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## EDITED BY

Shih-Ming Kao,  
National Sun Yat-sen University, Taiwan

## REVIEWED BY

Tsung Han Tai,  
Law School, Shandong University, China  
Wan-Chun Ho,  
Soochow University, Taiwan

## \*CORRESPONDENCE

Xiaolin Pan

✉ [mavispanpan@163.com](mailto:mavispanpan@163.com)

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# Application issues of compulsory conciliation in the settlement of fishery disputes in the Yellow Sea

Xiaolin Pan\*

Law School, Dalian Maritime University, Dalian, Liaoning, China

China and South Korea have made great efforts to settle their fishery disputes in the Yellow Sea through political negotiations. The results of the bilateral treaty, which was concluded around 2001, have been very limited. The Law of the Sea's compulsory conciliation procedure can become an alternative choice for two countries to settle fishery disputes. This article starts with a comparative study of fishery disputes in the Yellow Sea that should be subject to compulsory conciliation. Based on the similarities among these disputes, it is argued that compulsory conciliation is applicable to the settlement of fishery disputes in the Yellow Sea. This article also pays attention to some essential issues related to the application of compulsory conciliation, including the jurisdiction and powers of the Conciliation Commission and the implementation of the report concluded by the Conciliation Commission.

## KEYWORDS

compulsory conciliation, fishery disputes, conciliation commission, the Yellow Sea, discretion

## 1 Background and introduction

The Bohai Sea is the internal sea of China, connected to the Yellow Sea by the Bohai Strait, which is 45 nautical miles wide. The Yellow Sea has an area of approximately 380,000 square kilometers with an average depth of 44 meters and a maximum depth of 140 meters (Valencia, 1998). (pp.384) These natural advantages have caused serious disputes between coastal countries over fishing rights (Park, 1974). (pp.125) As per Zou Keyuan (1997), "Mainly due to overfishing, China's traditional fishing targets have declined to varying degrees." (Zou, 1997) (pp.296) The 1982 United Nations [Convention on the Law of the Sea \(UNCLOS\) \(1982\)](https://www.un.org/Depts/los/convention_agreements/convention_text_frontsp.pdf) has brought about profound changes in the system of marine fisheries management (Guo and Huang, 2005). (pp.379) Under this system, member states should cooperate with each other in the exploration and management of fishery resources and also settle their controversies arising from these practices under the dispute settlement mechanism of the UNCLOS. China and South Korea ratified the UNCLOS in 1996 and claimed 200 nautical miles of Exclusive economic zone (EEZ) in 1998 and 1996,

respectively. Serious fishery disputes have arisen in the Yellow Sea concerning the exploitation of fishery resources, the prompt release of detained vessels and crews, the jurisdiction to regulate and sanction the fishing vessels illegally crossing the border, and so on.

To resolve these disputes, China and South Korea have held a series of negotiations for approximately 7 years. In August 2000, the two countries concluded the South Korea-China Fisheries Agreement between the Government of the Republic of Korea and the Government of the People's Republic of China, ([The Fisheries Agreement](#)) which became effective on 30 June 2001. Unfortunately, the implementation of this treaty has somehow escalated fishery disputes between the two countries. Since the agreement took effect, hundreds of Chinese fishing vessels have been detained by South Korean maritime authorities. For more than a decade, 2005 was the year with the largest number of detentions of Chinese fishing vessels, and then this number began to decrease year by year; however, it has rebounded sharply in the past 11 years ([Wu et al., 2020](#)) (pp.493). In 2021, South Korea seized a total of 108 Chinese fishing boats in violation of due regulations. [Reference/endnote of this sentence: Chinese fishing boat seized for alleged illegal fishing in S. Korean waters. Available at: <https://en.yna.co.kr/view/AEN20220612002700325> (Accessed Apr. 6th 2023)]. Most recently, on 12 June 2022, the South Korean Coast Guard detained a 5-ton Chinese boat. [Reference/endnote of this sentence: Chinese fishing boat seized for alleged illegal fishing in S. Korean waters. Available at: <https://en.yna.co.kr/view/AEN20220612002700325> (Accessed April 06, 2023)]. So far, South Korea has become the country that has detained the largest number of Chinese vessels and crews.

The disputes referring to fisheries between China and South Korea can be roughly divided into the following three categories. The first and most significant category of disputes focuses on an unequal distribution of fishery resources in the Yellow Sea. Fish supply depletion has become not only a regional problem but also a global security issue ([Dupont and Baker, 2014](#)). (pp.80) The Fisheries Agreement so far has not resolved these disputes as effectively as was anticipated. Indeed, the original purpose of this bilateral treaty was to achieve the sustainable use of biological resources, avoid overfishing, and foster positive cooperation in the Yellow Sea, not to distribute fishing resources. In this regard, the Fisheries Agreement only plays a transitional and temporary role in the permanent settlement of disputes. The second category of disputes mainly involves the prompt release of detained vessels and crews. These disputes can be traced back to the mid-1950s, and, occasionally occurred in the early 1990s ([Yang, 2012](#)). (pp.481) Although consultations have been held to solve this problem and some progress has been made, the issue has not been eradicated. Another category of disputes concerns jurisdiction to regulate and sanction fishing vessels that illegally cross the border. The Fisheries Agreement confirms that both China and South Korea have exclusive rights over the fishery resources and fishing activities in their own EEZs ([Guifang, 2005](#)). (pp.366) The most typical dispute in the Yellow Sea is that Chinese fishermen are often accused of crossing the border by South Korea ([Shan et al., 2018](#)). (pp.41)

Although they manifest in different ways, fishery disputes have stemmed from the *status quo* that the EEZ boundary between China

and South Korea has not yet been delimited. As per Jan Paulsson, "Boundary disputes seem to be a ubiquitous part of international relations." ([Paulsson, 2001](#)) (pp.123) "The unclear legal status of disputed water is one reason for the global regime's failure to regulate IUU [illegal, unreported and unregulated] fishing in these waters." ([Kim, 2018](#)) (pp.526) China and South Korea have negotiated maritime boundaries: both countries approved provisional maritime boundary arrangements in the Fisheries Agreement ([Kim, 2008](#)) (pp.227), while this agreement also states clearly in Article 14 that "no provision of the present Agreement may be deemed prejudicial to the position of either Contracting Party with regard to its maritime jurisdiction." In other words, the Fisheries Agreement only applies to fishery-related issues and has no bearing on either party's position regarding any impeding maritime disputes, especially the delineation of sea boundaries. In fact, China and South Korea have held a series of formal and informal consultations from 1997 to 2021, taking into account the controversies on delimitation rules and methods on both sides ([Qi, 2022](#)). (pp.53-56) However, the possibility of concluding a bilateral sea boundary treaty is quite slim.

