Dispute Settlement in the UN Convention on the Law of the Sea

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The generality of the provisions relating to high seas fishing allows for a broad scope of interpretation and application. Article 119 states the general goal of the measures to be taken for conservation but a range of subjective factors is left for determination. The measures stipulated under Article 119 must produce, for example, the maximum sustainable yield, as qualified by "relevant environmental and economic factors" as well as "the special requirements of developing States." This situation has led one commentator to note, "the major shortcoming of UNCLOS is its attachment of vague duties and restrictions to high seas fishing without suggesting any parameters for these duties, let alone an enforcement regime or a list of appropriate sanctions that may be sought for violation of these duties."[211] The Convention does set out certain basic principles, but "the articles are phrased in hortatory language which appears to be primarily concerned with accommodation of conflicting interests and none of the relevant provisions provide a remedy if agreement is not forthcoming."[212] The exact substance of these obligations and possible remedies and sanctions are to be formulated in separate agreements or are to be elaborated through the processes available in Part XV of the Convention.

Overall, the balance of interests has clearly shifted to favor coastal State control over the traditional inclusive approach. Considerable coastal State authority has been recognized in the EEZ to decide how much fish can be caught and who can catch it, and these interests are also recognized to some degree in fisheries occurring beyond its EEZ. The extent that coastal State power is controlled – or reinforced – through dispute settlement procedures is next examined.

Resolution of Disputes Relating to Fishing

The increasing regulation of fishing has significantly curtailed and ultimately displaced the traditional freedom of fishing. Through the grant of sovereign rights and various discretionary powers, the EEZ regime is firmly biased towards the interests of coastal States. This bias is reinforced by the dispute settlement provisions of the Convention, which

[211] Patrick Shavloske, "The Canadian-Spanish Fishing Dispute: A Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty," 7 *Ind. Int'l & Comp. L. Rev.* 223, 237 (1996).

[212] David Freestone, "The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime?," 5 *Canterbury L. Rev.* 341, 347 (1994). Oda has also criticized the duty of cooperation imposed by the Convention in that it "seems rather abstract, and there is no provision describing how it can be performed in a concrete way." Oda, "Fisheries," at 751.

largely insulate the decisions of the coastal State from review. According to Article 297(3), disputes concerning the interpretation or application of the provisions of the Convention with regard to fisheries are to be settled in accordance with Section 2 of Part XV. Article 297(3) then proceeds to list the exceptions to this basic position. The exceptions only relate to fishing in the EEZ:

> [T]he coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.[213]

The discussion below examines the operation of the dispute settlement system in the Convention in respect of fishing in the EEZ, on the high seas, and in respect of stocks and species that move between these two maritime zones.

Resolution of Disputes Relating to Fishing in the EEZ

The restrictions on the availability of mandatory dispute settlement entailing binding decisions for fishing disputes pertain only to areas where States exercise sovereign rights, namely, the EEZ and the continental shelf. Except for the reference to sedentary species in relation to the regime of the continental shelf, the regulation of States' sovereign rights over fishing is dealt with as part of the EEZ regime. The limitations on dispute resolution pertain to both conservation and utilization of the living resources of the zone by the coastal State. In constructing this regime, the Convention clearly favors the rights of the coastal State over those of other users. Many of the legal obligations imposed on coastal States fall more in the category of guidelines for their behavior as so many decisions are left within the power of the coastal State.[214] Considerable discretion is thus granted to the coastal State: it has the power to determine the quantity of the allowable catch; to judge the amount it has the capacity to harvest; decides if there is a surplus and

[213] UNCLOS, art. 297(3)(a).

