

# The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management

Howard Schiffman<sup>1</sup>

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The 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>2</sup> represents a major advance in international law from a variety of standpoints. The comprehensive nature of the treaty, evinced by its 158 signatories<sup>3</sup>, governs virtually all aspects of the law of the sea. The substantive provisions of UNCLOS regarding protection and preservation of the marine environment are meaningful, if not ambitious, in their scope.<sup>4</sup> Similarly, the dispute settlement mechanisms provided for in Part XV of the Convention, some of which are compulsory and binding, were drafted to allow maximum flexibility for the State parties in their choice of procedure.<sup>5</sup> Although little activity thus far has occurred under Part XV, especially in the arena of environmental protection, an understanding of the dispute settlement provisions of UNCLOS is necessary to understand the way in which marine wildlife disputes may be addressed by State parties to the Convention in the future.

## I. UNCLOS and Marine Wildlife Management

Among the important provisions of UNCLOS that affect marine wildlife are requirements to prevent, reduce and control pollution of the marine environment.<sup>6</sup> In the Exclusive Economic

<sup>1</sup> Howard S. Schiffman, Adjunct Assistant Professor, New York University School of Continuing and Professional Studies, 48 Cooper Square, Room 100, New York, NY 10003-7154, 212.998.7133, howard.schiffman@nyu.edu.

<sup>2</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

<sup>3</sup> *Status of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the implementation of Part XI of the Convention adopted by the General Assembly on 28 July 1994*. United Nations Division for Ocean Affairs and the Law of the Sea, (last modified July 9, 1998) <<http://www.un.org/Depts/los/los94st.htm>>. The number of signatories here only relates to the original document and not the *Agreement Relating to the Implementation of Part XI of the Convention*. The status of the “Part XI Agreement” as well as the status of ratifications, formal confirmations, accessions and successions to the Convention are also available.

<sup>4</sup> Although provisions relating to marine environmental protection can be found in many parts of the treaty the most noteworthy is Part XII, entitled “The Protection and Preservation of the Marine Environment.” UNCLOS, *supra* note 1, at Part XII. The first two articles of Part XII (arts. 192 and 193) reflect a balancing of interests between “the obligation of States to protect and preserve the marine environment” (art. 192) and “the sovereign right to exploit their natural resources pursuant to their environmental policies . . .” (art. 193). Additional mention of environmental protection can be found in Part XI and the Agreement Relating to the Implementation of Part XI (of UNCLOS). *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, G.A. res. 48/263, U.N. GAOR, 48th Sess., 101st plen. mtg., Agenda Item 36, U.N. Doc. A/RES/48/263 (1994). A comprehensive discussion of the Sea-Bed regime is beyond the scope of this paper. It should be noted, however, that a separate Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea was established for disputes under Part XI. *See* UNCLOS, *supra* note 1, at arts. 186-191.

<sup>5</sup> UNCLOS, *supra* note 1, at Part XV.

<sup>6</sup> *Id.* at art. 194; *see also* arts. 204-237. For an excellent discussion of marine pollution in the context of international

Zone (EEZ), coastal States enjoy sovereign rights and jurisdiction concerning the management of resources.<sup>7</sup> This includes “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, . . .”<sup>8</sup> The Convention confers jurisdiction upon the coastal State for “the protection and preservation of the marine environment.”<sup>9</sup>

The conservation of living resources is entrusted to coastal States.<sup>10</sup> This provision is extremely important in the context of fisheries conservation because many commercially viable fish stocks are located within the EEZ.<sup>11</sup> In addition, special protection may be provided for cetaceans and other marine mammals.<sup>12</sup> These are only a sampling of the substantive provisions of UNCLOS that relate to the protection of the marine environment. General environmental requirements, applicable to all State parties, as well as specific powers of the coastal State to legislate and enforce conservation and management schemes, are provided for in the Convention. The rights of a coastal State in its EEZ are not absolute, however, and are tempered by the rights of all other States.<sup>13</sup> Similarly, the regime of the High Seas constitutes the global commons over which no State may exercise sovereignty.<sup>14</sup>

The balancing of interests that underlies the entire Convention virtually ensures that disputes between coastal States and other maritime parties, as well as competing interests on the High Seas. Inevitably, the protection of the marine environment and the management of marine wildlife will conflict with other uses of the oceans such as commercial fishing and mineral exploitation. As these disputes arise, the dispute settlement provisions of Part XV will become increasingly important.

