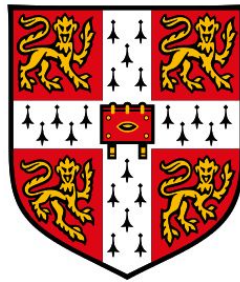


THE CONTRIBUTION OF UNCLOS DISPUTE SETTLEMENT BODIES TO THE DEVELOPMENT OF THE LAW OF THE SEA

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ABSTRACT

This thesis seeks to systematically examine the contributions made by the dispute settlement bodies established under the United Nations Convention on the Law of the Sea (UNCLOS) to the development of the law of the sea. The two main research questions to be answered are: (i) what kind of contribution have UNCLOS dispute settlement bodies made to the development of the law of the sea? and (ii) what are the factors that impact the performance of UNCLOS dispute settlement bodies in developing the law of the sea? To that end, Chapter 1 provides a working definition for the concept of 'judicial development of international law' in order to establish a framework for an assessment of the contributions of UNCLOS tribunals. Based on this working definition, Chapters 2, 3 and 4 examine the significance of UNCLOS tribunals' decisions in the development of three main areas of the law of the sea, respectively the law on fisheries, the law on the outer continental shelf and the law on marine environmental protection. Based on the findings of these chapters, Chapter 5 analyses the factors that help explain the contributions of UNCLOS tribunals to the law of the sea as identified in the preceding chapters. These factors include: (i) the jurisdictional scope of UNCLOS tribunals, (ii) the institutional design of UNCLOS, (iii) the interpretative method employed by UNCLOS tribunals in deciding their cases and (iv) the perception that UNCLOS tribunals hold regarding their roles. Chapter 6 concludes by taking stock of the contribution of UNCLOS tribunal in these areas and offering some final observations on the role of UNCLOS tribunals in the development of the law of the sea.

CONTENTS

ACKNOWLEDGEMENTS	i
PREFACE	ii
LIST OF ABBREVIATIONS	iii
TABLE OF TREATIES AND DOCUMENTS	vii
TABLE OF CASES	xii
CHAPTER 1 INTRODUCTION	1
I. THE GOAL AND CONTRIBUTION OF THE THESIS.....	1
II. A FRAMEWORK FOR UNDERSTANDING ‘JUDICIAL DEVELOPMENT’ OF INTERNATIONAL LAW	4
III. UNCLOS TRIBUNALS AND THE DEVELOPMENT OF THE LAW OF THE SEA	11
1. The law-development role of UNCLOS tribunals	11
2. Ad hoc tribunal v permanent tribunal: is there a difference?	15
IV. THE STRUCTURE OF THE THESIS	18
CHAPTER 2 DEVELOPMENT OF THE LAW ON FISHERIES	19
I. COASTAL STATES’ RIGHTS AND OBLIGATIONS OVER FISHING ACTIVITIES IN THE EEZ	20
1. Coastal States’ regulatory power	20
2. Coastal States’ enforcement power	27
3. Coastal States’ obligation to promptly release fishing vessels	31
II. FLAG STATES’ RIGHTS AND OBLIGATIONS IN FISHING ACTIVITIES IN THE EEZ	41
1. Flag States’ rights in granting nationality to ships.....	41
2. Flag States’ obligations over fishing activities in the EEZ.....	44
III. COASTAL STATES’ RIGHTS AND OBLIGATIONS OVER TRANSBOUNDARY FISH STOCKS.....	61
1. ‘Sustainable management’ of transboundary fish stocks.....	63
2. Coastal States’ obligations under Articles 63 and 64	65

IV. CONCLUDING REMARKS.....	71
CHAPTER 3 DEVELOPMENT OF THE LAW ON THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES	73
I. ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NM.....	75
1. The legal basis of entitlement to an outer continental shelf.....	75
2. Evidence for entitlement to an outer continental shelf	82
II. THE RELATIONSHIP BETWEEN DELIMITATION AND DELINEATION	86
1. The relationship between UNCLOS tribunals and the CLCS.....	87
2. Does delimitation effected by an international court or tribunal prejudice the work of the CLCS?.....	89
III. THE METHOD OF DELIMITATION APPLICABLE TO THE OUTER CONTINENTAL SHELF	95
IV. THE GREY AREA	101
1. Implication of the ‘grey area’ on the relationship between the EEZ and continental shelf.....	102
2. Practical difficulties caused by the ‘grey area’	105
V. CONCLUDING REMARKS.....	107
CHAPTER 4 DEVELOPMENT OF THE LAW ON MARINE ENVIRONMENTAL PROTECTION	110
I. THE PRECAUTIONARY PRINCIPLE.....	110
1. UNCLOS tribunals and the precautionary principle.....	112
2. Some observations regarding the precautionary principle	119
II. DUTY TO COOPERATE	123
1. UNCLOS tribunals and the duty to cooperate	123
2. Some observations on the duty to cooperate.....	128
III. ENVIRONMENTAL IMPACT ASSESSMENT.....	130
1. UNCLOS tribunals’ decisions on environmental impact assessment.....	130
2. Some remarks on the obligation to conduct EIA	134
IV. THE PRINCIPLE OF DUE DILIGENCE	137
V. CONCLUDING REMARKS.....	142
CHAPTER 5 FACTORS THAT IMPACT THE PERFORMANCE OF UNCLOS TRIBUNALS.....	146

I. JURISDICTIONAL SCOPE OF UNCLOS TRIBUNALS	146
1. Jurisdiction over contentious proceedings	147
2. Advisory jurisdiction	161
II. INSTITUTIONAL DESIGN OF UNCLOS	164
1. States parties to UNCLOS	165
2. UNCLOS institutions	168
3. Other international organisations referred to in UNCLOS	173
III. THE INTERPRETATIVE METHODS EMPLOYED BY UNCLOS TRIBUNALS	176
1. Evolutionary interpretation	177
2. Resort to subsequent conduct.....	181
IV. THE PERCEPTION BY UNCLOS TRIBUNALS OF THEIR ROLES.....	183
1. ITLOS's perception.....	184
2. Annex VII arbitral tribunals' perception.....	191
V. CONCLUSION.....	193
CHAPTER 6 CONCLUSION	196
I. TAKING STOCK OF THE CONTRIBUTION.....	196
II. FACTORS OF IMPACT.....	203
BIBLIOGRAPHY	205

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PREFACE

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution.

Part of Chapter 3 was published in the *International and Comparative Law Quarterly*, Volume 67, Issue 2, 2018.

This thesis, including footnotes, does not exceed the permitted length.

LIST OF ABBREVIATIONS

AfYBIL	African Yearbook of International Law
AJIL	American Journal of International Law
AuYBIL	Australian Yearbook of International Law
Braz J Int'l L	Brazilian Journal of International Law
BYIBL	British Yearbook of International Law
Cal W Int'l L J	California Western International Law Journal
CBD	Convention on Biodiversity
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CJIL	Chinese Journal of International Law
CLCS	Commission on the Limits of the Continental Shelf
COLREGS	Convention on the International Regulations for Preventing of Collisions at Sea
Conn. J. Int't L	Cornell Journal of International Law
ECtHR	European Court of Human Rights
EEZ	Exclusive economic zone
EIA	Environmental impact assessment
EJIL	European Journal of International Law
FAO	Food and Agricultural Organization

GATT	General Agreement on Tariffs and Trade
GJIL	Goettingen Journal of International Law
GWILR	George Washington International Law Review
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRW	International Convention on the Regulation of Whaling
Int'l J. Estuarine & Coastal L	International Journal of Estuarine and Coastal Law
IJMCL	The International Journal of Marine and Coastal Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMO	International Maritime Organization
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, unregulated and unreported
IWC	International Whaling Commission
JIBL	Journal of International Business and Law
LJIL	Leiden Journal of International Law
Loy LA Inter'l & Comp L J	Loyola Los Angeles International and Comparative Law Journal

LPICT	The Law and Practice of International Courts and Tribunals
MCA Convention	Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC
MPA	Marine protected area
MPYBUNLO	Max Planck Yearbook of United Nations Law Online
MSY	Maximum sustainable yield
MJIL	Melbourne Journal of International Law
MULR	Melbourne University Law Review
NJIL	Nordic Journal of International Law
nm	Nautical miles
NYUJILP	New York University Journal of International Law and Policy
ODIL	Ocean Development and International Law
PCIJ	Permanent Court of International Justice
RECIEL	Review of European Community and International Environmental Law
RFMO	Regional Fisheries Management Organisation
RIAA	Reports of International Arbitral Awards
S. Afr. Y.B. Int'l L.	South African Yearbook of International Law
SBT	Southern Bluefin tuna
SDC	Seabed Disputes Chamber

SDLR	San Diego Law Review
SRFC	Sub-Regional Fisheries Commission
TJIL	Texas Journal of International Law
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stocks Agreement
UNGA	United Nations General Assembly
VMS	Vessel monitoring system
VCLT	Vienna Convention on the Law of Treaties
VUWLR	Victoria University of Wellington Law Review
WTO	World Trade Organization
YBIEL	Yearbook of International Environmental Law

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I. THE GOAL AND CONTRIBUTION OF THE THESIS

The dispute settlement system under the United Nations Convention on the Law of the Sea ('UNCLOS' or 'the Convention') constitutes an integral part of the Convention.¹ Unlike the 1958 conventions for the law of the sea, which relegate the settlement of disputes to an optional protocol,² Part XV of UNCLOS on Settlement of Disputes sets out a compulsory dispute settlement system which is binding on a State once it becomes a party to the Convention. In that framework, UNCLOS establishes new tribunals, namely the International Tribunal for the Law of the Sea (ITLOS) and ad hoc arbitral tribunals, and provide them with compulsory jurisdiction to settle disputes arising from the interpretation and application of the Convention.³ The creation of new tribunals with specialised and compulsory jurisdiction to settle law of the sea disputes was hailed by one commentator as 'one of the pillars of the new world order in the ocean space'.⁴

To date, a total of around thirty cases have been initiated under the framework of the UNCLOS dispute settlement system. These cases have touched upon a variety of legal issues pertaining to both the law of the sea and more general international law. Despite this important body of jurisprudence, there has not been one single study which is devoted to assessing the role that UNCLOS dispute settlement bodies play in developing the law of the sea. Against that background, this thesis will be the first study to examine the contribution of UNCLOS tribunals to the development of the law of sea in a systematic manner. To that end, the thesis seeks to answer two main research questions: (i) what kind of contribution have UNCLOS dispute settlement bodies made to the development of the law of the sea? and (ii) what are the factors that impact the performance of UNCLOS dispute settlement bodies in developing the law of the sea?

While there has been a considerable amount of literature devoted to analysing the work of UNCLOS dispute settlement bodies, most of this takes the form of journal articles and book

¹ United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 396.

² Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (29 April 1958) 450 UNTS 169.

³ Article 287 UNCLOS allows States to choose one or more of the following means for the settlement of disputes: ITLOS, the International Court of Justice, ad hoc arbitral tribunals constituted in accordance with Annex VII and ad hoc special arbitral tribunals constituted in accordance with Annex VIII UNCLOS.

⁴ OA Adede, 'Settlement of Disputes Arising Under the Law of the Sea Convention' (1975) 69 AJIL 798, 798.

chapters which concentrate on the dispute settlement function of UNCLOS tribunals.⁵ As such, they have focused largely on specific cases or specific legal issues arising from the decisions of these tribunals, in other words, the tribunals' dispute settlement function. The number of studies on the law-development role of UNCLOS dispute settlement bodies is limited. Those that have attempted to do so tend to revolve around ITLOS only, and given the limited space afforded in these types of academic contribution, have made only cursory examination of the issue.⁶

Apart from journal articles and book chapters, there have only been two books which look at the UNCLOS dispute settlement system as a whole. The first, Natalie Klein's monograph 'Dispute Settlement in the UN Convention on the Law of the Sea',⁷ was published more a decade ago in 2005 when UNCLOS tribunals had not had the chance to deal with many cases. Thus it does not, and naturally cannot, take into account recent important developments in the case law of UNCLOS tribunals. More importantly, the focus of this book (whether the dispute settlement system is necessary for the regulation of the oceans under the Convention) and the approach that it adopts to answering its research question (by examining the relationship between the dispute settlement provisions and the substantive provisions of UNCLOS, focusing particularly on the exceptions and limitations to compulsory jurisdiction) differ significantly from those featured in this thesis. The second monograph, Igor V Karaman's 'Dispute Resolution in Law of the Sea' published in 2012,⁸ claims to offer a comprehensive study of dispute resolution in the contemporary law of the sea. However, its focus is on how UNCLOS dispute settlement bodies have dealt with disputes brought before them until 2012. This monograph drew a positive conclusion that the UNCLOS tribunals have functioned, and will continue to do so, efficiently. It is, thus, clear that the approach of Karaman's monograph is

⁵ See, eg, Louis B Sohn, 'Settlement of Disputes Arising Out of the Law of the Sea Convention' (1975) 12 SCLR 495; Shigeru Oda, 'Dispute settlement prospects in the Law of the Sea' (1995) 44(04) ICLQ 863; Thomas Mensah, 'The International Tribunal for the Law of the Sea: Its Role for the Settlement of Law of the Sea Disputes' (1997) 5 AfYBIL 227; Rosemary Rayfuse, 'The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention' (2005) 36 VUWLR 683; Jillaine Seymour, 'The International Tribunal for the Law of the Sea: A Great Mistake?' (2006) 1 Ind J Global Legal Stud 1; Bernard H Oxman, 'A Tribute to Louis Sohn - Is the Dispute Settlement System under the Law of the Sea Convention Working?' (2007) 39 GWILR 655; Sicco Rah and Tilo Wallrabenstein, 'International Tribunal for the Law of the Sea (ITLOS) and its Future' (2007) 21 Ocean Yearbook 41.

⁶ See, eg, Philippe Gautier, 'The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law' in Geert De Baere and Jan Wouters (eds), *Contribution of International and Supranational Courts to the Rule of Law* (Edward Elgar 2015); James Harrison, 'Judicial Law-Making and the Developing Order of the Oceans' (2007) 22(2) IJCLM 283; Helmut Tuerk, 'Contributions of ITLOS to International Law' in Seoung-Yong Hong and Jon M. Van Dyke (eds) *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009); Budislav Vukas, 'Possible Role of the International Tribunal for the Law of the Sea in Interpretation and Progressive Development of the Law of the Sea' in Davor Vidas and Willy Østreng (eds), *Order for the Oceans at the Turn of the Century* (Kluwer Law International 1999).

⁷ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005).

⁸ Igor V Karaman, *Dispute Resolution in Law of the Sea* (Brill 2012).

distinct from that set in this thesis. What both of these monographs share, in essence, is a focus on the dispute settlement role of UNCLOS tribunals. While each is enlightening in its own way, neither has addressed the issue that thesis purports to examine, which is their law-development role.

Before answering the two main research questions, two caveats need to be made. First, it should be acknowledged that ITLOS and Annex VII arbitral tribunals are not the only dispute settlement bodies engaged in the interpretation and application of UNCLOS. In fact, law of sea disputes occupy a prominent place in the docket of the International Court of Justice (ICJ), enabling it to interpret and apply UNCLOS on a frequent basis. However, this thesis will only focus on the decisions rendered by ITLOS and Annex VII arbitral tribunals (hereinafter collectively referred to as ‘UNCLOS tribunals’). The reason is that even though ICJ is indeed one of the four choices of fora under Article 287, none of the law of the sea disputes brought to the Court to date have been initiated within the framework of Part XV UNCLOS.⁹ As the thesis purports to examine the contribution of the dispute settlement system established under UNCLOS to the development of the law of the sea, it will only focus on the tribunals which (i) were established by the Convention, (ii) operate according to the rules and procedures of the Convention and (iii) have in practice heard cases brought to them under the auspices of the Convention. That is not to say that ICJ judgments will be absent in the analysis. As will be seen, references will be made to ICJ decisions insofar as it is appropriate and relevant to the analysis of the role of UNCLOS tribunals.

Second, the thesis will only examine the contribution of UNCLOS tribunals in three areas of law, namely: the law on fisheries, the law on the outer continental shelf regime, and the law marine environmental protection. The reason is that due to the limited space available in the thesis, it would be impossible to examine all the legal issues that UNCLOS tribunals have examined to date. Therefore, a choice has to be made regarding the areas of focus. These three areas were chosen as they were the areas of the law of sea with which UNCLOS tribunals have had the opportunity to deal on a frequent basis. As the legal issues in these specific areas have been addressed in more than one case, this makes it possible to discern a trend or a pattern in the decisions of UNCLOS tribunals in order to make an assessment of their contribution to the development of the law of the sea in a systematic manner. The thesis uses the conclusions drawn from the analysis of each of these areas as materials to obtain a more general understanding of

⁹ Neither have any cases been brought to Annex VIII tribunals. For a list of the cases brought before ITLOS, see: <<https://www.itlos.org/cases/list-of-cases/>> accessed 25 September 2018. For a list of cases brought before Annex VII arbitral tribunals, see: ><https://pca-cpa.org/en/services/arbitration-services/unclos/>> accessed 25 September 2018. In addition to the cases in this list, the *Southern Bluefin Tuna* case was also heard by an Annex VII arbitral tribunal, but for which the Permanent Court of Arbitration did not act as the Registry.

the different kinds of contribution that UNCLOS tribunals could and have made to the development of the law of the sea. It is acknowledged that a selection of only three areas may limit the generality of the conclusions to be drawn on the contribution of UNCLOS tribunals to the law of the sea. However, it is also argued that the analysis of these three areas of law serves more than mere samples. Instead, as the cases in these areas make up the bulk of UNCLOS tribunals' case law, they provide a rather clear indication of the ways the tribunals decide the cases and the kinds of contributions that they have made.

II. A FRAMEWORK FOR UNDERSTANDING 'JUDICIAL DEVELOPMENT' OF INTERNATIONAL LAW

As mentioned above, to date, only a limited number of studies have been devoted to critically examining the contribution of UNCLOS tribunals to the development of the law of the sea. In these studies, the relevant authors have mostly concentrated on ITLOS and its decisions on specific legal issues. While such an approach is not unreasonable, the focus on concrete instances and the lack of consideration for a more systemised understanding of why and in which ways the tribunal's pronouncements 'develop' the law leave the analysis incomplete. In order to avoid such loopholes, this Part seeks to outline the kinds of contribution which international courts and tribunals make to the development of the law, building on existing literature which examines the concept of 'development of the law' by various courts and tribunals. This will provide a framework for the analysis of the contributions of UNCLOS tribunals to the development of the law of the sea in the chapters to follow.

To set the background for such a framework, it is appropriate to raise at this juncture two observations. First, while international courts and tribunals are set up to settle disputes, this alone does not sufficiently cover the whole picture regarding the function of international courts. As Fitzmaurice pointed out,

There are broadly two main possible approaches to the task of a judge... There is the approach which conceives it to be the primary, if not the sole duty of a judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.¹⁰

¹⁰ Gerald Fitzmaurice, 'Hersch Lauterpacht—The Scholar as a Judge' (1961) 37 BYBIL 1, 14–15.

The second role performed by international courts and tribunals expounded in the above passage, that of developing international law, has been a subject of much interest to legal scholars and has been analysed from a variety of perspectives.¹¹ This chapter does not wish to rehearse nor engage in a detailed discussion on these topics. Suffice to say that, despite the fact that dispute settlement by means of international arbitration has had a longer history than that through permanent courts,¹² legal scholarship on the role of international courts and tribunals in the development of international law primarily revolves around the ICJ, and its predecessor, the Permanent Court of International Justice. Thus the more conservative view that these courts have adopted, ie that the function of international courts cannot go beyond settling disputes,¹³ has frequently been used as the point of departure for much academic discussion.

However, the past decades have witnessed the emergence of a large number of international dispute settlement mechanisms entrusted with the power to settle disputes in specific areas of law. Even though States still ‘[attempt] to circumscribe the judicial role rather narrowly by including safeguard clauses’ when establishing these new courts and tribunals,¹⁴ the specialised—and in many cases, compulsory—jurisdiction conferred upon this new generation of international courts and tribunals means that they have the potential to play a

¹¹ See, eg, Armin Von Bogdandy and Ingo Venzke, ‘The Spell of Precedents: Lawmaking by International Court and Tribunals’ in Cesare Romano, Karen Alter and Yuval Shany, *Oxford Handbook of International Adjudication* (OUP 2013); Rudiger Wolfrum, ‘Enforcing Community Interests through International Dispute Settlement: Reality of Utopia’ in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011); Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP 2014); Tullio Scovazzi, ‘Where the Judge Approaches the Legislator: Some Cases Relating to the Law of the Sea’ in Nerina Boschiero et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer 2013); Yuval Shany, *Assessing the Effectiveness of International Courts* (CUP 2014) (which does not consider law-development as an indicator of effectiveness for most courts and tribunals); Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) (which focuses on the influence of international courts on international and domestic politics, rather than on the development of the law per se, but which acknowledges that the role of international courts go beyond settling inter-state disputes).

¹² Stephan W Schill, ‘The Overlooked Role of Arbitration in International Adjudication Theory’ (2015) 4(2) ESIL Reflections <http://www.esil-sedi.eu/sites/default/files/Schill%20Reflection%20PDF_0.pdf> accessed 25 September 2018.

¹³ See, eg, *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 [18]; *Interpretation of Peace Treaties*, Advisory Opinion [1950] ICJ Rep 221, 229; *Case Concerning Rights of Nationals of the United States of American in Morocco (France v United States)* [1952] ICJ Rep 176, 199; *South West Africa cases (Ethiopia v South Africa, Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6 [91]; *Fisheries Jurisdiction (United Kingdom v Iceland)* [1974] ICJ Rep 3 [53]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 [26]. Note, however, that the Court itself has acknowledged on some occasion that its decisions have implications for the relations between States other the parties to a dispute before it. However, this was in the context of a maritime boundary dispute. *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3 [39].

¹⁴ For example, Article 3.2 and 19.2 of the WTO Dispute Settlement Understanding state that the WTO dispute settlement system and in particular the panels and Appellate Body ‘cannot add to or diminish the rights and obligations provided in the covered agreements’. See also: Christian J Tams and Antonios Tzanakopoulos, ‘Barcelona Traction at 40: The ICJ as an Agent of Legal Development’ (2010) 23(4) LJIL 781, 783.

significant part in shaping the law of those particular fields.¹⁵ Therefore, the conventional view regarding the role of international courts and tribunals in the development of international law, influenced by that long professed by the ICJ, seems no longer adequate to capture the changing landscape in international adjudication and arbitration. While not all States—or even international courts and tribunals themselves—accept that the latter have the task of developing the law, there has been a higher level of acceptance of the fact that international courts and tribunals may have a role to play the process in which international law develops. As one commentator observed, ‘the conception of international courts as actors in the development of the law has been a rather common theme in international legal thinking.’¹⁶ As a result, a growing number of studies have thus turned their focus away from the question of whether international courts have the power to develop the law, and instead to the question as to how and to what extent they have brought about such development.¹⁷

Second, this thesis opts for the term ‘development of the law’ rather than other terms which have been used to describe the role international courts have in addition to dispute settlement, such as ‘judicial law-making’¹⁸ or ‘judicial legislation’.¹⁹ The reason behind this choice is that the term ‘create’ or ‘make’ gives the impression that international courts and tribunals are introducing new rules of law which did not previously exist; in other words, introducing legislation *de novo*. However, judicial decisions are not recognised as a primary source of law binding on States under Article 38(1) of the ICJ Statute. As a general rule, international judicial or arbitral decisions are binding only on the parties to the case.²⁰ The

¹⁵ See, eg, Sivan Shlomo-Agon and Yuval Shany, ‘The WTO Dispute Settlement System’ in Yuval Shany (n 11); Richard H. Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’ (2004) 98(2) AJIL 247; Debra P. Steger, ‘The Appellate Body and Its Contribution to WTO Dispute Settlement’ in Daniel L. M. Kennedy and James D. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (CUP 2002); J G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1998).

¹⁶ Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 143–44.

¹⁷ De Baere and Wouters (n 6); John Merrills, ‘The place of international litigation in international law’ in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 15.

¹⁸ See, eg, Armin von Bogdandy and Ingo Venzke, ‘Beyond disputes: International Judicial Institutions as Lawmakers’ in Armin von Bogdandy and Ingo Venzke (eds) *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012); Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 272; Kelsen, cited in Ingo Venzke, *How Interpretation Makes International Law* (n16) 31.

¹⁹ See, eg, Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958); Geir Ulfstein, ‘International Courts and Judges: Independence, Interaction, and Legitimacy’ (2013-2014) 46 NYUJILP 849.

²⁰ See, for example, Article 59 of the ICJ Statute, Article 33 of the ITLOS Statute, Article 17(14) DSU of the WTO, Article 53 ICSID Convention.

majority of international courts also do not recognise the principle of *stare decisis*,²¹ so there is no obligation on the court in question—or others courts and tribunals for that matter—to follow the decision handed down previously even if in practice they generally do aim for consistency.²² It follows that judicial decisions do not in and of themselves constitute binding law.

Admittedly, the conventional understanding that judicial decisions are not a source of law but merely a source for recognising the law as Article 38(1) of the ICJ Statute posits may no longer hold true. As will be argued in this thesis, judicial decisions do not stop at recognising the law, they also clarify and enrich it. However, in that capacity, it is more proper to regard international courts and tribunals, including UNCLOS tribunals, as ‘agency for developing the law’²³ or ‘agents of legal development’.²⁴ As Tams and Tzanakopoulos argue, in the context of the ICJ, ‘the Court does not make or develop the law single-handedly, it operates within the broader context of legal development’,²⁵ thus judicial decisions ‘are not per se relevant contributions to the process of legal development, but only to the extent that they are acceptable to the international legal community.’²⁶ When and if accepted, international courts ‘exercise a normative pull that provides actors with incentives to adapt existing norms and adopt new ones’.²⁷ Therefore, referring to international courts as ‘agents of development’ acknowledges the fact that international courts are not the sole driving force behind the creation of new rules of law. They are but merely a stimulating element in the process of development of international law, or a link in the chain of ‘communicative practice of international law’.²⁸

Turning then to the meaning of ‘judicial development’, it follows from the above discussion that the development of law is a process which involves various actors, each of whom exerts a different kind of influence on and brings about changes to the law by different

²¹ For an overview of the *stare decisis* doctrine and the practice of international courts and tribunals in implementing this doctrine, see: Guido Acquaviva and Fausto Pocar, ‘Stare decisis’, Max Planck Encyclopedia of Public International Law (11/2007).

²² For example, for the ICJ, former ICJ President Judge Stephen Schwebel contended that ‘the Court has characteristically followed its own reasoning, even though it is not bound by precedents’. See Stephen Schwebel, ‘The Contribution of the International Court of Justice to the Development of International Law’ in Wybo Heere (ed), *International Law and The Hague's 750th Anniversary* (Springer 1999) 407. For the WTO Appellate Body, see Rule 4 Working Procedures for Appellate Review of the WTO Appellate Body. See also: Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 217 *Recueil des Cours* 101 (1998). Charney argued that there had been judicial dialogues and communications between the ICJ and other courts and tribunals in certain areas.

²³ Lauterpacht (n 19) 7.

²⁴ Franklin Berman, ‘The International Court of Justice as an “Agent” of Legal Development?’ in Christian J Tams and James Sloan, *The Development of International law by the International Court of Justice* (OUP 2013) 7.

²⁵ Tams and Tzanakopoulos (n 14) 784.

²⁶ *ibid* 785.

²⁷ Theresa Squatrito et al (eds), *The Performance of International Courts and Tribunals* (CUP 2018) 23.

²⁸ Ingo Venzke, ‘The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation’ (2011) 34 *Loy LA Int'l & Comp L J* 99, 122.

means. When one says that the law has been ‘developed’ by an international court or tribunal, this implies that the law has advanced or changed compared to what it was before the decision is rendered.²⁹ The majority of the scholarly works equate judicial development with clarification of the law. Lauterpacht, in his seminal work on the development of international law by the International Court, argued that the wide recognition of the achievement of the ICJ was owed to the ‘tangible contribution to the development and clarification of the rules and principles of law’.³⁰ Here, Lauterpacht used the terms ‘development’ and ‘clarification’ side by side, which could at first glance suggest that they are separate concepts. However, a closer examination of his book shows that he used these terms interchangeably. Other scholars echo the understanding that clarification of the law is a form of development of the law by international courts, noting that judgments ‘clarify difficult legal questions that were previously more or less left open’,³¹ or that ‘the clarification of international law goes hand in hand with its development’.³² But even when one accepts that international courts and tribunals develop the law through the clarification of the law, it still seems pertinent to determine further what sort of clarification contributes to the development of the law.