[214] Kwiatkowska, *Exclusive Economic Zone*, p. 48 ("the nature of guideline should be ascribed to all detailed provisions related to allowable catch, maximum sustainable yield and surplus-scheme established with a view to implementation of the principle of optimum utilization and consisting of determining a harvesting capacity of the coastal state and granting other states access to the surplus catch which the coastal state has declared to exist").

what should be done with it; and is further empowered to develop a specific regime to control and reinforce all of these decisions. It is clearly difficult to determine the content of a legal obligation and insist on its enforcement when the level of discretion incorporated into the norm permits so much flexibility of action and decision-making.[215] The dispute settlement mechanism in UNCLOS reinforces these decisions through the near-complete insulation of the coastal State's discretionary powers from review. States evidently did not consider third-party review of their decisions to be necessary as part of the international regulation of fisheries. Instead, many developing countries considered that the increase in maritime space under coastal State jurisdiction was accompanied by an increase in jurisdiction for their respective national courts.[216] National court control could be preferable since it would presumably be more sensitive to a country's interests in protecting its fishing industry and thus more inclined to uphold the discretionary decisions of the government compared with an international institution. The only counter-trend to be discerned is through prompt release proceedings under Article 292.

Dispute Settlement and the Discretionary Powers of the Coastal State

Many States resisted the possibility that their powers in the EEZ could be challenged externally once legal recognition of coastal State rights had been achieved.[217] Discretionary powers of the coastal State with respect to both conservation and utilization, namely, the determination of the allowable catch; harvesting capacity; allocation of surplus; and terms and conditions of conservation and management laws and regulations, are all excluded from the mandatory regime in Section 2 of Part XV. These categories of discretionary powers vested in the coastal State (which will be discussed immediately below) are not considered exhaustive but are merely examples of the types of disputes that are excluded from compulsory procedures entailing binding decisions. Even beyond these specifically mentioned issues, "any dispute" relating to the

[215] Developing countries preferred this flexibility since the adoption of an EEZ gives rise to problems due "to the lack of technological capacity and financial resources to exploit (harvest) resources in the zone, to carry out scientific research therein, and obtain the necessary facilities to control and prevent external encroachment in the zone." Hamisi S. Kibola, "A Note on Africa and the Exclusive Economic Zone," 16 *Ocean Dev. & Int'l L.* 369, 375 (1986).

[216] See Pierce, at 349.

[217] De Mestral, at 184. ("The substantive discretion is so broad and plenary that it is not easy to imagine a situation in which third states would have the right to question the exercise of the sovereign rights of the coastal state.")

coastal State's sovereign rights over the living resources is excluded from the procedures in Section 2 of Part XV. As such, the dispute settlement procedures reinforce the preference in favor of coastal States rather than provide an effective means to temper or control this power.

Allowable Catch

The coastal State is obligated to determine the allowable catch of living resources within its EEZ.[218] The determination of the allowable catch is required in order to ensure through proper conservation and management measures that the living resources are not endangered by overexploitation. Burke considers that this obligation is vaguely worded and is thus unlikely to impose a significant burden on the coastal State.[219] The assessment of allowable catch is to be made by taking into account "the best scientific evidence available" to the coastal State.[220] Coastal States must also consider the effects on species associated with or dependent upon harvested species when taking conservation and management measures.[221] A subjective standard for determining measures is incorporated into the text as there is an acknowledgement that not all coastal States will have an equivalent amount of scientific evidence about particular stocks available to it. Developing States have generally not adopted the specific goals of the Convention in their domestic legislation on the basis that they lack the technology to obtain the necessary scientific evidence.[222] To cater for this situation, the Convention anticipates the involvement of the appropriate international organizations by requiring the contribution and exchange of available scientific information, catch and fishing effort statistics, and any other data relevant to the conservation of fish stocks.[223] Yet the coastal State remains free to judge the appropriate allowable catch, subject only to its obligation to promote optimal utilization, and its decision may not be challenged through compulsory arbitration or adjudication.

[218] UNCLOS, art. 61(1). The reference to "living resources" thereby incorporates both targeted stocks as well as incidental catch.

[219] William T. Burke, "The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction," 63 *Oregon L. Rev.* 73, 81 (1984).

[220] UNCLOS, art. 61(2). Burke asserts that the term "available" includes data and evidence from sources beside the coastal State – such as foreign fleets, international organizations and other States involved in the fisheries under management. Burke, "Conditions of Access," at 85.

[221] UNCLOS, art. 61(4). [222] Attard, p. 155. [223] UNCLOS, art. 61(5).

