6. Fisheries Dispute Settlement under the Law of the Sea Convention: Current Practice in the Western and Central Pacific Region

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Introduction

The international regulation of fisheries is one of the central features of the United Nations Convention on the Law of the Sea of 10 December 1982 (the LOSC).\(^1\) Provisions regarding fisheries, which are largely incorporated into Part IV of the LOSC under the exclusive economic zone (EEZ) provisions, permit coastal States to extend their fisheries jurisdiction to 200 nautical miles from their baselines. This development has had far-reaching effects on the relations between coastal States and distant water fishing nations whose nationals had previously harvested the fisheries resources in the extended zones of jurisdiction under the freedom of the high seas.

Part XV of the LOSC establishes a comprehensive framework for the settlement of disputes arising from the interpretation and application of the Convention, including the settlement of fisheries-related disputes. This chapter provides an overview and analysis of the dispute settlement mechanism established by the LOSC and examines how the Part XV framework has been implemented by member countries of the Pacific Islands Forum Fisheries Agency (FFA).\(^2\)

Fisheries Dispute Settlement Under the LOSC

The Development Of LOSC Part XV

As discussed in detail below, the LOSC contains a number of specific provisions regarding the settlement of fisheries-related disputes and a significant number of disputes arising from the Convention have contained fisheries-related elements. The dispute settlement mechanism for fisheries is only one aspect of Part XV of the LOSC, the part of the Convention devoted to dispute settlement in general.

The context in which the entire dispute settlement mechanism was drafted is particularly important for understanding its key characteristics of flexibility, comprehensiveness, and complexity. During the Third United Nations

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2 The members are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand (including Tokelau), Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.
Conference on the Law of the Sea (UNCLOS III),\(^3\) it became obvious to negotiators from most States that a comprehensive and to some extent, compulsory, system was necessary to help resolve the variety of ambiguities and problems of interpretation fated to arise when the LOSC came into force.\(^4\) However, States were not prepared to establish a mechanism which could easily compel their submission to its jurisdiction, even as they were also not ready to submit all categories of disputes to the comprehensive system they desired.\(^5\)

The resolution of these conflicting perspectives, after much negotiation and creative\(^6\) legal work, was Part XV of the LOSC, which for the first time, incorporated within the main text of a major multilateral treaty, comprehensive, and in some cases, compulsory judicial settlement mechanisms, rather than relegating compulsory dispute settlement to an optional protocol.

There are many reasons why States were prepared to accept a general obligation on dispute settlement equally binding on all State ratifying the LOSC.\(^7\) The reasons included: the flexibility of the system based on the proposition that the will of the parties must prevail and that the parties may by agreement select any dispute settlement system they wish; the ingenuity of the system in incorporating the non-compulsory procedures of general international law; the presence within the system of the variety of dispute settlement approaches advocated by different States (functionalist arbitration; ad-hoc general arbitration; judicial proceedings); and the fact that the LOSC restricted itself to dispute settlement relating only to the written rules of the Convention, leaving out the unwritten rules of general international law about which there is much uncertainty. Finally, the major maritime and distant water fishing States accepted the dispute settlement system as the only means of keeping in check the broad powers granted to coastal States.\(^8\)

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\(^6\) See Adede, 1987, above n 4, p. 53-54, which discusses in particular the flexible system of access to the procedures devised by Professor Riphagen, known thereafter as the Montreux Formula. See also Nordquist, Rosenne and Sohn, above n 4, p. 8-9; Rosenne, S. ‘UNCLOS III – The Montreux (Riphagen) Compromise’ in Bos, A. and Siblesz, H. (eds) Realism in Law Making: Essays in International Law in Honour of Wilhelm Riphagen, 1986, p. 169.

\(^7\) See Jaenicke, above n 5, p. 815-816; Nordquist, Rosenne and Sohn, above n 4, pp. 3-19.