In practice, States bring cases to international tribunals not only when they disagree on the facts, but more often when they disagree on the applicable law and the application of the law to the facts. Thus any changes to the law effected by international courts and tribunals—as dispute settlement bodies—can only be brought about through the identification, interpretation and application of the rules and principles applicable to the dispute brought before them. In so doing, international courts and tribunals contribute to the development of the law by clarifying whether a rule of a law exists within the corpus of international law and articulating what the normative content of the rule is.³³

More specifically, the identification and confirmation of the existence of a rule of law is apposite to customary international law. While the definition of customary international law is defined in a rather straightforward manner in Article 38(1), it is not at all easy in practice to ascertain whether the two constituent elements for the formation of a rule of customary law have been satisfied. The identification of international customary law has, thus, always been

²⁹ Gregory Messenger, *The Development of World Trade Organization Law* (OUP 2016) 3.

³⁰ Lauterpacht (n 19) 5.

³¹ Armin von Bogdandy and Marc Jacob, ‘The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the Kosovo Opinion’ in Fastenrath et al (n 11) 818.

³² Geert De Baere, Anna-Luise Chane and Jan Wouters, ‘The Contributions of international and supranational courts to the rule of law: A Framework for analysis’ in De Baere and Wouters (n 6**Error! Bookmark not defined.**) 74.

³³ Merrills, ‘The place of international litigation’ (n 17) 17.

controversial and elusive.³⁴ Against such a backdrop, judicial decisions have widely been accepted as an authoritative and reliable source for identifying whether State practice in implementing a certain rule of law has ripened to reach the status of customary law. A judicial pronouncement on the existence of a particular rule of customary law thus provides an authoritative point of reference, and Pellet even regards it as ‘the final proof of it’.³⁵ Such a confirmation then becomes a ‘focal point’ that inspires subsequent State practice and helps to harden a rule.³⁶

The clarification of the normative content of a particular rule occurs with regard to both treaty law and customary law. It goes without saying that ‘the legal rules need to be sufficiently clear in order to provide a reliable and predictable framework’.³⁷ However, in reality they are not always so. It is perhaps not surprising that customary law can be indeterminate in scope and content, as the process in which customary law is formed is neither formal nor centralised. Yet, treaty law itself, while in black and white, can be equally ambiguous. When concluding international treaties, States sometimes fail to anticipate, or intentionally leave, legal gaps or uncertainties in the final provisions—UNCLOS being a fine example as will be analysed below. When an international court or tribunal is requested to apply such provisions to settle the dispute, it would likely have to fill in these legal gaps.³⁸ In such circumstances, by expounding the rule or principle of law invoked by the parties to the dispute, international courts and tribunals shed light on the meaning of the terms that are nebulous in the treaty and elucidate the scope of rights and obligations that arise from the rule in question.

Hence, through interpreting and applying the law to concrete cases, international courts ‘channel it into a concrete form’ and ‘bestow it with meaning and authoritative weight’.³⁹ As described by Judge Buergenthal, international courts’ engagement with international law is a process of ‘normative accretion’, through which law is not created with legislative processes, but rather in a more modest, incremental fashion, clarifying ambiguities and resolving

³⁴ Scovazzi (n 11) 299. Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 EJIL 523, 524.

³⁵ Alain Pellet, ‘Article 38’ in Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (2nd ed, OUP 2012) 864. See also: Christian J Tams, ‘Meta-Custom and the Court: A Study in Judicial Law-Making’ (2015) 14 LPICT 51.

³⁶ Gleider Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014) 91

³⁷ De Baere, Chane and Wouters (n 32) 70.

³⁸ One commentator contends that ‘judicial gap-filling seems an inescapable by-product of the application of any kind of law to fact’. See Jose Alvarez, ‘What Are International Judges for? The Main Functions of International Adjudication’ in Romano, Alter and Shany (n 11) 158.

³⁹ Boyle and Chinkin (n 18) 272.

perceived gaps in the law.⁴⁰ In so doing, international courts develop the law by thickening the corpus of the law and adding substance to it. In the words of Lauterpacht, development means making law ‘visible’,⁴¹ and the visibility of the law could be understood both in respect of its existence as well as its enriched content.

As a corollary of the clarification of the law, international courts also ‘provide systemization to a question of law where there might be conflicting practice or ambiguity’,⁴² thereby setting the direction for the rule subject to interpretation to develop.⁴³ When hearing a case, a court or tribunal is normally presented with competing views put forward by the parties, usually supported by references to relevant scholarly arguments which may also align themselves into opposing camps. In the process in which actors demand and give reasons for or against a particular interpretation of a provision, the law gains shape and develops.⁴⁴ The ICJ, for example, while keen to portray its practice as just applying the existing law, accepted that ‘in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.’⁴⁵ Judge Waldock similarly contended that in determining and clarifying what is conceived to be the existing law, the ICJ ‘threw fresh light on the considerations and the principles on which the law was based in a manner to suggest the path for future development’.⁴⁶ In other words, international courts and tribunals develop the law not only by clarifying its status and normative content, but also by suggesting a particular direction for the law to develop.

In short, the premise of this thesis is that, while international courts and tribunals may not be given the explicit competence to develop international law, they do in practice contribute to the development of the law through the clarification of the law in the course of settling specific disputes. Judicial decisions confirm the existence of the rules pertinent to the case, identify their scope of application and shed light on their normative content. By virtue of such clarification, the law takes a more defined form, becomes more enriched and detailed, and so it develops. It is through the prism of development by clarification of the law that the

⁴⁰ Thomas Buergenthal, ‘Lawmaking by the ICJ and Other International Courts’ in (2009) Proceedings of the American Society of International Law 403, 403.

⁴¹ Lauterpacht (n 19) 42–43.

⁴² Gleidar Hernandez, ‘International Judicial Lawmaking’ in Catherine Brolmann and Yannick Radi (eds) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 201.

⁴³ Note, however, that Lowe argues that the settlement of international disputes by adjudication is undesirable when litigation is conducted ‘over rights that are in the process of rapid and fundamental change, where the law is in flux’ as ‘international law lacks a legislature that can (at least in principle) act swiftly to reverse the effect of court decisions that indicate what are considered to be undesirable limitations in the existing law’ Vaughan Lowe, ‘The Function of Litigation in International Society’ (2012) 61(1) ICLQ 209.

⁴⁴ Venzke, ‘The Jurisgenerative Practice of Interpretation’ (n 2828) 121.

⁴⁵ *Legality of the Threat or Use of Nuclear Weapons* (n 13) [18].

⁴⁶ Humphrey Waldock, ‘The International Court of Justice as Seen from the Bar and the Bench’ BYBIL 54 (1983) 4.

contributions of UNCLOS tribunals to the development of the law of the sea will be examined in the following chapters.

III. UNCLOS TRIBUNALS AND THE DEVELOPMENT OF THE LAW OF THE SEA

1. The law-development role of UNCLOS tribunals

In order to set the scene for a thorough examination of the question of whether and to what extent UNCLOS tribunals have developed the law of the sea, it is worth taking a step back and ask whether UNCLOS tribunals have the competence to develop the law of the sea in the first place. This exercise does not seem strictly necessary, in light of the conclusion reached in the previous section that international courts and tribunals in practice contribute to the development of the law, even in the absence of any explicit conferral of such competence. However, an answer to such a question is still pertinent it helps to strengthen UNCLOS tribunals' legitimacy and authority in developing the law of the sea. It is argued that, despite the lack of an express provision to that effect, UNCLOS tribunals have implicitly been given the role of developing the law by the drafters of the Convention. This law-development role derives from: (i) the nature of UNCLOS, and (ii) the functions that drafters of the Convention expect UNCLOS tribunals to perform. Each will be analysed in turn.

(i) The nature of UNCLOS

UNCLOS is commonly referred to as 'the Constitution for the Ocean'. According to Tommy Koh, the father of this phrase, UNCLOS was given that name because 'it treats the oceans in a holistic manner. It seeks to govern all aspects of the resources and uses of the oceans'.⁴⁷ The desire to introduce a comprehensive instrument for the law of the sea is also evident in the preamble of the Convention itself, which reads in part, '[t]he problems of ocean space are closely interrelated and need to be considered as a whole'. As a result of the goal to 'govern all aspects' of the oceans in one single convention, as opposed to four separate conventions as had been done previously, UNCLOS became more comprehensive in scope and content than its predecessors. The large number of issues that eventually made their way into UNCLOS means that it is impossible for UNCLOS to regulate every legal issue with depth or specificity. Instead, the Convention could only aim to provide a normative framework for the regulation of ocean

⁴⁷ Tommy Koh, 'UNCLOS at 30: Some Reflections' in Lilian de Castillo (ed), *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea, Liber Amicorum Judge Hugo Caminos* (Brill 2015)107. Philip Allott, one of the representatives of UK in the Third Conference on the Law of the Sea, also observed that, '[t]he Convention's main structural feature is its comprehensiveness'. See Philip Allott, 'Power Sharing in the Law of the Sea' (1983) 77(1) AJIL 1, 8.

space.⁴⁸ As a result, the provisions of UNCLOS are usually worded in general terms, with the details left to be worked out by resort to other means.

Apart from its framework nature, UNCLOS is also characterised as a ‘package deal’, which underpinned the decision to adopt a convention dealing with all major question of the law of the sea.⁴⁹ During the Third Convention on the Law of the Sea, the ‘package deal’ was accepted and implemented with the understanding that:

[N]o delegation’s position on a particular issue should be treated as irrevocable until at least all the elements of the package had formed the subject of agreement and that, therefore, every delegation had the right to reserve its position on any particular issue until it had received satisfaction on other issues which it considered to be of vital importance to it.⁵⁰

The package deal was further reinforced by the consensus procedure in adopting the Convention.⁵¹ Consensus acted as ‘an “invisible hand” process’, which led States ‘to promote an end which was no part of [its] intention’.⁵² This combination meant that the final Convention had to be able, to the greatest extent possible, to accommodate all the demands of 160 States present at the negotiations which lasted for nearly a decade.⁵³ This inevitably resulted in a final Convention which was hinged upon extremely delicate compromise.⁵⁴ This compromise was evident in the large number of UNCLOS provisions which were either deliberately kept vague or ambiguous so as to cater for the interests of as many States as possible, or worded in general terms due to States’ inability to reach an agreement on the matter.

⁴⁸ Richard Barnes, David Freestone and David Ong, ‘The Law of the Sea: Progress and Prospects’ in Richard Barnes, David Freestone and David Ong, *The Law of the Sea: Progress and Prospects* (OUP 2006) 3.

⁴⁹ GM Danilenko, *Law-making in the international community* (Brill 1992) 288.

⁵⁰ UN Doc A/Conf. 62/WP.10/Rev. 2 (1980).

⁵¹ See: Louis B Sohn, ‘Voting Procedures in United Nations Conferences for the Codification of International Law’ (1975) 69(2) AJIL 310, 324–52; Barry Buzan, ‘Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea’ (1981) 75(2) AJIL 324; Wybo P Heere (ed), *International Law and Its Sources: Liber Amicorum Maarten Bos* (Kluwer Law International 1989) 27–28.

⁵² Allott (n 47) 5.

⁵³ Judge Robert Jennings commented that ‘[The conference was] unprecedented, not only in the number of governments taking part, but also in the vast field of law that [was] its subject matter’. See Robert Jennings, ‘The Discipline of International Law’ in International Law Association, *Report of The Fifty-Seventh Conference Held at Madrid* (1976) 622, 623.

⁵⁴ The representative of Bahamas conceded in during the Third Conference that due to the agreement on the package deal, ‘serious-minded delegations accepted that it would be impossible to satisfy each other’s individual concerns. In this spirit, compromise agreements have been reached.’ See: VR191st plen. mtg. (1982), id. at 104 in Hugo Caminos and Michael R Molitor, ‘Progressive Development of International Law and the Package Deal’ (1985) 79(4) AJIL 871. See also: AO Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Martinus Nijhoff 1987) 89.

In short, the preceding discussion shows that, in terms of substance, the Convention excels in breadth but lacks in depth. As a combined consequence of the attempt to regulate all activities in the ocean space and accommodate the interests of the negotiating States, the Convention is full of general provisions or nebulous terms whose meaning was left to be determined at a subsequent point in time.

(ii) The expected role of the dispute settlement system

It has been contended that the compulsory jurisdiction of UNCLOS tribunals ‘makes judicial interpretation a potentially important mode of change of UNCLOS’.⁵⁵ While there is much merit in this contention, it is arguable that the ability of UNCLOS tribunals to develop the law of the sea stems from a deeper cause than just the existence of compulsory jurisdiction.

Settlement of disputes was not a topic of substantial concern at the beginning of the law of the sea negotiations. It was not until 1976 that the topic attracted sufficient attention of the whole Third Conference to be considered in the plenary.⁵⁶ By the end of Third Conference, States succeeded in establishing a dispute settlement system, contained mostly in Part XV and partly in Part XI of the Convention, which was considered to be ‘the most sophisticated and detailed system for international dispute settlement ever drafted’.⁵⁷ One of the most fundamental changes that States agreed upon was that, instead of remaining optional as was the case with the 1958 conventions on the law of the sea, the dispute settlement under UNCLOS became compulsory for all States parties. It should be recalled that the Third Conference took place in an era where traditional reluctance of States to accept compulsory dispute settlement was still prevalent. The change in States’ attitude toward the nature of dispute settlement was, therefore, a highly radical development. Such a progressive approach towards dispute settlement came about as the negotiating States realised that, due to the delicately balanced UNCLOS provisions, some sort of mechanism would be needed to ensure that the hard-fought compromises would not be tampered with and reduced to empty black letters.

However, the negotiating texts of the Convention also show that the decision to put in place a compulsory dispute settlement system did not come about easily. The opponents of the system believed that compulsory jurisdiction was inappropriate, for it would affect State

⁵⁵ Jill Barrett, *The UN Convention on the Law of the Sea: A Living Treaty?* in Jill Barrett and Richard Barnes (eds) *Law of the Sea: UNCLOS as A Living Treaty* (British Institute of International and Comparative Law, 2017) 27.

⁵⁶ Myron H Nordquist (eds), *United Nations Convention on the Law of the Sea, 1982 : A Commentary*, Vol V (Martinus Nijhoff 1985), xiii. [Virginia Commentary]

⁵⁷ John E Noyes, ‘Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea’ (1989) 4 Conn J Int’l L 675, 675.

sovereignty.⁵⁸ Further, they argued that any judicial decision made on the basis of the Convention would be arbitrary because the law and the criteria on which dispute settlement would be based were so vague.⁵⁹ As a result, many States preferred to retain the model of the 1958 Conventions, which incorporated the compulsory settlement of disputes in an optional protocol.⁶⁰ On the other hand, the proponents of the compulsory dispute settlement system argued that it was precisely because the substantive articles of the treaty were so vague, they would not be able to provide ‘a complete answer to the basic problems or issues on which disputes could occur’. Thus, there would be a need for means to ensure that the disputes that were bound to arise would be settled peacefully.⁶¹ More importantly, many States made clear that they would only agree to many of the proposals on the substantive issues in the Convention if ‘a general system of compulsory dispute settlement for ocean uses’ was to be included.⁶² Here, ‘the package deal’ approach resurfaced, with the inclusion of a compulsory dispute settlement as the key condition for many States.

In the end, States reached an agreement to establish a compulsory dispute settlement system as an integral part of the Convention. The rationale for the establishment of a compulsory dispute settlement system is captured by the following statement made by the President of the Conference:

Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise, the compromise will disintegrate rapidly and permanently [...] Effective dispute settlement would also be the guarantee that the substance and intention within the legislative and language of the convention will be interpreted both consistently and equitably.⁶³

As is clear from this statement, the dispute settlement system was put in place with the primary aim to resolve any dispute that might arise between the parties in the implementation of the Convention. However, it is equally clear that UNCLOS dispute settlement bodies were expected to also (i) safeguard the delicate balance of rights and interests of States parties as recorded in the Convention and (ii) provide authoritative, consistent and equitable interpretation

⁵⁸ See, eg, Statement made by China in Third United Nations Conference on the Law of the Sea, Official Records, Volume V: Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fourth Session (New York, 15 March to 7 May 1976), p. 24, para. 26 [Official Records, Volume V]

⁵⁹ *ibid*, p 45, para 22.

⁶⁰ *ibid* p 24, paras 28, 31.

⁶¹ *Virginia Commentary* (n 56) 6.

⁶² Statement of the United States, Official Records, Volume V. See also: Statement made by Australia that ‘many provisions of the Convention would be acceptable only if their interpretation and application were subject to expeditious, impartial and binding decisions’ *Virginia Commentary* (n 56) 92.

⁶³ *Virginia Commentary* (n 56) 10.

of the law contained in the Convention. These two tasks show that, within the framework of the Convention, UNCLOS tribunals were expected to assume roles that transcend the confines of settling concrete disputes. More specifically, the tribunals, as the ‘pivot upon which the delicate equilibrium of the compromise must be balanced’, are expected to protect the integrity of the Convention as a whole and they should do so by virtue of providing consistent and equitable interpretation of its provisions. Put another way, UNCLOS tribunals should not interpret the law under UNCLOS merely to dispose of a disagreement between the parties to the dispute. Instead, given that UNCLOS is replete with provisions that are generally or vaguely worded thus that it constantly runs the risk of being subjected to contrasting reading on the part of States, UNCLOS tribunals are expected to clarify legal ambiguities and provide normative guidance to States in implementing the Convention in order to safeguard the uniformity and integrity of the Convention. In performing these tasks, the role of UNCLOS tribunals becomes that of an institutional guardian. In that capacity, UNCLOS tribunals have the ability to influence and shape the meaning and scope of the rights and obligations under the Convention and to become authoritative reference points in the legal discourse.⁶⁴

In conclusion, the drafters of UNCLOS created a framework instrument built upon delicate compromises, resulting in a Convention which was both general and vague in its provisions. This necessarily meant that States accepted, and indeed expected, further interpretation and guidance to be provided in order for the Convention to be effective. Coupled with the fact that States made a conscious and innovative decision to establish a dispute settlement system with compulsory jurisdiction with the aim of ensuring the uniform and consistent application of the Convention, it is argued that UNCLOS tribunals were given the implicit authority to develop the law contained in UNCLOS.

2. Ad hoc tribunal v permanent tribunal: is there a difference?

This thesis uses the term ‘UNCLOS tribunals’ to collectively refer to both ITLOS and Annex VII arbitral tribunals. But of course, these two bodies—as a permanent court and as ad hoc arbitral tribunals, respectively—differ in several fundamental aspects. In general, ad hoc arbitral tribunals are constituted to settle the single dispute brought before them. Arbitrators are selected by the parties to the disputes, with a specified rule of procedure and a set of applicable law to decide the dispute.⁶⁵ As a result, the conventional wisdom is that international arbitral tribunals would be more focused on settling the dispute before them and in a way that is most

⁶⁴ Venzke terms the ability of international courts and tribunals to influence and shape the meaning of the law as ‘semantic authority’. Venzke (n 28) 122.

⁶⁵ See generally JG Merrills, *International Dispute Settlement* (6th edn, CUP 2017) 88–95.

acceptable to the parties to the case. Thus the orthodox belief is that arbitrators are less inclined to address issues that go beyond what is needed to settle the dispute. Moreover, as they operate on an ad hoc basis and thus there is no continuity in the decisions rendered, it is often assumed that it would be impossible to speak of a consistent arbitral case law. Ad hoc arbitral tribunals are, therefore, considered to be less likely to have an impact on the development of international law compared to permanent courts. As Merrills argues, ‘to the extent that the avoidance and settlement of disputes are assisted by the development of international law, a permanent body has the potential to contribute more to legal progress than intermittent arbitrations’.⁶⁶

Leaving aside the fact that such a contention arguably no longer has any merits today considering the prevalence of international arbitral tribunals in many areas of international law,⁶⁷ it is further argued that the presumed differences between standing courts and ad hoc arbitral tribunals do not play out in the case of ITLOS and Annex VII arbitral tribunals. Admittedly, Annex VI and Annex VII providing for the Statute of ITLOS and for arbitration respectively contain some procedural differences to cater for their standing and ad hoc nature. For example, ITLOS is the default tribunal for prompt release proceedings under Article 292 and for provisional measures pending the constitution of the arbitral tribunal under Article 290(5), while Annex VII arbitral tribunal is the default tribunal for contentious proceedings should the parties fail to agree on the choice of procedures under Article 287(5). Moreover, the flexibility that is usually associated with arbitration still exists in the case of Annex VII arbitration under UNCLOS, for example, the parties can still appoint arbitrators, and the arbitral tribunal determines its own procedure. Nevertheless, as Article 4 of Annex VII makes clear, an arbitral tribunal constituted under Annex VII ‘shall function in accordance with this Annex and the other provisions of this Convention’. As dispute settlement bodies established by UNCLOS, ITLOS and Annex VII arbitral tribunals are conferred the same scope of jurisdiction over ‘disputes concerning the interpretation and application of the Convention’ as specified under Article 288(1) UNCLOS and operate under the same procedure stipulated under Part XV. In other words, when ITLOS and Annex VII arbitral tribunals decide cases brought to them under the Convention, they operate under the same jurisdictional framework, dealing with disputes arising out of the same convention and applying and having resort to the same body of law—law of the sea and other relevant general rules of international law—as provided for under

⁶⁶ Merrills, ‘The place of international litigation’ (n 17) 11.

⁶⁷ See Christine Gray and Benedict Kingsbury, ‘Developments in Dispute Settlement: Inter-State Arbitration Since 1945’ (1993) 63(1) BYBIL 97; Clovis J. Trevino, ‘State-to-State Investment Treaty Arbitration and the Interplay with Investor–State Arbitration Under the Same Treaty’ (2014) 5 JIDS 199; Tamar Meshel, ‘The Evolution of Interstate Arbitration and the Peaceful Resolution of Transboundary Freshwater Disputes’ (2016) 1 JIDS 361.

Article 293. It follows that the disparities between these two bodies in terms of their ability to deal with the substantive issues and clarify the law may be more apparent than real.

Furthermore, Annex VII arbitral tribunals are part of the dispute settlement system of UNCLOS. Thus while they are ad hoc bodies, they have been to a large extent institutionalised. For instance, according to Article 3(c), (d) and (e) of Annex VII, when the respondent fails to appoint its arbitrator or when the two parties are unable to agree on the remaining three arbitrators, the appointment of these arbitrators is made by the President or Vice-President of ITLOS. In practice, the majority of Annex VII arbitrators is or has been ITLOS judges. All of this not only highlights the close relationship between these two bodies but also the fact that Annex VII arbitral tribunals are deeply embedded in and assisted by the framework of UNCLOS. This should arguably alleviate any concerns regarding the lack of institutional continuity on the part of the arbitral tribunals stemming from their ad hoc nature. As Wood notes, '[u]nder Part XV of UNCLOS, arbitration and a permanent court may be mutually reinforcing; a permanent court may act in support of an arbitral process pending establishment of the tribunal, thus removing one disadvantage of ad hoc arbitration.'⁶⁸

The mutually reinforcing relationship between ITLOS and Annex VII arbitral tribunals further manifests itself in the fact that, as will become apparent in the subsequent chapters of this thesis, in deciding the cases, these two bodies frequently refer to and cite each other's decisions. This denotes that in their view, there is little difference between the value of an ITLOS judgment and an Annex VII arbitral award, and that they 'see themselves as serving the same international legal system'.⁶⁹ The following chapters will show that it would be difficult to maintain that the contribution ITLOS as a standing court has been more significant than that of ad hoc tribunals in the development of the law of the sea. ITLOS might have had more cases but the number of cases is of course not determinative of the impact on the development of the law. While Annex VII arbitral tribunals have only dealt with fewer than ten cases, these cases touch upon some of the most important issues under UNCLOS. In such cases as *Chagos MPA*, *Arctic Sunrise* or *South China Sea*, it seems clear that the arbitral tribunals were not only concerned with disposing of the disputes in a way that was acceptable to the parties as would be expected of an arbitral tribunal, but went further to elucidate on issues which have more general implications for the development of the law.

⁶⁸ Michael Wood, 'Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases' (2017) 32(1) ICSID Review 1, 8.

⁶⁹ *ibid*, 9.

In short, there is virtually no reason to distinguish between ITLOS and Annex VII arbitral tribunals when it comes to their contribution to the development of the law of the sea. The differences in the procedural rules relating to the composition of a standing court and the constitution of an ad hoc tribunal have little bearing on the value of their eventual decisions or on their potential impact on the development of the law of the sea.

IV. THE STRUCTURE OF THE THESIS

Having established that UNCLOS tribunals have implicitly been given a law-development role, the remainder of this thesis will be devoted to analysing and assessing the contributions of UNCLOS tribunals to the development of the law of the sea, built upon the framework to understand ‘judicial contribution’ set out in this Chapter. The following three Chapters will focus on three areas of the law of the sea. In particular, Chapter 2 will examine the contributions that UNCLOS tribunals have made to the development of the law on fisheries, Chapter 3 to the development of the outer continental regime and Chapter 4 to the development of the law on the protection of the marine environment. Based on the findings of these chapters, Chapter 5 seeks to analyse the factors that impact the contribution of UNCLOS tribunals to the development of the law. More specifically, this chapter examines four factors, namely (i) the jurisdictional scope of UNCLOS tribunals, (ii) the institutional design of UNCLOS, (iii) the interpretative method employed by UNCLOS tribunals in deciding their cases and (iv) the perception that UNCLOS tribunals hold regarding their roles, in order to grasp the impact of these factors on the contributions of UNCLOS tribunals to the law of the sea. Chapter 6 concludes by taking stock of the contribution of UNCLOS tribunal in these areas and offering some final observations on the performance of UNCLOS tribunals in the development of the law of the sea.

The entry into force of UNCLOS brought about an important development in the law on fisheries. UNCLOS introduced a new maritime zone, ie the exclusive economic zone (EEZ), in which coastal States have the exclusive rights to explore and exploit marine living resources, while at the same time, assuming the obligations to conserve and manage these resources.⁷⁰ In the high seas, the principle of freedom of the high seas still applies to all activities, including fisheries. This freedom, is however, subjected under Article 87 to the obligation to conserve and manage living resources. It should be noted that the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas also subjected the right to engage in fishing to provisions regarding the conservation of living resources.⁷¹ However, Article 2 of the 1958 Convention defines conservation as ‘the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products’ and requires conservation programmes to be formulated ‘with a view to securing in the first place a supply of food for human consumption.’ By contrast, Articles 61(4) on conservation of living resources in the EEZ and Article 119 on conservation of living resources in the high seas under UNCLOS require conservation measures to take into account ‘the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened’. It can be observed that UNCLOS has clearly shifted the focus from exploitation of resources solely for the benefit of humans to placing emphasis on measures with a view to conserving the marine environment as a whole.⁷²

Before the UNCLOS dispute settlement system came into being, fisheries disputes that were brought before the ICJ were centred mainly on claims regarding the exploitation of fisheries resources and establishing special fisheries zones.⁷³ In contrast, due to the evolution in fisheries law brought about by UNCLOS, the decisions of UNCLOS tribunals concerning fisheries have concentrated more on clarifying the scope of the rights and obligations of both coastal States

⁷⁰ Stuart M Kaye, *International Fisheries Management* (Kluwer Law International 2001) 92–98.

⁷¹ Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958) 559 UNTS 285.

⁷² Ellen Hey, ‘The Fisheries Provisions of the LOS Convention’ in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999) 28.

⁷³ *Fisheries Jurisdiction (United Kingdom v Iceland)* [1974] ICJ Rep 3; *Fisheries case (United Kingdom v Norway)* [1951] ICJ Rep 116.

and flag States concerning the conservation and management of living resources.⁷⁴ As UNCLOS only serves as the legal framework for resource regulation,⁷⁵ most of the relevant provisions are either general in scope or containing terms that are left open to interpretation. UNCLOS tribunals' decisions have thus presented important contributions to developing the law on fisheries under the Convention. Fisheries disputes brought before ITLOS and Annex VII arbitral tribunals have touched upon the following core issues: (i) the rights and obligations of coastal States concerning fishing activities in the EEZ (ii) the rights and obligations of flag States concerning fishing activities in the EEZ and (iii) the obligations of coastal States in the conservation and management of transboundary fish stocks. The contributions of UNCLOS tribunals to clarifying each of these issues will be examined in turn.