Regardless of their origins, these fishery disputes should be settled promptly since they are closely linked to national interests. The escalation of these disputes has also had a great impact on regional peace and security. The China-South Korea Maritime Affairs Dialogue and Cooperation Mechanism, which was set up under the leadership of the diplomatic departments of the two countries and involved other relevant departments, has played an important role in promoting bilateral maritime policy communication and managing maritime conflicts ([Wu, 2019](#)). However, as the resources in the Yellow Sea play a strategic role for both China and South Korea, fishery disputes have seriously hindered cooperation in the exploitation and development of the resources in the area. The fishermen of both countries are unable to have a good fishing environment, and the economic situation around the area is also receiving a harmful influence. According to an earlier report, many Chinese fishermen, especially in Dalian, lost their traditional jobs and nearly 15 billion yuan in one year ([Xu, 2008](#)). (pp.156) Furthermore, South Korea's practice of enforcing fishery laws against Chinese fishermen, including imposing heavy fines and detaining fishing vessels, affects both economic development and diplomatic relations between the two countries. The two sides hold very different views on what is to blame – unlawful fishing by Chinese fishermen or rough law enforcement by the Korean Coast Guard Investigation on the Conflict Between Chinese and Korean Fishing Police: Korean Police Detain one Chinese Fishing Boat Every Day on Average.

To settle the disputes relating to the implementation and interpretation of UNCLOS, a dispute settlement mechanism has been established that includes both political and judicial methods. As per Louis B. Sohn, "Unlike most other international instruments, the UNCLOS does not provide for a unitary system of dispute settlement." ([Sohn, 1983](#)) (pp.197) The dispute settlement provisions contained in Part XV were viewed as necessary to balance the interests of all states against the increased jurisdictional powers given to coastal states by the Convention

(Rayfuse, 2005). (pp.683) In order to comply with Article 279, China and South Korea are obliged to resort to this mechanism to settle their dispute by peaceful means (Sheehan, 2005).(pp.169) As per Peter Tzeng, “A critical difference between domestic legal systems and the international legal order is that the latter lacks courts with compulsory jurisdiction.” (Tzeng, 2016) (pp.503). Furthermore, Donald R. Rothwell noted that “the UNCLOS framework endorses states to have multiple judicial and quasi-judicial options to settle their disputes.” [SIC] (Rothwell, 2021) (pp.374) The dispute settlement mechanism aims to reconcile and combine, in essence, the obligation to settle the disputes by judicial means and the respect for the will and sovereignty of the States Parties (Pineda, 2021). (pp.4) However, according to Barkin and DeSombre, “States often pursue international relations through bilateral negotiations and multilateral mechanisms, such as alliances, treaties, and international organizations.” [SIC] (Samuel and DeSombre, 2000) (pp.339) China prefers political methods, especially diplomatic negotiations, to reach a certain conclusion. As per Wu Yingying and Kong Qingjiang, “There are many ways to resolve disputes ... China has always advocated the peaceful settlement of disputes and adhered to the principle of equality and fairness.” (Wu and Kong, 2019) (pp.49) Therefore, the legal methods do not seem to be applicable to resolving fishery disputes between China and South Korea. Besides, no agreement has been reached between the two countries on which method to use to settle their disputes. In addition, political negotiations may not be as effective when coupled with the tense diplomatic relations caused by South Korea’s frequent detention of Chinese vessels and crews. Under these circumstances, compulsory conciliation, as a method of dispute settlement in UNCLOS, provides an alternative for the settlement of fishery disputes in the Yellow Sea. Moreover, according to UNCLOS, exhaustion of judicial methods is designed as a procedural requirement. If China and South Korea do not want to be bound by a judicial decision, it is better to settle their conflicts through compulsory conciliation.

## 2 The applicability of compulsory conciliation procedures to fishery disputes in the Yellow Sea

According to Christopher C. Joyner, “International procedures and mechanisms should be made available to assist in the peaceful settlement of fishery disputes arising over non-implementation of legal obligations.”[SIC] (Joyner, 1998) (pp.296) The process of conciliation is one of the traditional methods of pursuing this goal.

Conciliation is a method for the settlement of international disputes of any nature according to which a Commission setup by the Parties ... proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or affording the Parties, with a view to its settlement, such aid as they may have requested. (International Conciliation, Session of Salzburg, 1961)

In UNCLOS, “conciliation is specifically mentioned as a means of settlement that a party may invite without entailing a binding

decision.” [SIC] (Schiffman, 1998) (pp.297) Meanwhile, conciliation is one of the political methods that have been designed as a precondition for judicial or arbitral settlement (Genevieve Bastid Burdeau, 2017). (pp.19)