In determining the appropriate conservation measures of the living resources of the EEZ, coastal States are required to maintain or restore populations in order to produce "the maximum sustainable yield."[224] "The Convention does not define the [maximum sustainable yield], but it is a well-known concept and is described by the maximum amount of fish that can be taken on a sustained basis without diminishing the species' reproductive capacity or adversely affect associated or dependent species."[225] The maximum sustainable yield is qualified by relevant environmental and economic factors "including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards."[226] In this respect, maximum sustainable yield has not only a quantitative character but also a qualitative character.[227] The latter aspect can be used by coastal States as a way to vary the allowable catch assessment: "the coastal State may maintain a level of population abundance, short of endangering the resource, that meets its interests as it determines those interests."[228]

The concept of maximum sustainable yield has been criticized since it is based on what is beneficial for humans rather than fish and the methods of calculating the maximum sustainable yield "rest on tenuous assumptions and data which is often incomplete or speculative."[229] Economists have also criticized the maximum sustainable yield formula as causing economic waste of fishery resources and weakness of international fishing regulations.[230] Further criticism has been directed at the scope of the concept for being too narrow and ignoring recent developments in fisheries management.[231] Yet the wording of the Convention is "sufficiently flexible to allow coastal States to do otherwise."[232] The "sufficiently flexible" content of the maximum sustainable yield concept effectively strengthens the scope of action for coastal States in managing its fish resources. The discretionary powers of the coastal State are further buttressed through the insulation from formal third-party review.

[224] *Ibid*., art. 61(3). [225] Kwiatkowska, *Exclusive Economic Zone*, p. 48.
[226] UNCLOS, art. 61(3). [227] See Castañeda, p. 617.
[228] Burke, "Conditions of Access," at 83. [229] Attard, p. 153. [230] *Ibid*.
[231] A. W. Koers, The Fishing Provisions of the 1982 Convention on the Law of the Sea, in *Proceedings of a Seminar in Jakarta 1983* (1984), p. 112, cited in Kwiatkowska, *Exclusive Economic Zone*, p. 49.
[232] *Ibid*.

Harvesting Capacity

Article 62 provides that the coastal State must determine its capacity to harvest the living resources. The determination of a coastal State's harvesting capacity is within the discretion of that State and is exclusive and non-reviewable. As part of the harvesting capacity calculation, Article 62 stipulates that coastal States are to promote the objective of optimum utilization without prejudice to the conservation measures to be taken. If a coastal State does not have the capacity to harvest the entire allowable catch, then other States must be given access. Such a system guarantees the sovereign rights of the coastal State because it ensures that the coastal State is still entitled to benefit economically even if it lacks the physical means fully to exploit its resources. In determining whether a surplus exists, a coastal State could simply establish an allowable catch that is equivalent to its capacity to harvest and thereby exclude all foreign exploitation of living resources within its EEZ.[233] In this respect, Burke has stated that a right to a portion of the surplus is not meaningful and that "a right that is dependent on another's discretion does not deserve the label 'right'."[234] O'Connell has instead argued that while the right to determine capacity is an exclusive right, it is not entirely subjective because of the obligation to allocate the surplus among other States.[235] "The coastal State could hardly be allowed to say that there is no surplus when manifestly it does not have the capacity to harvest the entire allowable catch."[236] In this regard, the coastal State "ostensibly does not have the right to permit less than full utilization of its resources."[237] Yet any external determination of the coastal State's assessment of its harvesting capacity – even where there is a gross discrepancy between the quantity of fish typically found in the relevant area and the capacity and advancement of the fishing industry of the relevant State – is not available under UNCLOS. It is only when the decision of the coastal State is "arbitrary" that it can be referred to compulsory conciliation procedures.

Allocation of Surpluses

Although third States have a right to the surplus, there is neither a legal obligation on the part of the coastal State to grant access to its

[233] Pierce, at 338 (arguing that the coastal State is granted unqualified sovereignty).
[234] William T. Burke, "Implications for Fisheries Management of U.S. Acceptance of the 1982 Convention on the Law of the Sea," 89 *Am. J. Int'l L.* 792, 800 (1995).
[235] D. P. O'Connell, 1 *The International Law of the Sea* (I. A. Shearer ed., 1982), p. 563.
[236] *Ibid*.
[237] Francis T. Christy, Jr., "Transitions in the Management and Distribution of International Fisheries," 31 *Int'l Org.* 235, 249 (1977).