I. COASTAL STATES' RIGHTS AND OBLIGATIONS OVER FISHING ACTIVITIES IN THE EEZ

The majority of fisheries disputes in the EEZ brought under the auspice of Part XV UNCLOS have been prompt release cases before ITLOS. Other than prompt release proceedings, ITLOS has only examined one contentious case concerning to fisheries-related activities in the EEZ, that is the *Virginia G* case. In these cases, ITLOS was engaged in the interpretation of and interaction between Articles 56, 58, 62 and 73 to clarify the extent of the coastal State's regulatory and enforcement competences over fisheries matters. Furthermore, in the context of prompt release proceedings, discussions concerning the determination of a 'reasonable bond' also occupied a substantial part of the case law. As will be shown, ITLOS' decisions have clarified the scope of the coastal State's regulatory power over fisheries resources, and specified the criteria for a 'reasonable bond', but they could have provided more guidance on coastal States' enforcement powers.

1. Coastal States' regulatory power

Article 56 provides that coastal States have 'the sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living or non-living' in the EEZ. Article 62(4) then provides a list of activities which coastal States, as part of the exercise of their sovereign rights over living resources in the EEZ, may regulate in order to conserve and manage their living resources. The list under Article 62(4) is, however, not exhaustive. Given that UNCLOS was negotiated in the 1970s, and thus that the drafters of the Convention

⁷⁴ Alexander Yankov, 'Current Fisheries Disputes and the International Tribunal for the Law of the Sea' in John Norton Moore and Myron H Nordquist (eds), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (Martinus Nijhoff 2001) 224.

⁷⁵ Richard Barnes, 'The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?' in Freestone, Barnes and Ong (n 48) 237.

could not envision many of the activities which commonly take place in the EEZ today, the question has arisen regarding the scope of coastal States' regulatory power, particularly regarding the extent to which it encompasses activities which are not expressly provided for under UNCLOS.

A determination as to whether a particular activity which is not specifically provided for under UNCLOS could be regulated under the coastal State's fisheries law is important for two reasons. First, from a practical view, it provides stability and transparency for States in conducting activities at sea. Second, such a determination clarifies the unique nature of the EEZ. It is to be recalled that the EEZ is a brand new concept introduced by UNCLOS aimed at ensuring a delicate balance between the rights and obligations of coastal States and those of flag States.⁷⁶ In the EEZ, coastal States have exclusive sovereign rights in the EEZ but only insofar as living resources are concerned; while other States enjoy the freedom of the seas compatible with the Convention. Article 55 makes clear that the EEZ is a 'specific legal regime', a *sui generis* functional zone under which there is no presumption in favour of coastal States, as with the territorial sea, or flag States, as with the high seas.⁷⁷ Scholars have, however, questioned this assumption, arguing that the history and rationale of the EEZ,⁷⁸ as well as the measures and control that coastal States are entitled to exercise in the EEZ,⁷⁹ ultimately shift the balance in favour of coastal States. Another contends that, given UNCLOS new focus on the conservation of the marine resources, the balance between the interests of the flag States and the sovereign rights of the coastal States 'needs a new equilibrium'.⁸⁰ A classification by an international tribunal one way or the other will shed light on where balance should be struck and provides new insights into the *sui generis* nature of the EEZ.

ITLOS has only had the opportunity to deal with this question in relation to one activity—the bunkering of fishing vessels in the EEZ. Under UNCLOS, bunkering activities in the EEZ are neither explicitly qualified as subject to flag State jurisdiction nor do they fall under coastal States' regulatory power under Article 62(4). Given the prevalence of offshore bunkering

⁷⁶ David J Attard, *The Exclusive Economic Zone in International Law* (Claredon Press 1987) 1; F Orrego Vicuna, *The Exclusive Economic Zone* (CUP 1989) 3–15; R L Friedheim, 'Fishing Negotiations at the Third United Nations Conference on the Law of the Sea' (1991) 22 ODIL 209.

⁷⁷ Umberto Leanza and Maria Cristina Caracciolo, 'The Exclusive Economic Zone' in David Attard, Malgosia Fitzmaurice and Norman A Martinez Gutierrez (eds) *The IMLI Manual on International Maritime Law*, Volume I: The Law of the Sea (OUP 2014) 7.

⁷⁸ Alexander Proelss, *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos, 2017) 432–33.

⁷⁹ Leanza and Caracciolo (n 77) 186.

⁸⁰ Seline Trevisanut, 'The Exercise of Administrative Functions by ITLOS: A Comment on Prompt Release Case-Law' in Boschiero et al (n 11) 322.

activities and their economic benefits nowadays,⁸¹ a definitive answer to legal nature of the activity was much needed.

The question surrounding the bunkering of fishing vessels came up in the very first case brought to ITLOS, the *M/V Saiga* prompt release case.⁸² *M/V Saiga*—an oil tanker flying the flag of Saint Vincent and the Grenadines—served as a bunkering vessel supplying fuel oil to fishing vessels and other vessels operating off the coast of Guinea and was arrested by Guinean Custom patrol boats. The prompt release procedures under Article 292, read together with Article 73(2), can only be invoked if there is a violation of the coastal State’s law and regulations concerning fishing activities. Therefore, ITLOS was faced with the question regarding whether the bunkering of a fishing vessel within a coastal State’s EEZ could be considered a fisheries-related activity?⁸³ While ITLOS eventually declined to offer a view on this question, deeming unnecessary to resolve the case before it,⁸⁴ ITLOS still stated that ‘laws or regulations on bunkering of fishing vessels may arguably be classified as laws or regulations on activities within the scope of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ’.⁸⁵

This position was not supported by all the judges. In his dissenting opinion, President Mensah noted that the classification of bunkering activities was an ‘issue of such fundamental importance’ that ITLOS should not have answered the question by implication and very much in the passing.⁸⁶ By the same token, Judges Wolfrum and Yamamoto also called on ITLOS to be cautious in interpreting Article 73 and making general pronouncements on the classification of bunkering in the context of a prompt release case, believing the arguments advanced ‘may prejudice future decisions of the Tribunal.’⁸⁷ On the substance, the two Judges disagreed with the majority’s conclusion and contended that this activity should not fall under fisheries law

⁸¹ Rainer Lagoni, ‘Offshore bunkering in the Exclusive Economic Zone’ in Tafsir Malick Ndiaye, Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 614; *M/V ‘SAIGA’ (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment, Sep. Op. Anderson) ITLOS Reports 1999, 10 [137]; *M/V ‘Virginia G’ (Panama/Guinea-Bissau)* (Judgment, Dis. Op. Ndiaye) ITLOS Reports 2014, 4 [258] – [270].

⁸² *M/V ‘SAIGA’ (Saint Vincent and the Grenadines v Guinea)* (Prompt Release, Judgment) ITLOS Reports 1997, 6.

⁸³ *ibid* [56].

⁸⁴ *ibid* [59].

⁸⁵ *ibid* [63].

⁸⁶ *M/V ‘SAIGA’ (Saint Vincent and the Grenadines v Guinea)* (Prompt Release, Dis. Op. Mensah) ITLOS Reports 1997, 6 [23].

⁸⁷ *M/V ‘SAIGA’ (Saint Vincent and the Grenadines v Guinea)* (Prompt Release, Collective Dis. Op. Wolfrum and Yamamoto) ITLOS Reports 1997, 6 [25].

and regulations as the list under Article 62(4) is not meant to encompass activities of merchant ships just because they service fishing vessels.⁸⁸

ITLOS was again faced with this question in *M/V Saiga (No. 2)* in 1999 in which it was asked to deal with the merits of the aforementioned dispute between Saint Vincent and Guinea.⁸⁹ However, as ITLOS was able to settle the case without having to address the broader question of the rights of coastal States and other States with regard to bunkering in the EEZ,⁹⁰ it declined to make any findings on the question of bunkering of offshore activities.

It was not until *Virginia G* in 2014 that ITLOS managed to provide a definitive answer to the long-debated question of whether coastal States can regulate the bunkering of fishing vessels under their fisheries laws and regulations.⁹¹ The *M/V Virginia G*, which was flying the flag of Panama, provided gas oil to foreign vessels fishing in the EEZ of Guinea-Bissau and was arrested for that activity by the authorities of Guinea-Bissau. The question that ITLOS had to address was whether Guinea-Bissau, in the exercise of its sovereign rights in respect of the exploration, exploitation, conservation and management of natural resources in its EEZ, had the competence to regulate bunkering of foreign vessels fishing in this zone.⁹²

ITLOS first identified that the legal basis for answering such question comprised Article 56 read together Articles 61 to 68 of the Convention.⁹³ Article 61 and 62 provide for measures that the coastal State must take to conserve and utilise living resources in the EEZ respectively, while the remaining articles mainly deal with the conservation and management of transboundary stocks. According to ITLOS, the term ‘sovereign rights’ in Article 56(1) encompassed all rights ‘necessary for and connected with’ the exploration, exploitation, conservation and management of the natural resources, ‘including the right to take the necessary enforcement measures’.⁹⁴ The use of the terms ‘conserving’ and ‘managing’ in the same article, in the Tribunal’s view, indicated that the rights of coastal States went beyond conservation in its strict sense.⁹⁵ On that basis, ITLOS found that Articles 56(1) and 62(4) were connected, in the sense that the measures listed under Article 62(4) were indeed management measures within the meaning of Article 56(1).⁹⁶ ITLOS further noted that the wording of Article 62(4) of the

⁸⁸ *ibid* [22].

⁸⁹ *M/V ‘SAIGA’ (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) ITLOS Reports 1999, 10 [137].

⁹⁰ *ibid* [138].

⁹¹ *M/V ‘Virginia G’ (Panama/Guinea-Bissau)* (Judgment) ITLOS Reports 2014, 4 [207].

⁹² *ibid* [208].

⁹³ *ibid* [209].

⁹⁴ *ibid* [211].

⁹⁵ *ibid* [212].

⁹⁶ *ibid*.

Convention, in particular, the use of ‘inter alia’, indicated that this list was not exhaustive.⁹⁷ However, in order for coastal States to regulate an activity as part of their fisheries laws, there must be a direct connection to fishing. ITLOS observed that such a connection to fishing existed for the bunkering of foreign vessels fishing in the EEZ since this enabled them to continue their activities without interruption at sea.⁹⁸ To support its conclusion, ITLOS also referred to the fact that the definitions of ‘fishing’ and ‘fishing-related’ activities in international agreements ‘establish a close connection between fishing and the various support activities, including bunkering’⁹⁹ and that the national legislation of several States regulated bunkering of foreign vessels in their EEZ as part of their fisheries law.¹⁰⁰

Lastly, even though coastal States have sovereign rights over living resources, Article 58 guarantees other States the freedom of navigation and other lawful uses of the sea. Thus, ITLOS had to establish whether the bunkering of foreign vessels was covered by the freedom of navigation provided for under Article 58.¹⁰¹ As ITLOS had already found the bunkering of fishing vessels to be closely related to fisheries and thus, coastal States’ competence to regulate bunkering of fishing activities in the EEZ derives from their sovereign rights in the EEZ, it concluded that Article 58 would not prevent coastal States from regulating, under Article 56, bunkering of foreign vessels fishing in their EEZs.¹⁰² This meant that the coastal States’ regulatory competence was limited only to the bunkering of fishing vessels; it did not extend to other bunkering activities.¹⁰³

For the above reasons, ITLOS held coastal States may regulate the bunkering of foreign vessels fishing in its EEZ to conserve and manage its living resources under Article 56 of the Convention read together with Article 62(4) of the Convention.¹⁰⁴ ITLOS’ opinion presented a significant development compared to its previous decisions. ITLOS in the *Virginia G* case finally provided a definitive answer to the question. The fact that ITLOS interpreted Article 62(4) broadly in light of recently adopted international instruments as well as contemporary State practice shows that ITLOS did not consider the Convention in a static mode but as an evolving instrument.

⁹⁷ *ibid* [213].

⁹⁸ *ibid* [215].

⁹⁹ *ibid* [216].

¹⁰⁰ *ibid* [217].

¹⁰¹ *ibid* [220].

¹⁰² *ibid* [222].

¹⁰³ *ibid* [223].

¹⁰⁴ *ibid* [217].

As mentioned above, the nature of the EEZ would require ITLOS to carefully balance the rights of both coastal States and flag States when examining an activity taken place in the EEZ.¹⁰⁵ Articles 56 and Article 58 impose on both the coastal State and other States operating in the EEZ the obligation to have due regard to each other's rights and duties, which requires a balancing exercise between the rights and obligations of the States concerned.¹⁰⁶ The 'due regard' obligation and the entailing balancing exercise meant that ITLOS would have to consider whether and to what extent the expansion of coastal States' power under Article 56 to cover the bunkering of fishing vessels would affect the freedom navigation that foreign vessels normally enjoy in the EEZ under Article 58. ITLOS indeed took cognisance of this 'due regard' obligation in *Virginia G*. By holding that coastal States can regulate only regulate fisheries-related bunkering and not bunkering activities in general, ITLOS gave due regard to the freedom of navigation of other States in the EEZ. At the same time, by giving coastal State the competence to regulate bunkering of foreign vessels engaged in the EEZ, it also gave due regard to their sovereign rights in the EEZ.¹⁰⁷

However, it should be noted that in this course of this balancing exercise, ITLOS failed to take notice of Article 59 which is designed to deal precisely with situations in which UNCLOS does not attribute rights or jurisdiction to coastal States or to other States.¹⁰⁸ Article 59 requires that the conflict of interests should be resolved 'on the basis of equity and in light of all relevant circumstances'. One could be tempted to argue that Article 59 would not be applicable to this situation, as the list under Article 62(4) is not exhaustive, thus it cannot be said that the bunkering of a fishing vessel is not regulated by the Convention. However, the fact that ITLOS completely ignored this important article was regrettable. At least, ITLOS should have acknowledged the existence of this article and explained why it was inapplicable. This would have made their conclusion more nuanced and provided better guidance for future cases.

In short, ITLOS in *Virginia G* clarified the scope of coastal States' 'sovereign rights' as provided for under Article 56(1) to encompass all measures to not only conserve but also manage marine resources in its EEZ. With regard to the scope of coastal States' regulatory

¹⁰⁵ Judge ad hoc Sérvulo Correia acknowledged the need to maintain this balance in his Dissenting Opinion, noting that decision of ITLOS regarding bunkering of fishing lay 'within the framework of the fragile system of balances and counterbalances that characterizes the regime governing the EEZ'. See *M/V 'Virginia G' (Panama/Guinea-Bissau)* (Judgment, Dis. Op. Sérvulo Correia) ITLOS Reports 2014, 4 [1].

¹⁰⁶ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Arbitral Award of 18 March 2015, [534] <http://www.pca-cpa.org/MU-UK%2020150318%20Award4b1.pdf?fil_id=2899> accessed 25 September 2018. [Chagos MPA]

¹⁰⁷ Vincent Cogliati-Bantz, 'Introductory Note to The M/V 'Virginia G' Case (Panama/Guinea-Bissau) (ITLOS)' (2014) 53(6) ILM 1161.

¹⁰⁸ See also: *M/V 'Virginia G' (Panama/Guinea-Bissau)* (Judgment, Decl. Nelson) ITLOS Reports 2014, 4 [8]–[10]; *M/V 'Virginia G' (Panama/Guinea-Bissau)* (Judgment, Decl. Nelson) ITLOS Reports 2014, 4 [8].

power in the EEZ, it is now clear that in order for the coastal State to regulate an activity under their fisheries laws and regulations, such an activity needs not be explicitly mentioned in Article 62(4). The key requirement is that there is a direct connection between fishing and the activity. On this basis, the long-debated question of whether the bunkering of fishing vessels falls within the scope of Article 62(4) has been settled in favour of coastal States. In his Dissenting Opinion to the *Virginia G* case, Judge *ad hoc* Sérvulo Correia acknowledged that the decision of ITLOS regarding bunkering of fishing vessel was an ‘important contribution’ and a ‘landmark decision’.¹⁰⁹ Similarly, Judge Jesus hailed ITLOS’ findings on the bunkering of foreign fishing vessels and the confiscation of foreign ships involved in fishing activities as ‘important contributions to the development of international of the sea’.¹¹⁰

ITLOS has adopted a broad understanding of what constitutes fisheries and fisheries-related activities, requiring only a direct connection with fishing activities. ITLOS’s interpretation of Article 62(4) stood in stark contrast with that of the arbitral tribunal in *Gulf of St. Lawrence*. In this case, the arbitral tribunal held that the coastal State’s sovereign right to manage the living resources of the EEZ did not extend to the processing of fish caught in the EEZ.¹¹¹ Therefore, this arbitral tribunal concluded that Article 62(4) UNCLOS did not cover activities substantially different from those listed. Arguably, ITLOS’ approach is more desirable for two reasons. First, it reflects the nature of the Convention as merely setting up a legal framework for activities at sea: it should not be interpreted in a narrow, rigid manner. Second, it placed contemporary State fishing practices which were not envisioned by the drafters of the Convention, thus not reflected in the wording of UNCLOS, under the regulation of the Convention.

From a broader perspective, ITLOS dealt with a right which was not assigned to coastal States nor to flag States under UNCLOS. The fact that ITLOS now placed bunkering of fishing vessels under coastal States’ regulation seems to suggest, at first glance, that the balance of rights has been tilted in favour of coastal States and that ITLOS has expanded the power of coastal States in the EEZ. However, it is worth remembering that ITLOS’ conclusion was based, to a large extent, on State practice regarding the activity of bunkering as recorded in subsequent international agreements or in States’ national legislations. These show a high level of acceptance of coastal States’ power to regulate bunkering of fishing vessels. The fact that

¹⁰⁹ Dissenting Opinion of Judge *ad hoc* Sérvulo Correia (n 105) [1].

¹¹⁰ Dissenting Opinion of Judge Jesus (n 123) [2].

¹¹¹ *Case concerning filleting within the Gulf of St. Lawrence (Canada v France)* (17 July 1986) 19 RIAA 225 [50].

ITLOS conclusion reflected State practice indicates that it had not upset the balance of rights in the EEZ regime, but merely reaffirming a new balance.

2. Coastal States' enforcement power

In order to enable States to exercise their sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ effectively, Article 73(1) allows coastal States to take measures 'as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention'. By virtue of the phrase 'to ensure compliance with the laws and regulations adopted by it in conformity with the Convention', UNCLOS establishes that the enforcement power of coastal States under Article 73(1) only extends to laws and regulations concerning fisheries-related activities prescribed under Article 62(4). Article 73(1) lists several measures, such as boarding, inspection, arrest and judicial proceedings, which they are permitted to take to deal with foreign vessels illegally fishing in the EEZ. Article 73(3), however, only prohibits imprisonment and other forms of corporal punishment as penalties for violations of fisheries laws and regulations. This leaves open the question as to whether a coastal State is allowed to take a measure which is not specified in Article 73(1) but also not prohibited under Article 73(3). Confiscation of fishing vessels was one such measure brought before ITLOS. The issue of whether coastal State could legitimately confiscate foreign fishing vessels to ensure compliance with its fisheries law came up in three cases, namely in *Grand Prince*, *Tomimaru* and *Virginia G*. As ITLOS found that it had no jurisdiction in *Grand Prince* and thus did not deal with the issue,¹¹² the remainder of this part will focus on the latter two.

In *Tomimaru*, ITLOS noted that Article 73 of the Convention made no reference to confiscation of vessels but that it was aware that many States provided for the confiscation of fishing vessels in their legislation relating to the management and conservation of marine living resources.¹¹³ Although ITLOS did not elaborate on the impact of such State practice on the interpretation of Article 73, it went on to say that 'confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention'.¹¹⁴ This indicated that ITLOS was not against confiscation *per se*, so long as it was done in a manner that was not prejudicial to the rights the flag State, including the rights to have recourse to the prompt release procedure under the Convention.¹¹⁵

¹¹² For an analysis of ITLOS' jurisdiction, see Chapter II.2.1.

¹¹³ '*Tomimaru*' (*Japan v Russian Federation*) (Prompt Release, Judgment) ITLOS Reports 2005-2007, 74 [72].

¹¹⁴ *ibid* [76].

¹¹⁵ *ibid*.

ITLOS was able to consider the compatibility of the confiscation with UNCLOS in more detail in *Virginia G*. In examining whether confiscation of the bunkering vessel was in violation of Article 73(1), ITLOS observed that pursuant to this article, coastal States may take such measures ‘as may be necessary to ensure compliance with the laws and regulations adopted by [them] in conformity with this Convention.’¹¹⁶ Accordingly, ITLOS had to establish whether (i) the legislation promulgated by Guinea-Bissau with regard to confiscation of vessels in the EEZ was in conformity with the Convention and (ii) whether confiscation was necessary to ensure the compliance with the law and regulations adopted by the Coastal State.¹¹⁷

In answering the first question, ITLOS held that a law providing for the confiscation of a vessel offering bunkering services to foreign vessels fishing in the EEZ of Guinea-Bissau was not *per se* in violation of article 73(1) of the Convention. Whether or not confiscation was justified depended on the facts and circumstances of a given case.¹¹⁸ As for the second question, ITLOS determined that Panama had breached the obligation to obtain written authorisation for bunkering and to pay the prescribed fee, and that this was ‘a serious violation’.¹¹⁹ However, it held that this breach was the result of ‘a misinterpretation of the correspondence’ between the fishing vessels and the authorities of Guinea-Bissau.¹²⁰ Therefore, ITLOS found that the confiscation of the vessel and the gas oil on board ‘was not necessary either to sanction the violation committed or to deter the vessels or their operators from repeating this violation’.¹²¹

Arguably, the most crucial term in Article 73(1) that needed clarification was ‘necessary’ as this would determine whether confiscation was consistent with UNCLOS. ITLOS, however, did not consider what was meant by ‘necessary’ or how to evaluate it. Instead, it only determined the gravity of the offence in question then compared it with the penalty imposed by the coastal State. This meant that for ITLOS, the necessity test involved balancing between the gravity of the offence and the gravity of the sanction. Compared with how the term ‘necessary’ has been interpreted by other international courts,¹²² ITLOS’ application of the requirement of

¹¹⁶ *Virginia G* (n 91) [252].

¹¹⁷ *ibid* [256].

¹¹⁸ *ibid* [257].

¹¹⁹ *ibid* [267].

¹²⁰ *ibid* [269].

¹²¹ *ibid*.

¹²² For example, WTO dispute settlement bodies, in examining whether a trade measure which would otherwise have violated WTO law was ‘necessary’ under Article XX(b) GATT or Article XIV(a) GATS set out a three-fold test. They examined: (i) the ‘relative importance’ of the interests that the measures are designed to protect, (ii) the contribution of the measure to the ends pursued’, ie, whether there were any reasonably available alternatives and (iii) evaluation of the measures’ ‘restrictive impact on international commerce.’ See *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, AB Report (12 March 2001) WT/DS135/AB/R; *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB Report (11 December 2000) WT/DS161,169/AB/R; *United States–Measures Affecting Cross-Border Supply of Gambling and Betting Services*,

‘necessary’, without setting out objective criteria to assess this requirement, was overly simplistic. As Judge Jesus observed, the lack of guidance as to how ‘necessary’ was to be interpreted and applied made ITLOS’ interpretation of Article 73(1) ‘arbitrary and subjective’,¹²³ creating serious difficulties for States in enforcing their fisheries laws and regulations, especially in the context of growing global concern for the conservation and sustainability of fishing resources.¹²⁴

ITLOS went on to hold that ‘the principle of reasonableness applies generally to enforcement measure under Article 73 of the Convention’ and concluded that the enforcement measure against the M/V Virginia G ‘was not reasonable’ in light of the circumstances of the case and the gravity of the violation.¹²⁵ In so doing, ITLOS incorporated the requirement of ‘reasonableness’ stipulated in Article 73(2) applicable to prompt release proceedings into Article 73(1) for a contentious proceeding. ITLOS’ introduction of a test of reasonableness into Article 73(1) was flawed as the requirement of reasonableness under Article 73(2) is applicable only to a bond to be posted by the flag State after its vessel has been detained by the coastal State in order to secure a prompt of its vessel. There seems to be no basis under the Convention for ITLOS to transfer the requirement of reasonableness intended for a payment to be made by the flag State to an enforcement measure of the coastal State. Moreover, it did not clarify what was meant by ‘reasonable’ or how to assess it. In any case, the threshold for the fulfilment of the test of reasonableness undoubtedly differs from that of necessity,¹²⁶ and thus ITLOS erred in bringing in the test of ‘reasonableness’ to evaluate the confiscation action by Guinea-Bissau in the context of Article 73(1) without any explanation as to why and how this was warranted under the Convention.

ITLOS’ failure to shed light on the term ‘necessary’ under Article 73(1) did not pass unnoticed by the individual judges and in fact, the majority of the declarations and separate opinions were devoted to scrutinising this term. These individual opinions added the much needed clarity that the judgment regrettably did not offer. Judge Paik, for example, argued that ITLOS should have considered both the extent to which the measure contributes to the

AB Report (7 April 2005) WT/DS285/AB/R. The European Court of Human Rights, in examining whether the State’s interferences with rights protected by the European Convention on Human Rights was necessary required that the State’s measure satisfy a three-prong test: (i) whether the ‘interference’ complained of corresponded to a ‘pressing social need,’ (ii) whether it was ‘proportionate to the legitimate aim pursued,’ and (iii) whether the reasons given by the national authorities to justify it are ‘relevant and sufficient. See *Sunday Times (I) v UK* 30 Eur. Ct. H.R. (ser. A), § 62.

¹²³ *M/V ‘Virginia G’ (Panama/Guinea-Bissau)* (Judgment, Dis. Op. Jesus) ITLOS Reports 2014, 4 [20].

¹²⁴ *ibid* [21].

¹²⁵ *Tomimaru* (n 113) [270].

¹²⁶ Judge *ad hoc* Sérvulo Correia held that ‘necessary’ cannot be regarded as synonymous with ‘reasonable’. See Dissenting Opinion of Judge *ad hoc* Sérvulo Correia (n 105) [18].

achievement of the objective sought and the degree to which the measure encroaches upon the protected rights of other States. In Judge Paik's view, the greater the contribution and the less the encroachment, the more likely the measure will be considered to be necessary.¹²⁷ This approach seems to be in line with the need to balance the rights of coastal States and those of flag States in EEZ. In a similar vein, Judge *ad hoc* Sérvulo Correia argued necessity meant when faced with two means 'both equally suitable and efficient for attaining the end aimed by a competent authority, the means equally effective by less onerous or intrusive to other interests subordinate but also deserving legal protection, must be chosen'.¹²⁸

Judge Jesus followed a different line of argumentation and believed that ITLOS had exercised its power in an *ultra vires* manner. In his opinion, Article 73(1) 'does not indicate, explicitly or implicitly, an exception to the measures that can be taken by the coastal State' and that such exceptions 'are to be found in paragraph 3'.¹²⁹ As confiscation was not found in paragraph 3, ITLOS had in fact created a third exception to the general policy of paragraph 1.¹³⁰ Judge Jesus, however, seems to have misunderstood the majority's decision. The majority expressly held that the confiscation of a vessel was not in itself and in all cases a violation of Article 73(1). In the specific context of the case, the measure did not meet the requirement of necessity, however that was defined, so it was inconsistent with Article 73(1). Therefore, Judge Jesus' criticism that ITLOS added an extra exception not found under the Convention did not hold true, especially given the fact that Article 73(1) does not purport to establish an exhaustive list of measures available to coastal States. Adopting a complete opposite view to that of Judge Jesus, Judge Ndiyaé contended that confiscation should be deemed lawful under Article 73(1) in light of the fact that it 'is a perfectly lawful sanction from the point of view of international law and is expressly provided for in the national legislation of many countries'.¹³¹ This statement suggested that, in his view, there was no need for any test of necessity, and that the measure of confiscation in itself should be permissible under into Article 73(1) in all cases.

ITLOS' decisions, particularly the *Virginia G* case, have shed light on the question of whether confiscation of foreign vessels could be taken by coastal States as part of their enforcement power under Article 73(1). ITLOS' conclusion makes clear that Article 73(1) does not establish an exhaustive list of enforcement measures, and that coastal States can take enforcement measures not listed under this provision, so long as they are 'necessary' to ensure compliance with their legislation concerning fisheries. Nevertheless, ITLOS failed to provide

¹²⁷ *M/V 'Virginia G (Panama/Guinea-Bissau)* (Judgment, Sep. Op. Paik) ITLOS Reports 2014, 4 [25].

¹²⁸ Dissenting Opinion of Judge *ad hoc* Sérvulo Correia (n 105) [18].

¹²⁹ Dissenting Opinion of Judge Jesus (n 123) [16].

¹³⁰ *ibid* [18].

¹³¹ Dissenting Opinion of Judge Ndiyaé (n 81) [170].

clear criteria to guide the determination of how a measure would be considered ‘necessary’. This arguably leaves the scope of Article 73(1) undefined, thus making it difficult for coastal States to grasp the exact extent of the enforcement power granted to them to conserve and manage their fisheries resources.