\(^8\) See Jaenicke, above n 5, p. 815-816; Adede (1987), above n 4, p. 243.
The Dispute Settlement Mechanism in Part XV of the LOSC

There are three ways in which fisheries disputes are addressed in Part XV and its related annexes. First, some disputes, including those concerning high seas fisheries are subject to compulsory settlement procedures. Second, fisheries disputes within the EEZ are exempted from any requirement of compulsory settlement where what is in dispute is the assertion of alleged or undisputed sovereign rights by a coastal State. Third, in three specified instances where sovereign rights are flagrantly exercised to the detriment of other States, conciliation procedures are compulsory at a disputant State’s request. The outcome is; however; not binding on the disputants, a clear recognition of the primacy of the sovereign rights granted the coastal State under the LOSC.

The ways in which fisheries disputes are addressed in Part XV result from the interaction of compulsory and non-compulsory dispute settlement procedures in addition to general obligations applicable to dispute settlement. These elements of Part XV of the LOSC may be described as follows.

General Obligations and Non-compulsory Dispute Settlement Procedures

Part XV Section 1 of the LOSC sets out a number of obligations regarding conciliation, exchange of views and the seeking of settlement through treaty mechanisms outside the LOSC framework.

Article 279 of the LOSC asserts that the fundamental and preliminary obligation of all State parties is to settle disputes, whether in the fisheries sector or otherwise, by the peaceful means indicated in Article 33(1) of the Charter of the United Nations (UN Charter), and in accordance with Article 2(3) of the Charter. Article 2(3) of the UN Charter requires members States to ‘settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.’ The peaceful means of dispute settlement indicated in Article 33(1) of the UN Charter include: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.10

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10 Article 33(1) of the UN Charter provides in full: ‘The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.’ The reference to this provision in LOSC Article 279 is really only to the ‘means referred to in Article 33, paragraph 1 of the Charter, not to paragraph 1, as a whole. This drafting choice was made in order to avoid the restriction in that provision that only disputes ‘the continuance of which is likely to endanger the maintenance of international peace and security’ are subject to the settlement under Chapter VI of the UN Charter. Under Article 279 all disputes, not only those endangering international peace and security, are subject to settlement: See Nordquist, Rosenne and Sohn, above n 4, p. 18.
Article 284 of the LOSC permits State parties involved in disputes concerning the Convention to invite the other disputant(s) to submit to conciliation. The presiding body is a five person Conciliation Commission, with the limited though useful brief of hearing the parties, examining their claims and objections, and making proposals with a view to reach an amicable settlement. The fifth conciliator is chosen by the other four or by the UN Secretary General at the request of a party to the dispute if an appointment is not made within a specified period. Conciliators are chosen from a list to which each State party to the LOSC is entitled to nominate four people. The Conciliation Commission is required to report to the UN Secretary General within twelve months. Where successful the report is to include any agreements reached, and where unsuccessful, the report is to state its conclusions on all questions of fact and law relevant to the matter in dispute, as well as all recommendations that the Commission deems appropriate for an amicable settlement. The report is not binding, though its hortatory value would presumably be quite high as the UN Secretary General may distribute it widely. The entire procedure can be aborted if one party rejects the Commission’s recommendations.

State parties are free to settle their disputes by peaceful means set out in general, regional or bilateral agreements in force between them outside the LOSC’s system. However, in cases where no settlement has been reached under these alternative procedures, and where reference to the LOSC procedure is not precluded, State parties may have recourse to the system set out in the LOSC.

The submission to the dispute-settlement procedures of the LOSC is predicated on the exhaustion of local remedies. This requirement has been described as ambiguous, since it could mean that in disputes which arise as State-to-State disputes inter-se local remedies should first be sought in one State’s fora. A more widely accepted interpretation is that the exhaustion of local remedies requirement applies only in situations where nationals of one State are engaged in a dispute against the authorities of another State, the core sense in which the concept is used in international law.

