction of the special arbitral tribunals in complex cases of interpretation or application of the Convention which are not merely disputes limited to fisheries, protection and preservation of the marine environment, marine scientific research or navigation, including pollution from vessels and dumping, is not clear. It would seem that if questions arise before a special arbitral tribunal going beyond the jurisdiction which one party has accepted in relation to that tribunal, the tribunal might be faced with a successful challenge to its jurisdiction. In that case, the parties would need recourse to another of the procedures indicated in article 287, without prejudice to the limitations and exceptions contained in articles 297 and 298, insofar as they are relevant.

Article 5
Fact finding

1. The parties to a dispute concerning the interpretation or application of the provisions of this Convention relating to (1) fisheries, (2) protection and preser-

vation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping, may at any time agree to request a special arbitral tribunal constituted in accordance with article 3 of this Annex to carry out an inquiry and establish the facts giving rise to the dispute.

2. Unless the parties otherwise agree, the findings of fact of the special arbitral tribunal acting in accordance with paragraph 1, shall be considered as conclusive as between the parties.

3. If all the parties to the dispute so request, the special arbitral tribunal may formulate recommendations which, without having the force of a decision, shall only constitute the basis for a review by the parties of the questions giving rise to the dispute.

4. Subject to paragraph 2, the special arbitral tribunal shall act in accordance with the provisions of this Annex, unless the parties otherwise agree.

A.VIII.8. Article 5 was the first provision of Annex VIII to have been accepted (see para. A.VIII.1 above), as it seemed to be the most necessary and the least controversial. It simply permits the parties to a dispute falling within the scope of Annex VIII to request a special arbitral tribunal to carry out an inquiry and establish the facts giving rise to the dispute. This fact-finding function is different in kind from the other functions envisaged in Annex VIII. It is no longer a matter of declaring the law in a doubly binding way (compulsory recourse to arbitration and the obligation to carry out the award), but of a judicial task entrusted to the tribunal by agreement of the parties, for the tribunal to proceed to an inquiry in order to establish the facts lying at the origin of the dispute. In those circumstances, the findings of fact shall be considered as conclusive as between the parties.

The Convention contains other provisions which envisage some sort of administrative inquiry, for instance by the coastal State in its territorial sea under article 27, paragraphs 1, 3 and 5, or by the flag State or port State in the matter of the protection of the marine environment under articles 217, 218 and 226. That kind of administrative investigation is quite different from the judicial inquiries of Annex VIII.

The questions which may be submitted to this fact-finding procedure are the same as those for which the special arbitral tribunals have been created, as listed in article 1. The special arbitral tribunal acts as the fact-finding body, constituted in accordance with article 3, and the proceedings for fact-finding are instituted in the same way.

Article 5 contains two special provisions. The findings of fact of the special arbitral tribunal will be considered as conclusive as between the parties, in sharp contrast to the provision of article 35 of the First Hague Convention of 1907 (see para. A.VIII.1 above). In addition, at the request of the parties, the special arbitral tribunal acting under article 5 may formulate recommendations which, without having the force of a decision, shall constitute the basis for a review by the parties of the questions giving rise to the dispute. This idea has always been present, from article 9 of the ISNT (Source 2) where it was somewhat confused with fact finding,

through the RSNT (Source 4) where it was given a more independent standing. In the final text the two aspects are contained in two separate provisions, paragraphs 2 and 3, which only serves to emphasize the heterogeneity of the two functions. The effect is that a special arbitral tribunal can have conferred on it a task analogous to that of a conciliation commission. The justification for this is the importance which the establishment of facts might have for the settlement of a dispute.

Article 5, paragraph 4, by which, subject to paragraph 2, the special arbitral tribunal shall act in accordance with the provisions of Annex VIII unless the parties otherwise agree, does not distinguish between fact-finding and recommendations on the merits. This element of ambiguity does not facilitate the understanding of this provision.

A.VIII.9. By article 287 the procedure of Annex VIII is one of the choices available to the parties to the Convention. To date, the following States have accepted Annex VIII procedures for special arbitration: Belgium, Byelorussian SSR, German Democratic Republic, Ukrainian SSR, USSR.⁹

⁹ As indicated in *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987*, Ch. XXI.6, at 737 (ST/LEG/SER.E/6 (1988)).