The dispute settlement mechanism under UNCLOS includes two kinds of conciliation: voluntary conciliation, in accordance with Article 284 and Section 1 of Annex V, and compulsory conciliation, according to Articles 297(2)(b), 293(3)(b), 298(1)(a)(i) and Section 2 of Annex 5. With respect to compulsory conciliation, as per Dai Tamada, “the establishment of the [conciliation] commission’s jurisdiction is automatic in the sense that any party is entitled to initiate the conciliation procedure without the consent of the other party.” [SIC] (Dai, 2020) (pp.324) Compulsory conciliation is distinguished from voluntary conciliation. Voluntary conciliation is a prerequisite for access to legal dispute settlement methods, while compulsory conciliation is not. It was reaffirmed by the Conciliation Commission in the *Timor Sea Conciliation* case In the Matter of the Maritime Boundary Between Timor-Leste and Australia (The “Timor Sea conciliation”) that “a party seeking to make use of dispute provisions of the Convention must first meet the requirements of Section 1 of Part XV to enable access to the binding procedures of Section 2 or the compulsory conciliation procedure provided in Section 3.” [SIC] (Decision on Australia’s Objections to Competence, 2016) Since the report issued by the Conciliation Commission is not binding on the disputing parties, compulsory conciliation can be called compulsory, non-binding conciliation. Actually, “Articles 297 and 298 involve issues of important national interest, binding decisions by a third party ... could be difficult for a party to accept.” [SIC] (Oystein and Nigel, 2017) (pp.213)

Compulsory conciliation is applicable for the resolution of the fishery disputes between China and South Korea in the Yellow Sea. This conclusion is drawn based on the high similarity between the fishery disputes and those subject to compulsory conciliation, in addition to the advantages that compulsory conciliation may have.

Although any dispute arising from maritime issues could be submitted to voluntary conciliation, in accordance with UNCLOS, only specific categories of disputes could be subject to compulsory conciliation, including marine scientific research in the EEZ and on the continental shelf (Articles 246, 253), fishery disputes and the obligation to maintain living resources in the EEZ (Article 297), and the delimitation of maritime boundaries or historic bays or titles (Article 298). These disputes all refer to the performance of the relevant obligations of the States Parties, and in the performance of the obligations, contracting states need to exercise their sovereign rights over these specific issues and make the necessary decisions based on state preferences. This process shows the exercise of discretion by States Parties. In other words, to fulfill these obligations under UNCLOS, the exercise of discretion is necessary. Therefore, a transitional zone can be observed between the obligations inspired by the provisions of UNCLOS and the actual implementation of these obligations. This transitional zone could be essential for States Parties because they could exercise discretion to first establish national rules and standards based on both treaty obligations and national interests in this zone, and then fulfill their treaty obligations by implementing these national rules

and standards. In this way, these rules and standards can somehow function as a bridge connecting the textual content and the actual implementation of treaty obligations. Moreover, even if states are under international supervision to fulfill their treaty obligations, their rights of discretion must never be taken away by any organization or tribunal (UNCLOS Article 297 (3) (c)).

Disputes referring to the delimitation of sea boundaries can be taken as an example. According to Articles 74 and 83 of UNLOS, the EEZ and the continental shelf shall be delimited on the basis of the consent of the states in dispute. However, the principles and methods by which states may delimit sea boundaries are not suggested in the provisions of UNCLOS. Therefore, it is necessary for the state to exercise discretion in the selection of delimitation methods, in addition to relevant circumstances that should be considered to achieve justice in the delimitation of maritime boundaries. In the case of the *Timor Sea Conciliation*, Timor-Leste argued that the delimitation of a boundary for both the continental shelf and the EEZ should follow the median line between the coasts of Timor-Leste and Australia under contemporary international law ([Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea](#)). (para.231, pp.67) With respect to the median line, Timor-Leste also stated that “it did not consider there were any relevant circumstances that would call for the adjustment of the median line.” [SIC] ([Oystein and Nigel, 2017](#)) (para.233, pp.67) On the contrary, Australia contended that there should be separate boundaries for the EEZ and continental shelf because “the physical continental shelves of Australia to the south and Timor-Leste and Indonesia to the north are entirely separate and that these significant factual characteristics geologically, geomorphologically and ecologically remained relevant in maritime boundary delimitation.” [SIC] ([Oystein and Nigel, 2017](#)) (para.234, pp.68) It is obvious that both countries have exercised their discretion to determine which delimitation method and relevant circumstances should be selected to reach the final solution. In order to show full respect for state sovereignty, it is not appropriate to require two conflicting parties to submit these disputes to judicial proceedings unless they agree to do so. Meanwhile, disputes arising from the boundary disputes between the two countries have also resulted in resource governance and exploration in Greater Sunrise, the Sunrise and Troubadour gas fields, located in the Timor Sea ([Decision on Australia’s Objections to Competence, 2016](#)). The urgent resolution of “remaining significant differences between them, stemming from their different understanding of the broader economic benefits that would follow from developing Greater Sunrise” [SIC] also demonstrates the applicability of compulsory conciliation.

With regard to the fisheries disputes in the Yellow Sea, which have mainly occurred in the respective EEZs of China and South Korea, both disputing countries have the obligation to “promote the objective of optimum utilization of the living resources in the EEZ,” along with the obligation to determine their allowable catch and capacity to harvest the living resources of the EEZs, in accordance with Article 62 of UNCLOS. Therefore, both conflicting countries

have the right to exercise discretion and then choose indicators and variables to determine the allowable catch, its harvesting capacity, the allocation of surpluses to other states, and the terms and conditions established in their conservation and management laws and regulations. If either side refuses to make such a determination or arbitrarily rejects the requests of the other side to participate in the exploitation of the surplus of fishery resources, the resulting disputes may be submitted to compulsory conciliation. However, the coastal state is not obliged to submit disputes arising from the exercise of its discretion to determine the above issues. The existence of the transitional zone and the exercise of discretion make it difficult to submit such disputes to some other methods of dispute settlement, especially judicial methods.