3. Coastal States’ obligation to promptly release fishing vessels

Coastal States have the right to arrest a vessel alleged of violating their laws and regulations on the exploitation and conservation of living resources under Article 73(1). However, they also have the obligation to release the vessel and the crew upon the posting of a reasonable bond or other security under Article 73(2). Should the coastal State fail to do so, the flag State of the detained vessel may bring the question of release from detention pursuant to the prompt release proceedings pursuant to Article 292.

Prompt release proceedings were introduced into UNCLOS with a view to balancing the rights of coastal States to take measures to ensure compliance with their fisheries laws and regulations on the one hand, and the interests of flag States to prevent their vessel and crew from prolonged detention, on the other.¹³² Coastal States have the discretion to set the bond at a level they deem fit in accordance with their respective domestic laws; but Article 73(2) requires that the bond must be ‘reasonable’. The term ‘reasonable’ is, however, not defined under the Convention, nor is there any indication in the Convention as to how this requirement should be applied in practice.¹³³ In fact, this term was intentionally left open as a compromise for the diverging opinions expressed during the negotiation of UNCLOS regarding whether coastal States or flag States should have jurisdiction to prosecute violations of the coastal State’s sovereign rights in the EEZ.¹³⁴ The founders of UNCLOS thus expected the competent courts and tribunals to give concrete content to the reasonableness criterion.¹³⁵ As all prompt release procedures have hitherto been initiated only before ITLOS and prompt release cases make up nearly a third of ITLOS case law,¹³⁶ the Tribunal has managed to develop over the years a list of criteria to provide guidance for the determination of ‘reasonable bond’.

¹³² Virginia Commentary (n 56) 67.

¹³³ Erik Franckx, ‘Reasonable bond in the practice of the International Tribunal for the Law of the Sea’ (2002) 32(2) Cal W Int’l L J 303.

¹³⁴ Myron H Nordquist (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol II (Martinus Nijhoff 1985) 784–95.

¹³⁵ Vincent P Cogliati-Bantz, ‘International Tribunal for the Law of the Sea, Hoshinmaru (Japan v Russian Federation) and Tomimaru (Japan v Russian Federation), Prompt Release Judgments of 6 August 2007’ (2009) 58(1) ICLQ 241.

¹³⁶ Prompt release cases account for 9 out of 25 cases ITLOS has received to date. See ITLOS List of Cases <<https://www.itlos.org/cases/list-of-cases/>> accessed 25 September 2018.

In *M/V Saiga*, the first case in which ITLOS assessed the reasonableness of a bond, it stated that ‘the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of bond or financial security must be reasonable’.¹³⁷ It should be noted that in this case, no bond or other financial security was requested by Guinean authorities for the release of the vessel and crew nor was any offered by Saint Vincent and the Grenadines.¹³⁸ In such a context, ITLOS found that the discharge the gasoil carried by *M/V Saiga*, taking into account its commercial value, were to be considered a security to be held.¹³⁹ There was no explanation as to how the ‘overall balance’ criterion that it had set out would be achieved when only the value of the oil on board of the vessel was taken into account.

In *Camouco*, ITLOS for the first time provided a list of factors relevant in an assessment of the reasonableness of bonds or other financial security.¹⁴⁰ In examining whether the bond required by French domestic court was reasonable, ITLOS stated that the relevant factors included the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.¹⁴¹ Compared with *Saiga*, ITLOS added some more criteria to assessing the reasonableness of bond, including those beyond the bond itself.¹⁴² However, when applying these factors to the case, ITLOS only focused on two factors, namely the maximum penalty which could be imposed on the Master of the *Camouco*, and the value of *Camouco* and of the catch on board. ITLOS then came to conclusion that the bond set by the French court was ‘not reasonable’.¹⁴³ Even though ITLOS drew up a list of factors relevant to the assessment of a reasonable bond, it actually did not apply all of these factors to the determination of the French bond, nor did it provide any explanation as to why only two factors were relevant in practice.

ITLOS’ conclusion was heavily criticised by several dissenting judges. Judge Anderson was of the opinion that the determination of the bond could not depend solely on the monetary value of the vessel, its gear, catch or the monetary value of the penalties.¹⁴⁴ The gravity of the

¹³⁷ *M/V Saiga* (n 82) [82].

¹³⁸ *ibid* [31].

¹³⁹ *ibid* [83].

¹⁴⁰ The *Camouco*, a fishing vessel flying the flag of Panama, was arrested by the French authorities and the Master was charged for breaching French fisheries law in the EEZ of the Crozet Islands near the Antarctic. ‘*Camouco*’ (*Panama v France*) (Prompt Release, Judgment) ITLOS Reports 2000, 10.

¹⁴¹ *ibid* [67].

¹⁴² *ibid* [68].

¹⁴³ *ibid* [70].

¹⁴⁴ ‘*Camouco*’ (*Panama v France*) (Prompt Release, Dis. Op. Anderson) ITLOS Reports 2000 [5].

alleged offence, which was illegal fishing, should have been given more weight given the widespread problems of illegal fishing, flags of convenience as well as the problems faced by coastal States in ensuring the effective conservation of fish stocks in extensive and remote EEZs.¹⁴⁵ In this case, while the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) was applicable in the area in question and the CCAMLR Commission had adopted limits and closed seasons for Patagonian Toothfish, the *Camouco* was reported to have caught six tonnes of this stock.¹⁴⁶ Therefore, Judge Anderson believed that the setting of a high bond and imposition of ‘swingeing penalties’ was particularly necessary to ensure effective law enforcement in extensive and remote EEZs.¹⁴⁷ Pointing also to the CCAMLR, Judge Wolfrum argued that France—as a State party to the CCAMLR—had the obligation to take conservation measures stipulated under that Convention, and thus should have ‘considerable discretion in laying down the content of laws concerning the conservation and management of marine living resources in their EEZ and of the corresponding laws on enforcement’.¹⁴⁸ Coastal States’ discretionary powers ‘limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not’.¹⁴⁹ These statements showed that conservation and management of the resources occupied a more prominent place in the judge’s assessment of ‘reasonable bond’ than in that of the majority.

The list of factors relevant for the determination of reasonable bond in *Camouco* was later adopted in the *Monte Confurco* case,¹⁵⁰ but ITLOS held that ‘this is by no means a complete list of factors. [...] the Tribunal did not intend to lay down rigid rules as to the exact weight to be attached to each one of them’.¹⁵¹ ITLOS stated instead that the balance of interests emerging from Articles 73 and 292 of the Convention provided the guiding criterion in the assessment of the reasonableness of the bond.¹⁵² In particular, Article 73 strikes a balance between the interest

¹⁴⁵ *ibid* [6]. Note, however, that some scholars argue that in order for the assessment of the ‘reasonable bond’ to be objective, the coastal State’s expenses for law enforcement should not be factored in as penalties as ‘[t]hese amounts reflect the subjective needs of the state in question and demands to secure them in prompt release proceedings could mean that the security demanded was unreasonable.’ See D J Devine, ‘Relevant Factors in Establishing a Reasonable Bond for Prompt Release of a Vessel Under Article 292(1) of the United Nations Convention on the Law of the Sea 1982’ (2002) 27 S. Afr. Y.B. Int’l L. 140.

¹⁴⁶ Dissenting Opinion of Judge Anderson (n 144) [4].

¹⁴⁷ *ibid* [5].

¹⁴⁸ ‘*Camouco*’ (*Panama v France*) (Prompt Release, Dis. Op. Wolfrum) ITLOS Reports 2000 [5]. [11].

¹⁴⁹ *ibid*.

¹⁵⁰ The *Monte Confurco*, a fishing vessel flying the flag of Seychelles, was boarded by the crew of a French surveillance frigate in the EEZ of the Kerguelen Islands in the French Southern and Antarctic Territories. *Monte Confurco* was charged with violating French fisheries law for having entered the EEZ without prior authorisation and for not declaring the toothfish caught on board. As a consequence, *Monte Confurco*, the fish catch, the navigation and communication equipment, computer equipment, and documents of the vessel and of the crew were apprehended. *Monte Confurco*’ (*Seychelles v France*) (Prompt Release, Judgment) ITLOS Reports 2000, 86.

¹⁵¹ *ibid* [76].

¹⁵² *ibid* [72].

of coastal States to take appropriate measures to ensure compliance with their laws and regulations and the interest of flag States in securing prompt release of its vessels and their crews;¹⁵³ while Article 292 reconciles the interest of the flag State to have its vessel and crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.¹⁵⁴

Perhaps in response to the dissatisfaction shown by individual judges in the previous cases, ITLOS stated that it took note of the general context of unlawful fishing in the region, the threat posed by illegal fishing to the future resources and the measures taken under CCAMLR for the conservation of toothfish.¹⁵⁵ However, in the final judgment, it is difficult to see how the ‘balance of interests’ and the concerns about illegal fishing were taken note of, nor was it clear the extent to which they informed the final decision that ITLOS reached on the amount of the bond. In the end, ITLOS took into account the following factors: the range of penalties imposable for the alleged offences, which indicated that the offence was ‘grave’ under French law,¹⁵⁶ the value of the *Monte Confurco*,¹⁵⁷ value of the cargo,¹⁵⁸ the value of the fish and of the fishing gear seized.¹⁵⁹ In essence, ITLOS adopted a similar approach to *Camouco*, comparing the penalty imposed based on the gravity of the offence on the one hand, and, on the other hand, the monetary value of the vessel and its catch to determine whether the bond was reasonable. Judge Anderson was again critical of ITLOS’ approach, pointing out that *Monte Confurco* was fishing at a time when the parties to the CCAMLR had prohibited all directed fishing for toothfish in the relevant area.¹⁶⁰ Based largely on arguments similar to those apprehended in his Dissenting Opinion in the *Camouco* case, he concluded that coastal States should be able to fix the bond and the fines imposed on illegal fishing at as high a level as they deemed fit to serve as deterrent.¹⁶¹

ITLOS used the same rhetoric in the subsequent *Juno Trader* case.¹⁶² In determining the reasonable bond, ITLOS stated that it took note of the Guinea-Bissau’s concern that IUU fishing

¹⁵³ *ibid* [70].

¹⁵⁴ *ibid* [71].

¹⁵⁵ *Ibid* [79].

¹⁵⁶ *ibid* [80]–[83].

¹⁵⁷ *ibid* [84].

¹⁵⁸ *ibid* [85].

¹⁵⁹ *ibid* [86]–[88].

¹⁶⁰ ‘*Monte Confurco*’ (*Seychelles v France*) (Prompt Release, Dis. Op. Anderson) ITLOS Reports 2000, 86 [2].

¹⁶¹ *ibid* [2].

¹⁶² The *Juno Trader* was a refrigerated cargo vessel flying the flag of Saint Vincent and the Grenadines.¹⁶² The vessel was boarded and charged with illegal fishing and subsequently detained and confiscated by the authorities of Guinea-Bissau. ‘*Juno Trader*’ (*Saint Vincent and the Grenadines v Guinea-Bissau*) (Prompt Release, Judgment) ITLOS Reports 2004, 17.

in its EEZ has resulted in a serious depletion of its fisheries resources.¹⁶³ However, as in previous cases, it is at all not clear how this concern was taken into account in the deliberation of the case. ITLOS was again occupied only with the gravity of the offence by reference to the penalties imposed or imposable under the law of the detaining State, placing particular emphasis on ‘the need to avoid disproportion between the gravity of the alleged offences and the amount of the bond’.¹⁶⁴ Despite the call from the individual judges to consider the reasonableness of the bond in the wider context of illegal fishing and the need for deterrence of this phenomenon, ITLOS still only looked at the gravity of the bond in isolation from the context in which the vessel was seized.

The *Volga* case in 2002, for its part, shed light on a different aspect of the bond under Article 73(2), ie on whether a bond of a non-financial nature was permissible.¹⁶⁵ After detaining *Volga* and its crew, the Australian authorities imposed as condition for the release the *Volga* and the crew, among others, the carriage of a fully operational Vessel Monitoring System (VMS) on board.¹⁶⁶ Russia maintained such a condition was unreasonable under Article 73(2) of the Convention;¹⁶⁷ while Australia argued that the carrying of the VMS was necessary in order to prevent further illicit fishing once the ship was released,¹⁶⁸ and to ensure ‘that the *Volga* complies with Australian law and relevant treaties to which Australia is a party until the completion of the domestic legal proceedings’.¹⁶⁹

Similar to previous cases, ITLOS acknowledged international concerns about IUU fishing and appreciated the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem of illegal fishing.¹⁷⁰ However, ITLOS held that the inclusion of additional non-financial conditions, including a ‘good behaviour bond’ to prevent future violations of the laws of a coastal State, would defeat the purpose of Article 73(2) read in conjunction with Article 292 of the Convention, which was to provide a mechanism through which vessel and crew could be released promptly by posting a security of a financial nature.¹⁷¹ On a more general point, ITLOS held that the reasonableness of the bond or other security should take into account ‘the terms of the bond or security set by the detaining State, having

¹⁶³ *ibid* [87].

¹⁶⁴ *ibid* [89].

¹⁶⁵ The *Volga* was a long-line fishing vessel flying the flag of the Russian Federation, boarded in Australia’s EEZ and subsequently charged with illegal fishing in violation of Australian fisheries law. ‘*Volga*’ (*Russian Federation v Australia*) (Prompt Release, Judgment) ITLOS Reports 2002, 10.

¹⁶⁶ *ibid* [53].

¹⁶⁷ *ibid* [60].

¹⁶⁸ *ibid* [75].

¹⁶⁹ *ibid* [78].

¹⁷⁰ *ibid* [68].

¹⁷¹ *ibid* [80].

regard to all the circumstances of the particular case',¹⁷² but this did not include the circumstances of the seizure.¹⁷³

Several judges not surprisingly expressed disappointment with ITLOS' repeated disregard for the problem of widespread illegal, unregulated and unreported (IUU) fishing, and particularly in relation to the Patagonian toothfish in the Southern Ocean, in assessing the reasonableness of the bond. Judge *ad hoc* Shearer and Judge Anderson, the latter while applauding ITLOS for having gone further than in previous cases in acknowledging IUU problems,¹⁷⁴ believed that the imposition of non-financial bond should have been considered reasonable in order for coastal States to fulfil their duties under UNCLOS and CCAMLR to ensure the conservation of fisheries resources in the EEZ.¹⁷⁵ In contrast, Judge Cot, while acknowledging Australia's right to take conservation measures in order to protect a common heritage,¹⁷⁶ agreed with ITLOS that, in the context of a prompt release case, the bond or financial security provided for in Articles 73(2) and 292 was in fact of a purely financial nature.¹⁷⁷

Finally, *Hoshinmaru* could be seen as a turning point in ITLOS' examination of the reasonableness of the bond.¹⁷⁸ While still holding that '[t]he amount of a bond should be proportionate to the gravity of the alleged offence',¹⁷⁹ ITLOS no longer only assessed the gravity of offence in isolation from the wider context in which the offence was committed. ITLOS noted that the present case was different from cases it had previously dealt with, since this case did not involve fishing without a licence. The *Hoshinmaru* held a valid fishing licence and was authorised to be present and to fish in the Russian EEZ. However, it also found that between Russia and Japan, there existed a high level of cooperation in respect of fishing activities in the area in question, including the establishment of an institutional framework for consultations concerning the management and conservation of fish stocks.¹⁸⁰ Within such cooperative framework, ITLOS was of the view that the offence committed by the Master of

¹⁷² *ibid* [65].

¹⁷³ *ibid* [83].

¹⁷⁴ '*Volga*' (*Russian Federation v Australia*) (Prompt Release, Dis. Op. Anderson) ITLOS Reports 2002, 10 [2].

¹⁷⁵ '*Volga*' (*Russian Federation v Australia*) (Prompt Release, Dis. Op. Shearer) ITLOS Reports 2002, 10 [16].

¹⁷⁶ *ibid* [8].

¹⁷⁷ *ibid* [26].

¹⁷⁸ The *Hoshinmaru* was a fishing vessel flying the flag of Japan and was arrested by Russia for falsely declaring 20 tons of raw sockeye salmon as the cheaper chum salmon. '*Hoshinmaru*' (*Japan v Russian Federation*) (Prompt Release, Judgment) ITLOS Reports 2005-2007, 18.

¹⁷⁹ *ibid* [89].

¹⁸⁰ *Ibid* [98].

the *Hoshinmaru* could not be considered a minor offence or an offence of a purely technical nature. ITLOS stated:

Monitoring of catches, which requires accurate reporting, is one of the most essential means of managing marine living resources. Not only is it the right of the Russian Federation to apply and implement such measures but the provisions of article 61, paragraph 2, of the Convention should also be taken into consideration to ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation.¹⁸¹

In his Separate Opinion, Judge Yanai argued that the *Hoshinmaru*'s false recording of the catch would hardly cause damage to the conservation of salmon and trout resources in the Russian EEZ as the amount of salmon and trout caught was within the limits of licence held by the *Hoshinmaru* and these fish stocks were conserved at a high level in the Russian EEZ. Judge Yanai, thus felt that this offence was of a 'low degree of gravity'.¹⁸² Judge Yanai's assessment of the issue, however, overlooked the damage that unreported fishing, a part of the IUU phenomenon, may cause to coastal States' conservation efforts.¹⁸³ The fact that the fish stocks in question were not under threat hardly seemed to be a convincing reason for a flag State to fish without notifying the coastal State.

The *Hoshinmaru* case presented a commendable development in ITLOS' approach to determining a reasonable bond. In previous cases, ITLOS only assessed the gravity of the offence based on the penalty prescribed in the relevant domestic legislation and only paid lip-service to concerns of IUU fishing. In contrast, in this case, ITLOS placed what might at first glance seem a minor offence in the wider context of IUU fishing, taking into account the rights of coastal States under UNCLOS and the cooperation framework between Russia and Japan to conserve and manage living resources in assessing the gravity of the offence. This is an extremely important step forward in recognising and reinforcing States' obligations to combat IUU fishing.

Interim conclusion

¹⁸¹ *ibid* [99].

¹⁸² '*Hoshinmaru*' (*Japan v Russian Federation*) (Prompt Release, Sep. Op. Yanai) ITLOS Reports 2005-2007, 18 [3].

¹⁸³ Unreported fishing is defined as 'fishing activities which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations'. See FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (23 June 2001) [FAO IPOA-IUU].

The clarification of the term ‘reasonable bond’ under Article 73(2) presents one of the most significant contributions of ITLOS. As mentioned above, the UNCLOS drafters deliberately left the term ‘reasonable bond’, which holds the key to the operation of both Articles 73(2) and 292, open-ended. The consolidated factors emerging from prompt release judgments have filled the void left by the drafters and provided some guidance as to how reasonableness is to be determined. ITLOS progressed from setting out general criteria in the first case to elaborating on more specific criteria for determining the reasonableness of the bond. The factors that have most commonly been taken into account in the determination of reasonable bond include: gravity of the alleged offences, imposed or imposable penalties, value of the detained vessel and of the cargo seized, amount of the bond imposed by the detaining state and the proportionality between the alleged offence and the bond. By drawing up a list of factors relevant for the determination of reasonableness while still maintaining that this list is not exhaustive, ITLOS has clearly endeavoured to allow for both predictability and flexibility in its assessment of reasonableness.¹⁸⁴

On the other hand, while the list may be clear, there still exists a certain level of ambiguity when it comes to the application of the abovementioned factors to specific cases. As one scholar commented, ‘when all relevant factors have been discussed and applied in a case, the setting of the bond itself still resembles as much a *deus ex machina* as it did during the first case’.¹⁸⁵ Even though ITLOS made clear in the *Monte Confurco* case that it did not wish to attach any weight to the factors, ITLOS had the tendency to only look at factors that could be quantified,¹⁸⁶ paying particular attention the gravity of the offence. But ITLOS’ assessment of the gravity of offence has been in itself an evolving exercise. In earlier cases, the gravity of the offence was determined with reference almost exclusively to the penalty imposed under domestic law; whereas in subsequent cases, the broader context of the offence, including States’ international commitments and the community interests, started to creep into the examination.

All prompt release cases brought before ITLOS to date stemmed from allegations of illegal fishing. Rothwell and Stephens contended that ITLOS prompt release cases ‘reflect the growth in IUU fishing carried out by significant commercial interests which exploit gaps in the international legal framework, domestic loopholes, and weak enforcement mechanisms in order to take illegal fishing operations in remote parts of the world’s oceans’.¹⁸⁷ Yet, it was not until

¹⁸⁴ Helmut Türk, ‘The Work of the International Tribunal for the Law of the Sea’ (2012) 26 *Ocean Yearbook* 181.

¹⁸⁵ Eric Franckx (n 133) 335.

¹⁸⁶ Edward Aurther Laing, ‘ITLOS Procedures and Practices: Bond’ in Moore and Nordquist, *Current Marine Environmental Issues* (n 74).

¹⁸⁷ Donald R Rothwell and Tim Stephens, ‘Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests’ (2004) 53 *ICLQ* 171, 172.

Hoshinmaru that one started to see IUU fishing allegations and coastal States' corresponding obligations to conserve their marine resources at global and regional levels have an impact on ITLOS' decision. If ITLOS continues with this path, viewing coastal State's international commitments to conserve living resources as a relevant factor in assessing 'reasonable bond', its decisions will arguably be more consistent with the shift under UNCLOS towards conservation and management of the marine environment as analysed above.¹⁸⁸ Continued consideration of the problems posed by illegal fishing activities would also pay heed to the call that several individual judges have made in their separate and dissenting opinions for higher regards to conservation concerns. Moreover, taking into account coastal States' rights and obligations will also allow ITLOS to better respect the nature of the EEZ. The EEZ regime places utmost importance on maintaining the balance of rights and interests of both the coastal State and the flag State. ITLOS itself acknowledged that the purpose of Article 73 was to identify 'two interests, the interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other'.¹⁸⁹ However, until *Hoshinmaru*, the balance seems to have tilted in favour of the flag State when ITLOS adopted a restrictive interpretation of the factors to be taken into account in determining the reasonableness of the bond.¹⁹⁰ Coastal States' rights and obligation to take measures to conserve and manage living resources in their EEZ under UNCLOS as well as regional agreements, such as the CCAMLR, were often treated lightly.

Several scholars have argued that prompt release is not exactly the appropriate procedure to strengthen the legal framework for combating IUU fishing. One contended that as prompt release proceedings are geared towards securing speedy release of the vessel and the crew, ie ensuring humanitarian considerations within the UNCLOS regime, 'ITLOS and, more specifically, the prompt release mechanism are ineffective at properly addressing the issue of regulating IUU fishing'.¹⁹¹ Other commentators, pointing to the narrow approach that ITLOS

¹⁸⁸ Andrew Serdy and Michael Bliss, 'Prompt Release of Fishing Vessels: State Practice in the Light of the Cases before the International Tribunal for the Law of the Sea' in Alex G Oude Elferink and Donald Rothwell, *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2002) 293; Seline Trevisanut 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' (2017) 48(3-4) ODIL 300.

¹⁸⁹ *Monte Confurco* (n 150) [70].

¹⁹⁰ *Contra* Abdul Ghafur Hamid and Khin Maung Sein, 'Prompt Release of Vessel and Crew Under Article 292 of the UNCLOS: Is It an Adequate Safeguard Against the Powers of Coastal States?' (2011) 7(13) Journal of Applied Sciences Research, 2421. These authors argued that 'the absence of direct access of private persons to the prompt release procedure and the tendency of the coastal State to confiscate the detained vessel are the two main factors that may swing the balance towards the coastal State'.

¹⁹¹ Taisaku Ikeshima, 'The "Reasonableness" of Unreasonable Arguments in Prompt Release Cases in the ITLOS' (2010) 6 Waseda Global Forum 107.

has adopted in interpreting a reasonable bond and the inherent jurisdictional limit under Article 292 which prevents ITLOS from prejudicing to the merits of the case before domestic courts,¹⁹² concluded that ‘it is wishful thinking to expect Herculean efforts by the Tribunal to address the general problem of IUU fishing’.¹⁹³

However, it appears that such contentions have adopted a rather pessimistic view of ITLOS’ power in prompt release cases. Although its jurisdiction is indeed only limited to examining the question of release, ITLOS made clear in the *Monte Confurco*, echoed in *Hoshinmaru*, that it ‘is not prevented from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond as set by the Respondent’.¹⁹⁴ More importantly, the need to maintain the balance of rights of coastal States and flag States in a prompt release proceeding, which according to ITLOS provides the guiding principle for the assessment of the reasonable bond, requires ITLOS to take into account the obligation that UNCLOS imposes on the coastal State to take measures to conserve and manage living resources in its EEZ. Considerations of responsible fishing practices can, therefore, enter into prompt release procedures through the reasonableness test, without necessarily constituting any misuse of the procedure or abuse of the legal process. It would further allow ITLOS to stay true to the conservationist approach to marine environment enshrined under UNCLOS.

Finally, it is interesting to note that since 2007, ITLOS has not received any requests for prompt release. This is a great contrast to the first ten years of its existence when the bulk of docket consisted prompt release cases. It is not exactly certain why this is the case, but one can speculate two reasons. First, the consolidated criteria for determining the bond as established in ITLOS case law have provided useful guidance for both coastal States and flag States to deal with prompt release cases out of court. Second, prompt release proceedings are initiated by flag States or owners of the vessel on behalf of flag States with a view to not only securing a rapid release of the vessel but also a lower bond than that set by the detaining State. In earlier cases, this was certainly true, but ITLOS is gradually paying more attention to coastal States’ rights and obligations to conserve fish stocks in the determination of the bond, and thus showing more deference to the bond set by the coastal State. A reasonable argument could be made, thus, that the amount of bond and the manner in which ITLOS decides on the bond no longer make prompt release proceedings an attractive option for flag States.

¹⁹² Article 292(3).

¹⁹³ Rothwell and Stephens (n 187) 187.

¹⁹⁴ *Monte Confurco* (n 150) [74].

In conclusion, ITLOS' decisions on coastal States' rights and obligations concerning fisheries in the EEZ have clarified several provisions under UNCLOS. First, it shed light on the scope of coastal States' regulatory power in the EEZ under Articles 56 and 62(4). Coastal States now have the competence to regulate under its fisheries law any activity which has a direct connection with fishing. In such a framework, the bunkering of fishing vessels is now firmly placed under coastal States' regulation, ending decades of uncertainty surrounding this particular activity. Second, the scope of coastal States' enforcement power under Article 73(1) is also made clearer. Coastal States are permitted to take enforcement measures which are not listed under this article, including confiscation of vessels, provided that such measures are necessary to ensure compliance with their fisheries laws and regulations. This allows coastal States to adopt more stringent measures than those explicitly contained in Article 73(1). Third, ITLOS' prompt release judgments have given important guidance to the interpretation and determination of what constitutes a 'reasonable bond' under Article 73(2) for the release of foreign vessels arrested for illegal fishing activities.

II. FLAG STATES' RIGHTS AND OBLIGATIONS IN FISHING ACTIVITIES IN THE EEZ

1. Flag States' rights in granting nationality to ships

The determination of the nationality of vessels plays a crucial role in the effective exercise of jurisdiction of flag State in both the EEZ and high seas. UNCLOS explicitly deals with this issue in Article 91, which provides that '[e]very State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship'.

M/V Saiga (No. 2) was the first case, and perhaps the most important case to date, in which ITLOS clarified the issue of nationality of vessel as ITLOS' findings are still followed in subsequent cases in which this issue arises. Guinea challenged the legal standing of Saint Vincent and the Grenadines to bring claims regarding the *Saiga* on the grounds that on the day of its arrest, the ship was not validly registered under the flag of Saint Vincent and the Grenadines.¹⁹⁵ Evidence showed that on the date of the arrest, the Provisional Certificate of Registration issued by Saint Vincent and the Grenadines had expired and the Permanent Certificate of Registration had not been issued. As a result, Guinea contended that *Saiga* only qualified as a ship without nationality.¹⁹⁶ Saint Vincent and the Grenadines, on the other hand,

¹⁹⁵ *M/V Saiga (No. 2)* (n 89) [55].

¹⁹⁶ *ibid* [58].

argued that when a vessel is registered under its flag ‘it remains so registered until deleted from the registry’. It also noted that the conditions and procedures for deletion of ships from its Registry are set out in its domestic law, ie the Merchant Shipping Act, and none of these procedures was at any time applied to the Saiga.¹⁹⁷

ITLOS held that under Article 91, each State had exclusive jurisdiction over the granting of its nationality to ships and thus it was for the flag State to fix the conditions for granting its nationality to ships, for the registration of ships in its territory and for the right to fly its flag in its domestic law.¹⁹⁸ This means that in a dispute concerning the nationality of a ship, it is not for the tribunal, nor any other State, to determine the sufficiency of the State’s domestic law providing for this matter.

