

Conciliation and the 1982 UN Convention on the Law of the Sea

SIENHO YEE

Wuhan University
Wuhan, China

Conciliation is an age-old peaceful means of dispute settlement. The UN Convention on the Law of the Sea provides for both voluntary and compulsory conciliation. The importance of conciliation under UNCLOS is obvious, yet it has received little focused attention.

Keywords conciliation, dispute settlement, law of the sea

Conciliation in General

Conciliation has been with us for a long time. Suffice it to say that conciliation has been utilized in state practice and that it has been provided for in many treaties. Two of these—the Vienna Convention on the Law of Treaties of 1969¹ and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975²—are seen as having been the inspiration for the provisions on conciliation in the 1982 UN Convention on the Law of the Sea (UNCLOS).³

Various authorities have defined *conciliation* slightly differently. Various instruments have regulated its practice in different ways as well. According to a 1961 resolution of the Institut de droit international,

“conciliation” means a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.⁴

Received 6 August 2013; accepted 14 August 2013.

This is a much expanded and revised version of the author’s short opinion piece first published as “Voluntary and Compulsory Conciliation under the United Nations Convention on the Law of the Sea,” *Dokdo Research Journal* 15 (2011): 20–33. The permission of *Dokdo Research Journal* is gratefully acknowledged for use of that version in this article. The preparation for the original opinion piece as well as this article benefited from the support of Research Project No. 08&ZD055 of the China Social Sciences Foundation and the Fundamental Research Funds for the Central Universities in China. This article was completed on 28 July 2013; the Web sites cited were current as of that date.

Address correspondence to Sienho Yee, Changjiang Xuezheng Professor, Wuhan University, China. E-mail: sienho@chinesejil.org

From this, one can say that conciliation is really an aid or adjunct to negotiation by the parties in order to settle a dispute.⁵

Conciliation is usually done by an independent person or a commission of independent persons who command the confidence of the parties. Often they are eminent experts in the subject matter to be dealt with, chosen by or on consultation with the parties. The conciliator(s) will “hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.”⁶ In all probability, these proposals serve as the basis for further negotiation between the parties for a settlement of the dispute. As a result, in terms of method and ultimate consent to the result, conciliation belongs in the category of diplomatic or political settlement of disputes. In terms of procedure, it resembles judicial or arbitral settlement of disputes. As such, it has been called a “half-breed” method for dispute settlement.⁷ It may offer the flexibility and ultimate control over a dispute that the parties seem to have in a political settlement process as well as the pomp and formality of judicial or arbitral proceedings.

The distinction between voluntary and compulsory conciliation is made not on the “binding or not” nature of the proposals made by the conciliator(s) because, as a rule, the proposals are never binding. Rather, the distinction is made on whether there must be a separate acceptance of the invitation or request to resort to conciliation if conciliation is invoked. If yes, the procedure is *voluntary conciliation*. If consent to conciliation over a category of matters has been given previously by one party to a dispute so that conciliation can be invoked by another party in the future without the need for renewed consent, the procedure is called *compulsory conciliation*. The true nature of this procedure is conciliation to which consent has previously been given. Such consent can be expressed in a unilateral instrument or in a treaty such as UNCLOS (Articles 297 and 298). In this compulsory mode, conciliation moves closer to the side of judicial or arbitral proceedings in terms of procedure, particularly on the point of institution of proceedings.

The debut of compulsory conciliation followed from the rise of the multilateral process and framework in international relations. Jean-Pierre Cot considered that the 1969 Vienna Convention on the Law of Treaties “inaugurated” compulsory conciliation.⁸ He observed that “[t]he flexibility of the procedure has been used to introduce an element of obligation and of gentle pressure so as to incite the parties to resort to the procedure and to accept the result as binding. This carrot-and-stick approach [is] quite contrary to the initial philosophy of the procedure.”⁹ Or, one may say, such a mode of dispute settlement is the best that the parties to a multilateral treaty manage to persuade themselves to accept, by way of the lowest common denominator, as is probably the case with compulsory conciliation under UNCLOS.

Conciliation provides a good service to parties in negotiation. First, party autonomy in the settlement of dispute and participation in the result of the settlement is respected. The usual conduct of conciliation is through a dialogue between the parties, so that “there is no danger of it producing a result that takes parties completely by surprise, as sometimes happens in legal proceedings.”¹⁰ If the recommendations are not acceptable, they can be rejected.

Second, it is generally accepted, as declared by the Institut de droit international, that

no admission or proposal formulated during the course of the conciliation procedure, either by one of the Parties or by the Commission, can be considered as prejudicing or affecting in any manner the rights or the contentions of either Party in the event of the failure of the procedure; and, similarly, the acceptance by one Party of a proposal of settlement in no way implies any admission by it

of the considerations of law or of fact which may have inspired the proposal of settlement[.]¹¹

This understanding promotes candor and often active give-and-take during the process, which can be conducive to an amicable settlement of a dispute.

Third, proposals for settling a dispute that are conscientiously made by a group of eminent persons or a single eminent person who has invested a significant amount of time in studying it carefully are bound to carry a certain amount of weight for the parties. The recommendations can become a good basis on which the parties may conduct further negotiations. Furthermore, whatever the resulting proposals may be, the conciliation process is such that the positions of the parties receive conscientious presentation and examination. The impartial examination by the conciliator(s) may be illuminating. This can help to promote a deeper appreciation of the positions. Accordingly, the process can help the parties to understand each other better and reach realistic conclusions on their own.

Fourth, in conciliation, the parties are the master of the procedure and can decide by agreement to adopt procedural rules to their liking in order to assure convenience, discretion, and confidentiality. Often secrecy of proceedings including the outcome of the proceedings is considered essential to the success of any conciliation. Secrecy may continue even after the proceedings are terminated.¹²

Fifth, although dependent on the terms of reference, the conciliator(s) can consider a broader spectrum of factors including political and economic ones without limiting their horizon to only legal issues. Indeed, if the consideration of certain factors or a certain legal position may entrench, aggravate, or engender animosity between the parties, the conciliator(s) may attempt a creative approach. Conciliator(s) often consider legal issues,¹³ which helps to strengthen the persuasiveness of the proposals.

