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Compulsory Conciliation Proceedings Regarding Disputes on Conservation and Management of Fish Stocks

Alina Miron

1. Introduction

Conciliation is one of the most promising but least resorted to diplomatic means of dispute settlement. As observed by Jean-Pierre Cot, '[t]he contrast is striking between the number of important, elaborate and highly political agreements calling for conciliation . . . [and] the paucity of any effective resort'.¹ Conciliation over fisheries disputes perfectly illustrates this observation.

Article 1 of the Salzburg resolution of the Institut de Droit international defines conciliation as

a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties . . . proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.²

¹ Jean-Pierre Cot, 'Expectations Attached to Conciliation Reconsidered' in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law* (Brill Nijhoff 2017) 9.

² Institut de Droit international, 'International Conciliation' (Salzburg 1961) art 1.

Three articles in the United Nations Convention on the Law of the Sea (UNCLOS) relate to conciliation. Article 284 provides for voluntary conciliation based on an ad hoc agreement between the parties. Articles 297 and 298 provide compulsory conciliation which can be triggered unilaterally by one of the parties.³ Compulsory conciliation is also defined as ‘conciliation in which participation in the process is mandatory but the results are nevertheless non-binding’.⁴ Rüdiger Wolfrum underlines that the term ‘compulsory’ is misleading: this ‘conciliation is compulsory only as a process’, not of result.⁵ In UNCLOS, the scope *ratione materiae* of compulsory conciliation is extremely limited. It only applies in limited fields: the exercise of sovereign rights with regards to marine scientific research, per Article 297(2)(b);⁶ sovereign rights in relation to fisheries, per Article 297(3)(b); and disputes over the delimitation of maritime boundaries when they are excluded from adjudication by an optional declaration,

³ One could add conciliation as part of the decision-making process within the International Seabed Authority per arts 161 and 162 of United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 3, entered into force 16 November 1994. This was revised substantially by the Agreement relating to the implementation of Part XI of the UNCLOS, 29 July 1994, entered into force 13 December 1998. These revisions have resulted in conciliation no longer being a pre-condition for using dispute-settlement procedures in arts 186–91 of UNCLOS.

⁴ *Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case 2016–10, 9 May 2018, para 52.

⁵ Rüdiger Wolfrum, ‘Conciliation Under the [UN](#) Convention on the Law of the Sea’ in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law* (Brill Nijhoff 2017) 186.

⁶ This concerns more specifically the rights enumerated in UNCLOS, arts 246, 253.

per Article 298(1)(a) and (b). These provisions are supplemented by Annex V to UNCLOS which provides for the conciliation procedure.

Conciliation has played a marginal role in the dispute settlement system under UNCLOS. This is not merely because of its inherent nature as an amicable procedure, but also due to its articulation with adjudication. Compulsory conciliation, as this chapter details further, has been carved as ‘a fallback mechanism for certain disputes that have been excluded from compulsory dispute settlement mechanisms’.⁷

2. Conciliation is not Adjudication: General Considerations on the Nature of Conciliation

Conciliation under UNCLOS reflects the philosophy underlying this method of dispute settlement in general. Despite its adversarial aspects, conciliation is not adjudication. Instead, it is an amicable method of dispute settlement. As the International Court of Justice (ICJ) held in relation to conciliation within the framework of the International Convention on the Elimination of All Forms of Racial Discrimination,

‘negotiation’ and the ‘procedures expressly provided for in [the] Convention’ [i.e., conciliation] are two means to achieve the same objective, *namely to settle a dispute by agreement* (emphasis added).⁸

⁷ Shunmugam Jayakumar, ‘Compulsory Dispute Settlement and Conciliation Under UNCLOS’ in Hao Duy Phan, Tara Davenport and Robert Beckman (eds), *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes* (World Scientific Publishing 2019) 14.

⁸ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of*

Similarly, the objective ‘to settle a dispute by agreement’ permeates the different phases of conciliation in UNCLOS. Several provisions of Annex V to UNCLOS recall this fundamental nature. Article 5 notes that the conciliation commission may ‘draw attention to measures [which] might facilitate an amicable settlement’. Article 6 provides that it will ‘examine their claims and objections and make proposals to the parties with a view to reaching an amicable settlement’. Article 7 specifies that the report of the commission consists of ‘conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement’. Article 7(2) also confirms the non-binding character of the outcome: ‘[t]he report of the commission, including its conclusions or recommendations, shall not be binding upon the parties’. Therefore, the parties may reject the recommendations and this rejection would not amount to an unlawful act.