In addition, the need to settle these fishery disputes is essential for maintaining normal and good diplomatic relations between China and South Korea and even for peace and security in the region. As parties to the dispute, China and South Korea are obliged to settle their disputes in a peaceful way. According to Article 3 of the Charter of the United Nations (the UN Charter), “all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Article 33 also provides for peaceful means, including conciliation, for states to seek solutions. Meanwhile, Article 297 of UNCLOS states that “State parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means...” [SIC] Unfortunately, “the Fisheries Agreement has not ended fishery disputes in the Yellow Sea ... the problem has begun escalating in the early 2000s.” [SIC] ([Lee, 2016](#)) (pp.94) The requirement for prompt settlement of fishery disputes in the Yellow Sea also shows a common feature of disputes subject to compulsory conciliation.

Based on these similarities, compulsory conciliation should be applied to resolve the fishery disputes between China and South Korea in the Yellow Sea. Furthermore, compulsory conciliation has the advantages of both political and legal dispute settlement methods. As per Seokwoo Lee, “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.” [SIC] ([Yee, 2013](#)) (pp.316) Due to the intervention of the third party, conciliation also leaves room for the disputing party to make concessions to avoid any “disgrace” of either party, and to avoid “surprise” and “accident” from either the disputing party or the third party like what might have happen in judicial courts ([Yang, 2018](#)). (pp.65) Besides, compulsory conciliation also shows strong competitiveness due to its unique characteristics, such as the following, which seem to be incentives for both China and South Korea.

Firstly, compulsory conciliation can function both flexibly and normatively. As a political dispute settlement method designed to leave the way open for future negotiations, compulsory conciliation functions strategically in a flexible manner. According to Article 293 (1), “the Conciliation Commission is exempted from applying UNCLOS and international law rules ... the Conciliation Commission is empowered to apply any rule or norm which is not

international law.” [SIC] (Dai, 2018) (pp.160) Both parties to the dispute could, to a certain degree, negotiate and adjust concrete procedures with regard to state interests and preferences. The arbitrators who make up the Conciliation Commission are appointed by the disputing parties (Annex V, Article 3). Failure to reply to the notice of commencement of the proceedings or to submit to such proceedings shall not constitute a bar to the proceedings (Annex V, Article 12). In contrast, the requirements and procedure of compulsory conciliation have been clearly stipulated in Annex V of the UNCLOS, including the institution of the proceedings, the constitution of the Conciliation Commission, the functions of the commission, the termination of the proceedings, the legal effects of the conciliation report, and so on.

Secondly, compulsory conciliation can be both mandatory and voluntary. At the request of any party to the dispute, the dispute shall be submitted to conciliation (Article 297(3)(b) UNCLOS). In other words, once initiated by any party to the dispute, the procedure will proceed without any influence from other parties. In this way, the parties to the dispute could be actively urged to fulfill their obligations to settle the dispute peacefully. Although the limited authority of the Conciliation Commission and the non-binding nature of the conciliation report still provide opportunities for conflicting parties to achieve a further compromise or resort to other settlement methods to resolve their disputes. Although China and South Korea have already concluded the Fisheries Agreement on fishing activities in the Yellow Sea, there are still a series of controversial issues related to the allocation of fishery resources. As far as the natural conditions are concerned, the rugged coastline, small islands, and reefs along the west coast of South Korea provide good fish habitats and form better fishing grounds than China (Why is it Difficult to Resolve China-South Korea Fisheries Disputes). Such uneven distribution and the resulting allocation of fishery resources make this bilateral treaty not as effective as it was expected. During the process of compulsory conciliation, both countries would be urged to actively cooperate. It would be helpful to adjust and modify the disputed provisions of the Fisheries Agreement.

Third, compulsory conciliation can help balance the efficiency and fairness of dispute resolution. Both parties to a dispute seek to settle their disputes efficiently and achieve fair solutions. In the application of compulsory conciliation, these two goals are not incompatible. In accordance with Articles 7 and 8 of Annex V UNCLOS, the Conciliation Commission shall report within 12 months of its constitution, and the conciliation proceedings shall be terminated if any party to the dispute rejects the report by written notification addressed to the Secretary-General of the UN or simply upon the expiration of a period of three months from the date of receipt of the report by the parties. Such time limits largely prevent undue delay in the proceedings. At the same time, also according to Article 7, the report of the commission is not binding on the parties to the dispute. If either China or South Korea contests the report or any of its relevant recommendations, they still have the option of pursuing other solutions.

Therefore, compulsory conciliation could be regarded as a new method or strategy for fishery issues management in the

Yellow Sea because other dispute settlement methods have not achieved significant results so far. It is also because compulsory conciliation has incomparable advantages in resolving these disputes.

### 3 Fishery disputes in the Yellow Sea: Resorting to compulsory conciliation

According to Article 286 of UNCLOS, there is no doubt that any dispute concerning the interpretation and application of UNCLOS should be submitted to the dispute settlement mechanism established in Part XV. Under this mechanism, compulsory conciliation has been designed as a complementary method.

Part XV is divided into three sections. Section 1 deals with the application of procedures outside the dispute settlement mechanism, including peaceful means of state members' own choice (UNCLOS Article 281) or those provided for in other regional, bilateral, and general agreements (UNCLOS Article 282). Section 1 also contains non-binding procedures consisting of negotiation or other peaceful means (UNCLOS Article 283) and voluntary conciliation (UNCLOS Article 284).

Section 2 focuses on compulsory procedures involving binding decisions, referrals to judicial or arbitral proceedings of the ITLOS, ICJ, arbitral tribunal under Annex VII and VIII, and so on.