Sixth, if at least one party to a dispute is particularly averse to judicial or arbitral settlement and prefers direct negotiation but the direct negotiation between the parties is deadlocked, conciliation may provide the only ray of hope to the parties if they are determined to have the dispute settled in a peaceful manner. In such a situation, conciliation can serve as a final resort means of dispute settlement.

Finally, the existence of compulsory conciliation procedures in various treaties has a positive “background effect” or “deterrence effect.” A former legal adviser at the Foreign Office of the United Kingdom described this effect as follows:

One must in any event bear in mind that the chief value of the automatic procedures for settlement of disputes now written into the [Vienna Convention on the Law of Treaties] lies not in their precise content but in their mere existence. Paradoxically, the less they are utilized the more effective they will be. No state is anxious to indulge in lengthy and expensive international conciliation or litigation. This imposes a very heavy burden upon Foreign Offices and upon their legal advisers, with the outcome far from certain. What is important—what is indeed crucial—is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the denial of justified claims automatically available procedures for the settlement of disputes.¹⁴

Thus, the existence of a conciliation procedure may help to deter provocative behavior on the part of states that are bent on pushing the limits of acceptable conduct. If deterrence is not successful, the procedure affords the aggrieved states an avenue to air their grievances.

The drawbacks of conciliation vary for different states. A conciliation proceeding may require an extensive investment of time, money, and energy. For the parties that are fed up with dealing with a particular dispute, it may be more attractive to go through a binding decision proceeding to get the dispute done with, once and for all.

Furthermore, for a state that feels uncertain about its positions, the existence of an unfavorable report from the conciliator(s) may have serious political consequences. An impartial assessment made by independent and distinguished persons after a rigorous investigation cannot be lightly disregarded by conscientious decision makers. It is possible, as discussed below, that the mandate may provide that in some circumstances the conciliator(s) are not to issue a report, or that they may be persuaded not to issue a report, a course of action that may be adopted when it is realized that the views and suggestions of the conciliator(s) do not stand a good chance of being accepted by the parties.

Some may argue that if a commission report is favorable to a party, that party might have a *prima facie* justification for its positions and, therefore, may have a *prima facie* justification to move forward with measures that may entrench its positions.¹⁵ Such an argument ascribes too much weight to a conciliation report, which is to have no binding effect on the parties. Conciliation does not have such a “*prima facie* function.” This argument discourages states from using conciliation and, therefore, can present obstacles to the peaceful settlement of disputes.

The Position of Conciliation in the UNCLOS Dispute Settlement System

Part XV of UNCLOS, titled “Settlement of Disputes,” sets up a complex system for the settlement of disputes concerning its interpretation or application.¹⁶ First, the states parties have an obligation under Article 279 to settle disputes concerning the interpretation or application of the Convention only through peaceful means. The term “dispute concerning the interpretation or application” of UNCLOS delineates the overall scope of the jurisdiction of the UNCLOS system of dispute settlement. Further, whatever the dispute, the parties enjoy under Article 280, in the first instance, their normal freedom of choice as to the peaceful means of settlement, including negotiation, enquiry, mediation, conciliation, arbitration, and judicial settlement, as enumerated under Article 33 of the United Nations Charter. Conciliation is specially dealt with under Article 284 and Annex V.

Second, if by their choice of means (or by making no choice) the parties cannot settle their disputes, a dispute may be submitted under Section 2 of Part XV (specifically, Article 286) by any party to “compulsory procedures entailing binding decisions,” unless the dispute falls within special exceptions.

Third, certain disputes are excepted (or may be excepted) under Articles 297 and 298 from “compulsory procedures entailing binding decisions,” but some of these excepted disputes may be submitted by any party to compulsory procedure for conciliation under Annex V, Section 2, leading to nonbinding recommendations for the parties while others are completely excepted from all compulsory procedures, be it adjudication, arbitration, or conciliation, though such disputes are still subject to Section 1 of Part XV. Sometimes “exclusions” is used to describe the exceptions under Article 297, even Article 299 does this, but Article 297 uses the term “except that” to describe these. Thus, it is more appropriate to use “exceptions.” In any event the two terms, “exclusions” and “exceptions,” have the same meaning in terms of ultimate effect, although the use of the former is intended to indicate exclusions preexisting in the Convention while the latter are exclusions that a state party has to take an additional act to claim. The terms will be used here interchangeably.

In the second possibility—binding decision procedures—the parties enjoy freedom of choice of forums in advance (including the International Tribunal for the Law of the Sea, the International Court of Justice, and arbitration under Annex VII or Annex VIII) and the overlapping choice will be the forum to decide their dispute. If the choices do not overlap (or no choice has been made by one party or both), arbitration under Annex VII becomes the default forum. The parties can agree, afresh, to override this result.

In the third possibility, Article 299 reminds the parties that although they have excluded various disputes from Section 2 of Part XV binding decision procedures, they can nonetheless agree, by and only by additional acts to express mutual consent, to submit them to a Section 2 procedure. This leads to the conclusion that an optional exception, once declared, need not be specifically invoked for it to take effect. This appears to be in contrast to the framework on reservations in the Optional Clause declarations made under Article 36(2) of the Statute of the International Court of Justice.¹⁷ The case law of the International Court shows that, if such a reservation is not invoked, it is not given effect or can be considered waived, and the Court need not address this issue at all. This happened, for example, with respect to the so-called automatic, self-judging reservation of domestic jurisdiction in *United States Nationals in Morocco*¹⁸ and *Military and Paramilitary Activities in and Against Nicaragua*.¹⁹

In the UNCLOS dispute settlement system, conciliation features as a “first resort” means of settlement as well as a “final resort” or “residual resort” means. As a first resort means under Section 1 of Part XV, it is optional and is usually referred to as *voluntary conciliation*. As the final or residual resort under Section 3 of Part XV, it is compulsory and is thus often called *compulsory conciliation*. As pointed out in the *Virginia Commentary*, it is possible that the parties to a dispute may resort to conciliation twice in order to settle it.²⁰ After resorting to conciliation voluntarily, they may not be able to settle the dispute; then, if it is one of those disputes excepted under Article 297 or Article 298 from Section 2 binding decision procedures but subject to the compulsory conciliation procedure, one of the parties may trigger compulsory conciliation so that the parties face each other again on a second attempt at conciliation.

