Goettingen Journal of International Law 13 (2023) 1, 82–118

The Settlement of EEZ Fisheries Access Disputes under UNCLOS: Limitations to Jurisdiction and Compulsory Conciliation

Valentin J. Schatz*

Table of Contents

* Junior Professor of Public Law and European Law with a Focus on Sustainability, Faculty of Sustainability, Leuphana University Lüneburg. This article is based on a section of the author's doctoral thesis "Foreign Access to Fisheries within National Jurisdiction: UNCLOS, Historic Fishing Rights and Dispute Settlement" submitted and defended at the Faculty of Law, University of Hamburg, in 2021. The author would like to thank the two anonymous reviewers for their helpful comments. Any remaining errors are the author's own. E-mail: valentin.schatz@leuphana.de

doi: 10.3249/1868-1581-13-1-schatz

Abstract

This article revisits the scope of the limitation to jurisdiction *ratione materiae* under Article 297(3) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) in the context of Exclusive Economic Zone (EEZ) fisheries access disputes in the light of recent jurisprudence of UNCLOS tribunals. It first provides an overview over general aspects of Article 297(3) of UNCLOS in the compulsory dispute settlement mechanism of Section 2 of Part XV of UNCLOS. Next, it briefly considers the relationship between Article 297(3) and Article 297(1) of UNCLOS in order to clarify the former limitation's role in the complex internal logic of Article 297 of UNCLOS. Thereafter, this article addresses the sometimes-overlooked function of Article 297(3) of UNCLOS as a confirmation of jurisdiction with respect to fisheries disputes that are not related to the EEZ. It then analyzes the scope of the limitation to jurisdiction *ratione materiae* of Article 297(3) of UNCLOS in the context of fisheries access disputes. Next, this article examines the potential and limits of the compulsory conciliation procedure under Article 297(3)(b) and Annex V of UNCLOS with a focus on the scope of the procedural mandate and subject-matter competence of such conciliation commissions.

A. Introduction

There is a long history of inter-State disputes concerning access to fisheries located both within and outside national jurisdiction. As noted by *Churchill*, the "intense competition for a finite resource among fishing vessels of different nationalities has been a fertile ground for international disputes".[1] While the nature of many such disputes has changed following the revolutionary developments of international fisheries law in the 20th century that brought with them an extension of coastal State rights and jurisdiction over fisheries from up to 3 nautical miles (nm) to up to 200 nm, they remain abundant.[2] Today, a considerable share of disputes concerns the conservation or utilization of fisheries located in the Exclusive Economic Zone (EEZ) of coastal States, and particularly the access of flag States (hereinafter referred to as 'non-coastal States' in order to put an emphasis on the status of the State seeking access to a specific coastal State's waters and to avoid confusion due to the fact that coastal States are generally also flag States) to fisheries in this maritime zone.

By recognizing the coastal State's sovereign rights over fisheries in an area extending to up to 200 nm from the baselines, the regime of the EEZ as codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[3] replaced the principle of the freedom of fishing of all States with the principle of exclusivity of coastal State rights in this area.[4] This was a remarkable development given that the issue of fisheries was a particularly contested subject during negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III), over which different interest groups, particularly coastal States, distant water fishing nations, and land-locked and geographically disadvantaged States (LLGDS) grappled at length.[5]

1 R. R. Churchill, 'Fisheries Disputes' (2018), in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2023), para. 2 [Churchill, 'Fisheries Disputes'].

2 J. Spijkers *et al.*, 'Global Patterns of Fisheries Conflict: Forty Years of Data', 57 *Global Environmental Change* (2019) 101921, 1, 1–9.

3 *United Nations Convention on the Law of the Sea,* 10 December 1982, 1833 UNTS 3 [UNCLOS].

4 B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea* (1989), 45 [Kwiatkowska, *EEZ*].

5 For discussion of fisheries-related negotiations at UNCLOS III, see R. L. Friedheim, 'Fishing Negotiations at the Third United Nations Conference on the Law of the Sea', 22 *Ocean Development & International Law* (1991) 1, 209. See also, with a special focus on fisheries access, J. Carroz, 'Le Nouveau Droit des Pêches et la Notion d'Excédent', 24 *Annuaire Français de Droit International* (1978), 851.

The effects of this disagreement persist in the fisheries regime of Part V of UNCLOS insofar as its provisions are based on compromises that did not always lead to ideal outcomes in terms of clear and meaningful regulation of fisheries access.[6] Article 56(1)(a) of UNCLOS lacks a clear emphasis on the exclusivity of the coastal State's rights corresponding to Article 77(2) of UNCLOS, which states that "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State".[7] Indeed, the exclusivity of the coastal State's sovereign rights under Article 56(1)(a) of UNCLOS is qualified by Articles 62(2) to (3), 69 and 70 of UNCLOS insofar as these sovereign rights are only truly exclusive in respect to the decision-making concerning the conservation and management of fisheries, not in access to such resources *per se*.[8] In other words, the coastal State may not remain inactive with respect to the exploitation of the fisheries in its EEZ, but has obligations to ensure optimum utilization of these resources, be it by harvesting them itself or by allowing other States to do so.[9]

The disagreements between coastal States and non-coastal States with respect to the *substantive* fisheries regime of the EEZ are also reflected in the *procedural* legal framework for the compulsory settlement of disputes contained in Section 2 of Part XV of UNCLOS. Article 297(3) of UNCLOS provides for limitations to the scope of jurisdiction *ratione materiae* of UNCLOS tribunals with respect to fisheries, as well as for a compulsory conciliation procedure for certain disputes excluded from jurisdiction. Historically, these special provisions

6 Kwiatkowska, *EEZ*, *supra* note 4, 45–46.

7 G. Pohl, 'The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea', in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone: A Latin American Perspective* (1984), 31, 47–48; C. A. Fleischer, 'The Exclusive Economic Zone under the Convention Regime and in State Practice', in A. W. Koers (ed.), *The 1982 Convention on the Law of the Sea: Proceedings, Law of the Sea Institute, Seventeenth Annual Conference, July 13–16, 1983, Oslo, Norway* (1984), 241, 262–263; W. T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994), 38 [Burke, *New International Law*].

8 A. V. Lowe, 'Reflections on the Waters: Changing Conceptions of Property Rights in the Law of the Sea', 1 *The International Journal of Estuarine and Coastal Law* (1986) 1, 1, 9; Burke, *New International Law, supra* note 7, 39; T. Scovazzi, ''Due Regard' Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone', 34 *The International Journal of Marine and Coastal Law* (2019) 1, 56, 68. Also B. H. Oxman, 'The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session', 72 *The American Journal of International Law* (1978) 1, 57, 67 [Oxman, '1977 New York Session']. See also P. Allott, 'Power Sharing in the Law of the Sea', 77 *The American Journal of International Law* (1983) 1, 1, 15: "*horizontally shared zone*".

9 Pohl, *supra* note 7, 48; Fleischer, *supra* note 7, 261–263.

for EEZ fisheries disputes reflect "the considerable sensitivity attaching to the conferral of extensive heads of sovereign rights and jurisdiction on the coastal State in the newly created EEZ"[10] by preventing binding third-party scrutiny of the exercise of such rights.[11] By now, there exists considerable jurisprudence of UNCLOS tribunals on various aspects of Article 297(3) of UNCLOS, with important arbitral decisions having been rendered in recent years.[12]

This article revisits the scope of the limitation to jurisdiction *ratione materiae* under Article 297(3) of UNCLOS in the context of EEZ fisheries access disputes. It aims to show both narrow and broad interpretations of certain aspects of this provision that have been developed by international courts and tribunals as well as in scholarly literature. Moreover, the article to identifies the legal reasons for the past – and likely future – practical irrelevance of the conciliation procedure laid down in Article 297(3)(b) and Annex V of UNCLOS, which has not received much academic attention to date. The article first provides an overview over general aspects of Article 297(3) of UNCLOS in the compulsory dispute settlement mechanism of Section 2 of Part XV of UNCLOS. Next, it briefly considers the relationship between Article 297(3) and Article 297(1) of UNCLOS in order to clarify the former limitation's role in the complex internal logic of Article 297 of UNCLOS. Thereafter, this article

10 A.Serdy, 'Article 297', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS): A Commentary* (2017), para. 4 [Serdy, 'Article 297'].

11 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, para. 216 [*Chagos Marine Protected Area Arbitration* (Award)]; A. L. C. de Mestral, 'Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective', in T. Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (1984), 169, 176; 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), 36–38; M. H. Nordquist, S. Rosenne & L. B. Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (1989), 87–88; R. Wolfrum, 'Das Streitbeilegungssystem des VN-Seerechtsübereinkommens', in W. Graf Vitzthum (ed.), *Handbuch des Seerechts* (2006), 461, 472 [Wolfrum, 'Streitbeilegungssystem'].

12 See, e.g., *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case No. 2013-19; *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, Award, 12 July 2016, PCA Case No. 2013-19; *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11. On substantive fisheries law aspects of EEZ fisheries jurisprudence, see, e.g., C. Goodman, 'Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone', 33 *The International Journal of Marine and Coastal Law* (2018) 3, 558.

addresses the sometimes-overlooked function of Article 297(3) of UNCLOS as a confirmation of jurisdiction with respect to fisheries disputes that are not related to the EEZ. It then analyzes the scope of the limitation to jurisdiction *ratione materiae* of Article 297(3) of UNCLOS in the context of fisheries access disputes. Next, this article examines the potential and limits of the compulsory conciliation procedure under Article 297(3)(b) and Annex V of UNCLOS with a focus on the scope of the procedural mandate and subject-matter competence of such conciliation commissions.

B. General Aspects of Article 297(3) of UNCLOS

The role of Article 297(3) of UNCLOS in the dispute settlement framework of UNCLOS is relatively straightforward. Section 2 of Part XV of UNCLOS contains a compulsory dispute settlement mechanism, with Article 286 of UNCLOS constituting the central compromissory clause that documents the States Parties' consent to jurisdiction.[13] In accordance with Article 286 of UNCLOS, any party to a dispute concerning the interpretation or application of UNCLOS may submit this dispute to binding settlement by a court or tribunal having jurisdiction under Section 2 where no settlement has been reached by recourse to Section 1 – but this avenue is subject to the limitations and exceptions to jurisdiction *ratione materiae* in Section 3. Therefore, as a second step in the determination of jurisdiction *ratione materiae*, the limitations to jurisdiction in Article 297 of UNCLOS come into play.

Article 297 of UNCLOS is explicitly only applicable to disputes "concerning the interpretation and application of [UNCLOS]" within the meaning of Articles 286 and 288(1) of UNCLOS, which means that it is not applicable to disputes that do not fall within the scope of Article 288(1) of

[13] B. H. Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals', in D. R. Rothwell *et al.* (eds), *The Oxford Handbook of the Law of the Sea* (2015), 394, 398 [Oxman, 'Courts and Tribunals']; J. Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation', 48 *Ocean Development & International Law* (2017) 3–4, 269, 269 [Harrison, 'Defining Disputes and Characterizing Claims']; R. R. Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use', 48 *Ocean Development & International Law* (2017) 3–4, 216, 218–221 [Churchill, 'Dispute Settlement System']. Also C. A. Fleischhauer, 'The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the in Hamburg', 1 *Max Planck Yearbook of United Nations Law* (1997), 327, 329.

