

United Nations Convention on the Law of the Sea

A Commentary

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resolution mechanisms specified within Art. 287 to be equally valid,⁵ while the position of Portugal is somewhat more ambiguous due to an apparent conflict in the wording of its Declaration, which purportedly accepts the full suite of settlement procedures yet subsequently endorses the Annex VIII process only 'in the absence of any other peaceful means'.⁶ Although not generally considered an adherent to this process, Germany is seemingly also prepared to accept Annex VIII jurisdiction in the absence of any other peaceful alternative, having recognised upon accession 'the validity of special arbitration' while designating the judicially-led mechanisms as its favoured options for the resolution of disputes.⁷ This position however appears to be little more than an acknowledgment of the historical acceptance by the former German Democratic Republic (GDR) of special arbitration as a potential means of dispute settlement prior to German reunification.⁸ After signing the Convention, Belgium briefly designated special arbitration as its favoured means of dispute resolution but subsequently reversed this position upon accession, rejecting the Annex VIII process as an acceptable mechanism. Beyond some scope for conflicts in the Black Sea and Latin America, the prospect of a marine grievance arising between two States that have specified Annex VIII arbitration as an equal dispute resolution priority accordingly appears remote. Parties may voluntarily submit to the special arbitration process but, again, there has been no evidence of any meaningful inclination to do so.

II. Historical Background

The origins of the expert-led special arbitration process established under Annex VIII lie in the pioneering dispute resolution mechanisms developed within the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (High Seas Fishing Convention). Disputes over shared and straddling fish stocks and the conservation measures imposed thereto were intended to be subject to a bespoke system of compulsory resolution, which operated independently to those prescribed under the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes that accompanied the High Seas Fishing Convention.⁹ Under Art. 9 (1) High Seas Fishing Convention, parties could opt to resolve such disputes either through the traditional means of pacific settlement as articulated in Art. 33 of the Charter of the United Nations, or 'at the request of any of the parties' by engaging a special commission.

The special commissions envisaged under Art. 9 High Seas Fishing Convention resemble the modern arrangements advanced under Annex VIII in a number of key respects. Indeed, for some time during the UNCLOS III negotiations, the same terminology was applied to the panels that were intended to be established under Annex VIII. Special commissions under Art. 9 (1) High Seas Fishing Convention were to be composed of five members with demonstrable expertise in 'legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled', as laid down in Art. 9 (2) High Seas Fishing Convention, to be appointed in the first instance by the parties in dispute. If an appropriate accommodation could not be reached, pursuant to Art. 9 (2) High Seas Fishing Convention the commission would instead consist of 'well-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', an eligibility process convened in consultation with the Food and Agriculture Organisation of

⁵ UN, UNCLOS Declarations Made upon Signature, Ratification, Accession or Succession, or Any Time Thereafter, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

⁶ Declaration of Portugal made upon ratification of the Convention, available at: *ibid.*

⁷ Declaration of Germany made upon accession to the Convention, available at: *ibid.*

⁸ Declaration of the German Democratic Republic made upon signature to the Convention, available at: *ibid.*

⁹ Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes of 29 April 1958, UNTS 450, 169.

the United Nations. According to Art. 9 (3) High Seas Fishing Convention parties to the dispute would also be able to appoint one of its nationals to the special commission, who could participate fully in the proceedings as an equal member, but was precluded from voting or taking part in the writing of the final decision. This provision was ambiguous as to whether the disputant-appointed member was required to demonstrate similar expertise to the commission's other participants; Art. 9 (3) High Seas Fishing Convention requires solely that the additional appointee be a national of the State in question. In the absence of any practice in this respect, it may be speculated that such a person would be likely to be a relevant expert, if as much as for tactical reasons as their individual right to 'participate fully in the proceedings on the same footing as a member of the commission', a privilege that would suggest a technical affinity (whether legal, administrative or scientific) with the matter in hand.