Turning to the relevant part of Article 91 which requires the existence of a genuine link between the vessel and the State, Guinea contended that ‘there was no genuine link between the Saiga and Saint Vincent and the Grenadines’, thus Guinea was not bound to recognise the Vincentian nationality of the M/V Saiga.¹⁹⁹ In response, Saint Vincent and the Grenadines argued that there was nothing under UNCLOS to support the contention that the existence of a genuine link between a ship and a State was a necessary precondition for the grant of nationality to the ship.²⁰⁰ ITLOS, for its part, first considered whether the absence of a genuine link between a flag State and a ship would entitle another State to refuse to recognise the nationality of the ship. It found that none of the UNCLOS articles, including Articles 91(1), 92 or 94, provided an explicit answer to this question. It then turned to the negotiating history of the 1958 Convention on the High Seas on the question of nationality—whose approach UNCLOS follows—and found that a proposal to include ‘genuine link’ as a criterion not only for the attribution of nationality to a ship but also for the recognition by other States of such nationality was not adopted.²⁰¹ More importantly, ITLOS pointed out that Article 94 set out the procedures to be followed when ‘a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised’; it did not permit a State which discovered ‘evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State’.²⁰² ITLOS, therefore, concluded that:

¹⁹⁷ *ibid* [59].

¹⁹⁸ *ibid* [63].

¹⁹⁹ *ibid* [75].

²⁰⁰ *ibid* [77].

²⁰¹ *ibid* [80].

²⁰² *ibid* [82].

[T]he purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States'.²⁰³

This marked the first time the meaning of the term 'genuine link' was clarified. In *Virginia G*, ITLOS recalled the above statement and reaffirmed that the requirement of 'genuine link' only comes into play 'once the ship is registered'.²⁰⁴

ITLOS' findings on the exclusive power of the State in the granting of vessel nationality clarified that the nationality of a ship depends entirely on States' registration procedures as provided in their domestic laws. In other words, compliance with domestic procedures for registration was the only criterion that mattered. ITLOS' exposition of the meaning of 'genuine link' in *Saiga*, affirmed and applied in *Virginia G*, further made clear that this requirement does not play a role in determining the nationality of a vessel, but rather in understanding States' duties over vessels flying their flags.

The question of nationality came up in several prompt release proceedings, because one of the conditions for ITLOS to have jurisdiction in this type of proceeding was that the application was made by the flag State. In *Grand Prince*, ITLOS found that under Belize law, the right of a fishing vessel to fly the Belizean flag flowed from the act of registration.²⁰⁵ The only document issued to the *Grand Prince* by Belize was the provisional patent of navigation which had already expired before the institution of prompt release proceedings and had not been extended or replaced by another statutory certificate.²⁰⁶ Even though there was a letter and a certification from the International Merchant Marine Registry of Belize which asserted that 'despite the expiration of the Patent of navigation and Ship station license, the vessel is still considered as registered in Belize',²⁰⁷ ITLOS was not satisfied that these communications could be treated as 'documents' within the meaning of Article 91(2) of the Convention.²⁰⁸ Moreover, Belize also sent an official communication in to France, which declared that it had de-registered the vessel as a punitive measure.²⁰⁹ In the light of the expiration of the provisional patent of navigation, and of the de-registration of the *Grand Prince*, ITLOS concluded that Belize was not the flag State of the vessel.²¹⁰ *Grand Prince* thus reaffirmed the vital role of domestic

²⁰³ *ibid* [83].

²⁰⁴ *M/V 'Virginia G'* (n 91) [113].

²⁰⁵ '*Grand Prince*' (*Belize v France*) (Prompt Release, Judgment) ITLOS Reports 2001, 17 [83].

²⁰⁶ *ibid* [84].

²⁰⁷ *ibid* [85].

²⁰⁸ *ibid*.

²⁰⁹ *ibid* [87].

²¹⁰ *ibid* [93].

registration in determining the nationality of ships. It is the procedures that are provided in domestic law that are of legal value, and not administrative acts.

In *Tomimaru*, the Tomimaru was confiscated by Russian authorities and one of the questions raised was whether confiscation may have an impact on the nationality of a vessel. ITLOS held that the nationality of the ship entailed a juridical link between a State and a ship, which, in turn, produced a network of mutual rights and obligations.²¹¹ Because of this important function of the flag States, ITLOS concluded that confiscation only resulted in a change of ownership but the latter did not automatically lead to the change or loss of its flag.²¹² ITLOS' decision again strengthened the exclusive power given to the State in determining the nationality of a vessel.

In conclusion, in dealing with the question of nationality of fishing vessels, ITLOS has consistently adopted the approach taken in *M/V Saiga (No. 2)*. The most important factor to be taken into consideration is whether the ship has been registered in accordance with domestic law providing for ship registration. The requirement of a genuine link between the flag State and the ship does not establish a prerequisite or condition to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.²¹³ As other States are not entitled to challenge any decision to grant nationality based on 'genuine link', the ITLOS' approach grants States the sole discretion in granting vessels the right to fly their flags.

2. Flag States' obligations over fishing activities in the EEZ

UNCLOS does not explicitly provide for flag State obligations over fishing vessels operating in the EEZ of another State. Article 92 only provides for the exclusive jurisdiction of flag States on the high seas. Article 94 entitled 'Duties of the flag State', in turn, requires flag States to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying [their] flag'. By virtue of Article 58, the rules on flag State jurisdiction in the high seas are also applicable to the EEZ. This means that in the EEZ, flag States have the obligation to exercise their jurisdiction and control over ships flying their flag as required under Article 94. However, Article 94 only provides for flag States' jurisdiction over a limited number of matters, namely 'administrative, technical and social matters'. As a result, it is not clear whether and to what extent flag States have an obligation under UNCLOS to exercise

²¹¹ *Tomimaru* (n 113) [70].

²¹² *ibid.*

²¹³ '*M/V Saiga*'(No. 2) (n 89) [110].

jurisdiction over their vessels engaged in fishing activities in the EEZ of another State.²¹⁴ An answer to this question is particularly important given the increase in IUU fishing worldwide, facilitated by the exploitation of flags of convenience and the unwillingness on the part of flag States to exercise control over their vessels.²¹⁵

To date, only the *Advisory Opinion on IUU Fishing* has addressed this question.²¹⁶ As ITLOS was the first international tribunal to deal with the issue, there was high hope for the Tribunal to clarify whether and, if so, how flag States' obligations with regards to fisheries in the EEZ are regulated under UNCLOS.²¹⁷ As will be shown, the Advisory Opinion helped to shed light on these questions. However, the legal basis which it invoked for its answer raised questions regarding the interpretive method that ITLOS employed, and from a broader perspective, the relationship between UNCLOS and other fisheries agreements.

2.1. The Advisory Opinion on IUU Fishing

The request for the Advisory Opinion was brought by the Sub-Regional Fisheries Commission (SRFC) on the basis of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (MCA Convention). The SRFC presented four questions to ITLOS, among which, the first questions concerned the 'obligations of the flag State in cases where IUU fishing activities are conducted within the EEZ of third party States'.²¹⁸ As the SRFC Member States explained, this question was triggered by the difficulties that they had encountered in securing the cooperation of flag States when the latter's vessels, which were involved in an offence, escaped the former's control. The SFRC thus sought a clarification on the nature and content of flag States' obligation under Article 94, and on whether a flag State could be held responsible for illegal fishing activities committed by a vessel

²¹⁴ D'andrea, for example, contends that under UNCLOS flag States' obligations in the EEZ do not extend to fisheries activities. See Ariella D'andrea, 'The "Genuine Link" Concept in Responsible Fisheries: Legal Aspects and Recent Developments' (2006) FAO Legal Papers Online No. 6 <<http://www.fao.org/3/a-bb094e.pdf>> accessed 25 September 2018.

²¹⁵ There is no one single definition of 'flag of convenience'. But 'flag of convenience' has been used to refer to flag of States with 'open registries' which place minimal or no restrictions on the kind of ship that may fly their flag; and so the only link between the flag State and the ship is registration. It is estimated that large-scale, industrialised flag of convenience fishing fleet makes up half of the world fishing capacity. See Judith Swan, 'Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities: Information And Options 2', FAO, Fisheries Circular No. 980, 2002; Jessica K. Ferrell, 'Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks', (2005) 35 *Env'tl L* 323; D.F. Matland, 'Re-evaluating the Status of Flags of Convenience Under International Law' (1990-1991) 23 *Vand J Transnat'l L* 1017.

²¹⁶ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4. [Advisory Opinion on IUU Fishing]

²¹⁷ Nele Matz-Luck and Johannes Fuchs, 'Marine Living Resources' in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 505.

²¹⁸ *Advisory Opinion on IUU Fishing* (n 216) [85].

flying its flag.²¹⁹ As the MCA Convention only addresses matters relating to access to fisheries resources for fishing vessels belonging to non-Member States within the EEZ of the SRFC Member States,²²⁰ ITLOS did not examine the obligations of flag States and coastal States in a general manner. Instead it narrowed the scope of the question to ‘obligations of flag States not parties to the MCA Convention in cases where vessels flying their flag are engaged in IUU fishing within the EEZ of the SRFC Member States’.²²¹

ITLOS acknowledged that the issue of flag State responsibility for IUU fishing activities was not directly addressed in UNCLOS. However, it stated that the framework within which this question was to be examined was provided by the Convention. This framework consisted of two layers of obligations: first, general obligations concerning the conservation and management of marine living resources in Articles 91, 92, 94 as well as Articles 192 and 193; and second, specific obligations of the flag State in the EEZ of the coastal State.²²²

With regard to the general obligations, Article 91 provides for the nationality of ships, Article 92 confirms the exclusive jurisdiction of flag State and Article 94(2) specifies the matters over which the flag State effectively exercises its jurisdiction as set out above. Even though none of these articles mention fishing activities, ITLOS interpreted the words ‘in particular’ contained in Article 94(2) to mean that ‘the list of measures that are to be taken by the flag State to ensure effective exercise of its jurisdiction and control over ships flying its flag in is only indicative, not exhaustive’.²²³ As a result, ITLOS held that the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, ‘must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention in respect of the conservation and management of marine living resources’.²²⁴ ITLOS thus used the term ‘administrative measures’ as an anchor to interpret the scope of flag State duties under Article 94(2)(b) to include obligations over fishing vessels engaged in IUU fishing.

Was ITLOS right to read Article 94(2)(b) so expansively as to include a flag State obligation to ensure that its vessels do not engage in IUU fishing? The Virginia Commentary interpreted

²¹⁹ Written Statement of SFRC, 12 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_19_CSRP_orig_Eng_rev.pdf> accessed 25 September 2018.

²²⁰ *ibid* [88].

²²¹ *ibid* [89].

²²² *Advisory Opinion on IUU Fishing* (n 216) [109].

²²³ *ibid* [117].

²²⁴ *ibid* [119].

the matters provided in Article 94(2)(b) as those which are ‘not so much matters concerning “the ship” as concerning the activities of the ship, or more accurately, the person on board’.²²⁵ On the other hand, the wording of this paragraph specifically stipulates jurisdiction ‘in respect of administrative, technical and social matters concerning the ship’. As this provision only refers to administrative matters concerning *the ship* itself, it arguably does not include flag State obligations over activities conducted by the ship, such as fishing. This argument is supported by the scope of sub-paragraph (a) of Article 94(2), which deals only with the particulars of the ship itself. The content of the article, thus, does not suggest such a broad reach of flag State obligation under the provision. From a policy point of view, a broad reach of Article 94(2)(b) is certainly desirable to secure a higher level of fisheries protection. However, given the different ways in which this proviso may be interpreted, it would have been more desirable if ITLOS had explained the basis on which the wording of Article 94(2)(b) could extend to fishing activities.

ITLOS further supported its findings on flag State jurisdiction by invoking Article 192 which provides for an obligation on all States to protect and preserve the marine environment.²²⁶ Recalling the statement made in the *Southern Bluefin Tuna* Order that ‘the conservation of living resources of the sea was an element in the protection and preservation of the marine environment’,²²⁷ ITLOS held that flag States were under an obligation to ensure compliance by vessels flying their flags with the relevant conservation measures concerning living resources enacted by the coastal State for its EEZ.²²⁸

Turning to specific obligations of flag States in the EEZ, ITLOS held that a reading of Article 58(3) together with Article 62(4) suggested that flag States were obliged to take necessary measures to ensure that their nationals and vessels flying their flag do not engage in IUU fishing activities.²²⁹ It is not at all clear how ITLOS reached this conclusion, as it merely recited the wording of these two articles without providing any actual analysis.²³⁰ Some commentators have argued that ITLOS had adopted too narrow of an approach to interpreting these two articles, and that they could not form the basis for flag State obligations concerning

²²⁵ Myron H Nordquist (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol III (Martinus Nijhoff 1985) 146.

²²⁶ *Advisory Opinion on IUU Fishing* (n 216) [120].

²²⁷ *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280 [70]. [Southern Bluefin Tuna Order]

²²⁸ *Advisory Opinion on IUU Fishing* (n 216) [120].

²²⁹ *ibid* [124].

²³⁰ Article 58(3) requires other States operating in the EEZ of the coastal State to have due regard to the latter’s rights and duties, and Article 62(4) stipulates that ‘Nationals of other States fishing in the [EEZ] shall comply with the conservation measures and with the other terms and conditions established in the law and regulations of the coastal State’.

fishing activities. One author argues that, first, Article 58(3) UNCLOS applies only to situations in which flag States are ‘exercising their rights and performing their duties under this Convention in the EEZ’, which include only the rights and duties that are clearly defined in the first two paragraphs of Article 58. These two paragraphs, in turn, only provide for the application of high seas freedoms to the EEZ, which do not include the freedom of fishing in EEZ.²³¹ Moreover, the wording of Article 62(4), which requires ‘nationals of other states fishing in the EEZ’ to comply with coastal State’s laws, does not confer an obligation on flag States but the State of the individuals on board of the vessel.²³²

ITLOS’s cursory examination of the matter clearly did not address these concerns. It is not difficult, in any case to see that these arguments confuse flag States’ right to exploit living resources in the EEZ with flag States’ obligation over their vessels fishing in the EEZ. Although it is true that flag States do not enjoy the freedom of fishing in the EEZ, Article 58(2) makes clear that the rules pertaining to flag State exercise of jurisdiction over vessels in the high seas are applicable to the EEZ. Second, a reading of Article 62(4) as referring only to nationals on the ship overlooks the holding of ITLOS in *M/V Saiga (No. 2)* that ‘the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State’.²³³ Article 62(4), therefore, should be more properly read as a further confirmation of the obligation placed upon the flag State to comply with the coastal State’s fisheries law and regulations.

Based on an examination of flag States’ general and specific obligations under UNCLOS, ITLOS concluded that flag States had an ‘obligation to ensure’ that vessels flying their flag do not conduct IUU fishing activities within the EEZ of the SRFC Member States.²³⁴ This was not the first time the ‘obligation to ensure’ appeared in ITLOS’ case law. The SDC had already expounded on the meaning and nature of this obligation in the *Advisory Opinion on Activities in the Area*.²³⁵ Following the approach of that Advisory Opinion, ITLOS also interpreted the ‘obligation to ensure’ to be an obligation of due diligence and noted that:

[T]he Convention is the key instrument which provides guidance regarding the content of the measures that need to be taken by the flag State in order to ensure compliance

²³¹ Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2012) 131.

²³² Valentin J Schatz, ‘Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State’ (2016) 7(2) GJIL 383, 399.

²³³ ‘*M/V Saiga (No. 2)*’ (n 89) [106].

²³⁴ *Advisory Opinion on IUU Fishing* (n 216) [120].

²³⁵ *Responsibilities and obligations of States with respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, p. 10 [110].

with the ‘due diligence’ obligation to prevent IUU fishing by vessels flying its flag in the EEZs of the SRFC Member States.²³⁶

On that basis, ITLOS specified that flag States had wide-ranging obligations, including the obligation to take necessary measures which comprises enforcement measures, to ensure compliance by vessels flying their flags with the laws and regulations adopted by the SRFC Member States;²³⁷ to adopt the necessary measures prohibiting their vessels from fishing in the EEZs of the SRFC Member States, unless so authorised by the SRFC Member States;²³⁸ to take the necessary measures to ensure that vessels flying their flag comply with the protection and preservation measures adopted by the SRFC Member States;²³⁹ to exercise effectively their jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked;²⁴⁰ to include enforcement mechanisms to monitor and secure compliance with these laws and regulations.

It is noteworthy that in relation to the obligation to include enforcement mechanisms as part of the due diligence obligation, ITLOS’ held that ‘sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities’.²⁴¹ This stood in stark contrast with its earlier prompt release decisions on the reasonableness of the bond. To recall, in these prompt release decisions, ITLOS paid scant attention to coastal States’ emphasis on the deterrent purpose of high bonds. It will be interesting to see whether and how this holding will affect the consideration of reasonableness in prompt release proceedings should there be another one in the coming time.

2.2. An appraisal of the Advisory Opinion on IUU Fishing

The findings of ITLOS in the *Advisory Opinion on IUU Fishing* made important contributions to clarifying the legal basis for flag States’ obligations concerning illegal fishing activities. First, ITLOS made clear that although the primary obligation to prevent IUU fishing rests with coastal States, this did not relieve flag States from the obligation to exercise due diligence over their vessels. Coastal States and flag States have concurrent obligations to prevent illegal fishing in the EEZ.

²³⁶ *Advisory Opinion on IUU Fishing* (n 216) [133].

²³⁷ *ibid* [134].

²³⁸ *ibid* [135].

²³⁹ *ibid* [136].

²⁴⁰ *ibid* [137].

²⁴¹ *ibid* [138].

Second, the contours of the due diligence obligation were elucidated to a more detailed extent. ITLOS not only read into Articles 58(3) and 62(4) an obligation of due diligence on the part of flag States over their fishing vessels operating in the EEZ of other States, it also specified the content of this obligation and identified concrete obligations to be taken with in dealing with IUU fishing. This will arguably give more teeth to the Convention, requiring flag States to adopt more stringent measures in the fight against IUU fishing. It has been argued that the Advisory Opinion did not go far enough in clarifying the measures that must be taken to satisfy the due diligence obligation,²⁴² leaving the content of the due diligence obligation open-ended, to be filled in through future practice and litigation. A closer look at the Advisory Opinion, however, shows that ITLOS *did* specify the obligations which flag States have to fulfil in order to satisfy the due diligence obligation.²⁴³ Even though the obligations and measures that ITLOS spelled out may still seem to be general, they at least provide a minimum standard and a yardstick to assess whether the due diligence obligation has been met. This is especially important given the fact that, in contrast to other areas such as marine pollution and sea safety, there are no globally agreed minimum standards of flag State responsibilities in the fishing sector.²⁴⁴ What is clear is that flag States now bear the burden of proof to show that they have taken the measures specified in the Advisory Opinion in order to discharge of their obligation to ensure over their fishing vessels. Whether or not a flag State can be considered to have satisfactorily implemented the measures specified would have to be assessed on a case-by-case basis taking into account the particular circumstances of the case. In the context of an advisory proceeding, it would have been impossible for ITLOS to go into much more detail.

Third, even though ITLOS attempted to limit its answer to a specific group of flag States, ie States whose vessels were fishing in the EEZ of the SRFC Member States, there was no such spatial limit in the eventual answer that it provided. ITLOS based its interpretation of the ‘obligations to ensure’ entirely on UNCLOS provisions, thus there is nothing in the Advisory Opinion that restricts the ‘obligation to ensure’ to flag States operating the waters of SRFC State Members. This means that the Advisory Opinion could have a much more general application than ITLOS made out to be; indeed it could be applicable to any other flag State whose vessels are engaged in fishing activities in any other States’ EEZ. What is more, as

²⁴² *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, Sep. Op. Paik) ITLOS Reports 2015, 4 [25]. See also Victor Alencar Mayer Feitosa Ventura, ‘Tackling Illegal, Unregulated and Unreported Fishing: the ITLOS Advisory Opinion on Flag State Responsibility for IUU fishing and the Principle of Due Diligence’, (2015) 12 Braz J Int'l L 50, 62.

²⁴³ *Advisory Opinion on IUU Fishing* (n 216) [134]–[140].

²⁴⁴ Tamo Zwinge, ‘Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So’ (2011) 10(2) JIBL.

Articles 94 and 192 are applicable to all maritime zone, flag States would also have to exercise due diligence with regard to fisheries in the high seas. The broad application of the Advisory Opinion on flag States obligations to areas beyond the EEZ may raise problems from a jurisdictional point of view,²⁴⁵ however it contributes to addressing the weaknesses that exist under UNCLOS relating to flag State jurisdiction in the high seas.²⁴⁶

Finally, it is worth recalling that in earlier prompt release cases, ITLOS only paid scant attention to the obligations to conserve marine living resources for coastal States, much less for flag States. Even though in more recent prompt release cases, ITLOS started to take note of coastal States' obligations with regards to the conservation and management of living resources in the EEZ, flag States' obligations in this regard were not mentioned at all. The Advisory Opinion shows a welcome development in ITLOS case law and it is arguably much more in line with the broader emphasis that UNCLOS places on all States to protect the marine environment, including conserving marine living resources. The conclusion in the Advisory Opinion may well have a significant impact on the balancing exercise that ITLOS is to carry out in future prompt release cases.

Notwithstanding the abovementioned important contributions, a close examination of the Advisory Opinion reveals a significant drawback in the interpretation method that ITLOS adopted. In clarifying the scope of flag State obligation over its vessels, ITLOS restricted itself to relying solely on the wording of UNCLOS provisions. It did not resort to any other means of treaty interpretation as stipulated under Article 31 of the Vienna Convention on the Law of Treaties (VCLT).²⁴⁷ In particular, it did not make any reference to the ordinary meaning of the terms, nor the object, purpose or context of the provisions in which flag States' obligations over IUU fishing were located. The UNCLOS Preamble, for example, makes clear that one of the objectives of the Convention is to 'facilitate [...] the conservation of the living resources and the study, protection and preservation of the marine environment'. ITLOS could have referred to this objective to support its decision to read the flag State obligation to ensure into the Convention in line with this conservationist spirit.

More importantly, even though ITLOS insisted that the provisions of UNCLOS provided the basis for flag State obligations as enumerated in the Advisory Opinion, it is difficult to see how this was the case for all of these obligations. For instance, ITLOS held that flag States had

²⁴⁵ See Chapter 5, Part I.2.

²⁴⁶ See Budislav Vukas and Davor Vidas, 'Flags of Convenience and High Seas Fishing: The Emergence of a Legal Framework' in Olav Schram Stokke, *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (OUP 2001) 56; Hey (n 72) 35.

²⁴⁷ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969).

the obligation to include enforcement mechanisms to monitor and secure compliance with the coastal State's laws and regulations, including the imposition of sanctions. However, nowhere in Article 58(3), 62(4), 192 or 193 of UNCLOS can one find any reference to or indication of enforcement mechanisms or sanctions. The requirement to put in place such mechanisms is instead found under Article 19(2) of the 1995 Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks—commonly known as the United Nations Fish Stocks Agreement (UNFSA).²⁴⁸ Similarly, the obligation to ensure that vessels are properly marked finds no basis under UNCLOS, but rather under Article 18(3)(d) UNFSA. Therefore, ITLOS' statement that UNCLOS provided the framework for flag State obligations did not hold true. Thus, instead of feigning that it was relying solely on UNCLOS to answer the advisory request, ITLOS should have acknowledged the relevance of other fisheries agreements and provided some explanation as to why and how these agreements were relevant to the interpretation of the 'obligation to ensure' under UNCLOS.

In any case, even if ITLOS had genuinely intended to use UNCLOS as the grounds for its findings on flag States' obligations over illegal fishing activities conducted by their vessels, it is argued that UNCLOS itself was both too broad and too narrow to serve as the basis for ITLOS' answer to the SRFC's question.

On the one hand, the reliance on UNCLOS was too broad in light of the fact that ITLOS took pains at the outset of the Advisory Opinion to affirm that the question and the answer provided only related to 'obligations of flag States not parties to the MCA Convention in cases where vessels flying their flag are engaged in IUU fishing within the EEZ of SRFC Member States'.²⁴⁹ In other words, ITLOS intended to limit the scope of the Advisory Opinion to a specified group of States in a specific area. However, as mentioned above, the answer provided betrayed this intention. Although fishing activities in the area under scrutiny, ie the EEZ of SRFC Member States, are regulated under the MCA as well as bilateral agreements between several SRFC Member States, the specific obligations contained in these instruments did not play any significant role in ITLOS' consideration. Although ITLOS did briefly mention both the MCA Convention and bilateral fisheries access agreements concluded by the SRFC Member States,²⁵⁰ it is not entirely clear whether or how these two instruments had any

²⁴⁸ The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3 (4 August 1995).

²⁴⁹ *Advisory Opinion on IUU Fishing* (n 216) [89].

²⁵⁰ *ibid* [113], [114].

substantive influence ITLOS' findings. The flag State obligations were instead all based on UNCLOS. In the end, there were no spatial or normative limits in ITLOS's final findings to show that the answers provided are only applicable to SRFC Member States in the context of the MCA Convention.²⁵¹

On the other hand, ITLOS's reliance only on UNCLOS was too narrow in that it failed to take into account the developments in the law on fisheries that have taken place since UNCLOS was concluded in 1982. UNCLOS only establishes a framework to regulate flag State jurisdiction which does not sufficiently address all issues, including flag State obligation over fishing vessels engaged in illegal fishing. ITLOS itself admitted as much.²⁵² Instead, the law on fisheries and specifically the rules on coastal States and flag States obligations over fishing vessels and fish stocks in both the EEZ and the high seas, have been developed to a large extent by post-UNCLOS instruments. In order to tackle the issue of ineffective flag State control over fishing vessels, several fisheries instruments have been put in place, including the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement),²⁵³ the 1995 UNFSA, and a series of soft law instruments developed under the auspices of the Food and Agricultural Organization (FAO), most importantly the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.²⁵⁴ However, as was evident, ITLOS made no mention of these subsequent fisheries agreements in the Advisory Opinion in the process of interpreting UNCLOS provisions relating to flag States' obligations over their fishing vessels.

One explanation for ITLOS' reluctance to expressly refer to the abovementioned subsequent agreements is that they are either non-binding documents or if they are binding, such the Compliance Agreement or the UNFSA, not all SRFC Member States are parties to these instruments.²⁵⁵ The imposition of obligations found under these agreements on States

²⁵¹ Michael A Becker, 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)' (2015) 109(4) AJIL 851, 856; Tom Ruys and Anemoon Soete, 'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea' (2016) 29(1) LJIL 155, 174; Solène Guggisberg, *The Use of CITES for Commercially-exploited Fish Species: A Solution to Overexploitation and Illegal, Unreported and Unregulated Fishing?* (Springer 2015) 173.

²⁵² *Advisory Opinion on IUU Fishing* (n 216) [110].

²⁵³ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (24 November 1993) 2221 UNTS 91.

²⁵⁴ FAO, Code of Conduct for Responsible Fisheries (31 October 1995); FAO IPOA-IUU (n 183); FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (22 November 2009).

²⁵⁵ The member States of the SRFC are Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra Leone. Among these States, only Guinea and Senegal are parties to the 1995 UNFSA. See <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement_for_the_implementation_of_the_provisions_of_the_Convention_of_10_December_1982_relating_to_the_conservation_and_management_of_straddling_fish_stocks_and_highly_migratory_fish_stocks> accessed 25 September 2018.

parties to UNCLOS may thus raise objection as it violates the fundamental rule of international treaty law, the *pacta tertiis* rule. However, instead of pretending that they were of no relevance to the interpretation exercise that it was conducting, it would have been more transparent if ITLOS had considered employing and explaining the interpretative techniques which would allow it to better account for the development that it had brought about under UNCLOS.