Voluntary Conciliation Under UNCLOS

Voluntary conciliation is regulated under Section 1 of Part XV of UNCLOS and Annex V, Section 1. As highlighted earlier, the UNCLOS dispute settlement system gives prominence to freedom of choice of means of dispute settlement. Since conciliation is enumerated as such a means under Article 33 of the United Nations Charter mentioned in Article 279 of UNCLOS and one that is well known in state practice, it is only fitting that it also receives some prominence in UNCLOS. Usually, one would think that Article 280 proclaiming freedom of choice of means would be sufficient to lead to the use of voluntary conciliation. The framers of the Convention, however, took further action. They included in the Convention Article 284 and Annex V. In so doing, the framers intended to give extra attention to the use of conciliation and to facilitate the recourse to it by providing a framework of conciliation and a set of ready-made procedures (in Annex V) or, to put it differently, a more institutionalized form of conciliation. Of course, parties are free to modify these or choose their own procedures. Both the framework and the procedures provided are similar to the general framework and procedures highlighted in the first part above, although there are some differences.

Conciliation under Article 284 of the Convention unmistakably is voluntary.²¹ The framework envisions the fresh consent of both parties every time conciliation is invoked.

The subject matter for voluntary conciliation can be any dispute relating to the interpretation or application of UNCLOS. Of course, this issue is not an important one in this context, as both parties must agree on it. The parties can use the procedure specified in Annex V, Section 1, or they can agree on another procedure.²² If the parties cannot agree on the procedure to be used, the conciliation proceedings are deemed to be terminated. However, if they agree to use the procedure under Annex V, Section 1, any disagreement on the detailed rules will have to be resolved by the conciliation commission under Article 4. Finally, unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed procedure.

If the parties agree to use the procedure provided for under Annex V, Section 1 (the text of which is reproduced in the Appendix), the following matters are already regulated to some extent: the institution of proceedings; the maintenance of a list of conciliators; the constitution of the conciliation commission of five members, possibly with the assistance of the UN Secretary-General (but the parties may change all this by agreement); the procedure of the commission; the types of measures that may facilitate amicable settlement; the functions of the commission; the report of the commission; termination; and fees and expenses.

The essential parts of this procedure include: The commission may draw the attention of the parties to any measures that might facilitate an amicable settlement of the dispute—an indication of a somewhat active conciliation approach; the commission must hear the parties, examine their claims and objections and make proposals to the parties with a view to reaching an amicable settlement; and the report of the commission, including its conclusions or recommendations, is not binding on the parties.

Several features of this procedure warrant attention. First, under Article 4 of Annex V, the conciliation commission determines its own procedure unless the parties otherwise agree. This can be a powerful way for the commission to move the proceedings forward. Second, the commission has 12 months to produce a report. The lengthy time period is probably given because of the complexity of law of the sea disputes.

Third, under Article 7, the report of the commission “shall record any agreement reached and, failing agreement, its 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” and the report “shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.” The existence of a report with the required content including conclusions on law and fact may be too much for a party to stomach. Furthermore, the import of “deposited with” is not clear, neither is whether any publicity may follow. Arguments have been made by commentators for and against publication of these reports by the Secretary-General.²³ It may be in the best interests of the parties to attempt to have this part of the procedure changed pursuant to Article 10. The lack of practice on point leaves some uncertainty as to whether such an attempt would be successful, although the text is favorable.

Fourth, while secrecy of the proceedings has been generally considered essential to the success of conciliation, this issue is not expressly regulated in Annex V, Section 1. Of course, the parties should be able to provide by agreement for secrecy under either Article 4 on procedure or Article 10 on the right to modify procedure.

Finally, consistent with various provisions in the Annex that respect party autonomy, Article 10—already mentioned twice above—stipulates, in a catchall fashion, that the parties to the dispute “may by agreement applicable solely to that dispute modify any provision of this Annex,” presumably including even Article 7 on the report of the conciliation commission or its transmission and distribution. The broad language of Article 10 should

favor the parties if they manage to agree on any proposed modifications. If this article is somehow not sufficient, Article 311(3) of UNCLOS may come to the rescue, as will be discussed in some detail below as Article 311(3) covers all that Annex V, Article 10, is intended to do.

Under this voluntary conciliation framework and procedure, the commission may be able to formulate and present to the parties a report that they accept, wholeheartedly or reluctantly, and that may settle the dispute. However, if the report is not accepted by the parties, the parties may then resort to a compulsory means of settlement under Section 2 of Part XV, which will entail a binding decision, unless the subject matter of the dispute is one that is excepted under Section 3 of the same part from a binding decision. Some of these excepted subject matters are subject to compulsory conciliation, to which we now turn.

Compulsory Conciliation Under UNCLOS

If recourse to Section 1 of Part XV does not settle a dispute relating to the interpretation or application of the Convention, the normal expectation would be to resort to Section 2, compulsory procedures leading to binding decisions. This would give the states parties a guarantee that their hard won victory reflected in the substantive provisions would be enforceable through binding dispute settlement. However, many states believe that there are subject matters that go to the sovereignty and sovereign, exclusive rights of states and, on these matters, states are not willing to submit to binding decision making by a third party. In order to avoid reservations to the Convention but also at the same time to make it possible for as many states as possible to become parties to the Convention, the framers decided to provide in Section 3 of Part XV for exceptions from the applicability of Section 2 of Part XV and, as a compromise, to require under Articles 297 and 298 some of these excepted matters to be submitted to compulsory conciliation under Annex V, Section 2.²⁴

Compulsory conciliation under UNCLOS is compulsory only as a process in the sense that a party has earlier accepted it (here, by ratifying UNCLOS) and must accept it when it is invoked by another party, but it does not result in a binding decision. An additional act of acceptance by the parties is necessary to make the resulting proposals binding. The proposals presented by the conciliator or commission are only recommendations that the parties may accept or reject. Under Article 298(1)(a)(ii), “the parties shall negotiate an agreement on the basis of that report.” If they accept them, the dispute may be settled; if they do not, they will have no further obligation to resort to another means of settlement unless they agree, afresh, to do so. Mutual consent is required. In any event, they are still under the obligations under Section 1 of Part XV.