UNCLOS in the first place.[14] The limitations in Article 297 of UNCLOS apply *ipso facto* without a special declaration by the coastal State concerned.

Disputes referred to in Article 297 of UNCLOS are subject to the special "preliminary procedure" pursuant to Article 294 of UNCLOS, which has, however, not been used in practice.[15] Article 299 of UNCLOS further clarifies that disputes excluded by Article 297 of UNCLOS may only be submitted to compulsory dispute settlement under Section 2 of Part XV of UNCLOS if the parties to the dispute so agree – and that they may agree on other procedures for the settlement of the dispute or negotiate an amicable settlement.[16] In addition, Article 297(3)(e) of UNCLOS contains an obligation (with the possibility to agree otherwise) to include a dispute settlement clause in EEZ fisheries access agreements between coastal States and LLGDS pursuant to Articles 69 and 70 of UNCLOS.

C. Relationship between Article 297(1) and 297(3) of UNCLOS

Before turning to the interpretation of Article 297(3) of UNCLOS, it must be noted that Article 297 of UNCLOS is among the most obscurely drafted

14 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 317; S. Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', 48 *Ocean Development & International Law* (2017) 3–4, 313, 316. In addition, it is sometimes argued that Article 297(1) of UNCLOS expands jurisdiction *ratione materiae* even beyond the confines of Article 288(1) of UNCLOS. See *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 316; L. N. Nguyen, 'The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?', 31 *The International Journal of Marine and Coastal Law* (2016) 1, 120, 136.

15 See generally T. Treves, 'Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations', in N. Ando, E. McWhinney & R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, Vol. 1 (2002), 749 [Treves; 'Preliminary Proceedings']; T. Treves, 'The Exclusive Economic Zone and the Settlement of Disputes', in E. Franckx & P. Gautier (eds), *The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea, 1982–2000: A Preliminary Assessment of State Practice* (2003), 79, 88–90 [Treves; 'EEZ and Dispute Settlement']; T. Treves, 'Article 96', in P. C. Rao & P. Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), 264 [Treves, *Article 96*]; F. Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989), 132–134.

16 See generally A. Serdy, 'Article 299', in Proelss (ed.), *supra* note 10, paras 1–9 [Serdy, 'Article 299'].

provision of UNCLOS and poses many interpretive challenges.[17] In particular, the meaning and scope of Article 297(1) of UNCLOS is unclear.[18] This raises the question of the relationship between Article 297(1) and (3) of UNCLOS.

Despite being located in a provision on *limitations* to jurisdiction *ratione materiae*, Article 297(1) of UNCLOS states in *positive terms* that "[d]isputes concerning the interpretation or application of [UNCLOS] with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in [UNCLOS]" are subject to compulsory dispute settlement in a number of listed cases. In simplified terms, the traditional interpretation of this wording holds that the effect of Article 297(1) of UNCLOS is that *only* those disputes concerning the exercise of sovereign rights by coastal States in the EEZ and the continental shelf contained in the exhaustive list (in addition to those reaffirmed in the second and third paragraphs of Article 297 of UNCLOS) are included in the scope of jurisdiction *ratione materiae*.[19] The contrary view is, in equally simplified terms, that Article 297(1) of UNCLOS merely recounts disputes concerning the sovereign rights of coastal States that are included in jurisdiction *ratione materiae* under Article 288(1) of UNCLOS but that the provision does not contain any limitations to jurisdiction as it lacks an explicit "only" that was present in earlier drafts of the provision.[20] Importantly, even under the traditional view, the focus is explicitly on the *exercise* of sovereign rights, which

17 See generally Allen, *supra* note 14.

18 Nguyen, *supra* note 14, 136.

19 See *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, XXIII, RIAA 1, para. 61 [*Southern Bluefin Tuna Case* (Award on Jurisdiction and Admissibility)]. Undecided: *South China Sea Arbitration* (Award on Jurisdiction and Admissibility), *supra* note 12, para. 359. See also G. Jaenicke, 'Dispute Settlement under the Law of the Sea Convention', 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1983), 813, 817; Orrego Vicuña, *supra* note 15, 124–126; R. R. Churchill & A. V. Lowe, *The Law of the Sea* (1999), 455; Treves, 'EEZ and Dispute Settlement', *supra* note 15, 82; S. Karim, 'Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System', in N. Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (2014), 260, 264; Oxman, 'Courts and Tribunals', *supra* note 13, 404. The arguments in favour of such an interpretation are thoroughly presented by Allen, *supra* note 14, 315–318 and 323–325. Notably, the limitation concerns coastal State rights and jurisdiction only, not disputes concerning the EEZ generally. See de Mestral, *supra* note 11, 183; Orrego Vicuña, *supra* note 15, 124.

20 De Mestral, *supra* note 11, 183; E. D. Brown, 'Dispute Settlement and the Law of the Sea: The UN Convention Regime', 21 *Marine Policy* (1997) 1, 17, 23 [E. Brown, 'The UN Convention Regime']; N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 141–142 [Klein, *Dispute Settlement in UNCLOS*]. This view was endorsed by *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 317. See also

means that disputes concerning the existence or extent of sovereign rights are in any case within jurisdiction *ratione materiae*.[21]

Regardless of how this question of interpretation is decided, it is clear that Article 297(1) of UNCLOS establishes a general limitation of jurisdiction *ratione materiae*, whereas Article 297(2) and (3) of UNCLOS lay down *special* rules for certain categories of disputes. In other words, Article 297(3)(a) of UNCLOS is – as shown in the next section – *lex specialis* vis-à-vis Article 297(1) of UNCLOS with respect to EEZ fisheries disputes.[22] Thus, there is no room for an application of Article 297(1) of UNCLOS as far as disputes falling into the scope of Article 297(3)(a) of UNCLOS are concerned. However, the characterization of disputes can raise difficulties in the context of disputes concerning both fisheries *and* marine environmental protection.[23]

D. Confirmation of Jurisdiction *ratione materiae* concerning Non-EEZ Fisheries Disputes

In its first sentence, Article 297(3)(a) of UNCLOS clarifies that, subject to the exceptions listed in the second part of that provision, "[d]isputes concerning the interpretation or application of the provisions of [UNCLOS] with regard to fisheries shall be settled in accordance with [Section 2]". This confirms that all categories of fisheries disputes that are not subject to the limitation in the second part of Article 297(3)(a) of UNCLOS fall within the scope of jurisdiction *ratione materiae* if they also fall within the scope of Article 288(1) of UNCLOS.[24] In

the discussion and endorsement (for reasons of judicial policy) of this jurisprudence by Nguyen, *supra* note 14, 135–137; Allen, *supra* note 14, 319–321 and 326.

21 See Treves, 'EEZ and Dispute Settlement', *supra* note 15, 82–84, who considers that this may also be implicit in *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Reports 1999 10, para. 127, where the ITLOS held that coastal States could not apply their customs laws in the EEZ, thereby denying that this was a sovereign right under Article 56(1) of UNCLOS.

22 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 82.

23 E. Scalieri, 'Discretionary Power of Coastal States and the Control of Its Compliance with International Law by International Tribunals', in A. del Vecchio & Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (2019), 349, 368.

24 *Southern Bluefin Tuna Case* (Award on Jurisdiction and Admissibility), *supra* note 19, para. 41(b); *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Separate Opinion of Justice Keith, 4 August 2000, XXIII, RIAA 49, para. 22; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom*), Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, 18 March 2015, PCA Case No. 2011-03, para.

other words, it confirms that disputes concerning fisheries in maritime zones other than the EEZ fall within jurisdiction *ratione materiae* under Article 288(1) of UNCLOS:[25] disputes concerning (1) high seas fisheries,[26] (2) sedentary species[27]

58 [*Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum)]; de Mestral, *supra* note 11, 180; B. H. Oxman, 'The Third United Nations Conference on the Law of the Sea: the Tenth Session (1981)', 76 *The American Journal of International Law* (1982) 1, 1, 19 [Oxman, 'The Tenth Session']; G. Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), 137; S. Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', 65 *The International and Comparative Law Quarterly* (2016) 4, 927, 945; A. X. M. Ntovas, 'Interpreting the Dispute Settlement Limitation on Fisheries after the Chagos Marine Protected Area Arbitration', in S. Minas & J. Diamond (eds), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters & Emerging Challenges* (2018), 225, 231–233. Also Treves, 'EEZ and Dispute Settlement', *supra* note 15, 85; Nguyen, *supra* note 14, 319.

25 In this direction (by implication) arguably also *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, PCA Case No. 2017-06, paras 401–402 [*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation)]. Contra: *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 58, who appear to consider that the first sentence of Article 297(3)(a) of UNCLOS applies to EEZ fisheries only.

26 Burke, *New International Law, supra* note 7, 124; M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987), 121; A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 *The International and Comparative Law Quarterly* (1997) 1, 37, 43 [Boyle, 'Dispute Settlement']; A. Tahindro, 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks', 28 *Ocean Development & International Law* (1997) 1, 1, 49; T. L. McDorman, 'The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention', 35 *Canadian Yearbook of International Law* (1997), 57, 63 [McDorman, 'The Dispute Settlement Regime']; M. G. García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (2015), 141; Talmon, *supra* note 24, 945; V. J. Schatz, 'The Settlement of Disputes Concerning Conservation of Fish Stocks in the Arctic and Antarctic High Seas: Towards Comprehensive Compulsory Jurisdiction?', in N. Liu, C. M. Brooks & T. Qin (eds), G*overning Marine Living Resources in the Polar Regions* (2019), 196, 209 [Schatz, 'Disputes Concerning Conservation of Fish Stocks']. See also the United Kingdom's arguments in *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 246.

27 On the definition of sedentary species, see, e.g., R. Young, 'Sedentary Fisheries and the Convention on the Continental Shelf', 55 *The American Journal of International Law* (1961) 2, 359; S. V. Scott, 'The Inclusion of Sedentary Fisheries within the Continental

of the continental shelf pursuant to Article 77(4) of UNCLOS,[28] (3) fisheries in waters subject to coastal State sovereignty – the territorial sea, internal waters, and archipelagic waters.[29] These categories of disputes will be treated like any other dispute falling within jurisdiction *ratione materiae* under Article 288(1) of UNCLOS.[30] Of course, the absence of provisions concerning non-coastal State access to fisheries in the territorial sea, internal waters, and on the continental shelf renders an inclusion of these maritime zones into Article 297(3)(a) of UNCLOS largely irrelevant.[31] It is only the absence of the archipelagic waters with their access provisions in Articles 47(6) and 51(1) of UNCLOS that needs to be highlighted.