Judge Paik, in his Separate Opinion, proposed the use of ‘the rule of reference’ in order to take into account the UNFSA as well as other bilateral fisheries agreements in the interpretation of flag States’ obligations under UNCLOS. This rule, he argued, was already employed in the Convention, particularly in Part XII of UNCLOS and in Article 94(5) in regard to the exercise of flag State duties to ensure safety at sea.²⁵⁶ According to this rule, UNCLOS ‘first formulates a general duty, and then refers to and incorporates those rules or standards developed in other legal instruments into its ambit’ and these rules and standards will ‘give specific content to the general duty enunciated by the Convention’.²⁵⁷ The rule of reference can thus be employed to ‘give effective content to the general yet rather vague obligations of the flag State in respect of IUU fishing’,²⁵⁸ and ‘to impose legal obligations on a State to apply certain rules and standards which it would otherwise not have been legally bound to apply’.²⁵⁹

The ‘rule of reference’ that Judge Paik proposed has merits to the extent that, unlike the Advisory Opinion which completely failed to mention any subsequent fisheries agreements, it provided the basis for the incorporation of the rules contained in non-UNCLOS instruments to clarify the content of the obligations imposed on flag States under UNCLOS. This ‘rule of the reference’ approach is, however, not without problem. UNCLOS provides for the rule of reference in only few specific cases, mostly relating to marine pollution. The rules, standards and procedures to which the relevant UNCLOS provisions make reference are those which are implied or widely accepted by States.²⁶⁰ Therefore, although they are not mentioned explicitly in the Convention, States parties to UNCLOS have given their consent to incorporate these rules into the Convention and thus implicitly agreed to be bound by them. The fact that the Convention does not include the rule of reference for flag State obligations over illegal fishing, while expressly providing for them in other specific cases, weighs strongly against Judge Paik’s

²⁵⁶ *Advisory Opinion on IUU Fishing*, Separate Opinion of Judge Paik (n 242) [24].

²⁵⁷ *ibid* [23].

²⁵⁸ *ibid*.

²⁵⁹ *ibid*.

²⁶⁰ For example, Article 211 UNCLOS requires the coastal States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from vessels which at least have the same effect as that of ‘generally accepted international rules and standards established through the competent international organization or general diplomatic conference’. The ‘competent international organization’ referred to in this article is the International Maritime Organization.

approach. This is especially so, given that the Convention was very carefully negotiated to ensure the balance of rights of both coastal and flag States in the EEZ. The use of analogy to extend the rule of reference to flag State obligations in the field of IUU fishing activities may upset this balance in the Convention.

It is instead argued that ITLOS could have considered the rules of treaty interpretation provided for under Article 31 of VCLT, in particular addressing whether post-UNCLOS fisheries instruments could be referred to on the basis of Article 31(3) of the VCLT to shed light on flag States' obligations under UNCLOS.²⁶¹

Paragraphs (a) and (b) of Article 31(3) provide respectively that subsequent agreements and subsequent practice which establish the agreement of the parties regarding a treaty's interpretation should be taken into account. While different in form, ie agreement and practice, courts and tribunals do not always draw a sharp distinction between subsequent agreement and subsequent practice,²⁶² leading the International Law Commission (ILC) to coin them collectively as 'subsequent conduct'. Whatever its form, therefore, the key point of the two paragraphs is that the subsequent conduct must establish the agreement or common understanding between the parties regarding the interpretation and/or application of the treaty under scrutiny.

Taking the aforementioned approach, without dwelling on the distinction between (a) and (b), the question is whether the UNFSA, the Compliance Agreement and other non-binding soft law fisheries instruments qualify as subsequent conduct for the purposes of interpreting UNCLOS? Article III, the core of the Compliance Agreement, specifies that flag States are responsible for vessels flying their flags, no high sea fishing should be take place without prior authorisation of the flag State, and no authorisation shall be given unless the flag State is able to exercise effective responsibilities.²⁶³ The UNFSA is, as its name makes clear, an 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the

²⁶¹ In order to interpret a treaty, Article 31(3) provides that: There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

²⁶² Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 173; Irina Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction' in Donald Rothwell et al (n 217) 49 (in which she argues that 'the distinction between subsequent agreement and subsequent practice is a fluid one').

²⁶³ Erik J Molenaar, 'Current Legal and Institutional Issues Relating to the Conservation and Management of High-Seas Deep-Sea Fisheries' (FAO Report for the FAO Expert Consultation on Deep Sea Fisheries in the High Seas) <<http://www.fao.org/tempref/docrep/fao/010/a1341e/a1341e02c.pdf>> accessed 25 September 2018.

Sea' which specifies on the fundamental obligation specified under UNCLOS to conserve and manage straddling stocks and highly migratory species. It elaborates at great length the duties of the flag State and makes more stringent the obligation of flag States to exercise control over vessels flying their flags in the high seas. Admittedly, the obligations imposed on flag States whose vessels are fishing in the high seas cannot be automatically transferred and imposed on flag States whose vessels are fishing in the EEZ, due to the concurrent coastal States' sovereign rights and jurisdiction in the EEZ. However, ITLOS had already recognised that, by virtue of Article 58(2), flag State duties in the high seas are applicable to the EEZ insofar as they are not incompatible with coastal State obligations. The flag States' obligations contained under the Compliance Agreement and the UNFSA, therefore, can provide guidance for the interpretation of flag States' obligations over fishing vessels in the EEZ. As a result, an argument could be made that these instruments should be considered as a subsequent agreement for the purposes of interpreting UNCLOS, particularly its Articles 63, 64 and 116 to 119.

Admittedly, such a categorisation encounters several potential issues. First, the UNFSA does not only give concrete content to otherwise general obligations under UNCLOS, it also introduces new principles and concepts that are not found under the Convention.²⁶⁴ With particular regard to flag States' obligations over vessels flying their flags, the UNFSA expands under Article 18 the scope of obligations found under Article 94(1) of UNCLOS. Due to these novel elements, some have even argued that the UNFSA has undermined the basic principles of UNCLOS,²⁶⁵ while others contend that the UNFSA has modified—not merely interpreted UNCLOS.²⁶⁶ On the other hand, the dividing line between interpretation and modification is often 'difficult, if not impossible to fix'.²⁶⁷ The ILC has also recognised that subsequent conduct could be to 'result in narrowing, widening, or otherwise determining the range of possible interpretations'. This means that the fact that the UNFSA and other fisheries agreements may have constituted a modification of UNCLOS does not necessarily exclude them from having a role in the interpretation of the Convention in accordance with Article 31(3).

²⁶⁴ For example, precautionary approach, compatibility of conservation and management measures, regional cooperation on high seas enforcement and port State enforcement.

²⁶⁵ David Freestone and Alex G Oude Elferink, 'Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever be Used?' in Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005) 169.

²⁶⁶ Buga (n 262) 63.

²⁶⁷ Georg Nolte, 'Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' Report of the Special Rapporteur, A/CN.4/715, 20.

Secondly, even if one were to adopt a loose understand of ‘interpretation’, subparagraphs (a) and (b) require the subsequent conduct to be ‘between the parties’. Here, the distinction between the two paragraphs may be of some importance. In relation to paragraph (a), not all parties to UNCLOS are parties to the UNFSA or the Compliance Agreement.²⁶⁸ The ICJ made clear in *Whaling* that the consent of all the parties involved to a subsequent instrument played a key role in determining whether an instrument constituted subsequent agreements within the meaning of subparagraph (a).²⁶⁹ In a recent ILC draft conclusion on ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’, the Chairman of the Drafting Committee also explained that even though the ILC opted not to include the word ‘all’ before ‘the parties’, the agreement of all parties is required under subparagraph (a).²⁷⁰ In the same vein, Boyle argued that ‘whether another treaty is regarded as an agreement on interpretation of UNCLOS [...] the level of participation cannot be ignored’.²⁷¹ All the aforementioned fisheries agreements, therefore, may not strictly qualify as ‘subsequent agreements’ under Article 31(3)(a) given the SRFC Member States’ uneven subscription to UNCLOS and to UNFSA or the Compliance Agreement.

When it comes to subparagraph (b), the requirement seems to be that not all States need to be engaged in the practice, so long as they are aware and acquiesce to it, to the extent that there is a common understanding between all parties regarding the application of the treaty.²⁷² The UNFSA came into being to address, *inter alia*, flag States’ lack of effective exercise over their vessels and the loopholes in the Convention regarding this issue. It is a global fisheries treaty which was negotiated and adopted by consensus, including by major distant water and coastal fishing states.²⁷³ In a study on the non-participation of UNCLOS States parties in the UNFSA, one commentator suggested four reasons why a number of States have not become

²⁶⁸ The number of State parties to the UNCLOS is 167. The number of State parties to the UNFSA is 83. See <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 25 September 2018. The number of State parties to the Compliance Agreement is 40. See <<https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>> accessed 25 September 2018.

²⁶⁹ In this case, the ICJ rejected the relevance of the recommendatory resolutions and Guidelines of the IWC to the interpretation of the undefined term of ‘scientific research’ in Article VIII(1) of the ICRW. The basis for this decision was that many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of VCLT 31(3)(a) & (b). See *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226 [83].

²⁷⁰ Charles Chernor Jalloh, ‘Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’ Statement of the Chair of the Drafting Committee (18 May 2018) > accessed 25 September 2018.

²⁷¹ Alan Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (2005) 54(3) ICLQ 563, 571.

²⁷² Nolte, ‘Fifth Report’(n 267) 14.

²⁷³ Boyle (n 271) 570.

parties to the UNFSA, none of which pertain to objections to flag States' obligations over fishing vessels.²⁷⁴ This shows that the flag States obligations under UNFSA, reiterating those under the Compliance Agreement and echoed under other non-binding instruments, could be understood to represent the common understanding of flag States obligations over fishing vessels which are not clearly stipulated under UNCLOS.

Furthermore, it is worth recalling that ITLOS has in fact referred to subsequent agreements, including the UNFSA and other non-binding fisheries agreements, in order to elucidate various UNCLOS provisions. For example, ITLOS in interpreting the requirement of 'genuine link' under Article 91(1) took note of several international agreements such as the United Nations Convention on Conditions for Registration of Ships, the UNFSA, the Compliance Agreement,²⁷⁵ even though these agreements were not in force at the time.²⁷⁶ ITLOS also resorted to a series of post-UNCLOS fisheries agreements in *Virginia G* in the interpretation and application of Articles 56 and 62(4).²⁷⁷ Many of these agreements had not at the time entered into force or were regional agreements, thus they were not binding on all State parties to UNCLOS and the parties to the case. As ITLOS did not specify the grounds for relying on these instruments, it is not clear whether such reference was based on Article 31(3) and if so, whether ITLOS was forsaking the requirement of 'all parties'.

In a similar vein, ITLOS has also resorted to subsequent practice in interpreting various provisions under UNCLOS. In *Virginia G*, in interpreting the scope of the measures which coastal States may take in its EEZ to conserve and manage its living resources under Articles 56 and 62(4) of the Convention, ITLOS sought guidance in 'national legislation of several States, not only in the West African region, but also in some other regions of the world', adding that 'there is no manifest objection to such legislation and that it is, in general, complied with.'²⁷⁸ In *M/V Saiga (No. 2)*, ITLOS also implicitly referred to subsequent practice in an earlier case when interpreting the principles of law enforcement at sea, without again

²⁷⁴ The four reasons are: (i) objections to substantive aspects, including the principle of compatibility under Article 7, high seas enforcement by non-flag States under Articles 21 and 22, the denial to non-members of RFMOs of access to fishery resources pursuant to Article 8(4), port State measures under Article 23 of the UNFSA; (ii) lack of Awareness and Misconceptions that the Agreement addresses the conservation and management of fish stocks on the high seas only; (iii) lack of direct interest in fisheries for straddling and/or highly migratory fish stocks and (iv) a cost-benefit analysis. See Erik J Molenaar, 'Non-Participation in the Fish Stocks Agreement: Status and Reasons' (2011) 26 IJMCL 195, 200.

²⁷⁵ *M/V 'Saiga' (No. 2)* (n 89) [85].

²⁷⁶ Georg Nolte, 'Second Report for ILC Study Group on Treaties over Time: Jurisprudence Under Special Regimes Relating Subsequent Agreements and Subsequent Practice (2011) 285.

²⁷⁷ *M/V 'Virginia G'* (n 91) [216].

²⁷⁸ *ibid* [218]

acknowledging this.²⁷⁹ The Annex VII arbitral tribunal in *South China Sea* was more explicit in acknowledging the relevance of subsequent practice pursuant to Article 31(3)(b) in interpreting Article 121(3) UNCLOS. Nevertheless, even then, the tribunal also did not engage in a detailed examination of this subparagraph. After stating that the threshold at which subsequent practice would come into the ambit of Article 31(1)(b) was ‘high’,²⁸⁰ it simply concluded that State practice on the interpretation of Article 121(3) did not differ from that adopted by the tribunal based on the interpretative canon found in Article 31(1) VCLT. There was no exposition of whose practice or what kind of practice was at stake. The tribunal appeared to use subsequent practice in this case to confirm an interpretation previously reached, thus much more in the sense of a supplementary means of interpretation as stipulated under Article 32 VCLT.²⁸¹

The preceding discussion shows that UNCLOS tribunals have not been reluctant to resort to subsequent conduct in previous cases to interpret various provisions under UNCLOS, without referring to Article 31(3) VCLT or providing a clear explanation of the interpretative technique used. ITLO—perhaps not uniquely—also did not specify whether the certain acts were considered subsequent agreements or subsequent practice under subparagraph (a) and (b). Furthermore, ITLOS paid little attention to the fact that the subsequent agreements it cited were not binding on the parties to UNCLOS nor the parties to the case when using them to interpret the Convention. The fact that the eventual interpretation adopted in these cases was based on a combination of both international agreements and domestic legislation shows that in cases in which the interpretative value of subsequent agreements may not be immediately clear—as the case of the Compliance Agreement or UNFSA above—ITLOS has strengthened the cogency of its interpretation by further examining State practice relating to the issue at hand. It would have been desirable if ITLOS in the *Advisory Opinion on IUU Fishing* had attempted to acknowledge subsequent agreements and practice in the same manner in interpreting flag States obligations.

Alternatively, ITLOS could have examined whether Article 31(3)(c) could be used to read into UNCLOS flag States obligations found under other fisheries agreement. Article 31(3)(c) essentially provides for what the ILC terms as the principle of systemic integration in treaty

²⁷⁹ *ibid* [156]

²⁸⁰ *South China Sea*, Merits (n 622) [552].

²⁸¹ Article 32 VCLT provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

interpretation, in order to avoid treaties from being interpreted and applied in a vacuum, detached from the rest of the corpus of international law. Indeed, the ICJ has acknowledged in several cases that treaties are to be ‘interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’.²⁸² Thus Article 31(3)(c) has been used by various courts and tribunals as a tool to resort to external rules in order to interpret certain terms or provisions in a particular convention.²⁸³ Following the same logic, it can be argued that flag States obligations over fishing vessels under UNCLOS cannot and should not be interpreted in isolation, without regard to relevant rules on the matter.

The application of this subparagraph (c) turns on the question as to what could be considered ‘relevant rules’ for the purposes of shedding light on a particular Convention? Case law seems to point to, with most authors in agreement, ‘rules’ as encompassing primary sources of law, including treaties, customary law and general principles of international law.²⁸⁴ While it could be argued that flag States’ exclusive jurisdiction over vessels flying their flags is a rule of customary international law, the flag States’ obligations listed under UNFSA have not achieved this status, as Judge Paik acknowledged himself,²⁸⁵ nor can they be regarded as general principles of international law. When external rules are in the form of international conventions, the same problem as in the case of subparagraph (a) and (b) resurfaces, ie whether all the parties to UNCLOS must also be parties to external conventions for interpretative purposes. Such a requirement would seem to severely restrict the applicability of subparagraph (c) as it is difficult to imagine a situation in which the membership of two multilateral conventions is exactly the same, so as to allow one to be a relevant rule to interpret the other. MacLachlan acknowledged that this understanding ‘precludes reference to treaties which represent the most important elaboration of the content of international law on a specialist subject matter’.²⁸⁶ Fisheries agreements are arguably specialist agreements in this sense. In any case, however, international courts and tribunals, when invoking Article 31(3)(c), did not seem to have adopted a stringent

²⁸² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 31; *Aegean Sea Continental Shelf Case* [1978] ICJ Rep 3, [32]–[33].

²⁸³ See, eg, *Proceedings Pursuant to the OSPAR Convention (Ireland/United Kingdom)* (2 July 2003) RIAA Volume XXIII 59-151, paras 93-105, 1137-38; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para 158.

²⁸⁴ *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291 (29 September 2006) para. 7.67; *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161 [41]. See also Campbell MacLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 310.

²⁸⁵ *Advisory Opinion on IUU Fishing*, Separate Opinion of Judge Paik (n 242) [22].

²⁸⁶ MacLachlan (n 284) 314.

threshold in regard of the parties requirement, as in some cases, they even referred to treaties to which only one of the disputing parties was party.²⁸⁷

In the *Advisory Opinion on IUU Fishing*, the reference to subsequent fisheries agreements would not necessarily mean that ITLOS was seeking to impose additional obligations on the SRFC Member or UNCLOS Member States in general. ITLOS' finding that an obligation to ensure on the part of flag States can be read from the existing obligations under UNCLOS was not unreasonable. The resort to other fisheries agreements would come into play only to shed light on the contours of that obligation. Thus resort to those instruments should be more properly viewed as the interpretation of the flag State obligations under UNCLOS in light of the development of the rules on flag States' obligations which has taken place since the adoption of UNCLOS, and which embodies the common understanding of flag States obligations by a large number of States. This approach is both in line with the object and purpose of UNCLOS, the framework nature of the Convention and the rules on treaty interpretation under the VCLT, and as one commentator observed, in the particular case of the WTO AB, in doing so 'the tribunal is using other treaties not so much as sources of binding law, but as a rather elaborate dictionary.'²⁸⁸

In sum, ITLOS established that while coastal States are entitled take enforcement measures against foreign vessels fishing in their EEZ, flag States also bear the obligation to ensure that their vessels do not engage in IUU fishing in the EEZ of another State. This 'obligation to ensure' is an obligation of due diligence requiring a hosts measures on the part of flag States. While there are arguably flaws in the method that ITLOS employed to reach the above conclusion, its answer provided an important development in the law on fisheries, particularly when UNCLOS itself is silent on this issue.

III. COASTAL STATES' RIGHTS AND OBLIGATIONS OVER TRANSBOUNDARY FISH STOCKS

Articles 63 and 64 UNCLOS specify the obligations imposed on coastal States with regard to straddling stocks and migratory species respectively. To date, the rights and obligations of coastal States in the conservation and management of transboundary stocks were at issue in two

²⁸⁷ Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 48.

²⁸⁸ MacLachlan (n 284) 315.

instances, namely the *Southern Bluefin Tuna* provisional measure case and the *Advisory Opinion on IUU Fishing*.²⁸⁹

The *Southern Bluefin Tuna* arbitration concerned Japan's unilateral experimental fishing of the southern bluefin tuna (SBT)—a highly migratory species under UNCLOS Annex I. However, as the Annex VII arbitral tribunal constituted to hear the cases decided that it did not have jurisdiction, the substance of Articles 64, 116(b) and 119(3) of UNCLOS, which are important provisions underpinning the regime for conservation and management of highly migratory stocks, were not addressed.²⁹⁰ In the provisional phase, as ITLOS was not allowed to make findings which may prejudice the merits of the case, it could only briefly address the abovementioned provisions and thus did little to throw light on the obligations contained in Articles 64 and 118. ITLOS stated that these articles required the parties to cooperate in the conservation and management of the SBT and noted that 'the parties should intensify their efforts to cooperate with the other participants in the fishery for SBT'.²⁹¹

In the *Advisory Opinion on IUU Fishing*, the question that ITLOS was asked did not directly mention transboundary fish stocks, nor did it employ the terms used by UNCLOS, ie 'straddling stocks' and 'migratory stocks'. Instead, the SRFC asked ITLOS for an opinion on 'the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest'.²⁹² ITLOS nonetheless determined that, based on the definition of 'shared stocks' in the MCA Convention and of 'stocks of common interest' provided by the SRFC in the oral proceedings, these two expressions referred to straddling stocks between two EEZs and between the EEZ and the high seas.²⁹³ This paved the way for ITLOS to examine two questions relevant to transboundary stocks: (i) does UNCLOS provide for an obligation for 'sustainable management' of transboundary stocks, despite it not being found under UNCLOS? and (ii) what are coastal States' obligations under Articles 63 and 64? ITLOS' answers will be examined in the following sections.

²⁸⁹ In the *Chagos MPA* case, the Annex VII arbitral tribunal touched upon the question of transboundary stocks, but only to the extent that concerned the compulsory jurisdiction over disputes arising from the conservation and management of transboundary stocks, not on the substance of the coastal State's obligations.

²⁹⁰ *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Award on Jurisdiction and Admissibility (4 August 2000) 39 ILM 1359. [Southern Bluefin Tuna Award]

²⁹¹ *Southern Bluefin Tuna Order* (n 227) [78].

²⁹² *Advisory Opinion on IUU Fishing* (n 216) [175].

²⁹³ *ibid* [186].

1. ‘Sustainable management’ of transboundary fish stocks

Although Article 63, which deals with transboundary fish stocks, does not expressly address sustainable management, only the ‘conservation and development’ of such stocks,²⁹⁴ ITLOS found that Article 61, which stipulates the obligations of coastal States to conserve living resources in general, provides guidance on the meaning of ‘sustainable management’.²⁹⁵ ITLOS then proceeded to cite Article 61 in full, before concluding that as ‘the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource’,²⁹⁶ the term ‘sustainable management’ had the same meaning as ‘conservation and development’ as used in Article 63(1).²⁹⁷

ITLOS’ interpretation of the term ‘conservation and development’ of fish stocks under UNCLOS as bearing the same meaning as ‘sustainable management’ brought about a welcome development to UNCLOS. Although UNCLOS does not use the terms ‘sustainable management’ or ‘sustainable development’, ITLOS’ interpretation confirmed that these are the goals underlying the Convention’s obligations for coastal States to conserve and manage living resources in the EEZ. Such an interpretation placed UNCLOS within the move towards sustainable development under international environmental law. This was also in line with the expectation placed upon UNCLOS to provide ‘the international legal basis for pursuing the protection and sustainable development of marine and coastal environment and its resources’.²⁹⁸

On the other hand, even though it seems reasonable to conclude that the term ‘sustainable development’ is implied in the use of ‘conservation and management’ under Article 63(1), the reasoning that ITLOS used to reach this conclusion was not persuasive. ITLOS relied entirely on Article 61 to link these two terms but did not explain which elements of Article 61 ‘provided guidance’ on the meaning of the term ‘sustainable development’. Article 61 provides in part ‘States shall take conservation and management measures to ensure that the living resources in the EEZ are not endangered by over-exploitation’ and that ‘such measures shall be designed to maintain or restore populations of harvested species at levels which can produce maximum sustainable yield’ (MSY). However, many have argued that the concept of MSY is inadequate

²⁹⁴ *ibid* [188].

²⁹⁵ *ibid* [189].

²⁹⁶ *ibid* [190].

²⁹⁷ *ibid* [191].

²⁹⁸ United Nations General Assembly, *Law of the Sea: Report of the United Nations Secretary General*, UN Doc A/47/623 (24 November 1992), para 62. See also: Alexander Yankov, ‘The Law of the Sea Convention and Agenda 21: Marine Environmental Implications’ in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 271.

for the task of conserving fish stocks and minimising the broader ecological effects of fisheries.²⁹⁹ It is also worth noting that under Article 61, coastal States are free to determine the ‘allowable total catch of the resources in their EEZ’. There is no obligation to promote sustainable use of the resources under Article 61. It is only under Article 62 that the obligation to promote the objective of optimum utilisation comes into play, albeit still ‘without prejudice to Article 61’. Thus, one commentator has argued that the principles to guide conservation and management of the EEZ in Article 61 are ‘at best, vague and ambiguous and, at worst, are based on precepts that are unworkable to maintain the sustainability of the living resources in the [EEZ] in the current environment’.³⁰⁰ It seems therefore difficult to conclude that Article 61 by itself contains the idea of sustainable development of living resources under UNCLOS. ITLOS’ reliance on Article 61 as the sole basis for the interpretation of the term ‘sustainable development’ without engaging in a meaningful analysis of this article leaves its conclusion less than satisfactory.

Again, similar to the interpretation of flag States’ obligations under UNCLOS, ITLOS could instead have taken into account post-UNCLOS instruments, in which States agreed to use the Convention as the legal foundation for sustainable use of the ocean, to help interpret the terms contained in Articles 61 and 63. For example, Agenda 21 entitled ‘Programme of Action for Sustainable Development’ adopted by the United Nations Conference on Environment and Development in 1992 clearly acknowledged in Chapter 17 on the ‘Protection, Rational Use, and the Development of the Living Resources in Marine and Coastal Areas’ that the measures for the sustainable use and conservation of marine living resources are in accordance with the relevant provisions of UNCLOS.³⁰¹ The Rio+ 20 United Nations Conference on Sustainable Development in 2012 reaffirmed that UNCLOS ‘is an important tool for sustainable development’.³⁰² These instruments, having been adopted by the majority of States in the international community, lend weight to reading the goal of ‘sustainable development’ into UNCLOS.

The concept of sustainability also features prominently in the UNFSA. Article 2 UNFSA defines the objective of the Agreement as ‘ensur[ing] long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective

²⁹⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 735; Donna R Christine, ‘The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone’ in Hey (n 72) 402–04.

³⁰⁰ Christine (n 299) 406.

³⁰¹ Rio Declaration on Environment and Development, 13 June 1992, UN Doc A/CONF.151/26.Rev.1.

³⁰² *The Future We Want*, UNGA Res A/RES/66/288.

implementation of the [UNCLOS]'. Moreover, Article 7(2) of UNFSA specifically sets out the compatibility principle which requires conservation and management measures for areas within national jurisdiction to be compatible with those in the high seas in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety.³⁰³ Barnes argues that this principle 'may result in the principles contained in the UNFSA being more widely applied to fisheries within national jurisdiction'.³⁰⁴ It follows, therefore, that ITLOS could have referred to the concept of sustainability in the UNFSA in the interpretation of coastal States' obligations with regard to transboundary fish stocks.

It is arguable that ITLOS to be reluctant to resort to the UNFSA in the interpretation of UNCLOS because of the SRFC Members' uneven party status to UNCLOS and UNFSA. However, the same arguments regarding the use of subsequent agreements as interpretive tools, as analysed above, apply in this situation. Moreover, as the UNFSA is an implementing agreement of UNCLOS and regulates the same stocks as those under Articles 63 and 64 of UNCLOS, it seems reasonable that conservation measures for transboundary stocks under UNCLOS and UNFSA share the same goals. ITLOS could have relied on subsequent agreements, particularly the compatibility and sustainability principles under the UNFSA, to read 'sustainable management' into Article 63, as opposed to merely relying on Article 61.

2. Coastal States' obligations under Articles 63 and 64

Turning to the substantive content the question, ie coastal States' obligation in ensuring the sustainable management of transboundary stocks, ITLOS identified three different regimes under UNCLOS applicable to the three different types of fish stocks. First, in respect of species which occur within the EEZs of two or more SRFC Member States, ITLOS found that under Article 63(1) these States have the obligation to seek to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks. It observed that while 'conservation' is provided for under Article 61, UNCLOS remains silent on 'development'. ITLOS then proceeded to fill in this gap and held that the term 'development of such stocks' used in Article 63(1) of the Convention suggested that 'these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime'.³⁰⁵ Even though the clarification of the term 'development of fish stocks' was welcome, ITLOS did not elaborate on what constituted a 'framework of sustainable fisheries management regime'. Since ITLOS

³⁰³ See Alex G Oude Elferink, 'The Impact of Article 7 (2) of the Fish Stocks Agreement on the Formulation of Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks', *FAO Legal Papers Online*, No. 4, August 1999 < <http://www.fao.org/3/a-bb037e.pdf> > accessed 25 September 2018.

³⁰⁴ Barnes, 'The Convention on the Law of the Sea: An Effective Framework' (n 75) 233.

³⁰⁵ *Advisory Opinion on IUU Fishing* (n 216) [198].

did not refer to any other international instruments, presumably, this framework was one contained solely under UNCLOS. Second, for stocks occurring in coastal States' EEZ and adjacent areas, ITLOS stated the limited scope of the advisory request could only allow it to make observations concerning the State's obligations insofar as the fish stocks were found in the EEZ.³⁰⁶ Accordingly, ITLOS held that coastal States have the obligation to cooperate through competent international organisations to ensure that the shared stocks are not endangered by over-exploitation.³⁰⁷

ITLOS further held that both the duty to cooperate and the duty to seek to agree were 'due diligence' obligations which required the States concerned to consult with one another in good faith, pursuant to Article 300 of the Convention.³⁰⁸ These obligations were thus an obligation of conduct and State parties have to consult each other with a view to reaching an agreement on measures to conserve and develop the fish stocks, but they are not under an obligation to reach such an agreement. ITLOS only required that consultation be meaningful, in the sense that substantial effort should be made by all States concerned.³⁰⁹ The obligations as interpreted by ITLOS thus have the nature of *pactum de negotiando*, implying a duty to enter into negotiation, not *pactum de contrahendo*, implying a duty to negotiate and to reach an agreement.³¹⁰ Such an interpretation sets a rather low threshold for the fulfilment of Articles 63 and 64.