It is worth noting that, under Article 21(2) of the 1995 UN Model Rules for the Conciliation of Disputes Between States: “If one of the parties does not accept the recommendations and the other party does, it shall inform the latter, in writing, of the reasons why it could not accept them.”²⁵ This requirement may induce the rejecting party to give the most thorough consideration possible to the matter. In some situations, such further consideration may change the decision of a party. It should be noted that stating the reasons for this rejection may have some future consequences. It is neither clear nor possible to speculate in advance and in an across-the-board fashion whether this may lead to the foreclosure of some arguments or possible estoppel. States considering whether or not to use the UN Model Rules may take this issue into consideration.

The subject matters that are subject to compulsory conciliation are provided for in Articles 297 and 298, subject to the overall limitation that the dispute must concern the interpretation or application of the Convention. Essentially, Article 297 provides for automatic

or “Conventional exceptions” from the applicability of Section 2 binding decision-making procedures (automatic because they are effective without any additional act from the states parties) while Article 298 provides for optional exceptions from Section 2, optional in the sense that these exceptions must be expressly claimed and declared by a state party on “signing, ratifying or acceding to this Convention or at any time thereafter.” Among these subject matters excepted under Articles 297 and 298, only some, not all, are made subject to compulsory conciliation.

Article 297 deals with the exceptions for disputes concerning the interpretation or application of the Convention with regard to the exercise by a coastal state of its sovereign rights or jurisdiction over marine scientific research and fisheries. The various exceptions and “exceptions to exceptions” are quite complicated.²⁶ The *Virginia Commentary* summarized them as follows:

Disputes relating to marine scientific research and fisheries were divided into three categories: those that would remain subject to adjudication (namely all those that do not fall into the other two categories), those that would be completely excluded from adjudication (and, like all other disputes, would remain only subject to section 1 of Part XV), and those that would be subject to compulsory resort to conciliation. To the second group belong primarily disputes relating to the exercise by a coastal State of those powers with respect to which the substantive provisions of the Convention granted such State complete discretion. The third group includes disputes involving clear cases of abuse of discretion, where a State manifestly or arbitrarily has failed to comply with some basic obligations under the Convention. In a case relating to such an abuse of discretion, the conciliation commission shall, in accordance with Annex V, section 2, examine the claims and obligations of the parties and make recommendations to the parties for an amicable settlement, provided that the conciliation commission shall not substitute its discretion for that of the coastal State. The report of the conciliation commission is to be communicated to the appropriate international organization.²⁷

For the purposes here, we need only note that Article 297(2)(b) and (3)(b) spells out the matters subject to compulsory conciliation. We will leave the detailed ascertainment of those matters for the future. Furthermore, it may be a significant challenge to interpret the proviso in Article 297(2)(b) that “the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.” This would mean that the conciliation commission which comes into existence as a matter of compulsory procedure would have to reconcile compulsion with discretion under some circumstances. Such a job can be an intriguing one. It would also be no small task for government actors to plan ahead regarding this scenario.

Article 298²⁸ deals with exceptions for disputes relating to the vital interests of states falling within these categories: (a) delimitation and historic bays or titles, (b) military and government enforcement activities, and (c) UN Security Council action. Under the article, “When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2” of Part XV with respect to the above mentioned categories of disputes. Categories b and c disputes, if excepted by a state from Section 2 binding procedures, are completely excluded from any

binding procedures. However, under Article 298(1)(a)(i), Category a disputes (relating to delimitation or involving historic bays or titles), if excluded by declaration from Section 2 binding decision procedures, are subject to compulsory conciliation under Annex V, Section 2, with the proviso that “any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.” This can be called the mixed disputes proviso.

By stating that a state may declare in writing that it does not accept one or more Section 2 procedures with respect to “one or more of the following categories of disputes” (Category a, b, or c), the chapeau of Article 298(1) suggests that a whole category of disputes can be excepted, if the option is exercised by declaration, en bloc from the jurisdiction of a Section 2 court or tribunal. Yet Article 298(1)(a)(i) describes the disputes that can be “optionally excepted” by declaration from the jurisdiction of an Article 287 court or tribunal and, at the same time, allocated to the competence of the conciliation commission as “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.” The use of the disjunctive “or” here within Category a appears to indicate, although there is some uncertainty on this, that states parties are allowed to cherry-pick disputes from within this category—either a smaller category or particular disputes—for exception from the jurisdiction of a Section 2 court or tribunal, rather than having to except the entire category of disputes. The *Virginia Commentary* is of the view that: “As the basic idea of the Conference was to limit to the maximum extent possible the available exceptions, it would be in the spirit of article 298 to permit narrower exceptions than those allowed therein.”²⁹ Perhaps one may add that general principles or common sense should permit one to choose less if one is already given more. In any event, permitting a state to exclude fewer disputes than it is apparently allowed to from the jurisdiction of a Section 2 court or tribunal would ensure greater respect for state sovereignty and enhanced quality of state consent to the jurisdiction of international courts and tribunals.

Limited state practice with respect to Article 298 declarations to date seems to support permitting cherry-picking. For example, Iceland specifically “declares that under article 298 of the Convention the right is reserved that any interpretation of article 83 shall be submitted to conciliation under Annex V, section 2, of the Convention,”³⁰ thus cherry-picking disputes relating to Article 83 from within Category a disputes for exclusion from a Section 2 court or tribunal. Furthermore, on signing UNCLOS, the Union of Soviet Socialist Republics declared that,

in accordance with article 298 of the Convention, it does not accept the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes concerning military activities, or disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.³¹

On ratification of the Convention, the Russian Federation (as continuator) declared that,

in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles;

disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.³²

It would seem that, with respect to disputes within both Category a and Category b, the declaration made on signature by Russia is narrower than that made on ratification. This indicates that the Russian Federation considered, on signing UNCLOS, cherry-picking from within a category would be permissible, although its second declaration has abandoned it.