Mindful of the possible confusion and delay in proceeding through the multiplicity of mechanisms, expeditious inter-party communications are

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12 LOSC Annex V Article 3.
13 LOSC Annex V Article 3.
14 LOSC Article 282.
15 LOSC Article 286.
16 LOSC Article 295.
mandated by Article 283.\textsuperscript{19} To accommodate a strongly expressed concern held by coastal States,\textsuperscript{20} Article 294 attempts to prevent costly and vexatious proceedings by empowering settlement bodies to determine the existence or not of a \textit{prima facie} case.\textsuperscript{21}

**Compulsory Dispute Settlement Procedures**

Part XV Section 2 of the LOSC sets out ‘compulsory procedures entailing binding decisions’ which become operative in accordance with LOSC Articles 286 and 287 where no settlement has been reached by recourse to the non-compulsory procedures specified in Part XV Section 1. Article 287 refers to four alternative fora for compulsory dispute settlement procedures, namely (i) the International Tribunal for the Law of the Sea (ITLOS); (ii) the International Court of Justice (ICJ); (iii) an arbitral tribunal constituted in accordance with Annex VII of the LOSC; and (iv) a special arbitral tribunal constituted in accordance with Annex VIII of the LOSC. States are entitled to choose, by means of a written declaration, one or more of these dispute settlement fora at any time, on or after becoming party to the Convention. State parties that have not made a declaration indicating their choice of fora are deemed to have accepted arbitration in accordance with Annex VII of the LOSC. If the parties to a dispute have chosen the same forum for dispute settlement under Article 287, the dispute may be submitted only to that forum unless the parties otherwise agree. If the parties to a dispute have not chosen the same forum for dispute settlement under Article 287, the dispute may be submitted only to ‘Annex VII’ arbitration unless the parties otherwise agree.

If a dispute has been duly submitted to a court or tribunal which considers that \textit{prima facie} it has jurisdiction under Part XV or Part XI, Section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.\textsuperscript{22} ITLOS is empowered to prescribe, modify or revoke provisional measures.

\begin{itemize}
\item \textsuperscript{19} See Adede, 1977, above n 5, p. 262.
\item \textsuperscript{20} For example, during UNCLOS III Kenya stated: ‘All matters relating to that zone were exclusively within the competence of the coastal State, and to accept the possibility of compulsory third-party settlement would mean that the coastal State might be subjected to constant harassment by having to appear before international tribunals at considerable loss of time and money. Similarly, where the coastal State had been given clearly defined jurisdiction by the Convention, particularly with respect to the preservation of the marine environment, its power would be negated if it could be subjected, each time it exercised such power, to compulsory dispute settlement systems on matters which could be dealt with through local courts.’: Statement by Mr Njenga (Kenya) III UNCLOS \textit{Official Records} 3, UN Doc. A (Conf. 621/WP.9/Add 1, 1976).
\item \textsuperscript{21} LOSC Article 294(1) provides: ‘A court or tribunal provided for in Article 287 to which an application is made in respect of a dispute referred to in Article 297 shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether \textit{prima facie} it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is \textit{prima facie} unfounded, it shall take no further action in the case.’
\item \textsuperscript{22} LOSC Article 290.
\end{itemize}
measures pending the constitution of the court or tribunal to which the dispute has been submitted.\textsuperscript{23}

Article 292 of the LOSC establishes a specific compulsory procedure for disputes concerning LOSC Article 73, which requires the prompt release of vessels and crews detained in the exercise of a coastal State’s right to enforce its laws and regulations regarding the conservation and management of living resources in its EEZ. Where the authorities of a coastal State have detained a vessel flying the flag of another State, disputes regarding compliance with LOSC Article 73 may be heard by ITLOS or a tribunal accepted by the detaining State under Article 287.\textsuperscript{24} The tribunal hearing the dispute is empowered to determine a reasonable bond or security and order the release of the detained vessel or its crew.\textsuperscript{25}

\textit{Fora Available for Compulsory Dispute Settlement}\textsuperscript{26}

As noted above, the variety of dispute settlement approaches available in Part XV of the LOSC was a key reason why States were prepared to accept the inclusion of a binding system of dispute settlement in the Convention. The four fora for compulsory dispute settlement set out in LOSC Article 287 and their varied characteristics are described briefly below.