These numerous references to the ‘amicable settlement’ emphasise that the objective of conciliation remains ‘for the States concerned to reach an agreed settlement of their dispute’.⁹ This outcome depends on the parties’ will.¹⁰ In compulsory conciliation, the difficulty is to create the appropriate conditions which can facilitate this outcome, particularly where a party challenges the competence of the conciliation commission.

On the procedural devices which can enable a successful outcome, much can be learnt from Timor-Leste/Australia Commission – the only example of compulsory conciliation held under UNCLOS so far.¹¹ This case concerned maritime delimitation, not fisheries. It is not suggested that its procedures should be transposed to all conciliations. However, its

Racial Discrimination (Ukraine v. Russian Federation), Judgment on Preliminary Objections, ICJ Rep 2019, para 110.

⁹ *ibid*, para 109.

¹⁰ *ibid*, para 110.

¹¹ *Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case 2016–10, 9 May 2018.

underpinning philosophy could serve as a guide. The key words to describe it are ‘flexible pragmatism’:

Article 5 of Annex V to the Convention, however, empowers the Commission to recommend ‘any measures which might facilitate an amicable settlement of the dispute.’ On its own terms, this provision is extremely broad and, for the Commission, emblematic of the flexible pragmatism that lies at the heart of conciliation: the Commission’s mandate is to take the steps necessary to assist the Parties in resolving their dispute.¹²

The Commission enjoyed significant discretion in conducting the proceedings and used it extensively. It thus innovated on several accounts. As a confidence-building measure, it chose to bifurcate the proceedings on competence, considering that Australia’s objections should be dealt with first. Bifurcation was also justified by the fact that, unlike the report on the merits, the Commission’s decision on competence was binding. Therefore, considerations of due process were of particular importance and required a different procedural approach from the merits.¹³ By contrast, at the merits stage, the Commission endeavoured to reduce the adversarial charge.¹⁴ To do so, it used informal means of communication.¹⁵ It also preserved

¹² *ibid*, para 62. The Commission added in a footnote:

This flexibility leaves a commission with significant discretion as to the conduct of the procedure, and the most appropriate approach may well depend upon the identity of the parties, the nature of their dispute, and the likely receptiveness of the parties to proposals for a genuine settlement.

¹³ *ibid*, para 66.

¹⁴ *ibid*, para 57, where the Commission stated ‘[i]n practice, most of the Commission’s meetings with the Parties were held separately, and the Commission considers that its most important discussions with each Party would not have occurred in a joint setting’.

¹⁵ *ibid*, para 58, where the Commission stated

confidentiality to the extent necessary,¹⁶ including through a non-prejudice clause which prevented the use of the parties' positions in any future contentious proceedings.¹⁷ The Commission also extended the 12-month deadline, under Article 7 of Annex V, for it to produce its report. The Commission endeavoured to bring the parties closer together with such procedural devices.¹⁸ It cultivated an agreement and encouraged unilateral commitments, which in the end proved important for success.

[t]he Parties further agreed that the Commission could authorize its Chairman or a delegation of the Commission to confer or meet with either Party and report to the full Commission. In the Commission's view, this flexibility was essential to the process in two respects: first, in enabling the Commission's engagement with the Parties to continue between meetings through regular, informal discussions by telephone and e-mail exchanges and, second, by facilitating discrete discussions with the political leadership of each Party that could not have occurred in a larger or more formal setting.

¹⁶ *ibid*, paras 61–2.

¹⁷ *ibid*, para 59; see also Henri Rolin, 'Une Conciliation Belgo-Danoise' (1953) 57 *Revue Générale de Droit International Public* 359.

¹⁸ *Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case 2016–10, 9 May 2018, para 68, where the Commission stated 'the 12-month period set out in Annex V should be understood not as the timeframe in which a successful conciliation can likely be concluded, but rather as a safeguard to ensure that an unproductive conciliation is not unduly prolonged'.

The Commission played close attention to the limits of its role and refrained from acting as a judge or arbitrator.¹⁹ It assumed that the parties did not expect an award, but instead the resumption and facilitation of their negotiations on a better basis. To fulfil its role, the Commission went beyond the law and engaged with other relevant factors, including economic and financial.²⁰ The Commission insisted that there was a distinction between applying the law and examining the situation in light of the legal principles without applying them, but also insisted that the result should not be contrary to UNCLOS:

The Commission has frequently noted that it is not an arbitral tribunal with the power to make a binding ruling. It follows, for the Commission, that a conciliation commission need not as a matter of course engage with the parties on their legal positions, but may engage with these matters to the extent that so doing will likely facilitate the achievement of an amicable settlement. It also follows, for the Commission, that a conciliation commission should not encourage parties to reach an agreement that it considers to be inconsistent with the Convention or other provisions of international law.²¹

In short, the goal of conciliation, i.e., facilitating the achievement of an amicable settlement, became the ultimate guide for the Commission's exercise of its broad discretion.