It is worth noting that Tullio Treves presented in 1999 an *a contrario* interpretation of the mixed disputes proviso to support his argument for an expansive scope of the jurisdiction of a Section 2 court or tribunal. He said:

This limitation may be interesting, if read *a contrario sensu*, as an argument to support the view that, when no declaration has been made according to article 298 para. 1(a), a dispute on delimitation of a maritime area “necessarily” involving the concurrent consideration of a dispute concerning sovereignty or other rights over land can be brought to the court or tribunal having jurisdiction under article 287.³³

No further support or analysis was provided. The basis for this assertion seems to be that this proviso does not in express terms apply to a Section 2 procedure.

Since this assertion addresses the jurisdiction of an Article 287 court or tribunal, not that of the conciliation commission, and since the jurisdiction of the commission is not affected by whatever conclusion one would arrive at as a result of the interpretation of this proviso regarding the jurisdiction of the former, I will only briefly touch on it here and leave a fuller treatment for the future. With due respect, it would seem difficult for one to accept Treves’s assertion. First of all, UNCLOS contains no substantive rules on the sovereignty over continental or insular land territory. It thus would stretch too far the phrase “any dispute concerning the interpretation or application of this Convention” under Articles 286 and 288 if one were to interpret it as including, as Treves’s assertion would have it, “a dispute on delimitation of a maritime area ‘necessarily’ involving the concurrent consideration of a dispute concerning sovereignty or other rights over land.”³⁴ Further, although Article 293(1) states that “[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention,” it smacks of “the tail wagging the dog” if one were to interpret “other rules of international law not incompatible with this Convention” as incorporating an entire area of international law on sovereignty over continental or insular land territory.

During the Third United Nations Conference on the Law of the Sea, apprehension was expressed by some states that under the guise of dealing with sea boundary delimitations, territorial claims could also be raised and adjudicated. The president of the Conference explained that this would not be the case, that territorial claims would be resolved in accordance with the general rules of international law, and that UNCLOS was not intended to deal with such disputes.³⁵ The proviso at issue was subsequently added in order to remove the apprehension by making it clear that a mixed dispute having a component that concerns the sovereignty over continental or insular land territory would be outside the ambit of even compulsory conciliation, not to mention any Section 2 procedure.³⁶ And it does not require any additional act from a state party—that is, whether or not a declaration of

optional exceptions is filed—for this result to obtain. Treating the absence of a declaration of optional exceptions under Article 298 as giving an Article 287 court or tribunal additional jurisdiction would be an ironic exercise; it would turn the original intent upside down.

In addition, in an attempt to overzealously expand the jurisdiction of the Section 2 courts and tribunals to cover land territory, such an assertion may bring great harm to the scope of Section 2 jurisdiction by moving states parties to file declarations of optional exceptions under Article 298 in order to ensure that an Article 287 court or tribunal would have no jurisdiction over cases concerning sovereignty or other rights over continental or land territory. This would lead to a result that the court or tribunal would have no jurisdiction, either, over maritime disputes that would otherwise be within its jurisdiction but for those declarations.

Providing procedural rules to implement compulsory conciliation mandated under Articles 297 and 298, Annex V, Section 2 addresses the institution of proceedings, failure to reply or to submit to conciliation, and competence and then incorporates Articles 2 to 10 of Annex V, Section 1. Since compulsory conciliation is a compulsory procedure, Section 2 sets up a framework that resembles unilateral recourse to litigation. Thus, the institution of proceedings in this context does not depend on a fresh agreement to resort to conciliation; failure to reply or to submit to conciliation is no bar to the proceedings; and any dispute on the competence of the commission is to be decided by the commission itself, which is an application of the *compétence de la compétence* principle. A dispute on the interpretation of Article 297(2)(b), as mentioned above, may well be decided by a commission.³⁷

In other respects, the procedure under Annex V, Section 2, is similar to that under Section 1, the bulk of which is incorporated such as composition of the commission, appointment, and many aspects of procedure. The similarities worthy of attention include: the lack of express provision for secrecy of proceedings; the content and treatment of the report of the commission; the parties' right to modify the procedures; and, most importantly, the nonbinding nature of the report of the commission.

It should be noted that in the compulsory procedure mode, the parties may disagree on procedure more than in the voluntary procedure mode, leaving greater power to the commission to decide it. The words of caution given above regarding the content of the commission's report and its deposit with the UN Secretary-General deserve consideration in this context because, if the parties do not agree, there is a greater chance that the report may cause harm to one or both of them.

Furthermore, UNCLOS provides in Article 297(3)(d) for the transmission of the report relating to disputes mentioned in Article 297(3)(b) to the appropriate international organizations. Commentators often note this requirement and do not say more. Thus, the usual position seems to be that this is not something the parties can modify as they can the provisions of Annex V. However, on reflection, I am persuaded that it may be an arguable position that, if the parties reach an agreement to modify, as between themselves only, Article 297(3)(d) on the transmission of the report even to the extent that no report should be made public, this agreement would seem to qualify as an agreement within the meaning of Article 311(3), which may legitimately modify or suspend the operation of provisions of the Convention. Part of the article governing the relation of UNCLOS to other conventions and international agreements, Article 311(3), provides:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object

and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Prima facie an agreement to modify Article 297(3)(d) on the communication of the conciliation commission report would qualify as an agreement under Article 311(3) and would not run afoul of any of the provisions or basic principles mentioned therein.

The only counterargument seems to be that the communication of the report to the appropriate international organizations is a matter going beyond the “relations between them”—the parties—and, therefore, the requirement for this cannot be modified by an agreement between the parties. However, to the extent that such communication of the report is really a measure of public pressure and in no way affects any right or obligation of any other party to the Convention, reading Articles 297(3)(d) and 311(3) this way would overprivilege the so-called public interest, perhaps to the extent of presenting a significant obstacle to, or even preventing, the peaceful settlement of disputes between the parties—a result opposite to the intent of the framers in providing for the compulsory conciliation framework. That would be to sacrifice peaceful settlement of disputes and, ultimately, peace and security in the world on the altar of vague and insignificant public interest. Such a reading is inappropriate.