Shelf Doctrine', 41 *The International and Comparative Law Quarterly* (1992) 4, 788; V. Schatz, ‚'Crawling Jurisdiction': Revisiting the Scope and Significance of the Definition of Sedentary Species', 36 *Ocean Yearbook* (2022), 188 [Schatz, ‚Sedentary Species'].

28 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 304. See also Oxman, 'The Tenth Session', *supra* note 24, 19; R. Casado Raigón, 'Règlement des Différends', in D. Vignes, G. Cataldi & R. Casado Raigón (eds), *Le Droit International de la Pêche Maritime* (2000), 316, 353–354; R. R. Churchill & D. Owen, *The EC Common Fisheries Policy* (2010), 88; Oxman, 'Courts and Tribunals', *supra* note 13, 405. Also Dahmani, *supra* note 26, 121; Talmon, *supra* note 24, 945. Contra: García-Revillo, *supra* note 26, 141, who suggests an application of the limitation to sedentary species in continental shelf areas that overlap with the EEZ.

29 With respect to the territorial sea, see de Mestral, *supra* note 11, 185–186; Oxman, 'Courts and Tribunals', *supra* note 13, 405; Talmon, *supra* note 24, 945. Also Mauritius' (successful) argument in *Chagos Marine Protected Area Arbitratio*n (Award), *supra* note 11, para. 267. Contra: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Preliminary Objections of the Russian Federation, 19 May 2018, PCA Case No. 2017-06, paras 195–197, in which it is argued in the context of Article 297(3)(a) of UNCLOS that there is no jurisdiction over disputes concerning fisheries in the territorial sea or internal waters. However, the unlikely *merits* of a claim to access fisheries in a maritime zone of sovereignty do not affect the existence of *jurisdiction*. See also the discussion by T. Treves, 'The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994', 55 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1995), 421, 434 [Treves, 'The Law of the Sea Tribunal'].

30 Contra: Oxman, 'Courts and Tribunals', *supra* note 13, 405, who suggests – without argument or authority – that while claims concerning the coastal State's rights to fisheries on the continental shelf or in waters subject to sovereignty fall within jurisdiction *ratione materiae*, they are "ordinarily" *inadmissible*.

31 But see Oxman, 'The Tenth Session', *supra* note 24, 19, who argues that the omission of the continental shelf despite the absence of access provisions concerning sedentary species constituted "an obvious error".

E. Limitation of Jurisdiction *ratione materiae* concerning EEZ Fisheries Disputes

The second part of Article 297(3)(a) of UNCLOS takes most EEZ fisheries disputes out of jurisdiction *ratione materiae* by stating that coastal States are not "obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the [EEZ] or their exercise". There are two key elements in this exclusion that require further clarification. These are the concept of "sovereign rights" and the nature of the relationship ("relating to") of the dispute with these sovereign rights, respectively.

I. Limited Concept of Sovereign Rights

The reference to "sovereign rights with respect to the living resources in the [EEZ] or their exercise" is a reference to Article 56(1)(a) of UNCLOS.[32] However, the meaning of the term sovereign rights in Article 297(3)(a) of UNCLOS is narrower than its counterpart in Article 56(1)(a) of UNCLOS. In particular, the sovereign rights envisaged in Article 56(1)(a) of UNCLOS and, for comparison, Article 77(1) of UNCLOS encompass both prescriptive *and* enforcement jurisdiction.[33] This argument is supported by the fact that while no equivalent of Article 73 of UNCLOS exists for non-living resources in the EEZ and on the continental shelf, the coastal State's sovereign rights also entail enforcement jurisdiction with respect to non-living resources (*sovereign* rights by definition entail both prescriptive and enforcement powers).[34] Despite the fact

[32] S. Rosenne, 'Settlement of Fisheries Disputes in the Exclusive Economic Zone', 73 *The American Journal of International Law* (1979) 1, 89, 91–95; de Mestral, *supra* note 11, 183; Treves, 'The Law of the Sea Tribunal', *supra* note 29, 434; R. Lavalle, 'Conciliation under the United Nations Convention on the Law of the Sea: A Critical Overview', 2 *Austrian Review of International and European Law* (1997), 25, 36; Ntovas, *supra* note 24, 234.

[33] *The M/V „Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, ITLOS Reports 2014, 4, para. 211. The coastal State's prescriptive and enforcement jurisdiction directly flows from its sovereign rights under Article 56(1)(a) of UNCLOS – and is only concretized by, respectively, Articles 61–62 (prescriptive jurisdiction) and Article 73 (enforcement jurisdiction). See, e.g., D. H. Anderson, 'The Regulation of Fishing and Related Activities in Exclusive Economic Zones', in Franckx & Gautier (eds), *supra* note 15, 31, 34; V. J. Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State', 7 *Goettingen Journal of International Law* (2016) 2, 383, 392 [Schatz, 'Combating Illegal Fishing in the EEZ'].

[34] *The Arctic Sunrise Arbitration (Netherlands v. Russia),* Award on the Merits, 14 August 2015, PCA Case No. 2014-02, paras 281–284. See also Churchill & Owen, *supra* note

that sovereign rights are, therefore, understood to cover enforcement powers in Part V of UNCLOS, Article 298(1)(b) clarifies that "disputes concerning *law enforcement activities* in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under [Article 297 of UNCLOS]" (emphasis added) do not already fall within the scope of Article 297(3)(a) of UNCLOS and, therefore, can only be *optionally* excluded by declaration.[35] In other words, disputes concerning enforcement measures under Article 73 of UNCLOS (insofar as they do not fall within the scope of the prompt release procedure under Article 292 of UNCLOS)[36] are not subject to Article 297(3)(a) of UNCLOS but to Article 298(1)(b) of UNCLOS.[37] This is a rather narrow understanding of what sovereign rights entail (prescriptive, but not enforcement jurisdiction) that does not fully correspond to the concept of sovereign rights in

28, 89–90; D. Azaria, 'The Scope and Content of Sovereign Rights in Relation to Non-Living Resources in the Continental Shelf and the Exclusive Economic Zone', 3 *Journal of Territorial and Maritime Studies* (2016) 2, 5, 19–20; Y. Tanaka, *The International Law of the Sea*, 3rd ed. (2019), 172–173.

35 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 87–88; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 188 and 308–311; P. Gautier, 'The Settlement of Disputes', in D. J. Attard, M. Fitzmaurice & N. A. Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law (Vol. 1): The Law of the Sea* (2014), 533, 549; J. Harrison, 'Patrolling the Boundaries of Coastal State Enforcement Powers: The Interpretation and Application of UNCLOS Safeguards Relating to the Arrest of Foreign-flagged Ships', 42 *L'Observateur des Nations Unies* (2017), 117, 120 [Harrison, 'Patrolling the Boundaries']. On the nature of the connection of Article 298(1)(b) and Article 297 of UNCLOS, see also *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Jurisdiction, 26 November 2014, PCA Case No. 2014-02, paras 69–72. See also Nordquist, Rosenne & Sohn (eds), *supra* note 11, 136–137; A. Serdy, 'Article 298', in Proelss (ed.), *supra* note 10, para. 25 [Serdy, 'Article 298'].

36 T. Treves, 'Article 292', in Proelss (ed.), *supra* note 10, para. 13 [Treves, 'Article 292'].

37 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 87–88; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 188 and 308–311; Gautier, *supra* note 35, 549; Harrison, 'Patrolling the Boundaries', *supra* note 35, 120. Nordquist, Rosenne & Sohn (eds), *supra* note 11, 136–137. Also *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation), *supra* note 25, para. 354. This may also affect claims to compensation based on unlawful enforcement measures under Article 73 of UNCLOS. See J. Harrison, 'Article 73', in Proelss (ed.), *supra* note 10, para. 23 [Harrison, 'Article 73']. Contra: R. R. Churchill, 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?', 22 *The International Journal of Marine and Coastal Law* (2007) 3, 383, 390 [Churchill, 'The Jurisprudence of ITLOS'].

Parts V and VI of UNCLOS.[38] This anomaly is so remarkable that Churchill has suggested to ignore it entirely and consider EEZ fisheries law enforcement disputes excluded by Article 297(3)(a) of UNCLOS.[39] While this *contra legem* interpretation is unpersuasive in light of the wording of Article 298(1)(b) of UNCLOS, considerable scope for clarification of the concept of sovereign rights under Article 297(3)(a) of UNCLOS remains.[40]

II. Disputes "relating to" Sovereign Rights

The limitation is broadly worded as "any dispute relating to" the coastal State's sovereign rights concerning marine living resources in the EEZ "or their exercise".[41] This wording is significantly broader than the first and second paragraphs of Article 297 of UNCLOS, which explicitly only address the "exercise" of sovereign rights but not sovereign rights as such.[42] Due to the non-exhaustive character of the list of excluded categories of disputes in Article 297(3)(a) of UNCLOS and the broad wording of the limitation, most EEZ fisheries disputes are arguably covered.[43] In particular, nothing in the wording of the provision suggests that excluded issues must necessarily involve

38 Treves, 'The Law of the Sea Tribunal', *supra* note 29, 437. For a persuasive in-depth analysis, see C. Goodman, ‚Compulsory Settlement of EEZ Fisheries Enforcement Disputes under UNCLOS: "Swallowing the Rule" or "Balancing the Equation"?', 13 Goettingen Journal of International Law (2023) 1, 27, 55-60 (in this issue).

39 Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 390.

40 Unfortunately, the scope of Article 297(3)(a) of UNCLOS was not explored by the ITLOS when it was first faced with an objection to jurisdiction based on this provision. See *The M/V "SAIGA" (No. 2) Case* (Judgment), *supra* note 21, paras 40–45. This was apparently due to a failure of Guinea to repeat its objection to jurisdiction in the proceedings concerning the merits. See R. Wolfrum, 'Conciliation under the UN Convention on the Law of the Sea', in C. Tomuschat, R. Pisillo Mazzeschi & D. Thürer (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (2017), 171, 174 [Wolfrum, 'Conciliation under UNCLOS'], who considers that "in the two cases on fisheries before ITLOS [the exceptions under Article 297 of UNCLOS] have not been invoked".

41 Dahmani, *supra* note 26, 121–122.

42 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 87.

43 Dahmani, *supra* note 26, 121–122; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 165; N. Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', 32 *The International Journal of Marine and Coastal Law* (2017) 2, 332, 350–351 [Klein, 'Vicissitudes of Dispute Settlement']. See also Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389, who mentions the example of disputes concerning Article 62(1) of UNCLOS. But see *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 58, who

"discretionary powers" of the coastal State.[44] The presumption has to be that any dispute "relating to" the conservation and management of fisheries in the EEZ is covered, including any disputes concerning obligations that the coastal State's sovereign rights are subject to.[45] Against this background, the limitation in Article 297(3)(a) of UNCLOS is so extensive that is has been suggested that "the exception comes close to swallowing the rule".[46] This broad scope of the exception cannot be overcome by claiming that the coastal State has violated its obligations under Article 300 of UNCLOS to fulfill its obligations in good faith and to refrain from an abuse of rights as this provision has no independent function but is necessarily attached to an existing right or obligation (which in turn may be subject to an exception from jurisdiction).[47]

That said, the interpretation of the scope of disputes "relating to" sovereign rights over fisheries in the EEZ is not always straightforward. The following sections will address several challenges in the interpretation of Article 297(3)(a)

consider that there is a substantial scope of disputes concerning EEZ fisheries that do not fall within the exception.