## II. The Spirit of Part XV

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law see R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 241-287 (2d ed. 1988).

<sup>7</sup> UNCLOS, *supra* note 1, at art. 56.

<sup>8</sup> *Id.* at art. 56(1)(a).

<sup>9</sup> *Id.* at art. 56(1)(b)(iii). For a review of the concept of “protection and preservation of the marine environment” in the drafting of the Convention, see *The Protection and Preservation of the Marine Environment: One of the Major Aspects of the 1982 Convention*, in the Proceedings of the Law of the Sea Institute Seventeenth Annual Conference, Oslo, July 13-16, 1983 (published by The Law of the Sea Institute, University of Hawaii) (Albert W. Koers and Bernard H. Oxman eds.) at 73-80.

<sup>10</sup> UNCLOS, *supra* note 1, at art. 61. “The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.” *Id.* at art. 61(1).

<sup>11</sup> WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* 26 (1994). The problem of managing fish stocks that “straddle” coastal waters and international waters is addressed in the Convention. UNCLOS, *supra* note 1, at arts. 63-64. For a detailed review of the problem of “straddling fish stocks” see William T. Abel, *Fishing for an International Norm to Govern Straddling Stocks: The Canada-Spain Dispute of 1995*, 27 U. MIAMI INTER-AM. L. REV. 553 (1996).

<sup>12</sup> UNCLOS, *supra* note 1, at art. 65. This extra protection for marine mammals is extended to the High Seas under Article 120. *Id.* at art. 120. For a comprehensive discussion of the rights of marine mammals in international law see Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21 (1991).

<sup>13</sup> UNCLOS, *supra* note 1, at art. 58. These inclusive rights include the freedom of navigation and overflight, and the laying of submarine cables and pipelines. Furthermore, the rights of the coastal State within its EEZ are limited by the principle of “‘due regard’ to the rights and duties of other States . . .” *Id.* at art. 56(2). In short, the EEZ has the character of the High Seas, except for the rights specifically reserved to coastal States.

<sup>14</sup> *Id.* at art. 89. The equality of all States on the High Seas, where no central authority is responsible for wildlife management, is the classic example of the “tragedy of the commons.” See Garrett Hardin, *Tragedy of the Commons*, 162 SCI. 1243 (1968).

The primary obligation of the parties under Part XV of UNCLOS is to resolve their disputes by peaceful means.<sup>15</sup> States are free to choose whatever means they wish to resolve disputes arising under the Convention.<sup>16</sup> Only after they are unable to resolve a conflict by their own means is it necessary to invoke the compulsory and binding machinery of Section 2 of Part XV.<sup>17</sup> Similarly, where State parties have agreed in a separate agreement to submit an UNCLOS dispute to a binding procedure, that procedure will apply in lieu of Part XV, unless the parties agree otherwise.<sup>18</sup> The Convention requires that when a dispute arises the parties “shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”<sup>19</sup>

### III. Conciliation

The third party dispute settlement mechanism of conciliation is noteworthy and of special interest in the area of wildlife conservation. First, conciliation is specifically mentioned as a means of settlement that a party may invite without entailing a binding decision.<sup>20</sup> In fact, it is the only method of third party settlement specifically referred to in Section 1, before the compulsory and binding methods enumerated in Section 2.<sup>21</sup> Second, conciliation is textually significant in the areas of fisheries and the conservation and management of living species. In disputes involving the conservation, management, determination and allocation of living resources in an EEZ, Article 297(3)(b) requires conciliation upon the demand of any party to the dispute, where no settlement has been reached under Section 1.<sup>22</sup>

Some disputes involving marine scientific research may also be submitted to conciliation, at the request of either party, subject to certain rights of the coastal State.<sup>23</sup> Additionally, some disputes concerning sea boundary delimitation, and historic bays or titles may optionally be exempted from compulsory settlement and submitted to conciliation.<sup>24</sup>

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<sup>15</sup> UNCLOS, *supra* note 1, at art. 279. Not only is the requirement of peaceful dispute settlement the first provision of Part XV, but article 279 also refers to the obligation of peaceful dispute settlement set forth in the UN Charter. U.N. CHARTER, art. 2, para 3; art. 33. For a thorough review of the history and methods of peaceful international dispute settlement, see J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (2d ed. 1995).