Perhaps, although one party on its own can trigger the compulsory conciliation process, the two parties can conclude an agreement to condition moving the proceedings forward on the commission’s acceptance of their demand that all the proceedings including the outcome be confidential and that the report not be communicated to any international organization. This would improve the chances that the commission would accept this common will of the parties, or at least be resigned to it. Of course, if the parties cannot reach any agreement, the commission will decide on its own and most likely follow the terms of Article 297(3)(d).

However the interplay between Article 297(3)(d) and Article 311(3) is handled, it is worth keeping in mind that Article 311(3) can be a potent tool for the parties to a dispute to tailor the conciliation procedure to their benefit and can afford the basis for undertaking even more drastic surgery to other provisions concerning conciliation in the Convention itself or in Annex V. One is tempted to suggest that states take full advantage of this provision with respect to conciliation and even with respect to any other matter within the scope of the Convention.

In any event, it should be pointed out that, in Article 298, there is no provision comparable to Article 297(3)(d) that relates to the matters subject to compulsory conciliation under Article 298(1)(a). Consequently, there is no requirement under Article 298 itself (not counting Annex V obligations) to communicate any report of the conciliation commission to any international organization. In other words, for those disputes subject to conciliation under Article 298, there is no comparable report transmission requirement.

Conciliation Precedents in the Law of the Sea and Concluding Remarks

UNCLOS provides a reasonable and flexible framework for voluntary and compulsory conciliation as a means of settling any dispute relating to its interpretation or application. The parties may take advantage of it as they see fit. Or, to the extent that the parties find any of the rules unappetizing, they can adopt a completely different framework or a different set of rules, which would allow them even greater control over the proceedings.

It is not clear how many states have had recourse to conciliation under Annex V since UNCLOS entered into force in 1994. Belize and Guatemala resorted to conciliation under the auspices of the Organization of American States (OAS) regarding their “territorial differendum,” including a maritime component. The “Facilitators,” as they were called, heard the parties, considered all pertinent factors, and presented comprehensive proposals in 2002 regarding how to settle the “differendum,” including maritime disputes. No clear explanation of the application of legal rules or principles was given. These proposals were innovative. But to date, the dispute has not been settled.³⁸ Therefore, the *Belize/Guatemala Conciliation* is not yet successful, although the experience may have played a positive role in the broader OAS process of promoting good relations between the two neighboring states. It may have moved the parties to go some way toward attempting to settle their dispute as they have signed a special agreement to submit the dispute to the International Court, and simultaneous national referenda were planned to be held on 6 October 2013 to vote on the special agreement.³⁹

There was a successful example of law of the sea conciliation before the Convention was adopted in 1982. That was the *Jan Mayen (Iceland/Norway) Conciliation* of 1980–1981. In that matter, Norway and Iceland agreed to resort to voluntary conciliation regarding the dividing line in the continental shelf area between Iceland and Jan Mayen. Consisting of eminent persons in the field (the heads of delegations of Iceland, Norway, and the United States to the Third UN Conference on the Law of the Sea) who were participants in devising the UNCLOS dispute settlement system (including conciliation), the Conciliation Commission was asked to “take into account Iceland’s strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances.”⁴⁰ The mandate was given faithful implementation by the commission. It considered a wide variety of factors including legal and factual matters, although the mandate was considered not to require it to act as a court of law. The legal rules on delimitation and the geological factors were not thought to provide a definitive solution and the commission decided to focus its proposals on a fair division of resources based on a treatment of the factual circumstances. As a result, it proposed a joint development zone.⁴¹ The conciliation was a great success as the parties subsequently accepted the recommendations of the commission and implemented them by agreement.⁴²

As each case is a peculiar one, it is difficult to draw too much from the *Jan Mayen (Iceland/Norway) Conciliation* experience. The friendly relations between Iceland and Norway may be the most important factor that made the conciliation a success. The state of their relations resulted in a mandate that directed the conciliators to consider a broad spectrum of factors, thus predetermining success. The report’s detailed treatment of law and fact, though not strictly required, may have also added to its persuasiveness. The quality and skills of the conciliators may have been another factor.

This record shows that conciliation apparently has not been a big success story in the law of the sea. Jean-Pierre Cot stated that “[c]onciliation has not lived up to the expectations of its founding fathers. It has never successfully operated in situations of major tension.”⁴³ He further pointed out that there were many reasons for this. They may include those inherent in the process itself (such as insufficient political clout to constrain the parties to accept a peaceful settlement of disputes and the greater attractiveness of direct negotiation and mediation) as well as what he considered to be not so honorable political reasons such as using the availability of conciliation, especially compulsory conciliation, as a convenient excuse for excluding compulsory adjudication.⁴⁴

In any event, the strengths and the drawbacks of conciliation are for government decision makers to appreciate. They no doubt will have to consider their national interests

in a comprehensive way before making a decision. However, when there is no better alternative, conciliation may offer the only ray of hope and may be worth a try.

Appendix Annex V [to UNCLOS]. Conciliation

Section 1. Conciliation Procedure Pursuant to Section 1 of Part XV

Article 1. Institution of proceedings

If the parties to a dispute have agreed, in accordance with article 284, to submit it to conciliation under this section, any such party may institute the proceedings by written notification addressed to the other party or parties to the dispute.

Article 2. List of conciliators

A list of conciliators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four conciliators, each of whom shall be a person enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list. If at any time the conciliators nominated by a State Party in the list so constituted shall be fewer than four, that State Party shall be entitled to make further nominations as necessary. The name of a conciliator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such conciliator shall continue to serve on any conciliation commission to which that conciliator has been appointed until the completion of the proceedings before that commission.