The International Court of Justice (ICJ) was established after the Second World War as the ’principal judicial organ’ of the United Nations.\textsuperscript{27} The ICJ is comprised of 15 judges, no two of whom may be nationals of the same State,\textsuperscript{28} who are:\textsuperscript{29}

\begin{quote}

elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.
\end{quote}

Judges are elected from a list of qualified persons for nine year terms according to a procedure involving separate votes in the UN General Assembly and Security Council.\textsuperscript{30} Judges are also subject to several requirements designed to ensure their impartiality\textsuperscript{31} and enjoy diplomatic privileges and immunities when engaged in the business of the court.\textsuperscript{32} The ICJ is empowered to manage

\textsuperscript{23} LOSC Article 290(5).
\textsuperscript{24} LOSC Article 292(1).
\textsuperscript{25} LOSC Article 292(4).
\textsuperscript{26} See, generally, Shaw above n 18, pp. 959-1012 (regarding the ICJ and ITLOS), Churchill and Lowe, above n 9, pp. 451-458.
\textsuperscript{27} See UN Charter Article 92.
\textsuperscript{28} ICJ Statute Article 3(1).
\textsuperscript{29} ICJ Statute Article 292(4).
\textsuperscript{30} See Shaw, above n 18, pp. 961-962.
\textsuperscript{31} ICJ Statute Articles 16-18.
\textsuperscript{32} ICJ Statute Article 19.
its own procedure and operations and has adopted detailed rules of court in addition to several practice directions. Each party to a dispute before the ICJ is entitled to appoint an ad hoc judge for the duration of the case, unless there is already a judge of its nationality on the bench. State parties to a dispute may also agree to have their dispute heard by a Chamber of the Court, although such arrangements are rare. The ICJ is required to form annually a Chamber of Summary Procedure, consisting of five judges allocated by the Court, ‘with a view to the speedy dispatch of business of the Court. Chambers may also be formed to handle particular subject matter (for example environmental matters) or specific disputes. In the latter case, parties to a dispute may, in practice, determine the composition of the Chamber by consensus.

The ICJ is considered to be the most prestigious judicial body with competence to adjudicate disputes in accordance with international law. The court has delivered many judgements in relation to disputes concerning the law of the sea and has been chosen as a dispute settlement forum by 24 of the 46 States that have, as of February 2009, submitted declarations under LOSC Article 287. Commentators have identified the time period required by the court to deliver judgements (a minimum of several years) and the formality of the court’s procedures as potential disadvantages of using the ICJ as a dispute settlement mechanism.

ITLOS was established in accordance with Annex VI of the LOSC. Unlike the ICJ, which is only capable of adjudicating disputes between States, ITLOS is also open to non-State entities (for example international organisations). The tribunal is comprised of 21 independent judges, who are ‘elected from among persons enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea.’ The Statue of the tribunal incorporates several requirements designed to ensure that the tribunal, as a whole, is representative of the principal legal systems of the world and reflects an equitable geographical distribution of judges. Judges are

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34 ICJ Statute Article 31.
36 See ICJ Statute Article 29.
37 See ICJ Statute Article 26(1) and (2). See also above n 35.
38 See the comments of Judge Oda at ICJ Reports, 1987, 10, 13 extracted in Shaw, above n 18, p. 965.
39 Shaw, above n 18, pp. 959-960.
40 See generally, Shaw, above n 18, pp. 490-571 and the list of cases referred to in Churchill and Lowe, above n 9, xix-xxii.
42 See Churchill and Lowe, above n 9, p. 452.
43 ICJ Statute Article 34.
44 See LOSC Annex VI Article 20.
45 LOSC Annex VI Article 2(1).
46 See LOSC Annex VI Articles 2 and 3.
elected by State parties to the LOSC for nine year terms.\textsuperscript{47} The Statute of the tribunal provides for the appointment of ad hoc judges in a similar manner to the ICJ procedure described above.\textsuperscript{48} Parties to a dispute may agree to have their dispute heard by a Special Chamber of the tribunal consisting of three or more judges, selected with approval of the parties.\textsuperscript{49} The tribunal is also required to form annually a chamber composed of five judges to hear and determine disputes by summary procedure.\textsuperscript{50} In accordance with the Statute of the tribunal and Part XI, Section 5 of the LOSC, a Seabed Disputes Chamber of the tribunal has been formed with jurisdiction in relation to disputes regarding activities in the international seabed area.\textsuperscript{51}

So far, ITLOS has emerged as the preferred judicial mechanism for the settlement of fisheries-related disputes under the LOSC, with 12 out of the 15 cases submitted, to date, to ITLOS having dealt with such disputes.\textsuperscript{52} Ten of these cases have been submitted to the tribunal under the Article 292 procedure described above (regarding the prompt release of vessels and crews detained by a coastal State). A key advantage of using ITLOS as a dispute resolution body is the tribunal’s ability to process disputes much faster than the ICJ.