44 Klein, *Dispute Settlement in UNCLOS, supra* note 20, 165 and 177–178. Contra: P. C. Rao & P. Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (2018), 95.

45 Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389. For a similarly broad view, see also Klein, 'Vicissitudes of Dispute Settlement', *supra* note 43, 350–351. Also Talmon, *supra* note 24, 946.

46 Serdy, 'Article 297', *supra* note 10, para. 3. See also the – perhaps somewhat exaggerated – view of Rosenne, *supra* note 32, 98: "Those exceptions may well be quantitatively larger than the initial grant of jurisdiction". In this direction also Orrego Vicuña, *supra* note 15, 127.

47 W. Riphagen, 'Dispute Settlement in the 1982 Convention on the Law of the Sea', in C. L. Rozakis & C. A. Stephanou (eds), *The New Law of the Sea: Selected and Edited Papers of the Athens Colloquium on the Law of the Sea, September 1982* (1983), 281, 292; W. T. Burke, 'The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction', 63 *Oregon Law Review* (1984) 1, 73, 91 [Burke, 'Law of the Sea Convention']; Orrego Vicuña, *supra* note 15, 130 and 132; M. Forteau, 'Regulating the Competition between International Courts and Tribunals: The Role of Ratione Materiae Jurisdiction under Part XV of UNCLOS', 15 *The Law and Practice of International Courts and Tribunals* (2016) 2, 190, 197–199. As Article 300 of UNCLOS does not contain independent obligations, a violation of this provision can only be claimed in conjunction with a right or obligation arising from another provision of UNCLOS. See, e.g., K. O'Brien, 'Article 300', in Proelss (ed.), *supra* note 10, paras 9–10; *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 303.

of UNCLOS, which have arisen in past litigation or have been identified in the literature.[48]

1. Exclusive Defence of Coastal States

The emphasis of the limitation in Article 297(3)(a) of UNCLOS is exclusively on the sovereign rights and conduct of *coastal* States. Therefore, only disputes concerning the coastal State's rights or actions are excluded from compulsory jurisdiction.[49] The exclusive protection of coastal States from the

[48] This article does not address the question whether Article 297(3)(a) of UNCLOS excludes disputes concerning the interpretation or application of the cooperation obligations concerning shared stocks laid down in Articles 63, 64, 66 and 67 of UNCLOS as these provisions do not concern access to fisheries in the strict sense. For discussion of topic, see, e.g., Rosenne, *supra* note 32, 98; Burke, 'Law of the Sea Convention', *supra* note 47, 117–119; E. D. Brown, *The International Law of the Sea*, Vol. 1 (1994), 227–228 [E. Brown, *Law of the Sea*]; McDorman, 'The Dispute Settlement Regime', *supra* note 26, 65–68; Tahindro, *supra* note 26, 48–49; Boyle, 'Dispute Settlement', *supra* note 26, 42–44; Orrego Vicuña, *supra* note 15, 131–132; A. E. Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes relating to Straddling Fish Stocks', in O. S. Stokke (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001), 91, 99–101 [Boyle, 'Straddling Fish Stocks']; B. Kwiatkowska, 'The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal', 16 *The International Journal of Marine and Coastal Law* (2001), 239, 276–278 [Kwiatkowska, 'Southern Bluefin Tuna']; C. P. R. Romano, 'The Southern Bluefin Tuna Dispute: Hints of a World to Come … Like It or Not', 32 *Ocean Development & International Law* (2001) 3-4, 313, 332; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 204; *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, Statement of Claim, 16 August 2013, PCA Case 2013-30 (on file with the author), para. 52; Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389–390; B. Kunoy, 'Assertion of Entitlement to Shared Fish Stocks', in M. H. Nordquist, J. N. Moore & R. Long (eds), *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (2016), 464–507; Talmon, *supra* note 24, 945–946; Serdy, 'Article 299', *supra* note 16, para. 8; Ntovas, *supra* note 24; B. H. Oxman, 'Compliance Procedure: Implementation Agreement on Straddling and Highly Migratory Fish Stocks (2019)', in Ruiz Fabri (ed.), *supra* note 1, para. 31 [Oxman, 'Compliance Procedure']. For jurisprudence addressing the issue, see *Barbados v. Trinidad and Tobago, Award of the Arbitral Tribunal,* 11 April 2006, PCA Case No. 2004-02, paras 276–293; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), Separate Opinion of Judge Paik, 2 April 2015, 2015 ITLOS Reports 102, paras 37–38; *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 300–301.

[49] *Southern Bluefin Tuna Case* (Award on Jurisdiction and Admissibility), *supra* note 19, para. 61: "insofar as coastal States are concerned".

unilateral submission of this category of dispute to compulsory dispute settlement constitutes an exception from the general principle of procedural reciprocity in Part XV of UNCLOS.[50]

However, the mere fact that rights of *other* States are also (or even primarily) at issue does not necessarily render Article 297(3)(a) of UNCLOS inapplicable. For example, if, for the sake of argument, disputes concerning claims based on non-exclusive historic fishing rights in the EEZ[51] were covered by Article 288(1) of UNCLOS,[52] they would concern a challenge to the exclusivity of the coastal State's sovereign rights to fisheries, and would, therefore, fall into the scope of the limitation in Article 297(3)(a) of UNCLOS.[53] This finding equally applies to claims based on consensually granted access to fisheries in the EEZ, such as access rights laid down in fisheries access agreements[54] – but only if such disputes are considered, *arguendo*, to fall within the scope of Article 288(1) of UNCLOS in the first place.[55]

50 See Wolfrum, 'Streitbeilegungssystem', *supra* note 11, 474, who considers that this lack of procedural reciprocity constitutes an exception to the principle of equality of arms in international dispute settlement more generally.

51 On the concept of such rights, see, e.g., V. J. Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union', 35 *The International Journal of Marine and Coastal Law* (2020) 1, 133, 150–151 [Schatz, 'Post-Brexit EEZ Fisheries Access'].

52 The better view is that claims based *directly* on rules external to UNCLOS are outside the scope of Article 288(1) of UNCLOS. V. J. Schatz, 'The Snow Crab Dispute on the Continental Shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access Disputes', 22 *International Community Law Review* (2020) 3-4, 455, 463 [Schatz, 'The Snow Crab Dispute'].

53 Talmon, *supra* note 24, 945; S. Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration', 48 *Ocean Development & International Law* (2017) 2, 181, 198; A. Kanehara, 'Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute', 2 *Japan Review* (2018) 3, 8, 34; *Barbados v. Trinidad and Toba*go (Award of the Arbitral Tribunal), *supr*a note 48, paras 276 and 283; B. Kwiatkowska, 'The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award', in T. M. Ndiaye, R. Wolfrum & C. Kojima (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), 917, 953 [Kwiatkowska, '2006 Award']. Contra: W. M. Reisman & M. H. Arsanjani, 'Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation', in Ndiaye, Wolfrum & Kojima (eds), *supra* note 53, 629, 657.

54 Talmon, *supra* note 24, 945. Also Jaenicke, *supra* note 19, 825.

55 Fisheries access agreements are rules external to UNCLOS and, therefore, claims based directly on such agreements do not fall into the scope of Article 288(1) of UNCLOS. Schatz, 'The Snow Crab Dispute', *supra* note 52, 463.

Even where a non-coastal State alleges that a coastal State has violated its *procedural* obligation to have due regard to the rights of other States in the EEZ pursuant to Article 56(2) of UNCLOS in relation to, for example, an EEZ fisheries access agreement or a non-exclusive historic fishing right,[56] the dispute falls within the scope of Article 297(3)(a) of UNCLOS.[57] In the words of the arbitral tribunal in *Mauritius v. United Kingdom*:

> "In nearly any imaginable situation, a dispute will exist precisely because the coastal State's conception of its sovereign rights conflicts with the other party's understanding of its own rights. In short, the two are intertwined, and a dispute regarding [a non-coastal State's] claimed fishing rights in the [EEZ] cannot be separated from the exercise of the [coastal State's] sovereign rights with respect to living resources."[58]

Another rationale applies where a coastal State *itself* claims that a non-coastal State has violated its sovereign rights over fisheries in the EEZ. As may be deduced from the wording of Article 297(3)(a) of UNCLOS ("the coastal State shall not be obliged to accept the submission to such settlement"), the exception protects coastal States against claims of other States relating to the coastal States' sovereign rights. It does not apply to the reverse situation in which the coastal State seeks to protect its own rights against another State.[59] Given the non-reciprocal nature of Article 297(3)(a) of UNCLOS, this result does not contradict the points made earlier with respect to the exclusion of claims by non-coastal States that also affect the coastal State's sovereign rights.[60]

Problems also arise with respect to disputes over access to fisheries in the EEZ if sovereignty over the *territory* generating the EEZ entitlement is disputed.

56 An argument along these lines was presented by Mauritius in *Mauritius v. United Kingdom*, see *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 250–251.

57 *Ibid*., para. 297. This part of the decision was also briefly alluded to in *South China Sea Arbitration* (Award), *supra* note 12, para. 260.

58 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 297.

59 *South China Sea Arbitration* (Award), *supra* note 12, para. 695. Also Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389 and 422; Scalieri, *supra* note 23, 372. Contra: N. Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', 15 *Chinese Journal of International Law* (2016) 2, 403, 410 [Klein, 'Expansions and Restrictions']; Klein, 'Vicissitudes of Dispute Settlement', *supra* note 43, 351–352.

60 Contra: Klein, 'Expansions and Restrictions', *supra* note 59, 410.

In this such cases, Article 297(3)(a) of UNCLOS does not automatically apply merely because both disputing States claim to be the coastal State.[61] Rather, the usual standard applies, but the limitation cannot be applied in the absence of a prior determination of sovereignty,[62] which in itself will usually constitute a dispute outside the scope of Article 288(1) of UNCLOS.[63]

2. Conservation, Exploitation and Access

The limitation of Article 297(3)(a) of UNCLOS is further concretized – but not exhaustively defined – by an indicative list of disputes that are excluded from jurisdiction.[64] These are disputes concerning the discretionary powers of coastal States for determining the allowable catch under Article 61(1) of UNCLOS, determining their harvesting capacity as mentioned in Article 62(2) of UNCLOS, the allocation of surpluses to other States (including LLGDS) pursuant to Articles 62(2) and (3), 69, and 70 of UNCLOS, and the terms and conditions established in their conservation and management laws and regulations recognized in Article 62(4) of UNCLOS.[65] The inclusion of disputes concerning allocation under Article 62 and Articles 69 to 70 of UNCLOS is also confirmed, *e contrario*, by Article 297(3)(b)(iii) of UNCLOS. The coastal State's discretion to determine the terms and conditions established in its conservation and management laws and regulations under Article 62(4) of UNCLOS is equally mentioned in Article 297(3)(b)(iii) of UNCLOS. All of these substantive provisions concretize the coastal State's sovereign rights under Article 56(1)(a) of UNCLOS.[66]

61 But see Russia's argument to this end in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Preliminary Objections of the Russian Federation), *supra* note 29, para. 186.