Article 3. Constitution of conciliation commission

The conciliation commission shall, unless the parties otherwise agree, be constituted as follows:

- (a) Subject to subparagraph (g), the conciliation commission shall consist of five members.
- (b) The party instituting the proceedings shall appoint two conciliators to be chosen preferably from the list referred to in article 2 of this Annex, one of whom may be its national, unless the parties otherwise agree. Such appointments shall be included in the notification referred to in article 1 of this Annex.
- (c) The other party to the dispute shall appoint two conciliators in the manner set forth in subparagraph (b) within 21 days of receipt of the notification referred to in article 1 of this Annex. If the appointments are not made within that period, the party instituting the proceedings may, within one week of the expiration of that period, either terminate the proceedings by notification addressed to the other party or request the Secretary-General of the United Nations to make the appointments in accordance with subparagraph (e).
- (d) Within 30 days after all four conciliators have been appointed, they shall appoint a fifth conciliator chosen from the list referred to in article 2 of this Annex, who shall be chairman. If the appointment is not made within that period, either party may, within one week of the expiration of that period, request the Secretary-General of the United Nations to make the appointment in accordance with subparagraph (e).

- (e) Within 30 days of the receipt of a request under subparagraph (c) or (d), the Secretary-General of the United Nations shall make the necessary appointments from the list referred to in article 2 of this Annex in consultation with the parties to the dispute.
- (f) Any vacancy shall be filled in the manner prescribed for the initial appointment.
- (g) Two or more parties which determine by agreement that they are in the same interest shall appoint two conciliators jointly. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint conciliators separately.
- (h) In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply subparagraphs (a) to (f) in so far as possible.

Article 4. Procedure

The conciliation commission shall, unless the parties otherwise agree, determine its own procedure. The commission may, with the consent of the parties to the dispute, invite any State Party to submit to it its views orally or in writing. Decisions of the commission regarding procedural matters, the report and recommendations shall be made by a majority vote of its members.

Article 5. Amicable settlement

The commission may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute.

Article 6. Functions of the commission

The commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

Article 7. Report

1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its 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. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.

2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.

Article 8. Termination

The conciliation proceedings are terminated when a settlement has been reached, when the parties have accepted or one party has rejected the recommendations of the report by written notification addressed to the Secretary-General of the United Nations, or when a period of three months has expired from the date of transmission of the report to the parties.

Article 9. Fees and expenses

The fees and expenses of the commission shall be borne by the parties to the dispute.

Article 10. Right of parties to modify procedure

The parties to the dispute may by agreement applicable solely to that dispute modify any provision of this Annex.

Section 2. Compulsory Submission to Conciliation Procedure Pursuant to Section 3 of Part XV

Article 11. Institution of proceedings

1. Any party to a dispute which, in accordance with Part XV, section 3, may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute.
2. Any party to the dispute, notified under paragraph 1, shall be obliged to submit to such proceedings.

Article 12. Failure to reply or to submit to conciliation

The failure of a party or parties to the dispute to reply to notification of institution of proceedings or to submit to such proceedings shall not constitute a bar to the proceedings.

Article 13. Competence

A disagreement as to whether a conciliation commission acting under this section has competence shall be decided by the commission.

Article 14. Application of section 1

Articles 2 to 10 of section 1 of this Annex apply subject to this section.

Notes

1. Vienna Convention on the Law of Treaties, 1155 *U.N.T.S.* 317, Article 66 and Annex.
2. Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 14 March 1975, UN Doc. A/Conf.67/16, Article 85.
3. U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397. See Shabtai Rosenne and Louis B. Sohn, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 5 (Dordrecht: Martinus Nijhoff, 1989) (“Virginia Commentary,”) 311.
4. Resolution, International Conciliation, 49(II) *Annuaire de l’Institut de droit international* (1961), 386, Article 1, available at idi-iiil.org/idiE/resolutionsE/1961_salz.02_en.pdf. For commentaries on conciliation in general, see Jean-Pierre Cot, “Conciliation” (2006), *Max Planck Encyclopedia of International Law*, available at www.mpepil.com; Jean-Pierre Cot, *International Conciliation* (London: Europe, 1972); Sven M. G. Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (The Hague: Asser Press, 2008); and J. G. Merrills, *International Dispute Settlement*, 5th ed. (Cambridge: Cambridge University Press, 2011), 58–82.
5. See also, for example, the Agreement for the Jan-Mayen Conciliation in Article 9, which reads:

The question of the dividing line for the shelf in the area between Iceland and Jan Mayen shall be the subject of continued negotiations. . . . For this purpose the Parties agree to appoint at the earliest opportunity a Conciliation Commission composed of three members. . . .

Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway (1981), reprinted in 20 *I.L.M.* (1981) 797, 799.

6. UNCLOS, supra note 3, Annex V, art. 6.
7. Cot, “Conciliation,” supra note 4, para. 3.
8. *Ibid.*, para. 8.
9. *Ibid.*, para. 15.
10. Merrills, supra note 4, at 81.
11. Institut de droit international, Resolution, supra note 4, 386.

12. See, generally, *ibid.*, at 390–391.

13. See the Jan Mayen Conciliation, Report, *supra* note 5, at 797, 823.

14. Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), 235.

15. See *ibid.*, at 233.

16. UNCLOS, *supra* note 3, Part XI, Section 5, sets up a special system for the settlement of disputes and advisory opinions by the Seabed Disputes Chamber or other chamber or arbitral tribunals regarding matters relating to that part. This section is coordinated by reference with Part XV where appropriate. Article 285 provides that Section 1 of Part XV (including the provisions on voluntary conciliation) applies to a dispute that is to be settled under Part XI, Section 5. Furthermore, Article 288(3) provides that “[t]he Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.” Part XV, Section 3, contains no exceptions for matters falling within Part XI, Section 5. For simplicity, further issues relating to Part XI, Section 5, will not be discussed herein. See generally, Satya N. Nandan, Michael W. Lodge and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea, 1982: A Commentary*, vol. 6 (Dordrecht: Martinus Nijhoff, 2002), 595–644. Also not to be discussed is the interesting possibility of using the Commission on the Limits of the Continental Shelf as a quasi-body of dispute settlement for some purposes. See, for example, Michael Sheng-ti Gau, “The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon ‘the Area,’” *Chinese Journal of International Law* 10 (2011): 3–33; Michael Sheng-ti Gau, “Recent Decisions by the Commission on the Limits of the Continental Shelf on Japan’s Submission for Outer Continental Shelf,” *Chinese Journal of International Law* 11 (2012): 487–504; and Bing Bing Jia, “Effect of Legal Issues, Actual or Implicit, upon the Work of the CLCS: Suspensive or Without Prejudice?” *Chinese Journal of International Law* 11 (2012): 107–126.