EEZ nor is there a corresponding legal right in third States to claim a right of access.[238] States are not required to determine their policies for the development and use of their fish resources against any obligation to grant access but rather against their obligation to ensure the conservation and optimum utilization of the living resources.[239] In practice, most States have allowed for third-State access to the living resources of the EEZ in domestic legislation but have varied on the conditions for fishing in the zone.[240] Each coastal State is free to introduce foreign capital to obtain technical assistance from foreign States as well as allow any third State to engage in fishing agreements through concessionary agreements and to secure the maximum of the total allowable catch for itself.[241] If any controversy over foreign fishing in the EEZ is likely to arise, it is thus more probable that the dispute would be in relation to the conditions for fishing rather than the question of access to the EEZ.

Developing States have taken advantage of the flexible standards in the Convention as a means of obtaining scientific evidence to enhance or develop their utilization of living resources in the EEZ. What has often happened is that developing States grant foreign access in exchange for fisheries data and statistics, as well as for various forms of compensation that can be used to develop conservation and management capabilities.[242] Developing States may further use the grant of access as a means of ensuring continued control over their living resources:

> For most developing states lacking the economic assets to directly and immediately make use of the resources in their EEZ, the effectiveness of their management and control efforts in their fisheries is largely dependent on their ability to strategically allocate their surplus to other foreign countries. Coastal states use their "access" powers to negotiate with those states that possess the economic and technical resources to help them exploit their fisheries. This area is where there exists a divergence between apparent legal authority and actual control over the resources. Ultimately, the party better able to efficiently exploit the resources has the actual control over them. In the case of many developing

238 Kwiatkowska, *Exclusive Economic Zone*, p. 15. See also Phillips, at 606.
239 Kwiatkowska, *Exclusive Economic Zone*, p. 60.
240 Orrego Vicuña, *Exclusive Economic Zone Regime*, p. 157.
241 Oda, "Fisheries," at 744.
242 Kwiatkowska, *Exclusive Economic Zone*, p. 63 (citing various examples of such an arrangement). The fee system has been criticized because the amount paid rarely corresponds to the value of the resources harvested. The preferable approaches are joint venture arrangements in cooperation with enterprises from industrialized States or multinational joint ventures between developing States in the same region. Kibola, at 378. "It is essential, therefore, that more and more emphasis is put on cooperation in training and the transfer of latest fishing technology to the fishermen in the poor countries." Anand, at 289.

countries, it would seem that the nation able to negotiate the best access agreements with economically powerful distant water fishing nations will, in the long run, assume greater control over its resources.[243]

The reality of the actual process of allocation might be that the discretionary powers of the coastal State are minimized to some extent in light of the superior negotiating position of the more economically developed States. Certainly, it could well be expected that coastal States would take a variety of factors into account, and not necessarily factors solely pertaining to fishing. O'Connell has noted as much:

> The obligation to give other States access to the surplus is stated in Article 62(2), but this is made subject to "agreements or other arrangements", and "pursuant to the terms, conditions and regulations" referred to in paragraph 4, which concern licensing, fees, and other matters. The negotiation of such agreements could raise issues of general political and economic relations affecting the duty of allocation. Some countries have included a paraphrase of the catalogue of grounds for allocation in their legislation, but have added to it the competence of the Minister to take into account "other relevant matters." That portends a policy of denying allocations to countries which do not reciprocate in other matters even if they fall within the catalogue . . . The fact that Article 62(3) authorizes the coastal State to take into account "its other national interests" in giving access to its EEZ lends more plausibility to this. The problem is further complicated by the fact that [the Convention] envisages joint ventures, which could give bargaining over participating rights preference over allocations of the surplus.[244]

It is certainly quite foreseeable that a coastal State would rely on political interests in determining access to fish in its zone.[245] The political nature of these decisions renders them largely unsuitable for third-party review through international courts and tribunals.