An arbitral tribunal constituted in accordance with Annex VII of the LOSC may be established in relation to disputes concerning the interpretation and application of the Convention between State parties to the LOSC and/or other entities (for example international organisations).\textsuperscript{53} Parties to a dispute may determine the composition of an Annex VII arbitral tribunal by agreement. Each party is entitled to appoint one of the five members of the tribunal, with the remaining three members being selected jointly.\textsuperscript{54} Members must be appointed from a list of arbitrators to which each State party to the LOSC may nominate four people, ‘each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity.’\textsuperscript{55} Persons nominated to the list of arbitrators are not required to have legal expertise, and accordingly may be technical experts in fisheries management.

\textsuperscript{47} See LOSC Annex VI Articles 4 and 5. Elections are conducted on a staggered basis every three years. In order to make this staggered process possible, the terms of 14 judges elected at the first election were shortened by lot – seven terms to three years, and the other seven terms to six years.
\textsuperscript{48} See LOSC Annex VI Article 17.
\textsuperscript{49} See LOSC Annex VI Article 15.
\textsuperscript{50} LOSC Annex VI Article 15(3).
\textsuperscript{51} See LOSC Annex VI Article 14. See also Shaw, above n 18, p. 1007.
\textsuperscript{52} A list of cases heard by ITLOS is available at the Tribunals website: <http://www.itlos.org/cgi-bin/cases/list_of_cases.pl?language=en>. See also Klein, above n 4, pp. 85-118.
\textsuperscript{53} See LOSC Annex VII Article 13.
\textsuperscript{54} See LOSC Annex VII Article 3. In the event that parties to a dispute fail to reach agreement regarding the appointment of the three members chosen jointly, these members are appointed by the President of the Law of the Sea Tribunal: See LOSC Annex VII, Article 3(d).
\textsuperscript{55} See LOSC Annex VII Article 2.
A Special Arbitral Tribunal constituted in accordance with Annex VIII of the LOSC may be established as a forum for four categories of disputes, namely: ‘(1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping.’ The fisheries panel is comprised of technically competent experts drawn primarily from a list of world-wide State-nominated experts (who may be technical, as opposed to legal experts). The list is drawn up and maintained through the Food and Agricultural Organisation of the United Nations (FAO). Parties to a dispute may agree to request the panel ‘to carry out an inquiry and establish the facts giving rise to the dispute.’ Unless the parties otherwise agree, the findings of fact made during this procedure are considered conclusive between the parties. Parties to a dispute may also agree to request the panel to formulate recommendations, which ‘shall only constitute the basis for a review by the parties of the questions giving rise to the dispute’ and do not have the binding effect of a legal decision.

Arbitral tribunals, constituted under either Annex VII or Annex VIII of the LOSC, have several advantages over judicial settlement bodies such as ITLOS or the ICJ. As Shaw notes:

Arbitration is an extremely useful process where some technical expertise is required, or where greater flexibility than is available before the International Court is desired. Speed may also be a relevant consideration … the establishment of arbitral tribunals has often been undertaken in order to deal relatively quietly and cheaply with a series of problems within certain categories …

However, a disadvantage of referring disputes to arbitration rather than ITLOS or the ICJ is the costs associated with such a process. Unless the relevant arbitral tribunal decides otherwise, because of the particular circumstances of the case, the costs associated with the establishment and operation of an arbitral tribunal constituted under either Annex VII or Annex VIII are borne equally by the parties to the dispute. In contrast, both ITLOS and the ICJ have established premises and staff that are funded, respectively, by parties to the LOSC and the United Nations.