17. Statute of the International Court of Justice, 33 *U.N.T.S.* 993.

18. *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment, [1952] *I.C.J. Reports*, 176.

19. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, *Jurisdiction and Admissibility*, Judgment, [1984] *I.C.J. Reports* 392.

20. See Rosenne and Sohn, *supra* note 3, at 312.

21. UNCLOS, *supra* note 3, Article 284 reads:

1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.
2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

22. There are several model rules of conciliation available: U.N. Model Rules for the Conciliation of Disputes Between States, UN General Assembly, Doc. A/RES/50/50, 11 December 1995, available at www.un.org/documents/ga/res/50/a50r050.htm; Permanent Court of Arbitration (PCA) Optional Conciliation Rules, available at www.pca-cpa.org/upload/files/CONCENG.pdf; and ICSID Conciliation Rules, available at icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.

23. See Roberto Lavalle, “Conciliation under the United Nations Convention on the Law of the Sea: a Critical Overview,” *Austrian Review of International and European Law* 2 (1997): 33, who favors the view that the UN Secretary-General should not publish these reports.

24. See, generally, 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* (Dordrecht: Martinus Nijhoff, 1987), 182–183; and Rosenne and Sohn, *supra* note 3, at 87–88, 122–125.

25. U.N. Model Rules for the Conciliation of Disputes, *supra* note 22.

26. UNCLOS, *supra* note 3, Article 297, reads in part:

- 2.(a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
 - (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or
 - (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
- (b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.
- 3.(a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.
 - (b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
 - (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
 - (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
 - (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.
 - (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
 - (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.

[...]

27. Rosenne and Sohn, *supra* note 3, at 105.

28. UNCLOS, *supra* note 3, Article 298, reads in part:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does

not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

- (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
 - (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
 - (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;
 - (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and 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, paragraph 2 or 3;
 - (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.
- [. . .]

29. Rosenne and Sohn, *supra* note 3, at 115.

30. See Iceland's Declaration in "Declarations and Statements," available at www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iceland.

31. Declarations of the Russian Federation, *ibid*.

32. *Ibid*.

33. Tullio Treves, "'Compulsory' Conciliation in the U.N. Law of the Sea Convention," in *Liber Amicorum Günther Jaenicke—zum 85.*, ed. Volkmar Götz, Peter Selmer and Rüdiger Wolfrum, (Berlin: Springer, 1998), 626. He repeated this argument in 2006. Tullio Treves, "What Have the United Nations Convention and the International Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Disputes," in *Maritime Delimitation*, ed. Rainer Lagoni and Daniel Vignes (Leiden: Martinus Nijhoff, 2006), 63, 77. The argument also appeared subsequently in "Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs," New York, 23 October 2006, 4–5, available at www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf; and in P. Chandrasekhara Rao, "Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures," in *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, ed. Tafsir Malick Ndiaye and Rüdiger Wolfrum (Leiden/Boston: Martinus Nijhoff, 2007), 877, 887–892.

34. Treves, *supra* note 33, at 626.

35. See Adede, *supra* note 24, at 132.

36. M. C. W. Pinto, "Maritime Boundary Issues and Their Resolution: An Overview," in *Liber Amicorum Judge Shigeru Oda*, ed. Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (Dordrecht: Martinus Nijhoff, 2002), 1115, 1130 ("The Convention seems to concede that one type of

dispute is to remain wholly outside the ambit of even compulsory conciliation: ‘any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory. . . .’”). See also Adede, *supra* note 24, at 159, 179, 180–181; and Rosenne and Sohn, *supra* note 3, at 117, 122–125.

37. It is true that a Section 2 court or tribunal may also enjoy *compétence de la compétence* and that it is possible in an extreme case both that court or tribunal and the conciliation commission could find themselves competent over the same dispute. This issue and those relating to the relationship between Section 2 and Section 3 of Part XV or the relationship between Part XV and other agreements (Article 282) are not analyzed here.

38. See “Belize and Guatemala Dispute,” available at www.oas.org/sap/peacefund/belizeandguatemala/; “Belize-Guatemala Territorial Differendum, Proposals from the Facilitators,” available at www.oas.org/sap/peacefund/belizeandguatemala/documentos/Facilitators%20Proposal%2030%20August%202002.pdf (30 August 2002); “Report on the Situation of the Belize and Guatemala Territorial Dispute, January–October 2010,” available at www.oas.org/sap/peacefund/VirtualLibrary/Inter-StateDisputes/Belize-Guatemala/Reports/ReportSituationBelizeGuatemala.pdf.

39. “Ministers of Foreign Affairs of Belize and Guatemala Agreed on Date for Simultaneous Referenda,” OAS press release E-145/12, 27 April 2012, available at www.oas.org/sap/peacefund/belizeandguatemala/documentos/EstablishmentSimultaneousReferendaApril272012En.pdf. Postscript: After this paper was typeset, the two States ultimately postponed the referenda. See Belize and Guatemala election officials meet in San Ignacio town, Patrick Jones, 7 October 2013, <http://www.patrickjones.bz/belize-and-guatemala-election-officials-meet-in-san-ignacio-town/>.

40. See Jan Mayen Conciliation Report, *supra* note 5, at 799.

41. See, generally, *ibid.* For comments from the chair of the Conciliation Commission, see Elliot L. Richardson, “Jan Mayen in Perspective,” 82 *American Journal of International Law* 82 (1988): 443–458.

42. Agreement on the Continental Shelf Between Iceland and Jan Mayen, done 22 October 1981, reprinted in 21 *I.L.M.* (1982) 1222.

43. Cot, “Conciliation,” *supra* note 4, para. 35.

44. *Ibid.*, paras. 37–38.