While UNCLOS imposes obligations on a State to establish allowable catch levels, its domestic harvesting capacity, and the surplus catch, there is no indication that other States should be allowed to participate in such a determination.[246] In determining how to allocate the surplus

[243] M. Johanne Picard, "International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony," 31 *Texas Int'l L. J.* 317, 323 (1996).

[244] O'Connell, 1 *International Law of the Sea*, p. 566–67.

[245] For example, the United States denied Soviet and Polish access to its EEZ following, respectively, the Soviet invasion of Afghanistan and the Polish government's crackdown against Solidarity. See Lawrence Juda, "The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea," 16 *Ocean Dev. & Int'l L.* 1, 25 (1986).

[246] See Attard, p. 165. See also Burke, "Conditions of Access," at 102.

fish stock, coastal States are required under the Convention to take certain factors into account. Article 62, paragraph 3 requires the coastal State to take into account:

> all relevant factors including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

This obligation is an attempt to balance the discretion of the coastal State with the rights of other users.[247] The difficulty in this provision lies in assessing which of the factors is to take priority. Once again, the discretion of the coastal State has preeminence. It has been noted that various proposals at the Third Conference did suggest a priority of interests but no such indication was ultimately included and thus "[t]he omission by the drafters raised the question of whether a list of priorities was rejected in favour of a free and possibly unordered competition."[248] Indeed, one of the possible reasons for not stipulating preferences could be that many States envisaged trading the right of access against non-marine concessions.[249]

Terms and Conditions in Conservation and Management Laws and Regulations

Article 62, paragraph 4 permits the coastal State to establish laws and regulations, consistent with the Convention, relating to fishing by

[247] One group of States to be considered in the allocation process is landlocked and geographically disadvantaged States. This group of States had advocated during negotiations that the determination of the coastal State's harvesting capacity should include a reserve to meet the needs of the coastal State as well as its neighboring land-locked or geographically disadvantaged States. See Phillips, at 585 (describing a proposal submitted by Afghanistan, Austria, and Nepal). However, the rights of land-locked and geographically disadvantaged States are subject to the discretionary powers of the coastal State. Burke, "Conditions of Access," at 97. "Any actual participation by [landlocked and geographically disadvantaged States] is by agreement among the states concerned, again underlining that coastal states have the dominant decision-making position." Burke, "Implications for Fisheries Management," at 800. Little benefit is given to land-locked and geographically disadvantaged States in favor of other users.

[248] Attard, p. 167.

[249] *Ibid*., p. 168. Christy agrees that the problem of distribution can only be resolved through negotiation, particularly by trading off one item of value for another. Christy, at 258.

nationals of third States in its EEZ. Beyond being consistent with the Convention, the nature of the terms and conditions is solely the decision of the coastal State. UNCLOS provides an inclusive list of topics to which these laws may relate. It has been suggested that the coastal State's power of regulation should be exercised in a reasonable manner in accordance with the duty to act with due regard for the rights and duties of other States.[250] Such an obligation would be a small concession in light of coastal States' resistance to any check on their powers through third-party review of allocation of fishing resources within the zone.[251] "The coastal State's authority to vary these conditions underscores the State's total control over access."[252]

Most typically, access to a coastal State's zone involves a system of licensing. Cooperation with a coastal State for scientific research into management and conservation of stocks of mutual concern as well as the condition of reciprocity are characteristic features of licensing systems.[253] Over 150 bilateral agreements have been concluded in the last twenty-five years providing for collaboration and cooperation between fishing activities in the EEZ, prescribing the terms and conditions under which the fishing vessels of one party may operate in waters under the EEZ of the other, or granting reciprocal fishing rights to vessels of both parties in their respective zones of jurisdiction.[254] The system of licensing may work to the disadvantage of some developing States as it is not necessarily a guarantee of adequate financial return compared with the value of the resources being taken from the coastal State's zone. Difficulties are compounded in regions of developing coastal States:

> The nearby developing states will constantly compete among each other in their efforts to attract buyers for these licenses, and this competitive pressure undermines the negotiation leverage of any one state. Without strong regional cooperation in license price-fixing between these coastal states, there is a built-in incentive for them to compete and lower the prices to unprofitable levels.[255]

[250] Phillips, at 604.
[251] *Ibid*., at 605 (noting that coastal States "strenuously criticized" a proposal by European nations advocating a settlement procedure for this issue).
[252] Burke, "Conditions of Access," at 93.
[253] Kwiatkowska, *Exclusive Economic Zone*, p. 68. Picard notes that coastal States usually seek direct financial benefits, fishery development assistance, and general development assistance in access agreements. Picard, at 324–25.
[254] Anand, at 285. [255] Picard, at 326.