- 7 The use of adjudicators with a strong degree of technical – as opposed to strictly legal – expertise was deemed important for the practical operation of Art. 9 High Seas Fishing Convention, since each commission under Art. 10 (1)(a) High Seas Fishing Convention would be required to consider both the validity of the science underpinning the policies in question, and whether such measures had been applied in a non-discriminatory manner. Indeed, a clear and objective understanding of the scientific and policy context was considered by a number of the negotiating parties to the High Seas Fishing Convention to be a vital component of the resolution of fisheries disputes. In this way, disputes over fisheries measures were to be reviewed by an impartial panel of specialists that were capable of addressing both the legal implications of conservation policies, as well as the shifting evidential basis and scientific baselines upon which such policies are founded. A degree of flexibility in this respect was further maintained through Art. 12 (1) High Seas Fishing Convention, which recognised that the biological circumstances of the stock in question or other marine living resources may alter subsequent to the decision rendered by the commission, thereby permitting the disputant States to agree appropriate conservation measures in the light of these developments.
- 8 Its innovatory nature notwithstanding, the dispute resolution process established under the High Seas Fishing Convention has never been invoked. Accordingly, as with Annex VIII arbitration itself, the merits of dispute settlement through technical fora remain an exercise in optimistic conjecture. Nevertheless, the existence of a specialised dispute resolution mechanism on this basis has been credited as an essential element in maintaining a balanced and coherent system of governance for high seas fisheries under the Convention.¹⁰
- 9 Due to the prevailing political conditions at the material time, it became swiftly apparent during the UNCLOS III negotiations that arbitration would constitute a core aspect of any purported dispute settlement mechanism within the eventual Convention. The Annex VIII process ultimately played a quietly significant role in reconciling the disparate negotiating interests, with strong and opposing views having been expressed over the form and substance of projected dispute resolution provisions within the evolving draft text. The USSR and the socialist bloc of negotiating States initially refused to countenance the prospect of a compulsory judicial resolution of disputes, which it condemned as 'bourgeois'. As a counter-proposal they favoured a forum involving non-judicial technical experts, with the parties able to exercise a considerable degree of control over its ultimate composition. Accordingly, specialist arbitration mechanisms were considered at a preliminary stage in these deliberations. There was, however, a notable lack of enthusiasm on the part of many delegations towards this mode of dispute resolution. A number of negotiating parties, especially developing States, were strongly opposed to these proposals, favouring the exclusive jurisdiction of the coastal State over the resources of the exclusive economic zone

¹⁰ Alan Boyle, Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks, in: Olav Schram Stokke (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001), 91, 93.

and resisting moves towards a compulsory review of national practices thereto. A more qualified acceptance of the possibilities of special arbitration was forthcoming from a number of western delegations, for whom the tolerance of this proposal was predominantly an act of *Realpolitik*, representing a gesture of good faith to ensure the participation of the Soviet bloc in the negotiating process. Indeed, the Canadian delegation appears privately to have considered the special arbitration mechanism 'an embarrassment',¹¹ which perhaps further explains the failure to ultimately secure a widespread endorsement of the Annex VIII process as a favoured means of dispute resolution.

The Annex VIII provisions were further complicated due to their being developed 10 concurrently with the wider principles of the Convention addressing the exclusive economic zone. The special arbitration process therefore presented some scope to impinge upon the exercise of powers that coastal States were keen to apply with minimal external oversight. Accordingly, once the overarching principles governing the exclusive economic zone and the limits of compulsory dispute resolution under Part XV had been broadly established, Annex VIII was finalised relatively swiftly. Its main proponents from within the Soviet bloc specified that, while they were ideologically unwilling to accept the dispute resolution provisions of the Convention without a mechanism for special arbitration, they nonetheless had no intention of imposing this process upon other parties.¹² In this regard, it appears that special arbitration was always destined to be of limited application, perhaps primarily as a means of dispute resolution concerning particular marine resources between the various Socialist States of that era. Indeed, following the conclusion of the Convention, with the initial exception of Belgium, the main adherents to the Annex VIII process were the USSR, two of its constituent Republics (Belarus and Ukraine) and the GDR. Subsequently, however, the USSR confounded expectations – including, seemingly, those of its own legal experts¹³ – by accepting the possibility of Annex VII arbitration as a binding form of dispute settlement, in addition to the Annex VIII process. There has accordingly been little scope for the application of the Annex VIII mechanism in the marine disputes raised between States to date.