<sup>16</sup> UNCLOS, *supra* note 1, at art. 280.

<sup>17</sup> *Id.* at art. 281. See *infra* note 24.

<sup>18</sup> UNCLOS, *supra* note 1, at art. 282.

<sup>19</sup> *Id.* at art. 283(1). The “obligation to exchange views” is not limited to the pre-dispute settlement phase. On the contrary, it is extended to those cases where a method of dispute settlement has failed and, additionally, where it has been successful and the question of implementation remains. *Id.* at art. 283(2). Although “negotiation” is not specifically enumerated in UNCLOS as a method of dispute settlement, its centrality to modern international dispute settlement cannot be overemphasized. See MERRILLS, *supra* note 14, at 1-26. See also CHURCHILL & LOWE, *supra* note 5, at 332.

<sup>20</sup> UNCLOS, *supra* note 1, at 284(1). See CHURCHILL & LOWE, *supra* note 5, at 332-333, 335.

<sup>21</sup> See MERRILLS, *supra* note 14, at 163-165.

<sup>22</sup> UNCLOS, *supra* note 1, at art. 297(3)(b)(i-iii). The rules and procedures for conciliation under Article 297 are set forth in Annex V, entitled “Conciliation.” Article 297 is the first article of Section 3. Section 3 is entitled, “Limitations and Exceptions to Applicability of Section 2.”

<sup>23</sup> *Id.* at art. 297(2)(b).

<sup>24</sup> *Id.* at art. 298(1)(a)(i-iii).

#### IV. Compulsory Procedures and Binding Decisions

One of the innovations of UNCLOS is its provisions for binding dispute settlement for the peaceful resolution of maritime disputes between and among States. Section 2 of Part XV establishes these important provisions.<sup>25</sup> Where States are unable to resolve disputes by methods of their own choosing, any party to the dispute that is a party to UNCLOS may submit the matter to a court or tribunal having jurisdiction under Section 2.<sup>26</sup> A court or tribunal listed in Section 2 has jurisdiction over any dispute concerning the interpretation or application of the Convention properly submitted to it.<sup>27</sup> Similarly, such court or tribunal has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of UNCLOS, which is referred to it.<sup>28</sup>

States are free to choose by written declaration one or more methods of dispute settlement enumerated in Section 2, when signing, ratifying or acceding to the Convention, or at any time thereafter.<sup>29</sup> The choices are: a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;<sup>30</sup> b) the International Court of Justice;<sup>31</sup> c) an arbitral tribunal

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<sup>25</sup> *Id.* at Part XV, Section 2. Section 2, entitled “Compulsory Procedures Entailing Binding Decisions,” consists of Articles 286-296.” Article 296 provides that “[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and complied with by all the parties to the dispute. *Id.* at art. 296(1). Such decisions, however, have “no binding force except between the parties and in respect of that particular dispute.” *Id.* at art. 296(2). This provision, limiting the binding character of the decision to the parties of the actual dispute, is identical to language found in the Statute of the International Court of Justice. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 59. *See infra* note 62. For a basic description of the binding procedures of Section 2 *see* CHURCHILL & LOWE, *supra* note 5, at 335-337.

<sup>26</sup> UNCLOS, *supra* note 1, at art. 286.

<sup>27</sup> *Id.* at art. 288(1).

<sup>28</sup> *Id.* at art. 288(2). It is certainly foreseeable that a Section 2 tribunal might be called upon to apply a related agreement such as a fishery treaty or environmental convention, for example.