56 See LOSC Annex VIII Article 1.
57 LOSC Annex VIII Articles 1 and 2.
58 LOSC Annex VIII Article 5(1).
59 LOSC Annex VIII Article 5(2).
60 LOSC Annex VIII Article 5(3). Adede observes that ‘the Special Arbitral Tribunal under this Annex combines the function of fact-finding and making non-binding recommendations comparable to those of the conciliation procedure, with the normal function of rendering binding decisions … No other third party procedures for judicial settlement under Article 287 of the Convention have this double function.’ Adede, 1987, above n 4, observes at page 235.
61 Shaw, above n 18, pp. 958-959.
Exceptions to Compulsory Procedures and Non-compulsory Dispute Settlement

The basic position set out in Article 297(3) of the LOSC is that disputes concerning the interpretation or application of the provisions of the LOSC with regard to fisheries are subject to the compulsory procedures set out in Part XV Section 2. However, the requirement set out in Part XV Section 2 of the LOSC to engage in compulsory procedures entailing binding decisions is subject to a number of exceptions, some of which specifically apply to fisheries-related disputes.

First, Article 297(1) provides that disputes concerning the exercise by a coastal State of its sovereign rights (including sovereign rights in the EEZ) or jurisdiction shall not be subject to the compulsory procedures entailing binding decisions set out in Part XV Section 2 of the LOSC except in the following cases:

a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58;

b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or

c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

Furthermore, the basic position of article 297(3) is qualified by the requirement that States shall not be …

obliged to accept the submission to such settlement [compulsory procedures under Article 287] 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 power 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.

63 These are set out in LOSC Part XV Section 3, entitled ‘Limitations and Exceptions to Applicability of Section 2’.
However, in three specified circumstances where sovereign rights are flagrantly exercised to the detriment of other States, a ‘compulsory conciliation’ procedure under Section 2 of Annex V of the LOSC may be initiated at a disputant’s request. The three specified circumstances comprise core possible areas of fisheries disputes, namely allegations 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; or

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.

The compulsory conciliation procedure is the same as the ‘classical’ conciliation set out in Article 284 of the LOSC and described above, except that States involved in a dispute are required to participate, and the Conciliation Commission is entitled to proceed despite a failure of a State to participate. Under Article 13 of Annex V, the ‘compulsory’ Conciliation Commission also has the competence to decide whether the subject matter of the dispute falls within its mandate. This is intended to prevent frustration of the proceedings through objections by the party compulsorily impleaded. Article 297(3)(c) of the LOSC prohibits the Conciliation Commission from substituting its own discretion for that of the coastal State when deciding disputes. Although this requirement has been criticised on the basis that it may completely frustrate the Commission’s work, it is arguable that Article 297(3)(c) does not prevent the

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64 LOSC Article 297(3)(b).
65 See Articles 11 and 12 of LOSC Annex V. Article 11 provides that ‘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 provides: ‘The failure of a party or parties to the dispute to reply to notification of institution of proceeding or to submit to such proceeding shall not constitute a bar to the proceedings.’ See Nordquist, Roseen and Sohn, above n 4, p. 331 for detailed commentary regarding the compulsory conciliation procedure.
66 Nordquist, Roseen and Sohn, above n 4, p. 327. See also LOSC, Article 288(4).
67 Nordquist, Roseen and Sohn, above n 4, p. 327: ‘In the case of compulsory recourse to conciliation … precisely because recourse to the procedure is compulsory for the other part, it was considered necessary to provide for the determination of the competence of the Commission as a precaution against frustration of the proceedings.’
Commission from finding that that actions of a coastal State were made on ‘patently impermissible grounds.’

**Optional Exceptions to Compulsory Procedures**

Article 298 of the LOSC enables States to exclude the application of compulsory dispute settlement procedures by opting out of such procedures in relation to one or more of three categories of dispute, namely: (a) disputes regarding the delimitation of maritime boundaries and claims to historic waters; (b) disputes concerning military and law enforcement activities; and (c) disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter. A State may invoke an optional exception by special declaration, at or after ratification of the LOSC.