UNCLOS does not impose any restraints or obligations on States in this regard, nor permit any differences to be submitted to compulsory procedures entailing a binding decision. Instead, States negotiating the Convention anticipated that the matter would continue to be resolved on a bilateral, or regional, basis.

Conclusion

Decisions on how much fish can be harvested from a coastal State's EEZ, who can fish when and according to what conditions are thus excepted from compulsory and binding dispute settlement. "Articles 61 and 62 are unequivocal in establishing the exclusivity of coastal State decision making authority, and article 297 both reinforces this exclusive authority and confirms the fact that decision making criteria are solely for the coastal State to determine in any specific instance."[256] Although coastal States have certain guidelines set out in the Convention, decisions relating to the exploitation, conservation, and management of the living resources of the EEZ are predominantly subjective and non-reviewable. Beyond national laws and regulations, coastal States will negotiate bilateral and regional agreements and potentially utilize these arrangements for technical or scientific information or economic benefits in other matters. If these separate agreements do not have their own dispute settlement procedures, States will typically rely on traditional consent-based methods of dispute resolution.[257] At most, a State wishing to fish in the EEZ of a coastal State may utilize conciliation as an external review process for limited categories of decisions.

Compulsory Conciliation for EEZ Fisheries Disputes

Article 297(3) provides that certain fisheries disputes relating to the sovereign rights of coastal States can be submitted to compulsory conciliation.[258] Settlement of fishing disputes must first be attempted in accordance with Section 1 of Part XV prior to the matter being submitted to conciliation under Annex V, Section 2. Article 297(3) specifies which disputes will be subject to compulsory conciliation rather than just submitting any dispute that falls within the terms of the exception. Conciliation can only be used when it is alleged that:

[256] Burke, "Conditions of Access," at 117.

[257] It is unlikely that decisions taken under the provisions of UNCLOS relating to harvesting capacity, maximum sustainable yield, and allocation would be justiciable in national courts.

[258] UNCLOS, art. 297(3)(b).

i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in that exclusive economic zone is not seriously endangered;
ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest its living resources with respect to stocks which that other State is interested in fishing; or
iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.[259]

These three sorts of disputes may be broad enough to encompass disputes that would otherwise fall within the exception to submission of fisheries disputes to compulsory dispute settlement. However, the conciliation procedure under Article 297 has been structured "precisely to avoid the control and legal review of sovereign acts of the coastal State."[260] It is thus unsurprising that the conciliation formula received "widespread and substantial support."[261] Burke has concluded, "there is only a remote possibility that the conciliation process would ever be successfully invoked by a party and no possibility whatsoever that a conciliation commission could require a change in U.S. allocation policy."[262]

In determining the potential effectiveness of a conciliation procedure, it is evident that reference to States "manifestly" failing or "seriously" or "arbitrarily" refusing third States allows for subjective interpretations.[263] A State could, for example, argue that measures reasonably designed to promote the local harvesting industry are not inconsistent with UNCLOS and that the adoption and implementation of these measures would not amount to an "arbitrary refusal to allocate."[264] Such a determination is

[259] *Ibid*., art. 297(3)(b). [260] Orrego Vicuña, *Exclusive Economic Zone Regime*, p. 130.
[261] Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)," 73 *Am. J. Int'l L.* 1, 19 (1979).
[262] Burke, "Implications for Fisheries Management," at 798.
[263] Shabtai Rosenne, "Settlement of Fisheries Disputes in the Exclusive Economic Zone," 73 *Am. J. Int'l L.* 89, 99 (1979); Singh, p. 138. Gamble argues that conciliation could be avoided if the coastal State is determined to do so. Gamble, "Binding Dispute Settlement?," at 50.
[264] Burke, "Implications for Fisheries Management," at 797 (arguing that the contention that conciliation proceedings would undesirably affect United States' decision-making is without serious foundation).