ITLOS also attempted to specify the conservation and management measures that coastal States should take to fulfil the obligation to cooperate. For example ITLOS stated that the measures should ensure that the shared stocks would not be endangered by over-exploitation or that they should be designed to maintain and restore stocks at levels which can produce MSY.³¹¹ These requirements, however, were more focused on the objectives that conservation and management measures should achieve, not on what the measures should be. They were, moreover, just repeating what was already provided for more generally under the Articles 61 and 62 on conservation and utilisation of marine sources.

It is worth recalling that the purpose of the SRFC's advisory request was to 'bring clarifications on the rights and duties of the coastal State in the sustainable management of

³⁰⁶ *ibid* [200].

³⁰⁷ *ibid* [207].

³⁰⁸ *ibid* [210].

³⁰⁹ *ibid*.

³¹⁰ For a discussion on the distinction between *pactum de negotiando* and *pactum de contrahendo*, see Stuart M Kaye, *International Fisheries Management* (Kluwer Law International 2001) 111.

³¹¹ *ibid* [208].

shared stocks or stocks of common interest’ in light of the ‘lack of cooperation among SRFC Member States in managing sustainably the stocks of common interest or shared stocks’.³¹² Thus, the request was aimed at asking ITLOS to shed light on the content of the obligation to cooperate in the conservation and management of straddling stocks, not on the objectives of the conservation measures to be taken. It is difficult to see how the fulfilment of the aforementioned objectives would help to address the lack of cooperation among SRFC Member States.

ITLOS also failed to address the consequences of a SRFC member State failing to comply with the obligation to cooperate, or the obligation to seek to agree. The advisory request was triggered by the lack of cooperation between SRFC member States and thus, it would have been more helpful if ITLOS had clarified not only the nature of the obligations but also the consequences of non-compliance. Judge Paik’s Separate Opinion addressed this issue to a certain extent by looking at the relationship between coastal States’ duty to cooperate and their sovereign rights to conserve and manage living resources in the EEZ. While agreeing on the importance of the obligation to cooperate, Judge Paik pointed out that Article 63(1) made clear that the obligation to seek to agree under this article was ‘without prejudice to the other the provisions of Part V’.³¹³ As Part V includes Article 56 providing for the coastal State’s sovereign rights over living resources in its EEZ, Judge Paik came to the conclusion that:

[T]he failure to comply with an obligation to cooperate under article 63, paragraph 1, of the Convention does not entail any constraint or restriction on the exercise of the sovereign rights of the SRFC Member State to conserve and manage the transboundary stocks within its EEZ such as the determination of the total allowable catch and giving other States access to the surplus of the allowable catch.³¹⁴

In the event that any Member State refuses to cooperate in good faith, he argued that other States may ‘invoke the liability of that State for the breach of obligations under article 63, paragraph 1, of the Convention, but not to try to restrict the exercise of its sovereign rights in the EEZ.’³¹⁵ Interestingly, in *Chagos MPA*, the Annex VII tribunal held that, by virtue of Article 297(3)(a), disputes arising from the lack of cooperation between State parties to UNCLOS with regard to transboundary stocks under Articles 63 and 64 were to be excluded from the compulsory jurisdiction of UNCLOS dispute settlement bodies, insofar as these stocks were found in the EEZ.³¹⁶ Judge Paik’s opinion, read in conjunction with the decision of the arbitral

³¹² SRFC Written Statement (n 219) 17.

³¹³ *Advisory Opinion on IUU Fishing*, Separate Opinion of Judge Paik (n 242) [33].

³¹⁴ *ibid* [38].

³¹⁵ *ibid* [38].

³¹⁶ *Chagos MPA* (n 106) [322].

tribunal, meant that coastal States would be left with no means to challenge the failure to cooperate on the part of other coastal States under UNCLOS.

Lastly, with regard to migratory stocks, particularly tuna in this case—a highly migratory species under Annex I of UNCLOS, ITLOS held that, SRFC Member States under Article 64(1) had the obligation to seek to agree upon the conservation and management measures in regard to stocks that occur both within the EEZ of the SRFC Member States and in an area beyond and adjacent to these zones.³¹⁷ ITLOS required the measures to be taken pursuant to the obligation under Article 64(1) to be consistent and compatible with those taken by the appropriate regional organisation, for example the International Commission for the Conservation of Atlantic Tunas in the case of tuna. In its 2014 *Whaling* judgment, the ICJ held that States parties to the International Convention on the Regulation of Whaling (ICRW) had a duty to co-operate with the International Whaling Commission (IWC) and the Scientific Committee, and thus should give due regard to recommendations of the IWC in implementing the Convention.³¹⁸ Although the obligation to cooperate in this case was based on a different convention, ITLOS' statement was reminiscent of the ICJ's *Whaling* judgment, emphasising the important role of treaty bodies in the conservation of highly migratory species.

What is interesting is that, apart from obligations, ITLOS held that SRFC Member States had the right to seek to agree with other Member States in whose EEZ these stocks occur on the measures necessary to coordinate and ensure the conservation and development of such stocks. This was based on the observation that 'although the Convention approaches the issue of conservation and management of living resources from the perspective of obligations of the coastal State, these obligations entail corresponding rights'.³¹⁹ In the same vein, under Article 64(1), SRFC Member States had the right to require cooperation from non-Member States whose nationals fish for tuna in the region.³²⁰ These statements imply that the rights which ensue from the obligation to cooperate under UNCLOS are only available to those that have vested interests in the conservation and management of the fish stocks in question, and not to all other State parties to the Convention. In discussing the right to cooperate, in *Southern Bluefin Tuna*, Churchill raised a highly pertinent question concerning Article 64 that '[t]here is clearly a duty on Japan under Article 64 but whether this confers a correlative right on Australia and New Zealand is much less certain as is what the scope of such a right might be.'³²¹ ITLOS'

³¹⁷ *Advisory Opinion on IUU Fishing* (n 216) [215].

³¹⁸ *Whaling* (n 269) [83].

³¹⁹ *Advisory Opinion on IUU Fishing* (n 216) [205].

³²⁰ *ibid* [206].

³²¹ Robin Churchill, 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?' [2007] 22 *IJMCL* 383, 413.

above statements seem to have answered Churchill's first question, but leaves untouched the intriguing and important second one.

In addition to cooperating with other member States of the regional fisheries organisation, ITLOS also held that States also had an obligation to cooperate with non-Member States. This is because, as ITLOS explained, UNCLOS imposes the obligation to cooperate on each and every State Party concerned to conserve and manage shared resources. As a result, it held that 'member States of the SRFC *may* also, directly or through relevant subregional or regional organizations, seek the cooperation of non-Member States sharing the same stocks along their migrating routes'.³²² The term 'may seek the cooperation' clearly places no binding obligation on coastal States, but merely recognises their discretion to do so. ITLOS' holding is reminiscent of its Order in *Southern Bluefin Tuna*, in which the Tribunal required Australia, New Zealand and Japan not only to make efforts to reach agreement with one another, but also to make efforts to reach agreement with other States and fishing entities engaged in fishing for SBT.³²³

ITLOS' lack of consideration for other international fisheries instruments applicable to the regulation of straddling and migratory stocks faces the same criticism as its analysis of flag States' obligations over fishing vessels. In his Separate Opinion, Judge Ndiaye claimed that ITLOS was 'strikingly mistaken about the extent of the law in force with regard to straddling fish stocks and highly migratory fish stocks'.³²⁴ He believed the question presented to ITLOS was not only governed by UNCLOS but also the UNFSA, as its provisions directly address the main concern of SFRC regarding sustainable management of shared stocks and gives substance to that obligation by establishing mechanism for international cooperation.³²⁵ Relying on the specifics of the obligation to cooperate under the UNFSA, Judge Ndiaye pointed out that in order to fulfil the duty to cooperate, the mere establishment of RFMOs was not sufficient, SRFC Member States also had to further undertake measures required of it as a RFMO under the UNFSA.³²⁶ Given the key role that UNCLOS gives to RFMOs in the conservation and management of transboundary stocks, the list of measures that a coastal State should take as a member of the RFMO as drawn up by Judge Ndiaye gave substance to the obligation to cooperate under Article 63 and 64. It also provided a more direct response to what the SRFC Member States were searching for with the advisory request. However, his opinion was mainly

³²² *Advisory Opinion on IUU Fishing* (n 216) [215]. (emphasis added)

³²³ *Southern Bluefin Tuna Order* (n 227) [90].

³²⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, Sep Op Ndiaye) ITLOS Reports 2015, 4 [9].

³²⁵ *ibid* [10]–[15].

³²⁶ *ibid* [37].

based on a reading of UNCLOS in conjunction with UNFSA and the 2009 Agreement on Port State Measures. The reliance on instruments other than UNCLOS to specify the obligations to be placed on member States of SRFC was not without issue, as analysed above.³²⁷

In the same vein, Judge Paik was not impressed with the absence of clarification on the meaning and scope of the duty to cooperate in managing the shared resources laid down in the relevant provisions of the Convention, as well as the way in which it would be applied between the SRFC Member States.³²⁸ Having established that it was unclear under UNCLOS how the obligation to cooperate was to be performed, Judge Paik commented that:

In addressing the problem arising from the lack of cooperation in this case, simply emphasizing the obligation of cooperation or repeating the relevant provisions of the Convention would hardly be sufficient. In a sense, it begs the question what specifically is required to discharge that obligation, a question this Opinion does not answer satisfactorily.³²⁹

Similar to Judge Ndiaye, he thus turned to and sought guidance in the UNFSA, Article 7 of which contains several concrete obligations to give effect the duty to cooperate.³³⁰

The *Advisory Opinion on IUU Fishing* was the first time coastal States' obligations over transboundary stocks under UNCLOS have been examined in detail. ITLOS attempted to shed light on various terms employed under Articles 63 and 64 which are central to the coastal State's obligations in this regard, such as 'management' and 'development' of fish stocks. The Advisory Opinion brought about a commendable development in that it confirmed that coastal States' obligations to conserve and manage living resources in the EEZ under Article 61 formed part of the sustainable development of ocean resources, placing UNCLOS firmly within the wider framework of sustainable development. However, the Advisory Opinion was limited on the substance of the two important obligations under Articles 63 and 64. Other than elucidating on the nature and objectives of the obligations, it did not provide in any detail on what these obligations entail or what was expected of States to fulfil the obligation to cooperate in conserving and managing transboundary stocks.³³¹

³²⁷ See Chapter 2, Part III.

³²⁸ *Advisory Opinion on IUU Fishing*, Separate Opinion of Judge Paik (n 242) [31].

³²⁹ *ibid* [34].

³³⁰ *ibid* [36].

³³¹ Note that the ICJ also refused to read anything of substance into the duty to cooperate in *Whaling*. However, some of the separate and dissenting judges argued that the duty should be given a very significant substantive content. See *Whaling in the Antarctic*, Separate Opinion of Judge ad hoc Charlesworth, [13]–[17].

IV. CONCLUDING REMARKS

The evolution of the case law concerning the interpretation of Articles 56, 64 and 73 shows that ITLOS was prepared to progressively develop the law on issues which are vague or controversial under the Convention. At the beginning of its existence, ITLOS was more reluctant to take a stand on issues that are not clearly provided for under UNCLOS, such as the legality of bunkering or confiscation of vessels under UNCLOS. However, it became more willing to take a stand and provide guidance on these issues. As a result of ITLOS' broad interpretation of Article 62(4) and Article 73(1), the scope of coastal States' sovereign rights in the EEZ has now been expanded beyond the wording of the relevant provisions of the Convention.

While ITLOS was comfortable with expanding coastal States' regulatory and enforcement powers over fisheries activities in the EEZ, it paid little attention to coastal States' rights in considering the reasonableness of the bond in early prompt release cases. In the bulk of the prompt release cases, ITLOS tended to adopt a restrictive interpretation of the factors to determine the reasonableness of the bond, essentially tilting the balance towards flag States' right to be released promptly over coastal States' rights and obligations to conserve the fish stocks in the EEZ under both UNCLOS and other international agreements. However, there are signs that ITLOS has become more aware of conservation concerns in the latest prompt release case.

The *Advisory Opinion on IUU Fishing* shows that ITLOS was prepared to embrace conservation concerns by incorporating flag States' obligations over fishing vessels engaging in IUU fishing in the EEZ into UNCLOS, despite the Convention's silence on this matter. ITLOS' creative interpretation of UNCLOS provisions to establish flag States' obligation over IUU fishing activities was extremely significant, making UNCLOS an authoritative legal tool in the fight against IUU fishing, and thus strengthened role that UNCLOS can play in the sustainable development of ocean resources. However, the legal reasoning and interpretative technique that ITLOS adopted in order to reach the above conclusion was not wholly satisfactory, giving the tribunal's answer the impression of being overly contrived and formulated so as to reach a predetermined result.

In sum, one of the most significant changes that UNCLOS and its implementing agreements brought to international fisheries law is the shift of focus from exploitation to conservation of marine living resources of living resources. UNCLOS tribunals' interpretation of the States' scope of rights and obligations over living resources has reflected this new focus and informed the balance to be struck in the Convention between coastal States' and flag States'

rights and obligations over living resources. UNCLOS tribunals' clarification of relevant provisions Convention also ensured the latter's applicability to the regulation of activities at sea, even when its wording may not explicitly provide for such activities.

CHAPTER 3 DEVELOPMENT OF THE LAW ON THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

The concept of the ‘continental shelf’ is not new to UNCLOS. It was already the subject matter of the 1958 Convention on the Continental Shelf, and prior to that, the Truman Proclamation.³³² However, while the continental shelf under UNCLOS is still described as the seabed and subsoil of the submarine areas beyond the coastal State’s territorial sea similar to the 1958 Convention,³³³ UNCLOS introduced fundamental changes in the criteria for determining the seaward limits of the continental shelf. According to Article 76(1) UNCLOS, the continental shelf can extend to: (i) a distance of 200 nautical miles (nm) from the baseline from which the breadth of the territorial sea is measured (the distance criterion) or (ii) the limit of the outer edge of the continental margin (the geological criterion). If the outer edge of the continental margin extends beyond 200 nm, the limits of the continental shelf are determined in accordance with the technical requirements in paragraphs (4) to (6) of Article 76.

When establishing the limits of the outer continental shelf, coastal States are required, under Article 76(8), to submit information relating to the limits of the continental shelf to a technical body established under UNCLOS called the Commission on the Limits of the Continental Shelf (‘CLCS’ or ‘the Commission’). The CLCS is comprised of experts in the fields of geology, geophysics or hydrography, and its main function is to consider data and other material submitted by coastal States and to make recommendations regarding where the outer limits are located. In this process of delineation, Article 76(10) UNCLOS, read in conjunction with Article 9 Annex II UNCLOS, makes clear that the CLCS shall not prejudice matters relating to delimitation of boundaries between States. Article 5(a) of Annex I of the Rules of Procedure of the Commission further provides that the Commission ‘shall not consider and qualify a submission made by any of the States concerned in the dispute, unless there is prior consent given by all States that are parties to such a dispute’. The different paragraphs of Article 76, which introduced the notion of ‘the continental shelf beyond 200 nm’ or ‘the outer

³³² Proclamation No. 2667 of September 28, 1945 ‘Policy of the United States with Respect to the Natural Resources of the Subsoil of the Sea Bed and the Continental Shelf’ <http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf> accessed 25 September 2018.

³³³ Article 1 of the 1958 Convention on the Continental Shelf defines the continental shelf as ‘the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea’. See 1958 Convention on the Continental Shelf (29 April 1958) 499 UNTS 311.

continental shelf”, have been described as combining ‘influences of geography, geology, geomorphology and jurisprudence’.³³⁴

Due to this interface between law and science, as well as the functions that the Convention assigns to the CLCS, the new legal regime governing the outer continental shelf under Article 76 becomes highly complex. Moreover, even though Article 83 UNCLOS relating to the delimitation of the continental does not distinguish between the continental shelf within and beyond 200nm, the delimitation of overlapping outer continental shelves undoubtedly raises complicated issues not only relating to the outer continental shelf regime but also delimitation issues not present in the delimitation of other maritime zones. Disputes concerning delimitation of the continental shelf beyond 200 nm have come before different international courts and tribunals, including the ICJ,³³⁵ ad hoc arbitral tribunals,³³⁶ ITLOS and Annex VII arbitral tribunals. To date, only ITLOS and an Annex VII arbitral tribunal have proceeded with delimiting the outer continental shelf in three cases,³³⁷ namely *Bangladesh/Myanmar*,³³⁸ *Bangladesh/India*,³³⁹ and most recently, in *Ghana/Côte d'Ivoire*.³⁴⁰ The decisions of UNCLOS tribunals, therefore, have provided an important source of legal authority in clarifying the legal ambiguities concerning both the regime of the outer continental shelf and the delimitation of this particularly interesting portion of the shelf. The remainder of this Chapter critically

³³⁴ DM Johnston, *The Theory and History of Ocean Boundary-Making* (McGill-Queen’s University Press 1988) 91.

³³⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Reports 624; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) 17 March 2016 <<http://www.icj-cij.org/docket/files/154/18956.pdf>> accessed 25 September 2018; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) 2 February 2017 <<http://www.icj-cij.org/docket/files/161/19330.pdf>> accessed 25 September 2018. In *Nicaragua v Colombia* (2016), the Court found that it had jurisdiction to declare the course of the maritime boundary in the area beyond 200 nm. Similarly, in *Somalia v Kenya*, the ICJ confirmed that it had jurisdiction draw a single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200nm. However, the judgments on the merits have yet to be delivered.

³³⁶ *Delimitation of Maritime Areas between Canada and France* (10 June 1992) RIAA Volume XXI 265–341.

³³⁷ The Annex VII arbitral tribunal confirmed jurisdiction to delimit the outer continental shelf in *Barbados v Trinidad and Tobago* in 2007, but it did not proceed to delimit the outer continental shelf after finding that ‘the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad, there is no single maritime boundary beyond 200 nm’. See *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them* (11 April 2006) RIAA Volume XXVII 147–251 [368]. [*Barbados v Trinidad and Tobago*]

³³⁸ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) ITLOS Reports 2012, 4.

³³⁹ *Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)* (7 July 2014) <<http://www.pcacases.com/web/sendAttach/383>> accessed 25 September 2018.

³⁴⁰ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment, 23 September 2017) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf> accessed 25 September 2018.

examines the significance of UNCLOS tribunals' decisions, with references to the decisions of other courts where appropriate, in clarifying the following issues: (i) coastal States' entitlement to an outer continental shelf, (ii) the relationship between UNCLOS tribunals and the CLCS; (iii) the delimitation method for the outer continental shelf and (iv) the grey area.

I. ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NM

Coastal States do not need to make an express claim to a continental shelf, unlike the EEZ, in order to enjoy the rights within this maritime zone. As the ICJ made clear in the *North Sea Continental Shelf* cases, the rights of coastal States in the continental shelf 'exist ipso facto and ab initio, by virtue of its sovereignty over land'.³⁴¹ Article 77(3) confirms this by providing that 'the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation'. UNCLOS tribunals have repeatedly stated that 'there is in law only a single continental shelf, rather than an inner continental shelf and a separate outer continental shelf'.³⁴² This statement would suggest that coastal States' entitlement to an outer continental shelf beyond 200 nm also exists ipso facto and 'by virtue of sovereignty over land'. Yet ITLOS itself in *Bangladesh/Myanmar* acknowledged that 'not every coast generates entitlements to a continental shelf extending beyond 200 nm'.³⁴³ This raises the question as to what constitutes the legal basis of a coastal State's entitlement to a continental shelf beyond 200 nm. Further, in cases of disagreement or uncertainty regarding whether a coastal State has entitlement to an outer continental shelf, what suffices as evidence of such entitlement? This Part examines these two issues in turn and considers whether the decisions of UNCLOS tribunals, and those of other international courts to the extent relevant, have satisfactorily provided an answer to these questions.

1. The legal basis of entitlement to an outer continental shelf

1.1. The meaning of 'natural prolongation'

Since it was first introduced by the ICJ in the *North Sea Continental Shelf* cases, 'natural prolongation' has long been accepted as the basis of entitlement to a continental shelf.³⁴⁴ However, in the establishment of a continental shelf that extends beyond 200nm within the UNCLOS framework, the concept of 'natural prolongation' is used alongside with that of 'the outer edge of the continental margin' under Article 76(1) UNCLOS, whose location is, in turn,

³⁴¹ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 [19].

³⁴² *Barbados v Trinidad and Tobago* (n 337) [213]. See also: *Bangladesh/Myanmar* (n 338) [362]; *Bangladesh/India* (n 339) [77]; *Ghana/Côte d'Ivoire* (n 340) [490].

³⁴³ *Bangladesh/Myanmar* (n 338) [439].

³⁴⁴ *North Sea Continental Shelf Cases* (n 341) [19]. See also: Proelss (n 78) 590.

identified using the formulae provided for under Article 76(4). The emergence of the concept of the ‘outer edge of the continental margin’ raises two important questions: (i) what does ‘natural prolongation’ mean under Article 76 and (ii) what is the relationship between ‘natural prolongation’ and the concept of ‘outer edge of the continental margin’?

These were the issues that divided the parties in *Bangladesh/Myanmar*. Bangladesh interpreted the term ‘natural prolongation of its land territory’ as referring to the need for geological and geomorphological continuity between the land mass of the coastal State and the seabed beyond 200 nm.³⁴⁵ Myanmar, on the other hand, was of the view that the existence of a geological discontinuity in front of the coast of Myanmar was irrelevant to the case. Instead, Myanmar argued that the controlling concept was not natural prolongation but that of the ‘outer edge of the continental margin’, which is defined by the two formulae provided in Article 76(4).³⁴⁶

ITLOS agreed with Myanmar on this issue. It held that while Article 76(1) mentions the term ‘natural prolongation’, it is clear from the wording of this article that ‘the notion of “the outer edge of the continental margin” is an essential element in determining the extent of the continental shelf’.³⁴⁷ Moreover, while the notion of ‘the outer edge of the continental margin’ is elaborated in paragraphs 3 and 4 of Article 76 UNCLOS,³⁴⁸ no such definition or elaboration of ‘natural prolongation’ could be found in any other paragraphs of Article 76.³⁴⁹ Finding further support in the *North Sea Continental Shelf* cases before the ICJ,³⁵⁰ the negotiating records of UNCLOS,³⁵¹ and the test of appurtenance adopted in The Scientific and Technical Guidelines on the Limits of the Continental Shelf by the CLCS,³⁵² ITLOS found that the notions of ‘natural prolongation’ and ‘continental margin’, under Article 76, paragraphs 1 and 4 respectively, are closely interrelated and they refer to the same area.³⁵³ This means that entitlement to a continental shelf beyond 200 nm should be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with the formulae provided in Article 76(4).³⁵⁴

³⁴⁵ *Bangladesh/Myanmar* (n 338) [426].

³⁴⁶ *ibid* [427].

³⁴⁷ *ibid* [429].

³⁴⁸ *ibid* [430].

³⁴⁹ See also: Proelss (n 78) 592.

³⁵⁰ *Bangladesh/Myanmar* (n 338) [432].

³⁵¹ *ibid* [433].

³⁵² *ibid* [436].

³⁵³ *ibid* [434].

³⁵⁴ *ibid* [437].

ITLOS thus concluded that natural prolongation did not constitute an independent, separate criterion for the establishment of entitlement to an outer continental shelf.³⁵⁵ Before the *Bangladesh/Myanmar* judgment was handed down, one scholar had argued that:

Article 76 does not indicate a formula or method to prove natural prolongation. The wording of the introductory sentence of paragraph 4 suggests that the formulae are to be applied by a coastal State to determine its limits only after a determination that there is natural prolongation up to the outer limit of the continental margin beyond 200 nm. There is nothing in the legislative history to suggest that the formulae in paragraph 4 are the same formulae that must be used to indicate proof of natural prolongation'.³⁵⁶

ITLOS's holding, however, showed that there is in fact a close connection between paragraphs (1) and (4) of Article 76, in the sense that the latter provides the technical formulae to define the concept of 'natural prolongation' contained in the former.

ITLOS' dismissal of the requirement of 'natural prolongation' in the establishment of entitlement to outer continental shelf was criticised by Judge Gao in his Separate Opinion in *Bangladesh/Myanmar*, as well as by some other scholars.³⁵⁷ Judge Gao opined that 'natural prolongation retains its primacy over all other factors and that legal title to the continental shelf is based solely on geology and geomorphology, at least as far as the continental shelf beyond 200 nm is concerned.'³⁵⁸ Judge Gao seemed to have interpreted ITLOS' decision as rejecting the relevance of the concept of 'natural prolongation' altogether in establishing the outer continental shelf. However, a closer look at the ITLOS' judgment shows that such a reading is not justified. ITLOS did not state that 'natural prolongation' had no role to play whatsoever in the establishment of the outer continental shelf as construed by its critics. It only rejected the argument that in addition to identifying the outer edge of the continental margin pursuant to Article 76(4), a coastal State would also have to show that there is geological and/or geomorphological continuity between the land mass and the continental shelf. In other words, ITLOS' conclusion was simply that 'natural prolongation' could not constitute an *additional*

³⁵⁵ *ibid* [435].

³⁵⁶ Suzette V Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Springer 2008) 151.

³⁵⁷ Huang Yao and Liao Xuexia, 'Natural Prolongation and Delimitation of the Continental Shelf Beyond 200 nm: Implications of the Bangladesh/Myanmar Case' (2014) 4 *Asian Journal of International Law* 281, 287–93; Bing Bing Jia, 'The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife?' (2013) 12(1) *CJIL* 87.

³⁵⁸ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Sep Op Gao) ITLOS Reports 2012, 4 [91].

criterion to those contained under Article 76(4) in order to establish entitlement to outer continental shelf.

ITLOS was surely correct in rejecting ‘natural prolongation’—interpreted as requiring continuity from the land territory to the seabed area—as a separate criterion for the establishment of an outer continental shelf.³⁵⁹ Nowhere under Article 76 UNCLOS or the CLCS Technical Guidance is there a requirement of proof of similarities in the geological or geomorphological condition in the seabed of the coastal State from its landmass to the outer continental margin. Moreover, the negotiating records of the Third Conference for the Law of the Sea show that the concept of ‘natural prolongation’ was discussed in relation to three main issues: (i) in defining the continental shelf, inspired by the judgment of the *North Sea Continental Shelf* cases;³⁶⁰ (ii) as a criterion for the establishment of the outer limits of the continental shelf, as opposed to the ‘exploitability test’ employed in the 1958 Geneva Convention, or the distance criterion or the bathymetric criterion as proposed by some States,³⁶¹ and (iii) as a basis for the argument that all States in the continent should be entitled to a continental shelf, not just the coastal State.³⁶² More importantly, the concept of ‘natural prolongation’ invoked in these discussions was understood with reference to the concept of ‘the continental margin’.³⁶³ The negotiating texts of UNCLOS, therefore, do not lend support to the

³⁵⁹ Hyun Jung Kim, ‘Natural Prolongation: A Living Myth in the Regime of the Continental Shelf?’ (2014) 45 ODIL 374, 379.

³⁶⁰ Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 16th Meeting A/CONF.62/C.2/SR.16, Statement of Bangladesh, para. 13 [Official Records, 16th Meeting]; Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 17th Meeting A/CONF.62/C.2/SR.17, Statement of Australia, paras 7–10, Statement of Republic of Korea, para 24 [Official Records, 17th Meeting]; Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 18th Meeting A/CONF.62/C.2/SR.18, Statement of Venezuela, para 42, Statement of Uruguay, para 58; Statement of Trinidad and Tobago, para 88; Statement of Burma, paras 90–92 [Official Records, 18th Meeting]; Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session), 19th Meeting A/CONF.62/C.2/SR.19, Statement of Thailand, para 55 [Official Records, 19th Meeting].

³⁶¹ Official Records, 16th Meeting, Statement of Honduras, para. 25; Official Records, 18th Meeting, Statement of El Salvador, para 10; Statement of Argentina, para 22; Official Records, 19th Meeting, Statement of Ecuador, para 30; Statement of Iceland, para 51.

³⁶² Official Records, 18th Meeting, Statement of Singapore, para 29; Statement of Nepal, para 35.