62 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation), *supra* note 25, para. 402. See also Ukraine's argument in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Written Observations and Submissions of Ukraine on Jurisdiction, 27 November 2018, PCA Case No. 2017-06, paras 102–105; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Rejoinder of Ukraine on Jurisdiction, 28 March 2019, PCA Case No. 2017-06, para. 104.

63 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation), *supra* note 25, para. 402.

64 Rao & Gautier, *sup*ra note 44, 95; Ntovas, *supra* note 24, 233–234.

65 For discussion, see Klein, *Dispute Settlement in UNCLOS, supra* note 20, 177–185.

66 Rosenne, *supra* note 32, 95.

As the relative fisheries access rights contained in Articles 62(2) and (3), 69, and 70 of UNCLOS are already very weak and subject to the coastal State's discretion,[67] the exclusion of disputes concerning these rights reflects "the reality that the management of EEZ resources is very much a matter for coastal State discretion".[68]

3. Fisheries Conservation and Marine Environmental Protection

In areas of overlap between fisheries conservation and management (Article 56(1)(a) of UNCLOS) on the one hand and marine environmental regulation in the EEZ (Article 56(1)(b) of UNCLOS) on the other, non-coastal States might try to emphasize the environmental aspect in order to overcome the limitation in Article 297(3)(a) of UNCLOS by arguing for an application

67 See, e.g., Burke, 'Law of the Sea Convention', *supra* note 47, 78; Carroz, *supra* note 5, 856; S. C. Vasciannie, *Land-Locked and Geographically Disadvantaged States in the International law of the Sea* (1990), 57; Burke, *New International Law, supra* note 7, 44–45 and 62; Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. 2) (1993), 609; Churchill & Lowe, *supra* note 19, 289; D. R. Christie, 'It Don't Come EEZ: The Failure and Future of Coastal State Fisheries Management', 14 *Journal of Transnational Law & Policy* (2004) 1, 1, 9; W. R. Edeson, 'A Brief Introduction to the Principal Provisions of the International Legal Regime Governing Fisheries in the EEZ', in S. A. Ebbin, A. H. Hoel & A. K. Sydnes (eds), *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (2005), 17, 18; R. Barnes, 'The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?', in D. Freestone, R. Barnes & D. M. Ong (eds), *The Law of the Sea: Progress and Prospects* (2006), 233, 239; M. Markowski, *The International Law of EEZ Fisheries: Principles and Implementation* (2010), 59; Lowe, *supra* note 8, 10; L. Gründling, *Die 200 Seemeilen-Wirtschaftszone: Entstehung eines neuen Regimes des Meeresvölkerrechts* (1983), 134; Kwiatkowska, *EEZ*, *supra* note 4, 61; J. Harrison & E. Morgera, 'Article 62', in Proelss (ed.), *supra* note 10, para. 7.
S. N. Nandan, 'Implementing the Fisheries Provisions of the Convention', in J. M. van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985), 383, 387; Fleischer, *supra* note 7, 268; Carroz, *supra* note 5, 858; Lowe, *supra* note 8, 10; Orrego Vicuña, *supra* note 15, 54–55; Kwiatkowska, *EEZ*, *supra* note 4, 60–61; E. Brown, 'The UN Convention Regime', *supra* note 20, 33–34; Edeson, *supra* note 67, 21; Scovazzi, *supra* note 8, 69. Also Barnes, *supra* note 67, 239. For the contrary view of the Spanish government upon signature of UNCLOS, see R. Casado Raigón, 'Fisheries', 21 *Spanish Yearbook of International Law* (2017), 335, 336.

68 Boyle, 'Dispute Settlement', *supra* note 26, 42–43. See also Burke, 'Law of the Sea Convention', *supra* note 47, 117; de Mestral, *supra* note 11, 183; Boyle, 'Straddling Fish Stocks', *supra* note 48, 98–99; Barnes, *supra* note 67, 239 and 245–246.

of Article 297(1)(c) of UNCLOS instead.[69] Indeed, jurisprudence has gradually moved towards an application of Part XII of UNCLOS concerning the marine environment to fisheries matters.[70] However, recent jurisprudence suggests that the provisions on EEZ fisheries (and therefore also Article 297(3)(a) of UNCLOS) are not so easily circumvented. To take the example of *Mauritius v. United Kingdom*, a marine protected area (MPA) might involve limitations on – or prohibitions of – fishing, such as a no catch zone. Such a ban on fishing essentially constitutes a determination of an allowable catch of zero under Article 61(1) of UNCLOS, which in turn prevents the activation of the obligation to grant access pursuant to Article 62(2) of UNCLOS. Therefore, a ban on fishing in the EEZ generally falls within the scope of Article 297(3)(a) of UNCLOS.[71] The fact that such a measure might also aim at – and/or contribute to – the protection of marine environment more generally does not render Article 56(1)(a) of UNCLOS – and by extension Article 297(3)(a) of UNCLOS – inapplicable.[72] Rather, the explicit reference to fisheries conservation in Article 297(3)(b)(i) of UNCLOS shows that, as far as catch limits or complete prohibitions are concerned, Article 297(3)

69 See, e.g., Mauritius' arguments in *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 240–243 and 249–250. Also Scalieri, *supra* note 23, 368–370.

70 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order (Provisional Measures), 27 August 1999, 1999 ITLOS Reports 280, para. 70; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, 2015 ITLOS Reports 4, paras 111, 120 and 140; *South China Sea Arbitration* (Award), *supra* note 12, para. 956. For discussion, see, e.g., V. J. Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ', 47 *Ocean Development & International Law* (2016) 4, 327, 333–334 [Schatz, 'Flag State Responsibility']; V. J. Schatz, 'Die Rolle des Flaggenstaates bei der Bekämpfung illegaler Fischerei in der AWZ im Lichte der jüngeren internationalen Rechtsprechung', 28 *Zeitschrift für Umweltrecht* (2017) 6, 345, 348 [Schatz, 'Bekämpfung illegaler Fischerei in der AWZ']; Y. Tanaka, 'Reflections on the Implications of Environmental Norms for Fishing: The Link between the Regulation of Fishing and the Protection of Marine Biological Diversity', 22 *International Community Law Review* (2020) 3-4, 389.

71 This is the (implicit) consequence of the arbitral tribunal's findings in *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 297; Contra: *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 60, who take the view that a complete ban on fishing without an explicit utilization-focused conservation objective does not constitute "conservation" within the meaning of Articles 56(1)(a) and 61 of UNCLOS.

72 A. E. Boyle, 'UNCLOS Dispute Settlement and the Uses and Abuses of Part XV', 47 *Revue Belge de Droit International* (2014) 1, 182, 193 [Boyle, 'UNCLOS Part XV']. Contra: *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 56.

(a) of UNCLOS is arguably *lex specialis* vis-à-vis Article 297(1)(c) of UNCLOS. However, if a ban on fishing forms part of a broader measure such as an MPA that has an overarching environmental objective, the broader measure *as such* will not usually fall within the scope of Article 297(3)(a) of UNCLOS even if it primarily contains fisheries regulations.[73]

F. Compulsory Conciliation

Non-coastal States are not entirely deprived of remedies against coastal State conduct with respect to EEZ fisheries access. Article 297(3)(b) of UNCLOS states that, failing dispute settlement by recourse to Section 1 of Part XV of UNCLOS, three categories of disputes that fall within the limitation of Article 297(3)(a) of UNCLOS may be submitted to conciliation under Section 2 of Annex V of UNCLOS.[74] This mechanism is a central part of the compromise reached at UNCLOS III with respect to EEZ fisheries.[75] At the time of writing, not a single EEZ fisheries dispute had been submitted to conciliation under Article 297(3)(b) of UNCLOS in conjunction with Section 2 of Annex V of UNCLOS.[76] However, a future conciliation commission established pursuant to Article 297(3)(b) of UNCLOS would be able to draw on the experience of the first conciliation commission established under Article 298(1)(a)(i) of UNCLOS in *Timor-Leste v. Australia* as both procedures are governed by Annex V of UNCLOS.[77]

73 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 286–291 and 304. Also Chagos Marine Protected Area Arbitration (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, paras 57–59.

74 On conciliation as a method of international dispute settlement generally, see, e.g., J. Cot, 'Conciliation (2006)', in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (2023), paras 1–39; S. M. G. Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (2008).

75 T. Treves, '"Compulsory" Conciliation in the U.N. Law of the Sea Convention', in V. Götz, P. Selmer & R. Wolfrum (eds), *Liber amicorum Günther Jaenicke: Zum 85. Geburtstag* (1998), 612, 617–618 [Treves, 'Compulsory Conciliation'].

76 Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 174.

77 *Timor Sea Conciliation (Timor-Leste v. Australia)*, Decision on Competence, 19 September 2016, PCA Case No. 2016-10 [*Timor Sea Conciliation (Timor-Leste v. Australia)*, Decision on Competence]; *Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, PCA Case No. 2016-10 [*Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea]. There is vast commentary on the various aspects of this conciliation. See, e.g., P. Tzeng, 'The

The following sections address the procedural and substantive mandates of conciliation commissions under Article 297(3)(b) and Annex V of UNCLOS. A special focus is on limitations as to the categories of EEZ fisheries disputes that are subject to compulsory conciliation as well as the prohibition of review of discretionary decisions of coastal States.