Section 3 sets out limitations and exceptions to the applicability of the compulsory procedures established in Section 2. These limitations and exceptions include mandatory exceptions applicable to all States Parties to UNCLOS. Disputes concerning the interpretation or application of UNCLOS in relation to the exercise by a coastal state of its sovereign rights or jurisdiction provided for therein may be excluded from the compulsory procedures, except when:

- (1) where it is alleged that a coastal state has acted in violation of the provisions of this Convention with regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or with regard to other internationally lawful uses of the sea referred to in article 58; or
- (2) where it is alleged that a State, in the exercise of the aforementioned freedoms, rights or uses, has acted in violation of this Convention or of laws or regulations adopted by the coastal state in accordance with this Convention and other rules of international law not inconsistent with this Convention; or
- (3) where it is alleged that a coastal State has acted in violation 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 by a competent international organization or diplomatic conference in accordance with this Convention. (UNCLOS Article 297). [SIC]

These limitations and exceptions also include optional exceptions applicable to States Parties making a declaration, which may exclude the following three kinds of disputes: First, disputes concerning the delimitation of maritime boundaries, those concerning historical bays or titles, or those that necessarily involve the simultaneous consideration of a dispute concerning sovereignty or other rights over continental or insular land territory. Second, disputes relating to military activities. Third, disputes in respect of which the Security Council (SC) of the United Nations is exercising the functions assigned to it by the UN Charter (UNCLOS Article 298).

On the basis of Section 3, disputes subject to compulsory conciliation fall into two groups: (1) optional exceptions under Article 298 relating to maritime delimitations or those involving historic bays or titles; (2) compulsory exceptions relating to marine scientific research projects and fishery issues under Article 297. In this way, compulsory conciliation has been designed as a complementary procedure to judicial or arbitral proceedings. To settle the disputes that are excluded from the application of compulsory procedures under Section 2, compulsory conciliation is introduced for the States Parties.

With regard to fishery disputes, to be specific, Article 297 (3) (b) provides a detailed explanation of the three types of fishery disputes that are subject to compulsory conciliation:

- (1) a coastal state has manifestly failed to comply with its obligations to ensure by appropriate conservation and management measures that the sustainability of the living resources in the EEZ is not seriously endangered; or
- (2) a coastal state has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources in respect of stocks which that other State wishes to fish; or
- (3) a coastal state has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and on such terms and conditions as the coastal State may determine in accordance with UNCLOS, all or part of the surplus which it has declared to exist. [SIC]

Based on these provisions, coastal states have the right to authorize and subsequently regulate fishing activities within their EEZ. Such rights have also been recognized and allocated in the Fisheries Agreement: First of all, “each Contracting Party shall, in accordance with this Agreement and with provisions of its respective national laws and regulations, allow the citizens and fishing vessels of the other Contracting Party to engage in fishing within its EEZ” [SIC] (The Fisheries Agreement, Article 2(1)). In order to monitor the licensing practices of both countries and, in particular, to avoid arbitrary denials of fishing activities by the other party, each state is required to determine, on an annual basis, “the species allowed to be caught, catch quotas, time and area of operation, and other operating conditions within its domestic EEZ for citizens and fishing vessels of the other Contracting Party” [SIC] (The Fisheries Agreement, Article 3). Obviously, any dispute arising from the exercise of such rights could be settled by

compulsory conciliation. However, as required by the fundamental principle of respect for state sovereignty, the right to decide on these domestic issues should not be interfered with by any other states or institutions. In accordance with Article 297 (3), any dispute relating to the sovereign rights of the coastal state over the living resources in the EEZ or the exercise thereof should be excluded from the application of compulsory conciliation, including its discretionary powers to determine 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. Since UNCLOS states that “in no case shall the Conciliation Commission substitute its discretion for that of the coastal State” [SIC] (UNCLOS, Article 297 (3)(c)), it seems that the compulsory commission would have no jurisdiction over disputes arising from such determinations. However, the factors and variables that each state party should select and consider to make the determination of authorization have been stipulated in the Fisheries Agreement, including “domestic fishing capacity, traditional fishing activities, the status of each other’s fisheries, and other related factors” [SIC]; meanwhile, the results of the consultations of the Korea-China Joint Fisheries Commission (the Joint Commission) should also be respected (the Fisheries Agreement, Article 3(2)). Thus, the Conciliation Commission shall have jurisdiction over the proportionality and legality of these factors and variables. Whether the consultations made by the Joint Commission are respected should also be covered by the jurisdiction of the Conciliation Commission.

In order to supervise and regulate the authorized fishing practices of the other country, the coastal state also has the right to adopt and establish relevant domestic laws and regulations on the basis of which the authorized agencies of each country could issue fishing licenses to citizens and fishing vessels of the other country (the Fisheries Agreement, Article 2(2)). On the other hand, after receiving fishing licenses, when citizens and vessels enter the EEZ of the other country to engage in fishing operations, they should abide by both the Fisheries Agreement and other relevant domestic laws and regulations of the other state (the Fisheries Agreement, Article 4(1)). Failure to ensure that its citizens and fishing vessels comply with these laws and regulations could constitute a violation of obligations under the Fisheries Agreement and lead to corresponding responsibilities (the Fisheries Agreement, Article 4 (2)). A more serious and urgent consequence may be the detention of fishing vessels and crews. As a result, the detaining country has the obligation to notify the other country and to release the detained vessel and crew immediately upon receipt of appropriate bail or other security (the Fisheries Agreement, Article 5). Any disputes arising from these practices could also be referred to the Conciliation Commission.

## 4 Appropriate extension of the powers of the conciliation commission

What attracts conflicting parties to submit their disputes to compulsory conciliation is the prospect that an impartial and

neutral Conciliation Commission comprised of conciliators freely chosen by them will be established and then dominate the subsequent proceedings. It is obvious that, in most cases, the involvement of an impartial third party will bring a high possibility of eliminating controversies between conflicting parties and promoting the settlement of disputes.

The Conciliation Commission usually consists of five conciliators who are selected and then appointed by the States Parties from a list of conciliators maintained by the Secretary-General of the UN (UNCLOS Annex V, Article 2). The Conciliation Commission has, according to UNCLOS Annex V, Articles 4 to 7, the following powers: (1) to determine the procedures of the commission; (2) to invite any state party to submit views on the disputes; (2) to draw the attention of States Parties to any measure which might facilitate the settlement of the dispute; (3) to hear the facts, claims, and arguments presented by the States Parties; and (4) to prepare a report which records all relevant information on the cases and provides recommendations on dispute settlement.