<sup>29</sup> *Id.* at art. 287(1). For an updated list of States’ declaration of dispute settlement procedures *see* “Settlement of disputes mechanism: Choice of procedure by States Parties under article 287 of the Convention,” <[http://www.un.org/Depts/los/los\\_sdm1.htm](http://www.un.org/Depts/los/los_sdm1.htm)>.

<sup>30</sup> UNCLOS, *supra* note 1, at art. 287(1)(a). The structure and function of the International Tribunal for the Law of the Sea (ITLOS) is established in Annex VI. The seat of the Tribunal is in the Free and Hanseatic City of Hamburg in Germany. ITLOS has already decided a preliminary issue in its first case, *The M/V Saiga* (Saint Vincent and the Grenadines v. Guinea). *See* <[http://www.un.org/Depts/los/judg\\_1.htm](http://www.un.org/Depts/los/judg_1.htm)>. The *M/V Saiga* case is a maritime action where Saint Vincent and the Grenadines, the flag State of the tanker *Saiga*, allege that the vessel was improperly detained by Guinea. Saint Vincent and the Grenadines brought the action in ITLOS for a prompt release of the vessel under Article 292 of UNCLOS. ITLOS ruled the vessel should be released upon the posting of an appropriate bond. The parties have since accepted the jurisdiction of ITLOS to decide the merits of the case. *See* Bernard H. Oxman, *International Decisions: Applicability of procedure for securing prompt release of vessels and crews under UN Convention on the Law of the Sea - burden of proof - bunkering of fishing vessels in the exclusive economic zone - hot pursuit - reasonable bond*, 92 AM. J. INT’L L. 298 (1998). *See supra* note 3.

<sup>31</sup> UNCLOS, *supra* note 1, at art. 287(1)(b). *See* CHURCHILL & LOWE, *supra* note 5, at 333-335. The acceptance of the jurisdiction of the International Court of Justice under Part XV would qualify as a jurisdictional (compromissory) clause under Article 36(1) of the Statute of the International Court of Justice. Significantly, both parties to the dispute must accept the jurisdiction of the ICJ under Art. 287(1)(b) for the dispute to be referred to the Court independently under Part XV. *See infra* text accompanying note 33. Of course, law of the sea disputes may also be referred to the ICJ by Special Agreement and under the optional clause declaration of Art. 36(2) of the Statute of the ICJ. Currently, a law of the sea dispute referred under the optional clause, *Fisheries Jurisdiction* (Spain v. Canada), is pending before the ICJ. *See infra* text accompanying notes 59-61. For a discussion of why a State might choose

constituted in accordance with Annex VII;<sup>32</sup> and d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the specified categories.<sup>33</sup>

Where the parties to a dispute have accepted the same procedure, it must be utilized unless they agree otherwise.<sup>34</sup> If no choice is designated by written declaration, that State is deemed to have accepted arbitration.<sup>35</sup> Similarly, if two States have both designated methods of dispute settlement under Article 287, but have not accepted the same method, then their dispute may only be submitted to arbitration.<sup>36</sup> Thus, arbitration is considered the “default” dispute settlement procedure. This is often referred to as “compulsory” arbitration, which is somewhat of a misnomer given the consensual nature of the arbitral process.

The power of a tribunal to exercise provisional measures pending the final decision of a dispute is common in international settlement of disputes.<sup>37</sup> Accordingly, a Section 2 court or tribunal may prescribe provisional measures to preserve the respective rights of the parties<sup>38</sup> and to “. . . prevent serious harm to the environment, pending the final decision.”<sup>39</sup>

The method of “special arbitration” provided for in Article 287(d) is particularly relevant in the area of marine wildlife management. The primary difference between arbitration and “special arbitration” is in the technical character of the disputes and the qualifications of the potential arbitrators. Annex VIII defines the categories of disputes that may be referred to “special arbitration.”<sup>40</sup> They are: 1) fisheries, 2) protection and preservation of the marine environment, 3) marine scientific research, and 4) navigation, including pollution from vessels and by dumping.<sup>41</sup> The special arbitral tribunal is comprised of recognized experts in those fields.<sup>42</sup> Seemingly, one of the key purposes of “special arbitration” is to submit those disputes involving technical and scientific issues to designated arbitrators who have previously been classified as experts in those categories of disputes. Such expertise should reduce the time necessary for consideration of highly technical disputes and potentially yield the most informed findings.