I. Procedural Mandate of the Conciliation Commission

Article 297(3)(b) of UNCLOS is not the only instance in which the settlement of a fisheries access dispute through conciliation is permitted under Part XV of UNCLOS. In Section 1 of Part XV of UNCLOS, Article 279 of UNCLOS repeats the general obligation to settle disputes by peaceful means and obliges States Parties to seek a solution by the means indicated in Article 33(1) of the UN Charter,[78] which also mentions conciliation. States Parties may invite each other to submit their fisheries disputes to conciliation in accordance with Article 284 in conjunction with Section 1 of Annex V of UNCLOS.[79]

Peaceful Non-Settlement of Disputes: Article 4 of CMATS in T*imor-Leste v Australia*', 18 *Melbourne Journal of International Law* (2017) 2, 349; N. Bankes, 'The First Example of Compulsory Conciliation under the Law of the Sea Convention: Delimitation of the Maritime Boundaries between Timor-Leste and Australia', in T. Haugli, G. K. Eriksen & I. U. Jakobsen (eds), *Rettsvitenskap Under Nordlys og Midnattssol: Festskrift ved det Juridiske Fakultets 30-Årsjubileum* (2018), 27; J. Gao, 'The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence', 49 *Ocean Development & International Law* (2018) 3, 208; N. Bankes, 'Settling the Maritime Boundaries between Timor-Leste and Australia in the Timor Sea', 11 *Journal of World Energy Law and Busines*s (2018) 5, 387; Y. Tanaka, 'Maritime Boundary Delimitation by Conciliation', 36 *Australian Year Book of International Law* (2019) 1, 69; X. Liao, 'The Timor Sea Conciliation under Article 298 and Annex V of UNCLOS: A Critique', 18 *Chinese Journal of International Law* (2019) 2, 281; A. Kedgley Laidlaw & H. D. Phan, 'Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Dispute Between Timor-Leste and Australia', 10 *Journal of International Dispute Settlement* (2019) 1, 126; A. Crosato, 'Conciliation between Timor-Leste and Australia (2019)', in Wolfrum (ed.), *supra* note 74, paras 1–41; R. Brown, 'Dispute Settlement in the Seas: International Law Influences on the Australia-Timor-Leste Conciliation', 34 *Ocean Yearbook* (2020) 1, 89 [R. Brown, 'Australia-Timor-Leste Conciliation']; D. Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement', 31 *The European Journal of International Law* (2020) 1, 321.

78 *Charter of the United Nations*, 26 June 1945, XVI UNTS 1.

79 A. Serdy, 'Article 284', in Proelss (ed.), *supra* note 10, para. 3 [Serdy, 'Article 284']; Lavalle, *supra* note 32, 27–34; S. Yee, 'Conciliation and the 1982 UN Convention on the Law of the Sea', 44 *Ocean Development & International La*w (2013) 4, 315, 319–321; Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, (2013), 184–185.

Various – but not all – procedural rules are shared by both voluntary and compulsory conciliation.[80] Most importantly, conciliation under Article 284 of UNCLOS requires *ad hoc* consent by all parties to the dispute.[81] For conciliation under Article 297(3)(b) of UNCLOS, on the other hand, Article 11(2) of Annex V of UNCLOS provides that coastal States have to accept the unilateral submission of these disputes to conciliation.[82] Thus, the term "compulsory conciliation" is often used for the procedure under Article 297(3)(b) of UNCLOS,[83] which reflects the existence of a *unilateral right* to submit the dispute to conciliation and the *obligation* of the respondent to accept this unilateral submission.[84]

Pursuant to Article 6 of Annex V of UNCLOS, the mandate of the conciliation commission is to "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement".[85] Article 7(2) of Annex V of UNCLOS states that the report of the conciliation commission is not binding,[86] which distinguishes this procedure from adjudication and arbitration.[87] Indeed, the conciliation procedure under Article 297(3)(b) of UNCLOS is peculiar given that participation is compulsory, whereas compliance with the outcome is not. Its nature was summarized by the conciliation commission in *Timor-Leste v. Australia* as follows:

80 Treves, 'Compulsory Conciliation', *supra* note 75, 612–615.

81 Bankes, *supra* note 77, 31.

82 S. Hamamoto, 'Article 11 of Annex V', in Proelss (ed.), *supra* note 10, paras 4–6. Also D. R. Rothwell, 'Conciliation and Article 298 Dispute Resolution Procedures under the Law of the Sea Convention', in S. Wu & K. Zou (eds), *Arbitration Concerning the South China Sea: Philippines versus China* (2016), 57, 63.

83 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 52; Churchill & Lowe, *supra* note 19, 455; Yee, *supra* note 79, 316; Rothwell, *supra* note 82, 63; Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 181.

84 Treves, 'Compulsory Conciliation', *supra* note 75, 615–616; Yee, *supra* note 79, 321; Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 186; Serdy, 'Article 284', *supra* note 79, para. 1.

85 J. I. Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea', 90 *The American Journal of International Law* (1996) 1, 69, 73.

86 Burke, 'Law of the Sea Convention', *supra* note 47, 91.

87 M. Tsamenyi, B. Milligan & K. Mfodwo, 'Fisheries Dispute Settlement under the Law of the Sea Convention: Current Practice in the Western and Central Pacific Region', in Q. Hanich & M. Tsamenyi (eds), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region* (2009), 146, 149; Yee, *supra* note 79, 321.

> "In such proceedings, a neutral commission is established to hear the parties, examine their claims and objections, make proposals to the parties, and otherwise assist the parties in reaching an amicable settlement. Conciliation is not an adjudicatory proceeding, nor does a conciliation commission have the power to impose a legally binding solution on the parties; instead, a conciliation commission may make recommendations to the parties. […] Procedurally, conciliation seeks to combine the function of a mediator with the more active and objective role of a commission of inquiry."[88]

As stated by Article 13 of Annex V of UNCLOS, the mandate of a conciliation commission also includes the competence to decide questions of competence (*Kompetenz-Kompetenz*). This competence serves as a safeguard against the frustration of the proceedings due to their compulsory nature.[89] In other words, its purpose mirrors that of Article 288(4) of UNCLOS.[90] Indeed, as the competence of a conciliation commission may be challenged,[91] the commission may be required to take a decision on its competence, in which it will have to analyze the provisions of UNCLOS forming the basis for the objections to competence (e.g., Article 281 of UNCLOS and, in the present context, Article 297(3)(b) of UNCLOS).[92] Unlike the final report and recommendations of the conciliation commission, decisions on competence constitute a legally binding determination of the conciliation commission's competence in the case at hand.[93]

88 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, paras 51–52. See also Cot, *supra* note 74, para. 3: "half breed method for the settlement of disputes". See also Treves, 'Compulsory Conciliation', *supra* note 75, 614; Yee, *supra* note 79, 316.

89 Treves, 'Compulsory Conciliation', *supra* note 75, 616.

90 Nordquist, Rosenne & Sohn (eds), *supra* note 11, 140 and 327.

91 Treves, 'Compulsory Conciliation', *supra* note 75, 619; Rothwell, *supra* note 82, 64; Tamada, *supra* note 77, 327–328.

92 See generally *Timor Sea Conciliation* (Decision on Competence), *supra* note 77. See also Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 186; Gao, *supra* note 77, 214–218; Bankes, *supra* note 77, 39–48; Crosato, *supra* note 77, paras 9–15. Contra: Lavalle, *supra* note 32, 44–45, who argues that questions of competence should be settled by an UNCLOS tribunal pursuant to Article 287 of UNCLOS.

93 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 66; Kedgley Laidlaw & Phan, *supra* note 77, 147; Bankes, *supra* note 77, 47–48. For critical commentary, see Gao, *supra* note 77, 210–211.

It is in this context that conciliation commissions have to interpret and apply the relevant provisions of Part XV of UNCLOS concerning jurisdiction – in particular Article 297(3) of UNCLOS and the substantive EEZ fisheries access provisions referenced therein.

In its report, the conciliation commission cannot address disputes beyond the wording of Article 297(3)(b) of UNCLOS, but it can – prior to issuing the report – propose any terms for an amicable settlement.[94] Article 7(1) of Annex V of UNCLOS provides that, *only*[95] failing agreement between the parties based on the conciliation commission's proposals, the report must include the commission's "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". This provision has been criticized because the conciliation commission is not a judicial or arbitral body and, therefore, its recommendations should not be based solely or even primarily on legal considerations, but should instead address aspects of a compromise that will necessarily entail a "waiver of some or all of the legal rights of both or one of the parties".[96] In the light of Article 7(1) of Annex V of UNCLOS, the conciliation commission in *Timor-Leste v. Australia* opted for a reasonable middle course in this respect:

> "[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."[97]

94 Riphagen, *supra* note 47, 292.

95 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 69.

96 Lavalle, *supr*a note 32, 29–32, with further references.

97 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 70. See also the conclusion of the commission that "the Parties' agreements are consistent with the UN Convention on the Law of the Sea and other provisions of international law", *ibid*., para. 305.

II. Subject-matter Competence of the Conciliation Commission

As explained in the following sections, in terms of subject-matter competence, the conciliation commission has a rather restricted mandate pursuant to Article 297(3)(b) of UNCLOS that only covers a narrow selection of disputes. Of the three categories of EEZ fisheries disputes subject to compulsory conciliation, only two directly concern access to fisheries.

1. Determination of the Allowable Catch and the Coastal State's Harvesting Capacity

Article 297(3)(b)(ii) of UNCLOS addresses disputes concerning the two key prerequisites for the activation of the obligation to grant access pursuant to Article 62(2) of UNCLOS, namely, the coastal State's determination of the allowable catch pursuant to Article 61(1) of UNCLOS and of its capacity to harvest the allowable catch pursuant to Article 62(2) of UNCLOS. Specifically, it covers disputes in which a State alleges that "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". The wording of Article 297(3)(b)(ii) of UNCLOS suggests that it only applies to situations where the coastal State has refused to determine the allowable catch or its harvesting capacity for a fish stock, but not the situation in which a coastal State has acted outside its discretionary powers and made an *unlawful* determination.[98]

Of course, it is possible that a conciliation commission disagrees with the (untested) interpretation presented here and considers that it has the competence to deal with allegations of unlawful determinations of the allowable catch. In light of this possibility, it is necessary to assess the limits of the conciliation commission's substantive mandate in this regard. In other words, the question must be asked to what extent coastal States can in fact violate their obligations to determine an allowable catch and their harvesting capacity – and what the standard of review of the conciliation commission or other international courts and tribunals with jurisdiction would be.

Given the considerable coastal State discretion involved in implementing the obligation to set an allowable catch, the obligation in Article 61(1) of

[98] Vasciannie, *supra* note 67, 58.

UNCLOS has been described as "more apparent than real"[99] and "illusory".[100] However, despite their discretion, coastal States *can* breach Article 61(1) of UNCLOS, and the various obligations under Articles 61(2) to (4) and 62(1) of UNCLOS limiting their discretion in setting the allowable catch, by taking decisions that exceed the limits of the discretion afforded by these provisions – particularly in light of the good faith obligation of Article 300 of UNCLOS. Most importantly, an *arbitrary* refusal to set the allowable catch would violate Article 61 of UNCLOS, as is evident from the wording of Article 297(3)(b)(ii) of UNCLOS.[101] A clear example of an unlawful "arbitrary refusal" to set an allowable catch under Article 297(3)(b)(ii) of UNCLOS would be "[a]n allowable catch of zero or a randomly selected [low] number" where a coastal State does not itself target an abundant fish stock and a landlocked State has expressed interest in harvesting that stock under Article 62(2) of UNCLOS.[102] Article 300 of UNCLOS similarly imposes a measure of restraint on the coastal State's discretion to determine its harvesting capacity under Article 62(2) of UNCLOS, which means that a refusal to determine the harvesting capacity or an *arbitrarily* high determination of harvesting capacity devoid of a factual basis would be unlawful.[103] That said, the coastal State's discretion in determining its harvesting capacity is broad, and in combination with the coastal State's broad discretion in determining the allowable catch, the result is almost unconstrained freedom to either allow or prohibit foreign fishing in the EEZ.[104] Overall, it would be difficult for a conciliation commission to establish the existence of an unlawful decision regarding the allowable catch except in the most obvious situations. Moreover, the conciliation commission must respect the limits imposed by the prohibition of review of discretionary decisions as envisaged by Article 297(3)(b)(c) of UNCLOS, to be discussed below.[105]

99 Burke, *New International Law*, *supra* note 7, 44 and 63.

100 Christie, *supra* note 67, 9.

101 *Ibid*., 8; Edeson, *supra* note 67, 18. Also Burke, *New International Law*, *supra* note 7, 63–64, who, however, somewhat blurs the distinction between substantive law and compulsory jurisdiction.