The optional exception relating to law enforcement activities undertaken by the coastal State is of particular relevance to fisheries-related dispute settlement, and raises a number of issues. First, it is unclear whether the exception applies to fisheries-related disputes. In light of the explicit reference to such disputes in paragraphs 2 and 3 of Article 297 (as discussed above), it is arguable that fisheries-related disputes may not be excepted by declaration under Article 298(1)(b). This, at least, is the view of the University of Virginia’s Centre for Ocean Law and Policy’s Commentary on the LOSC, which argues:

> The important consequence of these changes was to make law enforcement activities under article 297, paragraph 1 (namely those related to navigation, overflight or the laying of submarine cables and pipelines, as well as those related to the protection and preservation of the marine environment) subject to the jurisdiction of a court or tribunal. Only disputes concerning the enforcement of provisions relating to marine scientific research or fisheries, which are not subject to the jurisdiction of a court or tribunal because of the express exceptions in article 297, paragraphs 2 and 3, can be excepted by a declaration under article 298. That means the enforcement of some provisions on marine scientific research or fisheries may not be excepted under article 298, paragraph 1(b).

Second, it is unclear whether the optional exception regarding law enforcement activities by a coastal State may be invoked in relation to disputes where law

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69 Churchill and Lowe, above n 9, p. 455.
70 See LOSC Article 298.
71 LOSC Article 298(1)(b) provides: ‘When signing or 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 in section 2 with respect to one or more of the following categories of disputes … disputes concerning military activities including … 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.’
enforcement activities of one coastal State intrude into the territorial sea of an adjacent or neighbouring coastal State (for example as a result of the continuation of a hot pursuit into such a zone). Intrusion into the territorial sea is patently illegal, as under LOSC Article 111(3), Article 23(2) of the High Seas Convention, and customary law, hot pursuit has to cease in the territorial sea (unless the relevant coastal State agrees otherwise). For this reason, arising from the sovereignty of States over their territorial sea, it is arguable that disputes arising from such an intrusion could not be excluded from compulsory dispute settlement by the law enforcement activities exception set out in LOSC Article 298(1)(b).

Applicable Law

LOSC Article 293 provides that at least in relation to compulsory procedures entailing binding decisions, the law to be applied to any fisheries or other dispute is to be the LOSC itself and other rules of international law not incompatible with the LOSC. Article 293 also permits decisions *ex aequo et bono*73 if the parties to the dispute agree to this.74 The fact that Article 293 applies only to courts or tribunals handing down binding decisions75 provides a degree of flexibility to the non-binding conciliation procedures in the Convention – i.e. a conciliation commission may propose creative settlements without sole reference to the legal rights of the parties.76

State Practice of FFA Members

As explained in detail above, the system of dispute settlement set out in Part XV of the LOSC provides considerable flexibility for parties to a dispute. Key areas of flexibility include the ability to select a preferred means of compulsory dispute settlement under LOSC Article 287 and exclude specific subject matter from compulsory dispute settlement procedures set out in LOSC Part XV Section 2 in accordance with LOSC Article 298. In order to take advantage of these possible implementations of Part XV of the LOSC, State parties are required to make official declarations at the time they sign the LOSC, ratify it or any time thereafter, either choosing a forum for compulsory dispute resolution under Article 287 or declaring that the State does not accept compulsory dispute resolution procedure with respect to one or more categories of dispute set out in Article 298.

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73 In the context of international dispute settlement a decision *ex aequo et bono* is made according to what is fair and in good conscience, not necessarily in accordance with what the law requires: see Trakman, L. ‘Ex Aequo Et Bono: De-Mystifying an Ancient Concept’ in *Chicago Journal of International Law*, Vol. 8, 2008, p. 621.
74 LOSC Article 293(2).
75 The relevant sections of the LOSC (Annex V, Section 1 – Conciliation; Annex V, Section 2 – Compulsory Conciliation) have no clauses clearly detailing the applicable law.
76 See Shaw, above n 18, p. 927, who provides several examples of such proposals by conciliation commissions, including a proposal to settle a maritime boundary dispute between Iceland and Norway by establishing a joint development zone.
As of February 2009, only Australia and Palau have, among the FFA members, made declarations pursuant to Part XV of the LOSC.  