To a large extent, the powers granted to the special arbitral tribunal to decide environmentally related disputes are taken away by limitations on compulsory and binding dispute settlement. This is the case where a coastal State wishes to avoid a binding settlement.<sup>43</sup> Since many environmental disputes directly involve the rights of the coastal State, such limitation may prove significant in the future.

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ITLOS over the ICJ to adjudicate a law of the sea dispute, *see* Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 50 (1997).

<sup>32</sup> UNCLOS, *supra* note 1, at art. 287(1)(c). *See* CHURCHILL & LOWE, *supra* note 5, at 333.

<sup>33</sup> UNCLOS, *supra* note 1, at art. 287(1)(d). Annex VIII enumerates the types of disputes which may be submitted to “special arbitration.” *See infra* text accompanying notes 39-41.

<sup>34</sup> UNCLOS, *supra* note 1, at art. 287(4).

<sup>35</sup> *Id.* at art. 287(3).

<sup>36</sup> *Id.* at art. 287(5).

<sup>37</sup> The International Court of Justice (ICJ), for example, may exercise provisional measures under Article 41 of the Statute of the International Court of Justice. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 41. *See* CHURCHILL & LOWE, *supra* note 5, at 337.

<sup>38</sup> UNCLOS, *supra* note 1, at art. 290.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at Annex VIII.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at Annex VIII, art. 2.

<sup>43</sup> *See infra* text accompanying notes 45-48.

## V. Limitations and Exceptions to Compulsory Procedures and Binding Decisions

The concept of compulsory and binding dispute settlement was problematic for the drafters.<sup>44</sup> Although the provisions of Section 2 establishing compulsory and binding methods were fashioned to afford State parties maximum flexibility, not all disputes were deemed to be appropriate for binding settlement. Section 3 of Part XV defines the limitations and exceptions to the binding procedures of Section 2.<sup>45</sup> Disputes affecting the rights of a coastal State within its EEZ were one such area of controversy.<sup>46</sup> While UNCLOS provides for binding settlement of fishery disputes under Section 2, Article 297(3)(a) substantially obviates this provision where the rights of a coastal State are involved.<sup>47</sup> Article 297(3)(a) states:

Disputes concerning the interpretation 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 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.<sup>48</sup>

A coastal State may also avoid a binding decision in certain cases involving marine scientific research in its waters.<sup>49</sup> In some cases involving a coastal State, however, the binding provisions of Section 2 may be available. For example, where it is alleged that a coastal State has acted in contravention of the provisions regarding the freedoms and rights of “navigation, overflight, or the laying of submarine cables and pipeline, or in regard to other internationally lawful uses of the sea . . .” in the EEZ.<sup>50</sup> Similarly, binding settlement shall apply “when it is alleged that a State . . . (in exercising its enumerated freedoms) . . . has acted in contravention of this Convention or the regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention.”<sup>51</sup>

Under Article 298 States may, by written declaration, optionally exempt from the binding

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<sup>44</sup> MERRILLS, *supra* note 14, at 157. Dispute settlement under earlier 1958 law of the sea conventions was optional. *Id.* For UNCLOS, however, it was decided that “an instrument containing so many innovations was bound to generate disputes which could only be resolved by the use of a third-party procedure which was both obligatory, in the sense that it had to be used, and binding in its result.” *Id.* at 158.

<sup>45</sup> UNCLOS, *supra* note 1, at Part XV, Section 3. Section 3 consists of Articles 297-299. It is entitled, “Limitations and Exceptions to Applicability of Section 2.” For commentary, *see* CHURCHILL & LOWE, *supra* note 5, at 337-339.

<sup>46</sup> *See* MERRILLS, *supra* note 14, at 161-63. The issue of whether or not a coastal State should be required to submit to binding dispute settlement for questions involving its discretionary functions in the EEZ balances traditional notions of sovereignty with the need for third party settlement.

<sup>47</sup> UNCLOS, *supra* note 1, at art. 297(3)(a).