102 *Ibid*., 47 (at note 67).

103 Gründling, *supra* note 67, 134.

104 T. L. McDorman, 'Extended Jurisdiction and Ocean Resource Conflict in the Indian Ocean', 3 *The International Journal of Estuarine and Coastal Law* (1988) 3, 208, 227 [McDorman, 'Extended Jurisdiction']; S. Garcia, J. A. Gulland & E. L. Miles, 'The New Law of the Sea, and the Access to Surplus Fish Resources: Bioeconomic Reality and Scientific Collaboration', 10 *Marine Policy* (1986) 3, 192, 192–195; Burke, *New International Law*, *supra* note 7, 62–63.

105 See below F.IV.

2. Allocation of the Surplus

Article 297(3)(b)(iii) of UNCLOS addresses the separate issue of the allocation of a surplus of the allowable catch if the coastal State has declared a surplus to exist. It applies to disputes in which a State alleges that

> "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 [UNCLOS], the whole or part of the surplus it has declared to exist".

Again, the wording of this Article 297(3)(b)(iii) of UNCLOS envisages a complete refusal of the coastal State to make an allocation "to *any* State" (emphasis added), not any *unlawful* allocation decision in breach of the limits of the coastal State's discretion.[106] At first reading, the wording "it is alleged" in Article 297(3)(b) of UNCLOS suggests that, for an application to fall within the conciliation commission's competence, it is sufficient for the applicant to make such an allegation. However, this would be an overly subjective interpretation of this requirement that would place full control of the existence of jurisdiction into the hands of the applicant. Therefore, the better interpretation is that the commission may assess – either upon an objection by the respondent or *proprio motu* – whether the applicant's claims can *objectively* be characterized as an allegation of an "arbitrary refusal", which is a rather high threshold.[107] Therefore, if coastal States want to avoid the possibility of a compulsory conciliation procedure, they can take steps to ensure that their refusal does not appear "arbitrary" by bringing forward reasons for their refusal to allocate the surplus.[108]

106 Vasciannie, *supra* note 67, 58.

107 Lavalle, *supra* note 32, 37–38, who, however, considers this requirement as a matter of admissibility rather than jurisdiction. See also Bankes, *supra* note 77, 34. Implicitly also: Burke, 'Law of the Sea Convention', *supra* note 47, 90; Burke, *New International Law*, *supra* note 7, 63; T. Treves, 'The Settlement of Disputes According to the Straddling Stocks Agreement of 1995', in A. E. Boyle & D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), 253, 259 [Treves, 'Straddling Stocks Agreement'].

108 S. Heitmüller, *Durchsetzung von Umweltrecht im Rahmen des Seerechtsübereinkommens von 1982 durch den Internationalen Seegerichtshof in Hamburg* (2001), 152. Also Lowe, *supra* note 8, 9–10; J. K. Gamble, 'The 1982 UN Convention on the Law of the Sea:

A further interesting aspect of Article 297(3)(b)(iii) of UNCLOS is the reference to a refusal of an allocation "under the terms and conditions established by the coastal State". This reference arguably indicates that the conciliation commission may assess the coastal State's decision not to allocate the surplus against the coastal State's *domestic law* in addition to Articles 62, 69 and 70 of UNCLOS. As the applicable domestic legislation must be "consistent with [UNCLOS]", the conciliation commission may arguably also review its compatibility with the relevant provisions of UNCLOS before applying it for the purposes of this assessment.

Again, it might be the case that a conciliation commission considers – contrary to the view expressed here – that its mandate covers disputes concerning an allegedly unlawful allocation decision in breach of the limits of the coastal State's discretion (or that an allocation dispute is brought before an international court or tribunal with jurisdiction to decide such a dispute). In order to understand if this makes much of a difference in terms of the extent of subject-matter competence, it is necessary to identify the commission's standard of review in respect of the legality of the coastal State's discretionary allocation decisions under Article 62(2) to (3) of UNCLOS. Article 62(2) of UNCLOS states that the coastal State, in making its decision on allocation, must have "particular regard to the provisions of [Articles 69 and 70 of UNCLOS], especially in relation to the developing States mentioned therein". Furthermore, Article 62(3) of UNCLOS adds a second obligation by providing that "[i]n giving access to other States to its [EEZ] under this article, the coastal State shall take into account all relevant factors". This rather ambiguous obligation is concretized by a list of "relevant factors" that must be taken into account. As the list of "relevant factors" is not exhaustive,[109] additional factors not expressly listed may play a role.[110] A coastal State could, for example, take into account the interests of a neighbouring State's indigenous peoples in a certain fishery or fishing grounds.[111]

It is evident from the wording "have regard to" in Article 62(2) of UNCLOS and the wording "take into account" in Article 62(3) of UNCLOS that the allocation of the surplus by the coastal States is essentially a *discretionary*

Binding Dispute Settlement', 9 *Boston University International Law Journal* (1991) 1, 39, 50.

109 Kwiatkowska, *EEZ*, *supra* note 4, 64.

110 Nordquist *et.al.*, (eds), *supra* note 67, 637.

111 A. Chircop, T. Koivurova & K. Singh, 'Is There a Relationship between UNDRIP and UNCLOS?', 33 *Ocean Yearbook* (2019), 90, 113.

exercise.[112] This is confirmed by Article 297(3)(a) of UNCLOS.[113] In this respect, it has been noted that the obligations guiding the allocation process "are far from leading 'objectively' to one or more particular State or States, let alone to a distribution of the surplus between those States".[114] In other words, the "right" of third States to be granted access to the surplus is conditional upon the result of the coastal State's exercise of its discretion in allocating the surplus. It follows that these rights are not *absolute* rights but at most *relative* rights.[115] They are absolute only in relation to the entitlement of non-coastal States to a discretionary allocation decision by the coastal State following their request to receive access.

From the above, it follows that if the wording of Article 62(3) of UNCLOS is taken at face value, the coastal State is obliged to take into account "all relevant factors", including those not explicitly listed in the provision. Conversely, it can be argued that no "relevant factors" may be ignored as a matter of *procedure* if they are made known to the coastal State by the interested State, although they do not necessarily have to influence the *outcome*. This interpretation is also supported by Article 297(3)(b)(c) of UNCLOS, as discussed below.[116] Moreover, the good faith obligation arising from Article 300 of UNCLOS imposes some limitations on the coastal State's discretion, although it would be difficult (but not impossible) to establish a breach in a concrete situation.[117]

Due to the limitation of jurisdiction *ratione materiae* in Article 297(3)(a) of UNCLOS, there exists no jurisprudence of UNCLOS tribunals on how to review the legality of allocation decisions of coastal States under Article 62(2) to (3) of UNCLOS. That said, useful comparative insights can be drawn from

112 Nandan, *supra* note 67, 387; Fleischer, *supra* note 7, 268; Carroz, *supra* note 5, 858; Lowe, *supra* note 8, 10; Orrego Vicuña, *supra* note 15, 54–55; Kwiatkowska, *EEZ*, *supra* note 4, 60–61; E. Brown, 'The UN Convention Regime', *supra* note 20, 33–34; Edeson, *supra* note 67, 21; Scovazzi, *supra* note 8, 69. Also Barnes, *supra* note 67, 239. For the contrary view of the Spanish government upon signature of UNCLOS, see Casado Raigón, *supra* note 67, 336.

113 Riphagen, *supra* note 47, 292; Edeson, *supra* note 67, 21; E. L. Enyew, *The Rights of Indigenous Peoples to Marine Space and Marine Resources under International Law* (2019), 191–192.

114 Riphagen, *supra* note 47, 292.

115 Nordquist *et al.*, (eds), *supra* note 67, MN. 62.16(g); Lowe, *supra* note 8, 9; Harrison & Morgera, *supra* note 67, para. 13. See also Kwiatkowska, *EEZ*, *supra* note 4, 60, who even goes as far as (unconvincingly) denying Article 62(2) of UNCLOS the status of a legal obligation.

116 See below F.IV.

117 Fleischer, *supra* note 7, 268.

the report of a review panel established under the 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention).[118] The decision was rendered in 2018 in *Ecuador v. Commission*, a case in which Ecuador challenged an allocation decision of the Commission of the South Pacific Regional Fisheries Management Organization (SPRFMO Commission)[119] in relation to Pacific jack mackerel.[120] While the decision did not concern an allocation of a surplus by a coastal State under Article 62(2) of UNCLOS but an allocation with respect to a straddling fish stock by the SPRFMO Commission, certain statements of the review panel are relevant for the interpretation of Article 62(3) of UNCLOS.

In relevant part, the review panel accepted that, based on the applicable legal rules (UNCLOS, the UNFSA, and most importantly Article 21 of the SPRFMO Convention), the SPRFMO Commission had a "wide margin of discretion in allocating the [total allowable catch]".[121] Indeed, neither of the applicable instruments provided clear guidance on the application of the existing implicit and explicit allocation criteria,[122] although it was clear that the interests

118 *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, 14 November 2009, 2899 UNTS 211.

119 SPRFMO Commission, 'CMM 01-2018: Conservation and Management Measure for *Trachurus murphyi*' (2018), avialable at http://www.sprfmo.int/assets/Fisheries/Conservation-and-Management-Measures/2018-CMMs/CMM-01-2018-Trachurus-murphyi-8March2018.pdf (last visited 12 July 2023).

120 *Review Panel Established Under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Ecuador v. Commission)*, Findings and Recommendations of the Review Panel, 5 June 2018, PCA Case No. 2018-13 [*Ecuador v. Commission* (Findings and Recommendations of the Review Panel)]. For details, see J. Levine & C. Pondel, 'There Are Not Plenty of Fish in the Sea: PCA Case No. 2018-13 on Ecuador's Objection to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation', 24 *Australian International Law Journal* (2018) 1, 221; P. Tzeng, 'Fisheries Review Panels: Lessons from *Russia v. Commission and Ecuador v. Commission*', 37 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2019), 221, 235–240; R. Rayfuse, 'Settling Disputes in Regional Fisheries Management Organisations: Dealing with Objections', in H. Ruiz Fabri *et al.* (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (2020), 240, 267–269. On a previous SPRFMO review panel decision, see A. Serdy, 'Implementing Article 28 of the UN Fish Stocks Agreement: The First Review of a Conservation Measure in the South Pacific Regional Fisheries Management Organisation', 47 *Ocean Development & International Law* (2016) 1, 1–28 [Serdy, 'Implementing Article 28'].