¹⁹ *ibid*, para 52; see also Marcelle Breton-Jokl, 'La Commission de Conciliation Italo-Suisse' (1957) 3 *Annuaire Français de Droit International* 210, 217; Jean-Pierre Cot, 'Conciliation' (April 2006) *Max Planck Encyclopedia of Public International Law*. <<https://tinyurl.com/bdd7y4tc/>> accessed 15 July 2024.

²⁰ Marcelle Breton-Jokl, 'La Commission de Conciliation Italo-Suisse' (1957) 3 *Annuaire Français de Droit International* 210, 215.

²¹ *Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case 2016–10, 9 May 2018, para 70.

I. Conciliation as an Adjuvant to Adjudication

In the domain of fisheries, conciliation appears as an adjuvant to adjudication and its use speaks to States' reluctance to submit fisheries-related matters to binding judgment by a third party. Conciliation was conceived either as a substitute to adjudication (when the latter was excluded by limitations or optional declarations) or as a procedural precondition for adjudication. However, and paradoxically, there has been no practice of inter-State conciliation, whereas States have resorted to adjudication over fisheries-related matters before the International Tribunal for the Law of the Sea (ITLOS) and ad hoc tribunals. Further, in practice, conciliation competes not only with binding dispute settlement under UNCLOS, but also with mechanisms for adjudication established in other treaties.

2.1. Conciliation as a Substitute to Adjudication

Under Article 297(3)(b) of UNCLOS, conciliation is clearly a substitute for adjudication which is made unavailable under Article 297(3)(a). During the Third United Nations Conference on the Law of the Sea, the conciliation formula received 'widespread and substantial support'.²² Such support was not for conciliation per se, but rather as a compromise allowing for the exclusion of adjudication. As Andrew Serdy noted,

The debate at the Fourth session in 1976 highlighted the stark divide between those States wary of the extensive rights for a coastal State in the [exclusive economic zone (EEZ)] . . . who wanted them subjected to compulsory dispute settlement as a safeguard against their abuse, and the States that were the EEZ's leading proponents, for whom the prospect that *such disputes could be unilaterally referred to a settlement procedure beyond their control represented an undermining of the exclusive jurisdiction and decision-making that was the rationale for the creation of the EEZ*. . . . Owing to the continuing tension

²² Bernard Oxman, 'The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)' (1979) 73 *American Journal of International Law* 1.

between coastal States rights fearing a plethora of legal challenges to their actions within their EEZs and other States insisting on the availability of compulsory adjudication to prevent abuse of the EEZ rights, Negotiating Group 5 was established at the Seventh Session in 1978, and developed *a compromise in the form of compulsory conciliation of the identified categories of disputes, but without an obligation to accept the ensuing report as binding* (emphasis added).²³

However, the division between compulsory conciliation and mandatory adjudication is not clear. All that is excluded from adjudication is not necessarily included in conciliation.²⁴

Further, what appears included in the purview of conciliation may also fall under mandatory adjudication, pursuant to other provisions of UNCLOS. For instance, under Article 297(3)(b)(i), States may submit to conciliation the manifest failure by a coastal State ‘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

²³ Andrew Serdy, ‘Article 297’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck, Nomos and Hart 2017) 1911–2. See also Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 177. The relevant documents of the *travaux préparatoires* are the following: Third United Nations Conference on the Law of the Sea, ‘Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America: Working Paper on the Settlement of Law of the Sea Disputes’ (27 August 1974) A/CONF.62/L.7; Third United Nations Conference on the Law of the Sea, ‘Informal Composite Negotiating Text: Revision 1’ (28 April 1979) A/CONF.62/WP.10/REV.1; Third United Nations Conference on the Law of the Sea, ‘Informal Composite Negotiating Text: Revision 2’ (11 April 1980) A/CONF.62/WP.10/REV.2.