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.* at art. 297(2)(a)(i) and (ii).

<sup>50</sup> *Id.* at art. 297(1)(a).

<sup>51</sup> *Id.* at art. 297(1)(b).

procedures of Section 2, disputes regarding maritime boundaries<sup>52</sup>, military activities<sup>53</sup> and disputes where the United Nations Security Council is exercising its functions.<sup>54</sup> Of particular importance to marine wildlife management, however, is the right of a State to exempt “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.”<sup>55</sup>

Thus, not only can the coastal State limit compulsory settlement with regard to its marine wildlife policies in its EEZ, but it can also exempt review of its law enforcement activities for the enforcement of those policies. Both of these provisions can cut both ways from the standpoint of wildlife preservation. It should be noted that Article 298 applies to all State parties and not just coastal States.<sup>56</sup> Thus, a state may be powerless to pursue an action under UNCLOS where a coastal state is not living up to its obligations to ensure proper conservation and management and to prevent over-exploitation.<sup>57</sup> On the other hand, a State with a stricter scheme would also be exempt from an action contending that it was not fulfilling its obligation to promote the objective of “optimum utilization” of the living resources in its EEZ.<sup>58</sup> Therefore, a coastal State not engaging in law enforcement operations to curtail over-fishing, for example, would likely be exempt from compulsory settlement if it files the appropriate declaration under Article 298.<sup>59</sup> Conversely, a State engaging in aggressive law enforcement operations for the same purpose would likewise be exempt, subject to the requirements of Article 298.

## VI. The Spain-Canada Dispute

The inherent tension between coastal States and other maritime users is demonstrated by the *Spain-Canada Fisheries Dispute*.<sup>60</sup> In 1995, Canadian authorities arrested the Spanish fishing vessel *Estai* slightly seaward of Canada’s EEZ in response to the *Estai*’s pursuit of turbot stocks which “straddle” Canadian waters and the EEZ.<sup>61</sup> The *Spain-Canada* dispute, which is still pending before the ICJ, was not brought under Part XV of UNCLOS, but rather under the optional clause of Article 36(2) of the ICJ Statute.<sup>62</sup> Nevertheless, this conflict between

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<sup>52</sup> *Id.* at art. 298(1)(a).

<sup>53</sup> *Id.* at art. 298(1)(b).

<sup>54</sup> *Id.* at art. 298(1)(c).

<sup>55</sup> *Id.* at art. 298(1)(b). Recall that art. 297(3) exempts from compulsory settlement, at the election of the coastal State, disputes concerning management of living resources in the EEZ.

<sup>56</sup> *Id.* at art. 298.

<sup>57</sup> *See id.* at art. 61(2).

<sup>58</sup> *Id.* at art. 62(1).

<sup>59</sup> *Id.* at art. 298(1). The State may declare the exception from Section 2 in writing, “[w]hen signing, ratifying or acceding to this Convention or at any time thereafter.” An interesting issue may arise where a State that has not previously filed a declaration under this section is faced with an action and then seeks to file a declaration and invoke the exception. Such a problem may be foreseeable given the liberal language “or at any time thereafter.”

<sup>60</sup> *See Fisheries Jurisdiction (Spain v. Canada)*, Web site of the International Court of Justice, <<http://www.icj-cij.org/idocket/iec/iecframe.htm>>.

<sup>61</sup> *Id.* Application of the Kingdom of Spain (Spain v. Canada), 1995 ICJ Application (filed March 25, 1995). For further discussion of the problem of straddling fish stocks, and the legal and policy issues raised by the *Spain-Canada* dispute, *see* Abel, *supra* note 10.

<sup>62</sup> 1995 Application of the Kingdom of Spain (Spain v. Canada), *supra* note 60. Article 36(2) of the Statute of the ICJ provides that:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement,

conservation and fishing rights will likely constitute one of the greatest sources of future marine wildlife disputes. The ICJ is currently considering whether or not a Canadian reservation filed in accordance with Article 36(2) of the ICJ Statute will defeat jurisdiction in this case.<sup>63</sup> However, should the ICJ reach a final judgment on the merits, this case will serve as a point of reference for other similar disputes.<sup>64</sup> The case may also serve to advance the concept of judicial settlement for conservation and resource management disputes.