121 *Ecuador v. Commission* (Findings and Recommendations of the Review Panel), *supra* note 120, paras 91–92.

122 *Ibid*., para. 93.

of developing States needed "to be treated with the utmost seriousness".[123] Nonetheless, the review panel considered that it could determine that the SPRFMO Commission "acted outside of its […] wide margin of discretion".[124] This, however, required that an SPRFMO Member State "must substantiate its claim [of inconsistency] with compelling evidence".[125] In the review panel's view, "a determination of inconsistency could for example arise if the allocation were exclusively based on only one of the allocation criteria".[126] Ultimately, the review panel rejected Ecuador's challenge because Ecuador could not offer "compelling evidence" in respect of those claims it had substantiated and/or did not sufficiently substantiate its claim in the first place.[127] It is submitted that the review panel's basic approach and standard of review can be transferred to the question of the legality of an allocation under Article 62(2) to (3) of UNCLOS. However, the differences between the applicable allocation principles (e.g., the relevant factors guiding the discretion of the coastal State) must be taken into account.

If it is established, on the basis of such review by a conciliation commission (within the limits of the prohibition of review of discretionary decisions as envisaged by Article 297(3)(b)(c) of UNCLOS) or an international court or tribunal with jurisdiction, that the coastal State unlawfully withheld the surplus or made an unlawful allocation decision, this amounts to a violation of Article 62(2) and/or (3) of UNCLOS. As a result, the coastal State is internationally responsible vis-à-vis the State(s) seeking access – which have a right to a lawful decision on allocation following their request – under the rules of State responsibility.[128] However, under normal circumstances, this would not amount to a right to receive the surplus, but only to an obligation of the coastal State to take a new decision on allocation that is lawful. There is no right of self-help of other States that would allow them to replace the coastal State's decision concerning the allocation of the surplus with their own. In particular, such conduct may arguably not be justified as a countermeasure given that, in allocating itself a share of the allowable catch, the non-coastal State would go beyond what it could have reasonably claimed under Article 62(2) of

123 *Ibid*., para. 94.
124 *Ibid*., para. 95.
125 *Ibid.*
126 *Ibid*., para. 96.
127 *Ibid*., para. 97.
128 Articles 1 and 2 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10, 2001.

UNCLOS.[129] Support for this interpretation may be found in Article 297(3)(b)(iii) of UNCLOS, which refers interested non-coastal States to the possibility of compulsory conciliation only in situations where coastal States have "arbitrarily refused to allocate [the surplus] to *any* State" (emphasis added).

III. Categories of Disputes Not Subject to Compulsory Conciliation

When compared to the significantly broader wording of Article 297(3)(a) of UNCLOS, the wording of the three categories of EEZ fisheries disputes mentioned in Article 297(3)(b) of UNCLOS indicates that the scope of disputes subject to compulsory conciliation is not as broad as the scope of disputes excluded from jurisdiction *ratione materiae* under Article 297(3)(a) of UNCLOS.[130] In other words, some categories of disputes that are excluded from compulsory dispute settlement by Article 297(3)(a) of UNCLOS are not brought back into compulsory conciliation by Article 297(3)(b) of UNCLOS – thereby falling into what could be called a *jurisdictional gap* between the two provisions.[131]

As mentioned, if the wording of Article 297(3)(b)(ii) and (iii) of UNCLOS is taken at face value, disputes concerning the *legality* of discretionary decisions of the coastal State are not covered by the conciliation commission's mandate, whereas a refusal by the coastal State to take discretionary decisions that it is *obliged* to take is subject to compulsory conciliation. Therefore, the former category of disputes is excluded from compulsory jurisdiction but not subject to compulsory conciliation. Where the coastal State is not obliged to take a discretionary decision, such as in the context of the coastal State's power under Article 62(4) of UNCLOS to determine the terms and conditions established in its conservation and management laws and regulations as mentioned by Article 297(3)(a) of UNCLOS, compulsory conciliation is unavailable. Similarly, to the extent that disputes concerning non-exclusive historic fishing rights in the EEZ and disputes concerning rights and obligations in fisheries access agreements are excluded by Article 297(3)(a) of UNCLOS, they are not subject to compulsory conciliation. Moreover, if one considers that Article 297(3)(a) of UNCLOS applies to disputes concerning Articles 63 and 64 of UNCLOS, these disputes are equally not subject to compulsory conciliation.[132]

129 On the substantive requirements of countermeasures, see generally F. Paddeu, 'Countermeasures (2015)', in Peters (ed.), *supra* note 74, paras 18–25.

130 Boyle, 'Straddling Fish Stocks', *supra* note 48, 99.

131 *Ibid.*

132 *Ibid*.

IV. Prohibition of Review of Discretionary Decisions

Article 297(3)(b)(c) of UNCLOS states that the conciliation commission, in the recommendations adopted in its report,[133] may "[i]n no case […] substitute its discretion for that of the coastal State". This prohibition reflects – and aims to safeguard – the coastal State's discretionary powers under Articles 61(1), 62(2) and (3), 69 and 70 of UNCLOS by preventing the conciliation commission from reviewing the coastal State's discretionary exercise of these powers to an extent that amounts to a normative statement as to the result at which the coastal State *should* have arrived.[134]

Article 297(3)(b)(c) of UNCLOS is widely criticized as frustrating the conciliation commission's mandate.[135] However, as the discretion afforded to the coastal State by Part V of UNCLOS is not unlimited, this provision does not render the compulsory conciliation procedure entirely meaningless. The conciliation commission is not prevented from adopting recommendations based on a finding that a coastal State's conduct falls outside the limits of its discretionary powers and is based on "patently impermissible grounds".[136] In other words, the conciliation commission may identify a breach of the aforementioned obligations where such a breach can be determined despite the discretionary nature of these obligations (i.e., "manifest" violations or "arbitrary" conduct such as a refusal to take a decision), but in its recommendations it may not indicate a particular outcome (beyond guidelines or suggestions) that the coastal State should have arrived at.[137] In the words of *Treves*:

> "For instance, while the conciliation commission can ascertain the manifest failure of the coastal State to determine the allowable catch, it cannot indicate what should be the level of such allowable catch."[138]

133 The prohibition does not apply to proposals for an amicable settlement prior to the issuing of the final recommendations included in the conciliation commission's report. See Riphagen, *supra* note 47, 292; Treves, 'Compulsory Conciliation', *supra* note 75, 622.

134 Boyle, 'Dispute Settlement', *supra* note 26, 43. Also Orrego Vicuña, *supra* note 15, 130.

135 Rosenne, *supra* note 32, 99; Riphagen, *supra* note 47, 292; Dahmani, *supra* note 26, 122; Nordquist, Rosenne & Sohn (eds), *supra* note 11, 321. Also Reisman & Arsanjani, *supra* note 53, 650: "severe limitation".

136 Churchill & Lowe, *supra* note 19, 455. See also Tsamenyi, Milligan & Mfodwo, *supra* note 87, 156–157.

137 Treves, 'Compulsory Conciliation', *supra* note 75, 622; Lowe, *supra* note 8, 10.

138 Treves, 'Compulsory Conciliation', *supra* note 75, 622.

Moreover, given that the conciliation commission's mandate pursuant to Article 297(3)(b)(ii) and (iii) of UNCLOS is restricted to situations where it is alleged that the coastal States refused to *take* a discretionary decision in the first place, but not situations where the *legality* of discretionary decisions is at issue, the safeguard in Article 297(3)(b)(c) of UNCLOS may in many respects be of declaratory rather than limiting effect. An example of an excess of the conciliation commission's mandate would be to not merely ascertain the arbitrary refusal of the coastal State to allocate the surplus to any State, but to also indicate to which State the surplus must be allocated despite the discretion of the coastal State.[139]

G. Conclusion

While the scope of disputes relating to the coastal State's sovereign rights over fisheries automatically excluded from jurisdiction *ratione materiae* under Article 297(3)(a) of UNCLOS is generally very broad it only covers EEZ fisheries disputes and not disputes concerning fisheries located in – or attributed to – other maritime zones of coastal States. Moreover, not all imaginable categories of EEZ fisheries access disputes are covered by this limitation. In particular, Article 297(3)(a) of UNCLOS is designed exclusively as a coastal State defence, which means that a coastal State may choose to invoke its sovereign rights under Article 56(1)(a) of UNCLOS against a non-coastal State claiming access (e.g., under a fisheries access agreement or based on alleged non-exclusive historic fishing rights). Moreover, Article 297(3)(a) of UNCLOS does not shield broad marine environmental measures of coastal States – such as MPAs that may include restrictions or a ban on fishing as part of an overall protection regime – completely from judicial review. That said, all traditional categories of EEZ fisheries access disputes involving claims by non-coastal States to access based on either Articles 62(2), 69 or 70 of UNCLOS or separate treaty-based or customary rights are excluded from jurisdiction *ratione materiae*. Therefore, Article 297(3)(a) of UNCLOS may be said to have stood the test of time in relation to its objective of protecting the coastal State's sovereign rights from non-coastal State litigation.

The same cannot be said of the compulsory conciliation procedure under Article 297(3)(b) and Annex V of UNCLOS, which serves the purpose of providing a remedy to non-coastal States in situations where a denial of EEZ fisheries access by a coastal State appears arbitrary or manifestly in violation

139 Lowe, *supra* note 8, 10.

In relevant part, this competence only covers disputes where the non-coastal State alleges that the coastal State has arbitrarily refused to determine the allowable catch or its harvesting capacity or to allocate the surplus of the allowable catch to any State. Conversely, the conciliation commission's subject-matter competence neither covers disputes concerning the *legality* of discretionary coastal State decisions beyond such a refusal to take a decision, nor any of the other categories of EEZ fisheries access disputes excluded from compulsory jurisdiction under Article 297(3)(a) of UNCLOS, but not mentioned in Article 297(3)(b) of UNCLOS. For these reasons, the compulsory conciliation procedure may remain irrelevant in the future at least as far as EEZ fisheries access disputes are concerned. While the conciliation commission in *Timor-Leste v. Australia*, which was based on Article 298(1)(a) of UNCLOS, could rely on a very broad competence encompassing "disputes concerning the interpretation or application of [Articles 15, 74 and 83] relating to sea boundary delimitations", conciliation commissions under Article 297(3)(b) of UNCLOS may only entertain the most extreme cases of coastal State inaction, refusal to act or conduct that is equivalent to a refusal to act.