As specified within Annex VIII Art. 1, the special arbitration mechanism may be applied 11 solely to four distinct categories of disputes: fisheries; protection and preservation of the marine environment; marine scientific research; and navigation, which also explicitly includes vessel-sourced dumping activities. These categories were identified at a relatively early stage in the negotiating process. Initially, it was considered that Annex VIII might advance an expansive sweep-up clause, permitting States to apply the special arbitration process to disputes over 'any field not fully within the four categories'.¹⁴ This met with little support from the negotiating parties, not least given that the general lack of enthusiasm for special arbitration would have been likely to render the designation of experts in sundry areas of marine activities a fundamentally redundant yet administratively-intensive exercise.

The initial bases for Annex VIII arbitration were confined to fisheries, pollution and 12 marine scientific research, with dispute resolution considered on a separate basis within the draft chapter of marine environmental issues. Navigation was subsequently added to the Annex VIII provisions, given the strong likelihood that aspects of seafaring would be raised in this respect and in view of the long tradition of national Admiralty courts drawing upon specialist expertise in this context. Arguably, the notion of 'navigation' for the purposes of Annex VIII is broader than that expressed in Art. 297 (1)(a), with the latter formulation confined to 'freedoms and rights of navigation'. At the material time, the Convention on the

¹¹ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2004), 56.

¹² A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (1987), 232.

¹³ Patricia Birnie, *Dispute Settlement Procedures in the 1982 UNCLOS*, in: W. E. Butler (ed.), *The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives* (1985), 39, 62.

¹⁴ Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989), 445.

Prevention of Marine Pollution by Dumping Wastes and Other Matter and the International Convention for the Prevention of Pollution from Ships had been recently concluded under the auspices of the International Maritime Organization (IMO). This ultimately informed the final wording of Annex VIII, with the notion of 'navigation' duly adjusted to its present formulation within this provision at the behest of the IMO.

III. Elements

1. Relationship with Part XV of UNCLOS

- 13 As a preliminary point, it should be observed that where an attempt to invoke the Annex VIII special arbitration process is made between States, any such action must be read in conjunction with the wider principles of Part XV of the Convention. Accordingly, the application of the Annex VIII mechanism will be subject to specific limitations as established under Arts. 286 to 299, as States may preclude the compulsory jurisdiction of a special arbitral panel. Therefore, even if a dispute were to arise between States that had accepted Annex VIII as a potential form of adjudication with equal priority, and the matter fell unequivocally within the range of matters subject to the special arbitration process, it is by no means axiomatic that such a procedure would indeed be followed. Nevertheless, there is sufficient flexibility in the definition of the disputes eligible for Annex VIII arbitration that a potentially vast array of issues may be addressed through this process, engaging the interpretation or application of a substantial number of the provisions of the Convention.

2. Jurisdictional Constraints

- 14 As specified clearly in Annex VIII Art. 1, the special arbitration process only applies to four specific types of disputes. Nevertheless, while the terms 'fishing', 'protection and preservation of the marine environment', 'marine scientific research' and 'navigation' may appear to be relatively self-contained, in reality disputes that may engage one of these issues are also likely to encompass additional legal and factual questions. Given that many disputes, even those ostensibly raising these matters as a topic of central concern, may not necessarily be strictly confined to the issues specified in Annex VIII, it is questionable as to whether the special arbitration process could be validly invoked under such circumstances. Indeed, in the absence of any discernible practice in relation to expert-led arbitral processes, it may be considered that Annex VIII jurisdiction is intended to be viewed narrowly and ought to be applicable only to disputes that clearly engage one of these four categories. There are strong policy grounds upon which to advance a naturally conservative approach to the jurisdiction of an Annex VIII tribunal. In the first instance, the core advantage of this process is to provide an opportunity to ensure that important factual and technical considerations are correctly and appropriately applied by specialists within these particular fields. These concerns become less apparent when the experts in question are then called upon to address complex legal issues that are ancillary to their stated proficiencies and could accordingly undermine the ability of the UNCLOS dispute resolution mechanisms to deliver clear and consistent interpretations of the Convention and the wider principles of the law of the sea. Moreover, there is little practical advantage to advancing the use of the Annex VIII process if a resultant special arbitral tribunal is only empowered to deal partially with the dispute in question. Ultimately, these considerations would further serve to inhibit the prospect of a regular establishment of an Annex VIII panel.
- 15 By way of example, the *Antarctic Whaling* case, for which judgment was ultimately rendered by the ICJ, turned fundamentally on the exercise of privileges to undertake lethal scientific research on the high seas. In this respect, the Court was required to assess whether a programme of scientific whaling conducted by Japan, as purportedly sanctioned under