For States that are parties to UNCLOS, disputes similar to *Spain-Canada* may be addressed within the applicable machinery of Part XV. Significantly, Canada's enforcement action occurred on the High Seas and affected fishing, a recognized High Seas' freedom.<sup>65</sup> Then again, as a "straddling stocks" dispute involving the rights of a coastal State, compulsory and binding settlement may not be available.<sup>66</sup> Even if a binding procedure is unavailable, Part XV may provide the formula for successful resolutions of these types of disputes. The availability of conciliation as a non-binding method may generate proposals that can facilitate a negotiated settlement.

Where the spectre of a binding decision is present, however, States have an increased incentive to reach a negotiated settlement before Part XV is invoked. Where the parties are unable to directly negotiate mutually acceptable solutions, the involvement of neutral and well-informed third parties may add potency to the negotiation process. This is likely to be the case so long as States fear losing before international tribunals.

Should a future dispute like *Spain-Canada* reach a binding tribunal, the potential choice of forum between the ICJ, ITLOS, arbitration and special arbitration raises novel issues of possible competition between forums.<sup>67</sup> A State might choose ITLOS, or special arbitration,

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in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 2.

<sup>63</sup> See *Fisheries Jurisdiction (Spain v. Canada)*, Press Communiqué 98/24, Web Site of the International Court of Justice, *supra* note 59. The reservation purports to exclude the acceptance of compulsory jurisdiction for ". . . disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO (Northwest Atlantic Fisheries Organization) Regulatory Area . . . and the enforcement of such measures." *Id.*

<sup>64</sup> A decision of the ICJ has no binding force except between the parties of a particular case. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 59. On the other hand, case law of the ICJ permeates the international legal community, not only from the weight of the decisions, but through the wider implications of their methodology and reasoning. See Nagendra Singh, *The UN and the Development of International Law, in UNITED, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS* 384-419, 405 (Adam Roberts and Benedict Kingsbury, eds., 2d. ed. 1993).

<sup>65</sup> UNCLOS, *supra* note 1, at art. 87(e). Fishing is specifically enumerated as High Seas' freedom in Part VII of UNCLOS. Of course, it is tempered by the language: "subject to the conditions laid down in section 2" (of Part VII). Section 2 of Part VII is entitled, "Conservation and Management of the Living Resources of the High Seas."

<sup>66</sup> See *supra* text accompanying notes 46 and 47.

<sup>67</sup> See Boyle, *supra* note 30, at 50. While the problem of competition between forums is potentially an issue, it should be kept in mind that both States must accept the same procedure for it to be invoked. See *supra* text

where there are highly technical issues in a dispute.<sup>68</sup> Similarly, a State might choose the ICJ where the issue to be decided has wider implications for general international law.<sup>69</sup>

One can hardly predict whether future activity under Part XV will be “environmentally friendly.” However, it appears as if the substantive and dispute settlement provisions of UNCLOS were drafted to address environmental and wildlife management concerns in a thoughtful and informed manner. At this early stage, there is every reason to believe that UNCLOS dispute settlement bodies will apply environmental and conservation provisions as they were intended by the drafters.

## VIII. Conclusions

Whether or not the UNCLOS dispute settlement provisions will be heavily utilized, or largely ignored, in the arena of marine environmental protection remains to be seen. On the other hand, the flexibility and highly consensual nature of Part XV will help ensure a higher level of compliance should States avail themselves of the procedures. The initial ability of States to successfully obtain meaningful and mutually acceptable solutions to maritime disputes will instil confidence in the dispute settlement mechanism and bode well for the future of UNCLOS.

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accompanying notes 33-35. The possibility of competition between forums can only exist where more than one method of settlement is available in a dispute.

<sup>68</sup> Boyle, *supra* note 30.

<sup>69</sup> *Id.* See also Malcolm N. Shaw, *The International Court of Justice: A Practical Perspective*, 46 INT’L & COMP. L.Q. 831, 834 (1997). Of course, States will always choose the forum they deem most advantageous.