²⁴ See Section 3. Conciliation as a Shield Against Abuse of Rights.

endangered'. It is uncertain how this provision for compulsory conciliation may be combined with Article 297(1)(c) which provides for compulsory adjudication

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 (emphasis added).²⁵

Indeed, it is now widely accepted that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'.²⁶

The same formula of compulsory conciliation as a substitute for unavailable adjudication was retained in other treaties. For example, under the Convention on Biological Diversity, States may consent to arbitration under Annex II to that treaty or to adjudication before the ICJ to resolve their disputes.²⁷ In the absence of such consent, compulsory conciliation is available instead.²⁸ Some of these treaties may encompass disputes concerning

²⁵ On the obvious contradiction between these provisions, see Valentin Schatz, 'The Settlement of EEZ Fisheries Access Disputes Under UNCLOS: Limitations to Jurisdiction and Compulsory Conciliation' (2023) 13 *Goettingen Journal of International Law* 82, 94–5.

²⁶ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Rep 1999, para 70.

²⁷ Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, entered into force 29 December 1993.

²⁸ *ibid*, art 27(3)–(4), A similar dispute settlement regime is available under the United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, entered into force 21 March 1994, art 14, and in the Paris Agreement, 12 December 2015, 3156 UNTS 79, entered into force 4 November 2016, art 24.

fisheries. In the *Whaling* case, Australia did invoke the Convention on Biological Diversity in its Application but dropped it subsequently.

2.2. A Procedural Condition for Resorting to Adjudication

Outside UNCLOS, conciliation is envisaged by other fisheries-related treaties as a procedural condition for resorting to adjudication. However, these compromissory clauses do not oblige the parties to exhaust conciliation before resorting to adjudication.²⁹ Conciliation is simply listed among the dispute settlement means available to the parties, but it is not a precondition. Thus, the typical dispute-resolution clause stipulates that

If any dispute arises between two or more Contracting Parties concerning the interpretation or implementation of this Convention, those Contracting Parties shall consult among themselves with a view to resolving the dispute, or to

²⁹ See *mutatis mutandis*, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, Treaty Series, 660 UNTS 195, entered into force 4 January 1969. While, following *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, ICJ Rep 2011, there was uncertainty as to whether conciliation was a precondition to ICJ jurisdiction, the ICJ eventually decided that it would be unreasonable and against the purpose of a compromissory clause to multiply the preconditions for solving the dispute, by adding several methods of amicable settlements, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, ICJ Rep 2019, paras 110–1.

having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

Where a dispute is not resolved by recourse to other means referred to in this article within a reasonable time, such dispute shall, at the request of any party to the dispute, be submitted for binding decision in accordance with procedures for the settlement of disputes provided in Part XV of the 1982 Convention or, where the dispute concerns one or more straddling stocks, by provisions set out in Part VIII of the 1995 Agreement. The relevant part of the 1982 Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also Parties to these instruments.³⁰

³⁰ Convention on the conservation and management of fishery resources in the South East Atlantic Ocean, 20 April 2001, 2221 UNTS 189, entered into force 13 April 2003, art 24, which is applicable beyond national jurisdiction and cites to both UNCLOS and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement), 4 August 1995, 2167 UNTS 3, entered into force 11 December 2001. Similarly, see Framework Agreement for the Conservation of the Living Marine Resources of the High Seas of the South-Eastern Pacific, 14 August 2000, art 14; Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, UNTS 2221, entered into force 24 April 2003, art IX; Food and Agriculture Organization of the United Nations Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2019, entered into force 5 June 2016, art 22.

Conventions establishing a regional fisheries management organisation or arrangement (RFMO) with competence on the high seas typically refer to conciliation either in relation to adjudication or another mechanism of dispute settlement, such as expert bodies. These conventions generally have their own mechanisms of dispute settlement. These may include compulsory conciliation or an ad-hoc expert body. The articulation with the conciliation mechanism under UNCLOS is not always obvious.

While RFMO mechanisms are not significantly used,³¹ their binding nature is debated. Each constitutive treaty defines the disputes which may be submitted to panels; their composition; and the legal effect of their recommendations or decisions. Valentin Schatz considers that

generally, *ad hoc* expert panels share many elements of other forms of alternative dispute resolution, most importantly conciliation and arbitration. . . . Against this background, they may be categorised as ‘hybrid’ or ‘mixed’ procedures whose features may be placed on a spectrum between what could be called ‘quasi-arbitration’ . . . and ‘quasi-conciliation.’³²

³¹ Two panel proceedings have taken place in the South Pacific Regional Fisheries Management Organization. See Robin Churchill, ‘Fisheries Disputes’ (October 2018) *Max Planck Encyclopedias of International Law*. <<https://tinyurl.com/5ykrak2m/>> accessed 15 July 2024; Natalie Klein, ‘Law of the Sea Dispute Settlement Outside of the United Nations Convention on the Law of the Sea (UNCLOS)’ (May 2021) *Max Planck Encyclopedias of International Law*. <<https://tinyurl.com/3wtcmw4h>> accessed 15 July 2024.