Article VIII of the 1946 International Convention for the Regulation of Whaling (Whaling Convention), had in fact met the requirements of such a programme for the purposes of the Whaling Convention. *Prima facie*, this dispute would appear to fall clearly within the category of marine scientific research as advanced under Annex VIII, Art. 1. Indeed, given the stated trepidation of the Court towards addressing the scientific background to the case,¹⁵ it might further have exemplified adjudication on precisely the types of technical issues for which special arbitration was created, had both parties accepted this juridical possibility. However, in addition to the central issue as to whether the Japanese programme of scientific research could be properly considered to have qualified as such under the Whaling Convention, a further point of contention in the case concerned whether Australia's Antarctic exclusive economic zone constituted a disputed area and would therefore deprive the ICJ of jurisdiction by virtue of the Australian national reservation to dispute resolution processes.¹⁶ Assuming instead that the parties had opted for special arbitration, on a likely strict construction of the parameters of Annex VIII, this issue would have fallen outside the jurisdiction of the process.

Similar questions arise in the context of the powers of inquiry that may be potentially exercised pursuant to Art. 5 of Annex VIII.¹⁷ By way of example, the *Mavi Marmara* incident of May 2010 – whereby which Israeli forces fired upon a flotilla of protest vessels that had taken the ill-advised decision to attempt to breach a naval blockade – arguably engaged a fundamental question of freedom of navigation, an issue that falls squarely within the remit of an Annex VIII tribunal. Indeed, the resulting Panel of Inquiry addressed aspects of high seas navigation extensively within its report.¹⁸ Nevertheless, the incident raised wider questions of interpretive concern, including the right to self-defence, the proportionality of the use of deadly force and the parameters of the rights to freedom of speech and assembly, issues that lie clearly outside the inquiry jurisdiction of Annex VIII. This again begs the question as to whether such matters could have legitimately been raised before an Annex VIII panel of inquiry, had the parties in question chosen this forum.

3. Processes and Practice

Given that Annex VIII was developed concurrently with Annex VII, the administrative requirements for the initiation of special arbitration procedures are materially similar to those of the more mainstream arbitral processes. As with Annex VII arbitration, the special arbitration process is commenced by addressing written notification to the other party, alongside a statement of the claim and the grounds on which it is based. This has proved to be unproblematic in an Annex VII context, even in the event of stoic non-engagement by the respondent, as recently evidenced in the *Arctic Sunrise Case*¹⁹ and the extensive arbitration process concerning maritime claims in the South China Sea.²⁰ Accordingly, if special arbitration is ever ultimately invoked, there appears to be relatively little scope for difficulty in the initiation of the process for the purposes of Annex VIII, Art. 1.

¹⁵ *Antarctic Whaling* (note 3), paras. 69, 82, 172 and 185.

¹⁶ *Ibid.*, paras. 30–41.

¹⁷ See Caddell on Annex VIII Art. 5 MN 7–8.

¹⁸ UN Secretary-General, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (2011), paras. 69–93, available at: http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

¹⁹ ITLOS, *The Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, available at: <https://www.itlos.org/index.php?id=264&L=0> and PCA, *The Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), Award on the Merits of 14 August 2015, available at: PCA, *The Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), Award on the Merits of 14 August 2015, available at: <https://pcacases.com/web/view/21>.

²⁰ PCA, *The South China Sea Arbitration* (Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility of 29 October 2015 and PCA, *The South China Sea Arbitration* (Republic of Philippines v. The People's Republic of China), Award of 12 July 2016, available at: <https://pcacases.com/web/view/7>.