**Australia**

Australia has declared acceptance of ITLOS and the ICJ as fora for compulsory dispute settlement under LOSC Article 287. Australia has also made a declaration under Article 298 excluding disputes referred to in Article 298(1)(a) (regarding the delimitation of maritime boundaries and claims to historic waters) from the compulsory dispute settlement procedures set out in Part XV, Section 2. The relevant Australian declaration provides in full:  

The Government of Australia declares, under paragraph 1 of article 287 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention, without specifying that one has precedence over the other:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI of the Convention; and

(b) the International Court of Justice.

The Government of Australia further declares, under paragraph 1 (a) of article 298 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two, that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.

These declarations by the Government of Australia are effective immediately.

8 April 2002

**Palau**

Palau has also made a declaration under Article 298 excluding disputes referred to in Article 298(1)(a) from the compulsory dispute settlement procedures set out in Part XV Section 2. The declaration by Palau provides in full:

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77 This conclusion is based on a review of the United Nations Treaty Collection online database, available at <http://treaties.un.org>
The Government of the Republic of Palau declares under paragraph 1 (a) of Article 298 of the 1982 United Nations Convention on the Law of the Sea that it does not accept compulsory procedures entailing binding decisions relating to the delimitation and/or interpretation of maritime boundaries.
28 April 2006

 Remaining FFA Members

The Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand (and Tokelau), Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu have made no declarations under either Articles 287 or 298 of the LOSC. However, New Zealand has accepted the compulsory jurisdiction of the International Court of Justice by declaration under Article 36(2) of the ICJ Statute. The New Zealand declaration provides:

I have the honour, by direction of the Minister of Foreign Affairs of New Zealand, to declare on behalf of the Government of New Zealand:

(I.) The acceptance by the Government of New Zealand of the compulsory jurisdiction of the International Court of Justice by virtue of the Declaration made on 1 April 1940 under Article 36 of the Statute of the Permanent Court of International Justice and made applicable to the International Court of Justice by paragraph 5 of Article 36 of the Statute of that Court, is hereby terminated.

(II.) The Government of New Zealand accept as compulsory, ipso facto, and without special agreement, on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with paragraph 2 of Article 36 of the Court over all disputes other than:

1) Disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement;

2) Disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute: or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court;

3) Disputes arising out of, or concerning the jurisdiction or rights claimed or exercised by New Zealand in respect of the


80 This declaration is published on the ICJ website at
exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

This Declaration shall remain in force for a period of five years from 22 September 1977 and thereafter until the expiration of six months after notice has been given of the termination of this Declaration provided that the Government of New Zealand reserves the right at any time to amend this Declaration in the light of the results of the Third United Nations Conference on the Law of the Sea in respect of the settlement of disputes.


**Conclusion**

Part XV of the LOSC provides parties to the Convention with considerable flexibility to determine and utilise their preferred means for resolving disputes, including fisheries-related disputes, concerning the interpretation and application of the Convention. Key areas of flexibility include the ability to select a preferred means of compulsory dispute settlement under LOSC Article 287 and exclude specific subject matter from compulsory dispute settlement procedures set out in LOSC Part XV Section 2 in accordance with LOSC Article 298. In order to take advantage of these possible implementations of Part XV of the LOSC, State parties are required to make official declarations at the time they sign the LOSC, ratify it or any time thereafter, either choosing a forum for compulsory dispute resolution under Article 287 or declaring that the State does not accept compulsory dispute resolution procedure with respect to one or more categories of dispute set out in Article 298.

FFA member countries that have not made official declarations regarding Part XV of the LOSC are advised to identify a preferred implementation of Part XV and incorporate this into fisheries governance policies. Such action would enable FFA member countries to be well-prepared for international fisheries-related disputes in the Western and Central Pacific Region and to avoid any perceptions of bad faith that may be associated with making declarations regarding Part XV in haste following the development of an international fisheries dispute.
Bibliography