Compulsory conciliation is designed as an indispensable component of the dispute settlement mechanism under UNCLOS, and the exercise of its powers should be guaranteed. It is reflected in the *Timor Sea Conciliation*.

It is not suggested that the role of the Commission was of only modest utility. In particular, two roles of the Commission that are intimately intertwined with each other merit being highlighted: the role in establishing maritime boundaries and that in resource governance. [SIC] (Tanaka, 2018) (pp.73)

Simultaneously, “the [Conciliation] Commission positioned itself as an intermediary between the parties, testing the positions of each side. It played an unusually active role in pushing the parties.” [SIC] (Exposto, 2018) (pp.54) An appropriate extension of the powers of the Conciliation Commission must benefit the fulfillment of its function of expediting the settlement of disputes. Even if the powers are expanded to some extent, the Conciliation Commission should still respect the sovereignty and will of the disputing countries. It is precisely because the disputing countries believe that their will and sovereignty must be fully respected that they want to resort to compulsory conciliation. If expectations are disappointed by the excessive expansion of the authority of the Conciliation Commission, the application of compulsory conciliation will be adversely affected. In conclusion, the powers of the Conciliation Commission should be adequately expanded as follows:

First, and most importantly, the jurisdiction of the Conciliation Commission should be clearly defined and well established. Under the condition of respecting state sovereignty, the Conciliation Commission should be entitled to a wide range of jurisdiction based on the proven similarities between the disputes it accepts and those that should be subject to compulsory conciliation under UNCLOS. However, disputes relating to territorial sovereignty and historic title over maritime zones should be excluded. Meanwhile, the Conciliation Commission can neither replace the disputing countries to exercise discretion in determining essential fishery issues, nor supervise the domestic laws adopted by them relevant to fishing activities. However, the Conciliation Commission should still have the authority to consider the

rationality and legitimacy of variables and factors selected by the disputing parties to determine essential fishery issues based on national and international law. Furthermore, since the Conciliation Commission is not a judicial institution, it is appropriate to establish a certain appeal mechanism to examine the legality and rationality of the decisions made by the Conciliation Commission on jurisdictional issues. At the same time, the Conciliation Commission should be authorized to determine its jurisdiction, as it has also been stated in Article 13 of Annex V that “a disagreement as to whether a Conciliation Commission acting ... has competence shall be decided by the commission.” [SIC] At the beginning of the conciliation process in the *Timor Sea Conciliation*, the Conciliation Commission was engaged in determining its competence to deal with the jurisdictional objections of Australia. As the grounds for Australia’s objections were rejected one by one by the Conciliation Commission, its jurisdiction was established. The Commission functions in this phase of its works in a way that is indistinguishable from that of an arbitral tribunal, or even ITLOS, in dealing with jurisdictional objections (Tullio, 2017). (pp.326) With respect to fishery disputes in the Yellow Sea, the Conciliation Commission has the authority to determine its jurisdiction unless China and South Korea agree to seek solutions through other peaceful means or two countries are obligated to settle these disputes through specific procedures under some other treaties (UNCLOS Articles 281, 282).

Second, the Conciliation Commission should have the authority to set up groups of experts to investigate the facts of the dispute. In fact, there are a number of facts that need to be investigated in fisheries disputes in the Yellow Sea, including the existence of Chinese fishing grounds (Dong, 2014), (pp.36) illegal fishing, border crossing, detention of vessels and crews, and so on. Even similar events in different maritime zones may have different consequences. For instance, under the Fisheries Agreement, the legal effects and consequences of fishing activities in the Provisional Measures Zone must be different from those in the Transnational Zone (the Fisheries Agreement, Articles 7 and 8). The investigation of facts by an impartial third party is more likely to be accepted by both parties to the dispute. However, since state consent is generally considered an essential factor in the formation of international law (Bjorn, 2020), (pp.79) the establishment of groups of experts should be decided by the majority of the commission members and, at the same time, receive the consent of China and South Korea, whose cooperation is indispensable to the future activities and functions of the groups. These groups of experts should also abide by the basic principles of international law and respect the sovereignty of the disputing parties. More importantly, the groups of experts should refrain from interfering with the discretion of the two countries on fishery issues. The outcomes of the investigation will be concluded in the form of reports submitted by the groups of experts. The clarification of certain facts and information in this way may be helpful and then be regarded as a precondition for the settlement of the dispute.

Thirdly, the Conciliation Commission should be granted appropriate discretionary powers. It is asserted that the coastal state is not obliged to submit any dispute arising out of the exercise of discretion on specific issues related to the exploitation of fishery

resources, including the determination of 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 (Article 297 (3) (a) of UNLOS). Also, the Conciliation Commission may not substitute its discretion for that of the coastal state in these issues (Article 297 (3) (c) of UNLOS). However, without any authority to evaluate and examine some specific contents of these issues, the Conciliation Commission would be unable to perform efficiently the functions of dispute settlement. The Conciliation Commission should have a certain degree of discretion for examining and estimating the proportionality of the indicators and variables selected by the two countries. Consequently, the Conciliation Commission could make decisions on the reasonableness of the operating conditions set by two countries each year for the nationals and fishing vessels of the other party, including the species to be fished, catch quotas, fishing periods, and zones. In addition, the Conciliation Commission should also be authorized to make suggestions on the terms and conditions of these relevant fishing issues established in the domestic laws and regulations of the two countries.

Finally, the suggestions made by the Conciliation Commission for replacing the dispute settlement method should be respected. Since the disputes in the Yellow Sea include not only fishery issues but also those related to maritime delimitation and enforcement of laws and regulations, the Conciliation Commission can first classify these different categories of disputes and then decide whether to exercise its jurisdiction or make suggestions on which method China and South Korea can resort to. The two countries would not be obliged to follow such suggestions, but they could serve as a reference for the settlement of disputes in the future. On the issue of the detention of vessels and crews, the Conciliation Commission may also have the right to recommend that China and South Korea apply for provisional measures adopted by the International Tribunal for the Law of the Sea (ITLOS).