clearly biased and a matter within the discretion of the coastal State. Moreover, "because there are solid economic and environmental reasons for refusing to find a surplus, it is not an abuse of discretion to find the harvesting capacity is equal to the allowable catch."[265] Measures intended to promote local fishing industries that are consistent with the Convention are unlikely to be construed as an "arbitrary refusal to allocate."[266] Certain extreme conditions would need to be in effect to expect a conciliation commission to have jurisdiction. An example might be a State prohibiting any fishing of any stock for an indefinite period of time. These conditions are not indefensible, however. Even Oda has argued that terms such as "allowable catch," "capacity to harvest," and "surplus" are ambiguous and could be extremely difficult to implement.[267]

Assuming jurisdiction could be established, the impact of a conciliation process on State behavior is difficult to gauge. The process is limited because the conciliation commission may not substitute its discretion for that of the coastal State.[268] Moreover, the type of fisheries disputes to be referred to conciliation is specified in the Convention itself, rather than the procedure being available for all disputes excepted from arbitration or adjudication.[269] These limitations are then reinforced by the express stipulation in the Convention that the recommendations of the conciliation commission are not binding. The question of effectiveness ultimately revolves around the possible impact of any political pressure that could be derived from the recommendations of the commission. "Such political pressures as may be associated with conciliation proceedings, and this suggestion is speculative, may be expected to have varying weight depending on the nature of the recommendations, the parties to the dispute, and the general political context."[270]

Conciliation was nonetheless the best compromise that could be reached. Clearly the wide scope of powers accorded to the coastal State over living resources in the EEZ leaves opens the possibility of abuse where a State may neglect to follow the provisions relating to optimal

[265] *Ibid*., at 796. [266] *Ibid*., at 797.
[267] Oda, "Fisheries," at 742–51. [268] UNCLOS, art. 297(3)(c).
[269] A. D. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea* (1987), pp. 255–56.
[270] Burke, "Implications for Fisheries Management," at 797. Burke doubts that the United States would retreat from a particular policy because of an adverse, non-binding, recommendation by the conciliation commission. *Ibid*., at 798.

utilization, maximum sustainable yield, harvesting capacity, and allocations of surplus. To prevent certain arbitrary, serious, or manifest violations of these provisions, States included compulsory conciliation as an external source of review. Through conciliation, some impact is inevitable since the coastal State is at least required to pay part of the costs of the conciliation proceedings and it cannot prevent the completion of the proceedings by refusing to participate.[271] There is no bar to the proceedings if the parties fail to reply to notification of institution of proceedings or fail to submit to the proceedings.[272] The question of whether any recommendation could ever be enforced in the case of a default proceeding would again rest on political exigencies or other pressures that may be brought to bear. By insulating coastal State discretion and accepting the use of non-binding recommendations, the risk of third-party decisions being entirely ignored and thereby rendered redundant is reduced. The benefits of this process rest in the politically persuasive value of the recommendation. A State may opt to ignore a conciliation commission recommendation in furtherance of its own fishing policies. Otherwise, a State could conceive that it is in its interests to follow the recommendations of the commission as it is more likely to retain a good reputation in future negotiations over fishing capacity and access.

Disputes Relating to the Enforcement of Fisheries Laws and Regulations in the EEZ

If disputes arise between parties concerning measures taken by the coastal State for the enforcement of its laws and regulations relating to the exercise of its sovereign rights to explore, exploit, conserve, and manage the living resources in the EEZ and have not been resolved under Section 1 of Part XV, the matter can be referred to Section 2 of Part XV. The only exception to the availability of mandatory jurisdiction, which will be considered further in Chapter 4, is where States have opted to exclude this type of law-enforcement dispute in accordance with Article 298 of the Convention.[273] Coastal States may board, inspect, arrest, and institute judicial proceedings against vessels found in violation of fishing laws and regulations.[274] In these circumstances,

[271] Burke, "Conditions of Access," at 90–91. [272] UNCLOS, Annex V, art. 12.
[273] See further pp. 308–311. [274] UNCLOS, art. 73(1).