³² Valentin Schatz, ‘Ad Hoc Expert Panels; Regional Fisheries Management Organisations (RFMOs)’ (March 2022) *Max Planck Encyclopedias of International Law*.

RFMO conventions may restrict further the scope of adjudication through additional conditions. For instance, Article 18 bis of the Convention on Future Multilateral Cooperation in North East Atlantic Fisheries provides for the exhaustion of its own panel procedure prior to triggering the UNCLOS procedure:

Where a dispute is not resolved by recourse to the means set out in paragraphs 2 and 3, one of the parties to the dispute may refer the dispute to compulsory procedures entailing binding decisions. Such procedures shall be governed *mutatis mutandis* by the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea of 10 December 1982 (1982 [UN](#) Convention) or, where the dispute concerns one or more straddling stocks, by the provisions set out in Part VIII of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (1995 Agreement). The relevant parts of the 1982 [UN](#) Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also Parties to these instruments.

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Similarly, the Agreement for the Establishment of the Indian Ocean Tuna Commission anticipates that State parties may consent to the jurisdiction of the ICJ if the dispute cannot otherwise be resolved through compulsory conciliation:

<<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3806.013.3806/law-mpeipro-e3806/>> accessed 15 July 2024.

33 North East Atlantic Fisheries, ‘Proposed amendment to the NEAFC Convention’ (July 2003).

<www.neafc.org/system/files/Annex%20K%20_2_dispute_settlement_july_2003.pdf> accessed 23 December 2023, the amendment has not entered into force.

Any dispute regarding the interpretation or application of this Agreement, if not settled by the Commission, shall be referred for settlement to a conciliation procedure to be adopted by the Commission. The results of such conciliation procedure, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as the result of this procedure the dispute is not settled, it may be referred to the International Court of Justice in accordance with the Statute of the International Court of Justice, unless the parties to the dispute agree to another method of settlement.³⁴

By contrast, other treaties encourage adjudication, by transforming compulsory conciliation under UNCLOS in a system of voluntary conciliation. For example, Article 34 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission provides that

1. Any dispute on the interpretation or implementation of the provisions of the present Convention shall be brought before the Conference of Ministers of the SRFC.
2. Disputes shall be settled amicably through conciliation, mediation or arbitration.
3. Any dispute which shall arise amongst Member States on the interpretation or implementation of the provisions of the present Convention, which may not be resolved through the afore-mentioned procedures, shall, on the request of one of the parties, be brought before the International Tribunal for the Law of the Sea.³⁵

³⁴ Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement), 25 November 1993, 1927 UNTS, entered into force 27 March 1996, art XXIII.

³⁵ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member

The articulation between these regional conventions and UNCLOS likely rests upon the interpretation of Articles 281 and 282 of UNCLOS. These conventions are *lex specialis* and their provisions may apply in lieu of Part XV of UNCLOS, provided that they result in a binding decision by the third body.

2.3. Concurrence with Other Modes of Dispute Settlement

Despite this plethora of dispute-settlement provisions which refers to conciliation in respect of fisheries dispute, no conciliation has taken place so far. Since UNCLOS, States have proved much less reluctant to include compulsory adjudication among the means for dispute settlement, particularly in regional conventions. The bigger the integration, the larger the trust in adjudication. Adjudication, in turn, has become an indispensable part of the governance of fisheries.

For instance, the Brexit agreement favours rather sophisticated, yet compulsory, mechanisms for dispute settlement which result in binding decisions.³⁶ Further, some fisheries

States of the Sub-Regional Fisheries Commission, 1 June 2012, entered into force 16 September 2012. The parties to this Convention are Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. This Convention served as a basis of jurisdiction in *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Rep 2015.

³⁶ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, 30 December 2020, entered into force 1 May 2021, art 501. On art 501, see Valentin Schatz and Alexander Proelss, ‘Workshop on Impacts of the [EU](#)-UK Trade and Cooperation Agreement on Fisheries and Aquaculture in the [EU](#) – Part I: Legal aspects’ (December 2021).

disputes have been submitted to the World Trade Organization's dispute settlement panels. This included the herring dispute between the Faroe Islands and the European Union which led to parallel Annex VII proceedings until the parties reached an agreement.³⁷ The windows of opportunities for adjudication are too open for States not to take advantage of them.