## 5 Improved implementation of the conciliation commission's final report

The application of compulsory conciliation would eventually become meaningless if the final report issued by the Conciliation Commission is not accepted or even ignored by one of the parties to the dispute. All the efforts of the conciliators and experts involved would also be in vain. Failure to settle the dispute means that the States Parties involved would have to return to the starting point of the dispute settlement procedure, and then the dispute settlement would become a circular process (Song, 2017). (pp.39) Although it is clearly stipulated in UNCLOS that the report of the Commission, including the conclusions and recommendations therein, shall not have binding force upon the States Parties (UNCLOS Annex V, Article 7(2)), some degree of impact and effect of the report should be guaranteed in order to promote the efficiency and fairness of this dispute settlement procedure. Meanwhile, since it is the non-binding nature of the Commission's report that attracts both China and South Korea, strict enforcement of the report will

become unacceptable. Undoubtedly, it is significant to strike and maintain a balance between promoting the effects of the Commission report and respecting the consensus of the states.

First and foremost, throughout the whole process of dispute settlement and especially in the final report of the Commission, the relationship between efficiency and fairness should be well handled. On the one hand, the report must show enough respect for the mutual consensus and common consciousness of China and South Korea and based on this consideration, reach a final compromise or equal conclusion. On the other hand, according to the urgent fishery disputes, especially those concerning the release of detained fishing vessels, the report must focus on efficiency.

Strengthening internal cooperation within the other institutions of the UNCLOS dispute settlement mechanism is also beneficial for improving the implementation of the Commission report. In an emergency, failure to order the immediate preservation of evidence usually results in loss or difficulty in obtaining such evidence for the claims of both sides. The requests for the preservation of evidence and the adoption of provisional measures can be submitted to the courts and tribunals under the UNCLOS dispute settlement mechanism. With regards to the enforcement of the Commission's report, these courts and tribunals, including the ICJ, ITLOS, arbitral courts established under Annex VII or VIII, and so on, can also be relied upon. Being established as a permanent tribunal, ITLOS has been granted certain jurisdiction and functions that the Conciliation Commission does not have. The ITLOS has made remarkable achievements because it has compulsory jurisdiction over cases requesting provisional measures and prompt release of vessels and crews under the UNCLOS (Xu and Lu, 2007). (pp.430) The exercise of such jurisdiction and functions can, directly and indirectly, promote the enforcement of the Commission's report. The ITLOS has jurisdiction over all disputes submitted to it in accordance with UNCLOS and over all matters specifically provided for in any other agreement that confers jurisdiction on the ITLOS (UNCLOS Annex VI, Article 21). Thus, the ITLOS has the authority to accept and hear the case concerning the enforcement of the Commission's report if the jurisdiction of the ITLOS is established. The ITLOS may also give an advisory opinion on legal questions if an international agreement is related to the purpose of UNCLOS (Rules of the Tribunal (ITLOS/8)). This authority may also be helpful to facilitate the implementation of the Commission's report. Moreover, if the conflicting parties have not agreed on which court or tribunal they would like to resort to, ITLOS will still have jurisdiction over requests for provisional measures and to promote the release of vessels and crews (UNCLOS, Articles 290 (5) and 292). ITLOS has jurisdiction to order provisional measures if it has established two conditions: "that *prima facie* the tribunal which is to be constituted would have jurisdiction" [SIC] and "the urgency of the situation so required." [SIC] (Linkevicius, 2011) (pp.165) On the one hand, before the report is completed by the Conciliation Commission, any request for the imposition of provisional measures and the release of the vessels may be submitted to ITLOS (UNCLOS Article 290 (4), (5)); on the other hand, during the subsequent proceedings dealing with substantive issues, the Conciliation Commission would also take into account the statements made by ITLOS when issuing



provisional measures for reference. This result might be acceptable if ITLOS took into consideration a rule of general international law only for the purpose of interpreting relevant UNCLOS provisions (Dai, 2018). (pp.149)

In addition to international judicial institutions, the enforcement of the Commission's report could also be facilitated by strengthening cooperation with other international or regional organizations that have been established with specialized functions or that have a great influence on international affairs. To facilitate the implementation of the Fisheries Agreement, the Joint Commission, consisting of a representative appointed by each of the two countries and a number of commissioners, has been established. Where necessary, groups of experts may also be set up to provide assistance to the Joint Commission (Article 13 (1) of the Fisheries Agreement). The Joint Commission has been granted these functions:

- (1) Consult on the Following issues and make recommendations to the Governments of both Contracting Parties: (a) Species allowed to be caught, catch quotas, and other substantive operational issues with respect to the citizens and fishing vessels of the other Contracting Party under the provisions of Article 3 above; (b) Maintenance of order in operation; (c) Status and conservation of marine living resources; (d) Fisheries cooperation between the two countries;
- (2) When necessary, make recommendations to the Government of both Contracting Parties regarding the amendment of the present Agreement;
- (3) Consult and decide on issues related to the provisions of Article 7 ["Provisional Measures Zone"] and 8 ["Transnational Zone"] above. [SIC]

As an institution specializing in the development and management of fishery resources, the Joint Commission must be aware of the challenges and dilemmas faced by China and South Korea in the development of fishery resources. However, the Joint Commission is not a dispute settlement body - it is only entitled to make recommendations under the Fisheries Agreement. If close cooperation can be built between the Conciliation Commission and the Joint Commission, the two institutions can make up for each other's shortcomings. Nevertheless, if fishery disputes arise from the Joint Commission's inaccurate and inappropriate recommendations, the Conciliation Commission can also make suggestions on such recommendations.

Among all other universal organizations, either China or South Korea could submit to the UN the fact that the other party refuses to comply or does not completely fulfill its obligation to comply with the report of the Conciliation Commission. When it comes to international peace and security, the two countries could rely on the UNSC resolutions under Chapter VII of the UN Charter.

Moreover, the theory of state responsibility in international law can also be invoked to urge States Parties to respect the Commission's report and fulfill their international obligations. Even if the report is not binding on China and South Korea, the two countries are obliged to settle fishery disputes in the Yellow Sea

in a peaceful way in case the crisis in the region escalates. Refusing to seriously consider the report, in contradiction with the international obligations of conflicting parties, constitutes state responsibility. A conflicting party is allowed to claim self-help against certain international wrongful acts of the other party, and if the requirements of claiming countermeasure are met, the wrongfulness of the countermeasure can be released, so that the state can be immune from state responsibility (Zhu, 2019). (pp.137) Of course, the parties to the dispute should take countermeasures with strict limitations as stipulated in Draft Articles on Responsibility of State for International Wrongful Acts (the Draft Article). The purpose and requirements of taking countermeasures should be met (Article 49 of the Draft Article). Countermeasures should not undermine the performance of other international obligations, including the abstention from the act or use of force, the protection of fundamental human rights, and those under peremptory norms of general international law (Article 50 (1) of the Draft Article). Countermeasures shall cease as soon as the responsible party begins to comply definitively with the arbitral award (Article 53 of the Draft Article).

## 6 Conclusions

The task of compulsory conciliation is to encourage and organize a dialogue between the parties to a dispute and to provide the necessary assistance for the settlement of disputes. After its successful application in the case of the "*Timor Sea Conciliation*," compulsory conciliation was brought to the attention of the international community. "The *Timor Sea Conciliation* process has demonstrated the flexibility that may be afforded to the parties, in addition to a Conciliation Commission, in exploring diverse options so as to arrive at an amicable settlement." [SIC] (Klein, 2019)(pp.45). In theory, the Conciliation Commission not only has the objective position of the arbitrator as a third party, but also can break through the investigative authority of the arbitrator as a third party to a certain extent, so as to examine the facts of the case in a relatively independent way (Wang and Du, 2019). (pp.33) "Like an international court or tribunal, a Conciliation Commission can examine the legal issues from the independent and impartial viewpoints." [SIC] (Tanaka, 2018) (pp.82) The similarities between the disputes involved in the *Timor Sea Conciliation*, those relating to fishery issues in the Yellow Sea, and those that should be subject to compulsory conciliation under the UNCLOS can be identified. The similarities, including the exercise of discretion on specific issues relevant to state sovereignty and the necessity for a prompt settlement of the disputes, have shown the applicability of compulsory conciliation in the settlement of fishery disputes between China and South Korea in the Yellow Sea.

Furthermore, compulsory conciliation has combined the advantages of political and legal dispute settlement methods under UNCLOS. Its unique characteristics make it more neutral and thus more acceptable to both China and South Korea. The compulsory conciliation procedure embodies both flexible and normative features, functions both coercively and voluntarily, and helps to balance the efficiency and justice of the dispute settlement.

Therefore, it can be argued that it is the best alternative to resolving the fishery disputes in the Yellow Sea.

In order to achieve this expectation, the specific scope of fisheries disputes to which compulsory conciliation could be applied should be well defined. As a complementary method of dispute settlement in the UNCLOS system, compulsory conciliation is applicable to three types of fishery disputes under Article 297 (3) (b). To be specific, any dispute arising from the exercise of authorization and further regulation of fishing activities within the EEZ, in accordance with UNCLOS and the Fisheries Agreement, could be settled by compulsory conciliation.

The powers of the Conciliation Commission should be guaranteed and appropriately expanded. Instead of substituting the discretion of the conflicting parties in determining essential issues and supervising domestic laws relating to fishery activities, the Conciliation Commission should clearly define its jurisdiction, especially in consideration of the rationality and legitimacy of variables and factors selected by the disputing parties to authorize and regulate fishery activities. In other words, the appropriate authority of discretion should be assigned to the Conciliation Commission. Further, the authority to set up groups of experts to investigate the disputed facts based on the cooperation of two countries could be beneficial to the clarification of controversial facts. Also, if the Conciliation Commission recommends using any other settlement methods in the subsequent proceedings, China and South Korea should also take such recommendations seriously.

The report concluded by the Conciliation Commission is not binding on the parties to the dispute, but if the report is recognized and then adhered to by the two parties, the efficiency of compulsory conciliation as a dispute settlement method would be greatly improved. The maintenance of a balance between efficiency and fairness in dispute settlement outlined in the report would be the precondition for implementing the Commission's report. Only the Commission's report makes both China and South Korea feel that the fishery disputes in the Yellow Sea have been resolved fairly, efficiently, and appropriately, and that they would be willing to comply with it. Meanwhile, close and effective cooperation with other dispute settlement institutions within the UNCLOS system, and other international or regional organizations can also benefit the implementation of the Commission's report. In addition, countermeasures can be adopted to urge the parties in the dispute to comply with their obligations to settle the dispute peacefully by respecting and implementing the Commission's report.

It is undeniable that the possibility of resorting to compulsory conciliation to resolve the fishery disputes in the Yellow Sea may be severely limited by the unresolved maritime boundary delimitation issues between China and South Korea. As per Young-Koo Kim, "National boundary delimitation is always a difficult task, no matter

whether it is a land boundary or ocean boundary issue, because it has the implication of deciding the spatial extent of the sovereignty itself, beyond any practical and rational considerations of the national economy." [SIC] (Kim, 1997) (pp.49) However, if two countries could reach an agreement to submit the fishery disputes to compulsory conciliation first, the outcomes of such dispute settlement would definitely be favorable for further maritime boundary delimitation practices.

## Data availability statement

The original contributions presented in the study are included in the article/supplementary material. Further inquiries can be directed to the corresponding author.

## Author contributions

The author confirms being the sole contributor of this work and has approved it for publication.

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