3. Conciliation as a Shield Against Abuse of Rights

Unlike maritime delimitation disputes, disputes with respect to fisheries submitted to conciliation under Article 297(3)(b) only partially overlap with disputes excluded from judicial settlement by virtue of Article 297(3)(a).³⁸ The jurisdiction *ratione materiae* of the Conciliation Commission under UNCLOS is defined extremely narrowly.³⁹ Article 297(3)(b) only considers conciliation in three situations:

1. 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;

<[www.europarl.europa.eu/RegData/etudes/STUD/2021/690906/IPOL_STU\(2021\)690906_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/690906/IPOL_STU(2021)690906_EN.pdf)> accessed 23 December 2023.

³⁷ See, inter alia, Jacques Hartmann and Michael Waibel, 'The 'Mackerel War' Goes to the WTO', *EJIL:Talk!* (13 November 2013). www.ejiltalk.org/the-mackerel-war-goes-to-the-wto/ accessed 23 December 2023.

³⁸ Andrew Serdy, 'Article 297' in in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck, Nomos and Hart 2017) 1911–2.

³⁹ For a more in-depth discussion, see Valentin Schatz, 'The Settlement of EEZ Fisheries Access Disputes Under UNCLOS: Limitations to Jurisdiction and Compulsory Conciliation' (2023) 13 *Goettingen Journal of International Law* 82, 108–17.

2. 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
3. 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 (emphasis added).

Thus, in all three situations, the other party can challenge the action of the coastal State if this action amounts to an abuse of rights or discretion (or arbitrary action). The ‘mere’ violation of international obligations cannot be a cause of action before the Conciliation Commission. Characterising conduct by the coastal State as manifestly wrongful or arbitrary can be done only on a case-by-case basis.

As a panel from the World Trade Organization held, a decision can be arbitrary by design or in its implementation:

the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX *not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner* (emphasis added).⁴⁰

Similarly, an RFMO expert panel considered that discretion amounted to arbitrariness when it was used in a discriminatory manner, by imposing an unjustifiable difference of treatment on States in similar positions:

⁴⁰ World Trade Organization, Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 12 October 1998, para 160.

for there to be unjustifiable discrimination in the procedures relating to allocation, there would for example need to be treatment . . . clearly inconsistent with the treatment of other similarly placed Members, or some unreasonable requirements made of [one State] but not applied to other Members.⁴¹

However, the same panel noted that ‘bad faith is not necessarily a requirement for discrimination’.⁴² This is not surprising, since bad faith is extremely difficult to prove.

A decision is also arbitrary if it is not based on any rational motives or if there is significant inadequacy between the motives asserted and the measures adopted:

discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination ‘bear no rational connection to the objective’ or ‘would go against that objective’. Thus, ‘[o]ne of the most important factors’ in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of article XX.⁴³

The arbitrary character could also result from the coastal State’s refusal to consider the positions of other States and envisage an alternative course of action, less harmful to the other

⁴¹ Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Findings and Recommendations, PCA Case 2013–14, 5 July 2013, para 106.

⁴² *ibid.*

⁴³ World Trade Organization, Panel Report on recourse to Article 21.5 on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/RW, 14 April 2015, para 7.316, citing to Appellate Body Report on *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, paras 226–7.

States, by insisting on its unilateral position where international law prescribes some obligations of cooperation.⁴⁴

There is no point in speculating on the standard of review which a conciliation commission, should it be convened, would retain in such cases. However, given the procedures' ultimate objective to provide a basis for an amicable settlement, a high level of review could be counterproductive.

Many authors have concluded that the virtues of the conciliation procedure rest less on any outcome than on the very fact that it can be unilaterally resorted to. In the words of Ian Sinclair,

What is important – what is indeed crucial – is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the denial of justified claims, automatically available procedures for the settlement of disputes.⁴⁵

This may indeed be the case. However, the other reason why conciliation in fisheries-related disputes has never been resorted to is that States have increased access to judicial means and specialised bodies, established under sectorial or regional conventions. These means seem to be preferred to a method of dispute settlement which remains, in the end, amicable.

⁴⁴ World Trade Organization, Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 12 October 1998, paras 171–6.

⁴⁵ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press 1984) 235. In the same vein, see Jean-Pierre Cot, 'Expectations Attached to Conciliation Reconsidered' in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law* (Brill Nijhoff 2017) 10–1.