³⁶³ Official Records, 18th Meeting, Statement of Uruguay, para 61–62, Statement of Trinidad and Tobago, para 86; Statement of Burma, para 91; Official Records, 19th Meeting, Statement of Switzerland, para 26; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume II (Summary Records of Meetings of the First, Second and Third Committees, Second Session)*, 20th Meeting A/CONF.62/C.2/SR.20, Statement of Jamaica, para 95.

argument that ‘natural prolongation’ constituted an independent requirement upon the fulfilment of which States would be entitled to an outer continental shelf.³⁶⁴

Furthermore, as ITLOS acknowledged, the term ‘natural prolongation’ originated from the *North Sea Continental Shelf* cases. In those cases, the ICJ was not concerned with the issue of the establishment of the outer limits of the continental shelf, but with that of whether the equidistance/special circumstances method of delimitation for the continental shelf embodied in Article 6 of the 1958 Convention on the Continental Shelf reflected a rule of customary international law.³⁶⁵ The notion of ‘natural prolongation’ was invoked by the Court to reject the argument put forward by Denmark and the Netherlands that ‘continental shelf entitlement was based on proximity, which implied a direct link between entitlement and delimitation between neighbouring states by application of equidistance’.³⁶⁶ The concept of natural prolongation used by the ICJ in the *North Sea Continental Shelf* cases was not meant to impose a condition based on which entitlement for the outer continental shelf could be established, but ‘to justify the appurtenance of the continental shelf to the coastal State’.³⁶⁷ It follows, therefore, that an interpretation of ‘natural prolongation’ as a separate criterion to establish entitlement to an outer continental shelf finds no basis either under the Convention or the history of development of the shelf.

In short, the concept of ‘natural prolongation’, as Evans correctly noted, performs multiple functions including ‘a basis of title, a means of delimitation, an equitable principle of delimitation, a criterion for delimitation and as a relevant circumstance’.³⁶⁸ This concept has been discussed in several cases before other dispute settlement bodies,³⁶⁹ but mainly in relation to continental shelf delimitation, not as the basis of title to an outer continental shelf within the UNCLOS framework. UNCLOS tribunals through their decisions have made important contributions to clarifying the meaning of this concept, often considered to be ‘a source of

³⁶⁴ See Steinar Thor Gudlaugsson, ‘Natural Prolongation and the Concept of the Continental Margin for the Purposes of Article 76’ in Myron N Nordquist, John Norton Moore and Tomas H Heidar, *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 69.

³⁶⁵ *North Sea Continental Shelf Cases* (n 341) [66]–[69].

³⁶⁶ Alex G Oude Elferink, ‘Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective’ (2006) 21(3) *IJMCL* 269, 273.

³⁶⁷ Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) 11.

³⁶⁸ Malcolm D Evans, *Relevant Circumstances and Maritime Delimitation* (Clarendon Press 1989) 100.

³⁶⁹ *Delimitation of the Anglo-French Continental Shelf Arbitration (UK/France)*, (First) Decision, 30 June 1977, RIAA XVIII:3, 63; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)* [1984] ICJ Rep 246; *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* [1985] ICJ Rep 13.

mystery and confusion'³⁷⁰ or 'a semi sacred expression'³⁷¹ in establishing entitlement to a continental shelf. UNCLOS tribunals made clear that 'natural prolongation' under Article 76 did not mean geological or geomorphological continuity or similarity between the land mass and the seabed. The Bay of Bengal decisions ultimately mean that within the UNCLOS framework, geological or geomorphological continuity does not constitute a condition for entitlement to the continental shelf in its entirety. For shelves that do not extend beyond 200 nm, entitlement is based on distance, thus a discontinuity between the landmass and the seabed within 200 nm is irrelevant. Beyond 200 nm, 'natural prolongation' is defined with reference to the outer edge of the continental margin as determined by the formulae under Article 76(4).

1.2. The relationship between entitlement and the outer limits of the continental shelf

In *Bangladesh/Myanmar*, Myanmar objected to ITLOS exercising its jurisdiction to delimit the outer continental shelf on the basis that the Tribunal could not determine entitlements to an outer continental shelf, as this task belonged to the CLCS. This objection may at first glance pertain only to procedural issues. However, given that the tasks of the CLCS involve reviewing and giving recommendations to coastal States regarding the location of the outer limits of the continental shelf, in essence, Myanmar's objection implied that a coastal State's entitlement to an outer continental shelf depended on the establishment of the outer limits of the shelf.

In response to Myanmar's objection, ITLOS held that it had competence to determine entitlements. ITLOS drew a clear distinction between the notions of 'entitlement to the continental shelf beyond 200 nm' and 'the outer limits of the continental shelf'.³⁷² ITLOS was adamant that the coastal State's entitlement to an outer continental shelf 'does not depend on' the establishment of the outer limits of the continental shelf.³⁷³ It further held that the procedures set out under Article 76(8), whereby States are required to submit information to the CLCS and then to wait for the latter's recommendation regarding the outer limits, did not imply that entitlement to the continental shelf depended on any procedural requirements.³⁷⁴ In ITLOS's view, Article 77(3) confirms that the existence of entitlement does not depend on the establishment of outer limits but only on 'the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present'.³⁷⁵

³⁷⁰ Clive Schofield, Anatasia Telesetsky and Seokwoo Lee, 'A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case' (2013) 44 ODIL 363, 375.

³⁷¹ Kim (n 359) 374.

³⁷² *Bangladesh/Myanmar* (n 338) [406].

³⁷³ *ibid* [409].

³⁷⁴ *ibid* [408].

³⁷⁵ *ibid* [409].

There are merits in ITLOS's view regarding the independent relationship between the establishment of 'entitlement' to and the identification of the 'outer limits' of the continental shelf. A coastal State does not need to have established its outer limits in order to prove that it has entitlement to a continental shelf beyond 200 nm. Under UNCLOS, entitlement is determined with reference to the outer edge of the continental margin, which is ascertained in accordance with Article 76(4).³⁷⁶ On the other hand, the outer limits of the continental shelf, pursuant to Article 76(5), are drawn 'in accordance with paragraph 4(a)(i) and (ii)' *and* subject to the technical requirements under paragraphs (5), (6) and (7) of the same article. It is clear that the identification of the line indicating the outer edge of the continental margin is only the starting point of the delineation process to determine the outer limits of the shelf. Further, the 'test of appurtenance' set out by the CLCS, which requires that a coastal State must first prove that it has a continental shelf entitlement that extends beyond 200 nautical miles before it is permitted to delineate the outer limits of the shelf, affirms that the establishment of entitlement to an outer continental shelf precedes and predicates the identification of the outer limits of the shelf.³⁷⁷ In other words, in addition to identifying the outer edge of the continental margin, the coastal State would have to take further steps and consider all of the requirements under paragraphs (5), (6) and (7) in order to establish the outer limits of the continental shelf. Entitlement to an outer continental shelf, therefore, does not depend on the establishment of the outer limits of the shelf.

In short, the Bay of Bengal cases clarified three important issues. First, the basis of a coastal State's entitlement to an outer continental shelf is the existence of a juridical continental margin as defined under Article 76(3) that extends beyond 200 nm, ascertained pursuant to Article 76(4). Second, natural prolongation is still relevant to the establishment of an outer continental shelf, but not in the sense that there has to be geological or geomorphological continuity between the land territory and the seabed area beyond 200 nm. 'Natural prolongation' is defined with reference to Article 76(4), which means that the natural prolongation of a coastal State's territory is the seabed area that extends to the outer edge of the continental margin as determined by Article 76(4). Third, the establishment of the outer limits of the continental shelf does not constitute the basis for entitlement. A coastal State does not need to identify the exact scope of the continental shelf—or the limits of its entitlement—in order to establish that it has entitlement beyond 200 nm.

³⁷⁶ *ibid* [437].

³⁷⁷ See also: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower [55].

2. Evidence for entitlement to an outer continental shelf

Based on the independent relationship between the determination of entitlement to an outer continental shelf and the establishment of the outer limits of the continental shelf, the tribunals in the Bay of Bengal cases confirmed that the determination of entitlement to an outer continental shelf fell within their jurisdiction, whereas any tasks relating to the identification of the outer limits belonged to the CLCS. This, however, raises an interesting question regarding the evidence that a party seeking to establish an outer continental shelf must present to an international court or tribunal to prove its entitlement. The decisions rendered by international courts and tribunals have not to date definitively disposed of this question.

In the 2012 maritime delimitation case between Nicaragua and Colombia, in which Nicaragua requested the ICJ to delimit the outer continental shelf as part of a request for the delimitation of the maritime boundary with Colombia, Nicaragua had only submitted ‘Preliminary Information’ indicative of the limits of the continental shelf to the CLCS, not a full submission with complete information.³⁷⁸ The Court found that the Preliminary Information ‘falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles’ to be submitted by the coastal State to the Commission in accordance with Article 76(8) of UNCLOS.³⁷⁹ In its judgment, rendered after *Bangladesh/Myanmar*, the ICJ declined to delimit the boundary between Nicaragua and Colombia in the area in which Nicaragua claimed an outer continental shelf entitlement. Even though the Court acknowledged the decision of ITLOS, it distinguished its case from that of ITLOS on the basis that both Bangladesh and Myanmar had made full submissions to the CLCS,³⁸⁰ whereas ‘Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast’.³⁸¹ In the operative paragraph, the Court declared that it ‘cannot uphold’ Nicaragua’s claim to an outer continental shelf. This decision may create the impression that information in Preliminary Information to the CLCS would not be sufficient to prove entitlement to an outer continental shelf.

However in 2016, when Nicaragua again invited the ICJ to delimit its maritime boundary with Colombia in an area beyond 200 nm from Nicaragua’s mainland coast, the ICJ explained

³⁷⁸ *Nicaragua v Colombia* (2012) (n 335) [127].

³⁷⁹ *ibid.*

³⁸⁰ *ibid* [125].

³⁸¹ *ibid* [129]. Note, however, that the Court did not comment on the overlap between Nicaragua’s entitlement to a continental shelf beyond 200 nm and the Colombian islands.

that in 2012 it neither made a decision on whether or not Nicaragua had an entitlement beyond 200 nm, nor on ‘the substantive legal standards which Nicaragua had to meet to prove entitlement beyond 200 nm’.³⁸² During the proceedings of the new case, the parties disagreed on the meaning of the term ‘cannot uphold’ that the Court had used in the operative paragraph in its 2012 judgment. Nicaragua argued that this term simply meant that the ICJ refused to rule on the request because a procedural and institutional requirement had not been fulfilled,³⁸³ while Colombia contended that ‘cannot uphold’ must be interpreted as a ‘straightforward dismissal of Nicaragua’s request for lack of evidence’.³⁸⁴ The ICJ agreed with Nicaragua and held that:

While the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua’s claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.³⁸⁵

The Court, therefore, made clear in the 2016 *Nicaragua v Colombia* judgment that the Court’s decision in 2012 was based on a procedural requirement. In the 2012 judgment, the Court did not ‘consider it necessary to decide the substantive legal standards which Nicaragua had to meet if it was to prove vis-à-vis Colombia that it had an entitlement to a continental shelf beyond 200 nautical miles from its coast.’³⁸⁶ The Court’s judgment in 2016 clarified that the 2012 *Nicaragua v Colombia* judgment could not be construed as providing any guidance on the evidential threshold required of a State to prove entitlement to an outer continental shelf.

In the 2016 *Nicaragua v Colombia* case, the ICJ interpreted its 2012 Judgment requiring Nicaragua to submit its information to the CLCS ‘as a *prerequisite* for the delimitation of the continental shelf beyond 200 nautical miles by the Court’.³⁸⁷ Nicaragua had in fact, following the 2012 Judgment, furnished complete information and documentation to the CLCS, although the Commission had yet to issue its recommendation. The ICJ then found that it had jurisdiction to delimit the maritime boundary within the area of in which Nicaragua argued that it had outer continental shelf entitlement.³⁸⁸ Bearing in mind that delimitation could only be conducted if the parties have entitlement to the area in question and these entitlements overlap,³⁸⁹ this

³⁸² *Nicaragua v Colombia (2016)* (n 335) [82].

³⁸³ *ibid* [74].

³⁸⁴ *ibid*.

³⁸⁵ *ibid* [84].

³⁸⁶ *ibid* [82].

³⁸⁷ *ibid* [105]. (emphasis added)

³⁸⁸ *ibid* [85].

³⁸⁹ *Bangladesh/Myanmar* (n 338) [397].

confirmation of jurisdiction could be read to mean that the full submission to the CLCS was implicitly accepted by the ICJ as evidence of Nicaragua's entitlement beyond 200 nm.

In *Bangladesh/Myanmar* and *Bangladesh/India*, all three States had made submissions to the CLCS in respect of their claims beyond 200 nm. In both cases, UNCLOS tribunals acknowledged that the parties had entitlement an outer continental shelf and thus proceeded to delimitation. Again, this would seem to suggest full submissions to the CLCS were considered necessary and sufficient evidence for entitlement. In fact, one commentator argued that 'in order to continue the delimitation beyond 200 nautical miles, it was crucial that the parties had each made their submissions to the Commission'.³⁹⁰

However, on closer inspection, interpreting the approaches taken by UNCLOS tribunals and the ICJ in the above cases as establishing an evidentiary threshold for coastal States' entitlement beyond 200 nm is arguably mistaken. In the Bay of Bengal cases, UNCLOS tribunals were eager to proceed with delimitation because, based on available scientific evidence to which neither party objected, they were certain that the parties had entitlements to an outer continental shelf. In other words, it was not the submission *per se* that assured the tribunals that they should exercise jurisdiction, it was the availability of uncontested scientific evidence which removed any doubt as to the existence of the outer continental shelf. The fact that the parties had made their submissions was not the 'crucial' element in this case. Therefore, a general conclusion that submissions to the CLCS constitute conclusive evidence of entitlement cannot be drawn from these two cases.

In the latest *Ghana/Côte d'Ivoire* case decided by the Special Chamber of ITLOS, both parties had logged their submissions to the CLCS, and Ghana, for its part, had received the recommendation from the CLCS. Neither parties contested the entitlement of the other party to a continental shelf beyond 200 nm,³⁹¹ thus the question of uncertainty regarding the existence of entitlement did not arise in this case. Ghana, however, questioned the scope of Côte d'Ivoire's entitlement,³⁹² arguing that the latter's Revised Submission to the CLCS in 2016 indicated an overlap between the entitlements of the two States which had not existed previously.³⁹³ Ghana's objection to the Revised Submission was based on 'normal principles of litigation'³⁹⁴—as the Revised Submissions were made after the proceedings before the Chamber had commenced—

³⁹⁰ Øystein Jensen, 'Maritime Boundary Delimitation Beyond 200 Nautical Miles: The International Judiciary and the Commission on the Limits of the Continental Shelf' (2015) 84 NJIL580, 587.

³⁹¹ *Ghana/Côte d'Ivoire* (n 340) [503], [507].

³⁹² *ibid* [498].

³⁹³ *ibid* [504].

³⁹⁴ *ibid* [505].

as well as the claim that this was a tactic for Côte d'Ivoire to 'discard and set aside seven years of common practice and agreement' in relation to the delimitation line.³⁹⁵ It could be seen that Ghana's doubts regarding Côte d'Ivoire's scope of entitlement beyond 200 nm had little to do with the sufficiency or otherwise of the Revised Submission or the fact that it had not been considered by the CLCS. As Ghana was more focused on procedural issues, the Special Chamber eventually dismissed this objection on account of the fact that 'Côte d'Ivoire invoked this fact before the closure of the written proceedings'.³⁹⁶ The Chamber's decision thus did not provide new insights into the question of evidence of entitlement to the outer continental shelf.

As for the ICJ, in the 2016 *Nicaragua v Colombia* case, nowhere in the judgment did the ICJ attempt to deal with the question of whether Nicaragua had met the legal threshold to prove entitlement by virtue of a full submission to the CLCS, or whether Nicaragua had entitlement to an outer continental shelf. This was perhaps partly due to the fact that Colombia's objection to the Court's jurisdiction was not grounded on the insufficiency of Nicaragua's evidence to prove its claim to entitlement.³⁹⁷ Instead, Colombia relied on the argument that 'the CLCS has not made the requisite recommendation concerning Nicaragua's Submission, nor has it 'consider[ed] and qualif[ied]' it according to Article 5(a) of Annex I to its Rules of Procedure'.³⁹⁸ Colombia's objection thus related to procedural issues, in particular to the fact that Nicaragua had not obtained the CLCS's recommendation. The Court did not, therefore, have to address the question relating to evidence of entitlement to deal with Colombia's objections. It only needed to follow the approach taken by UNCLOS tribunals in the Bay of Bengal cases—albeit without once acknowledging it—to reject the importance of procedural requirements in establishing entitlement. In any case, it is worth noting that, while the Court might have been silent on the issue, seven judges in their Joint Dissenting Opinion put forward the view that 'information submitted to the CLCS pursuant to Article 76 (8) of UNCLOS will

³⁹⁵ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Reply of Ghana <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/pleadings/Reply_of_Ghana_Vol.1.PDF> accessed 25 September 2018.

³⁹⁶ *Ghana/Côte d'Ivoire* (n 340) [515].

³⁹⁷ This can be contrasted with the position that Colombia took in *Nicaragua v Colombia* (2012), in which one of the main arguments that it employed to object to Nicaragua's claim to an outer continental shelf was that 'the so-called "evidence" that Nicaragua has adduced [...] is woefully deficient, and would not even begin to satisfy the Commission on the Limits of the Continental Shelf'. See *Verbatim Record of the Public sitting held on Friday 27 April 2012, at 10 a.m., at the Peace Palace in the case concerning the Territorial and Maritime Dispute (Nicaragua v Colombia)*, para 46 <<http://www.icj-cij.org/docket/files/124/16985.pdf>> accessed 27 December 2017.25 September 2018.

³⁹⁸ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections of the Republic of Colombia, Volume I [7.12] <http://www.icj-cij.org/docket/files/154/18778.pdf> accessed 27 December 2017.25 September 2018.

not necessarily be regarded as sufficient to establish the existence of an extended continental shelf.³⁹⁹

In the end, international courts and tribunals, including both the ICJ and UNCLOS tribunals, have not definitively disposed of the question regarding what constitutes sufficient evidence of entitlement to an outer continental shelf in cases in which there is uncertainty regarding the existence of such an entitlement.

II. THE RELATIONSHIP BETWEEN DELIMITATION AND DELINEATION

In the context of the outer continental shelf, ‘delimitation’ refers to the establishment of a boundary that divides overlapping entitlements lying beyond 200 nm from the baselines of one or more States, whereas delineation refers to the establishment of the limits of the continental shelf. While there has been some confusion relating to the use of these two terms,⁴⁰⁰ ITLOS made clear in *Bangladesh/Myanmar* that delineation and delimitation are two distinct concepts.⁴⁰¹ Delimitation does not depend on delineation, meaning that delimitation can be carried out regardless of whether the outer limits of the continental shelf have been identified; it only requires that the parties’ entitlements to an outer continental shelf exist and that those entitlements overlap.⁴⁰² On the basis of this distinction, UNCLOS tribunals in the two *Bangladesh/Myanmar* and *Bangladesh/India* cases clarified the much debated relationship between the UNCLOS tribunals and the CLCS.⁴⁰³ This Part examines the soundness of UNCLOS tribunals’ approach in this regard and questions whether their decisions could be considered to have settled the relationship between UNCLOS dispute settlement bodies and the CLCS.

³⁹⁹ Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower (n 377) [56].

⁴⁰⁰ Several scholars have used the terms ‘delimitation’ and ‘delineation’ interchangeably; in particular, ‘delimitation’ has been used in place of ‘delineation’ when referring to the procedures under art 76 UNCLOS. See, eg, Ron Macnab, ‘The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76’ (2004) 35 ODIL, 1; Vincente Marotta Rangel, ‘Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunals’ (2006) 21(3) IJMCL 347.

⁴⁰¹ *Bangladesh/Myanmar* (n 338) [376].

⁴⁰² *ibid* [397]–[399].

⁴⁰³ See Bjorn Kunoy, ‘The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate’ (2012) 25(1) LJIL 109; Alex G Oude Elferink, ‘The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Dispute Settlement’ in Alex G Oude Elferink and Donald Rothwell, *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004) 118.

1. The relationship between UNCLOS tribunals and the CLCS

ITLOS stated that, as a dispute settlement body, it has the legal expertise to interpret and apply the provisions of the Convention; while the CLCS deals with scientific and technical issues.⁴⁰⁴ When faced with the question of entitlement to the outer continental shelf under Article 76, ITLOS held that as Article 76 contains both elements of law and science, its proper interpretation and application required both legal and scientific expertise.⁴⁰⁵ Therefore, as ‘the question of the Parties’ entitlement to a continental shelf beyond 200 nm raises issues that are predominantly legal in nature’, ITLOS would be in a position to examine this issue under Article 76.⁴⁰⁶

With regard to the interaction between the tasks of the two bodies, ie between delimitation and delineation, ITLOS noted that there was nothing in the Convention, the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constituted an impediment to the performance by the Commission of its functions.⁴⁰⁷ In the same vein, the CLCS is mandated only to consider coastal States’ submissions relating to the limits of continental shelf, an exercise of technical nature, and it should do so ‘without prejudice to questions of delimitation’ as required under Article 76(10). ITLOS thus adopted the view, which was subsequently followed by the Annex VII arbitral tribunal in *Bangladesh/India*, that the absence of a CLCS recommendation relating to the limits of the continental shelf beyond 200 nm could not prevent it from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned.⁴⁰⁸ ITLOS further supported this conclusion by stating that it was justified in delimiting the outer continental shelf boundary because if it had not done so, there would have been a deadlock in resolving the dispute between the two parties when the CLCS could not make a recommendation in respect of Myanmar’s submission.⁴⁰⁹

The clarification of the interrelated but independent relationship between the two institutions has a significant bearing on the temporal order in which delimitation and delineation are to be carried out. Before the Bay of Bengal decisions, some scholars had argued that delimitation should not and could not be conducted prior to delineation.⁴¹⁰ The case law

⁴⁰⁴ *Bangladesh/Myanmar* (n 338) [411].

⁴⁰⁵ *ibid.*

⁴⁰⁶ *ibid* [413].

⁴⁰⁷ *ibid* [377].

⁴⁰⁸ *Bangladesh/India* (n 339) [410].

⁴⁰⁹ *Bangladesh/Myanmar* (n 338) [390].

⁴¹⁰ Bjorn Kunoy, ‘The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the

produced by UNCLOS tribunals has, however, rejected this absolute view. Their decisions mean that, as one scholar notes, ‘States are now free to choose whichever course of action to first undertake, be it the CLCS path or the delimitation the continental shelf with their neighbouring States’.⁴¹¹ Even though it is possible that in some cases, as will be further analysed below, international courts should be cautious in delimiting the outer continental shelf in the absence of a CLCS recommendation, what is at least clear is that there is no set temporal order between delineation and delimitation, in which delineation must necessarily precede delimitation in all cases.

The decisions of ITLOS and the Annex VII arbitral tribunal in the Bay of Bengal cases regarding the relationship between a dispute settlement body and the CLCS stood in contrast with earlier decisions by other international courts and tribunals. In particular, in the delimitation case between *Canada/France* arbitration in 1992, the arbitral tribunal declined to recognise any rights of the parties over the outer continental shelf in the absence of a determination as to where their entitlements ended, because ‘it is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist’.⁴¹² In *Nicaragua v Honduras* in 2007, the ICJ held that ‘any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder’.⁴¹³ It is worth noting, however, that in this case, neither party had requested the Court to delimit the outer continental shelf. Thus, the Court’s *obiter dictum* should not be construed as establishing a relationship between itself and the CLCS, nor did the Court say that the recommendation of the CLCS was a precondition for delimitation. It does, however, signal a certain level of reluctance on the part of the Court to deal with question of delimitation beyond 200 nm in the absence of a CLCS recommendation. An explicit refusal to proceed with the delimitation of the outer continental shelf by the ICJ only came in *Nicaragua v Colombia* in 2012.⁴¹⁴ It can be seen that following the 2012 *Nicaragua v Colombia* case, there was disparity in the view of UNCLOS tribunals and that of other international dispute settlement bodies concerning the relationship between a court or tribunal and the CLCS, as well as the impact of this relationship on the

Continental Shelf’ (2010) 25 IJMCL 237.

⁴¹¹ Bjarni Már Magnússon, ‘Is there a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?’ (2013) 28 IJMCL 465, 483.

⁴¹² *Canada/France* (n 336) [81].

⁴¹³ *Nicaragua v Honduras* (n 335) [319].

⁴¹⁴ The ICJ cited the above statement in *Nicaragua v Honduras*, which Judge Donoghue interpreted as an implicit confirmation on the part of the Court that delimitation is precluded before the outer limits have been established. *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Separate Opinion of Judge Donoghue [25].

jurisdiction of a court or tribunal to delimit the outer continental shelf in the absence of a CLCS recommendation.

However, the 2016 *Nicaragua v Colombia* judgment presented an important shift in the approach of the ICJ to the relationship between itself and the CLCS. In determining ‘whether a recommendation made by the CLCS, pursuant to Article 76, paragraph 8, of UNCLOS, is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua’,⁴¹⁵ the ICJ essentially adopted the view of UNCLOS tribunals in the Bay of Bengal cases regarding the relationship between delineation and delimitation and that between the CLCS and international tribunals⁴¹⁶ Moreover, both Nicaragua and Colombia relied extensively on the two Bay of Bengal cases in their pleadings to advance their arguments.⁴¹⁷ Even when Colombia urged the ICJ not to confirm jurisdiction to delimit the outer continental shelf beyond 200 nm, it did not argue that the conclusions of the Bay of Bengal tribunals were wrong or unreasonable. It merely contended that the factual circumstances of the case before the Court differed substantially from those of the Bay of Bengal cases, so that the UNCLOS tribunals’ conclusions were not applicable to the case.⁴¹⁸ This illustrates that the significance of the UNCLOS tribunals’ decisions transcended the two cases in which they were delivered. With the 2016 *Nicaragua v Colombia* judgment, the approach of international courts and tribunals regarding the relationship between a dispute settlement body and the CLCS, along with its implications on the former’s jurisdiction to delimit the outer continental shelf seems to have converged.

2. Does delimitation effected by an international court or tribunal prejudice the work of the CLCS?

In distinguishing between the functions of the CLCS and dispute settlement bodies, UNCLOS tribunals were adamant in stating that their work could not be seen as precluding or prejudicing the work of the Commission. ITLOS grounded this statement on Article 76(10) which makes clear that the determination of the extent of the continental shelf is ‘without prejudice’ to the question of its delimitation. Indeed, if delineation occurs before delimitation, that is, if the CLCS issues a recommendation regarding the location of the outer limits of a coastal State's entitlement before a tribunal determines the maritime boundary between that State and its

⁴¹⁵ *Nicaragua v Colombia* (2016) (n 335) [106].

⁴¹⁶ *ibid* [112].

⁴¹⁷ *Nicaragua v Colombia*, Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia (19 January 2015) [2.25], [2.27], [2.29], [2.31] <<http://www.icj-cij.org/docket/files/154/18780.pdf>> accessed 25 September 2018.

⁴¹⁸ *Nicaragua v Colombia*, Preliminary Objections of the Republic of Colombia, Volume I (14 August 2014) [5.68], [7.16] <<http://www.icj-cij.org/docket/files/154/18778.pdf>> accessed 25 September 2018.

neighbour, such a recommendation will unlikely prejudice the maritime boundary to be drawn by the tribunal. This is because delineation makes no presumption about where the boundary will lie, nor does it determine the course of the boundary. Article 76(10) ensures that the Article 76 process of defining the outer limits of the continental shelf ‘is not intended to coincidentally settle in any way delimitations of overlapping areas of continental shelf’.⁴¹⁹

However, a different scenario emerges when an international court or tribunal is requested to delimit the outer continental shelf *before* the CLCS has adopted final recommendations regarding the outer limits of the continental shelf. Even though ITLOS took pains to show that ‘delimitation by an international tribunal would not prejudice the work of the CLCS’,⁴²⁰ such a statement might not be true for all cases.

First, a statement that ‘delimitation’ did not depend on the identification of the ‘outer limits of the continental shelf’ was true in the Bay of Bengal cases, but might not necessarily be so in other cases. The three States in the Bay of Bengal cases are adjacent to each other. When delimitation is between States with adjacent coasts, as Evans argued, ‘it is perfectly possible to project a delimitation line seawards in accordance with the favoured methodology and allow for the terminus to be determined at some later date when the precise delineation of the outer limit might be determined’.⁴²¹ In cases where the two States have opposite coasts, such as Nicaragua and Colombia, it may be difficult for a tribunal to determine whether there are overlapping entitlements without knowing where the limits of the entitlement end. This was, in fact, the argument used by Colombia in its Written Pleadings to distinguish the case brought by Nicaragua to the ICJ in 2016 from the Bay of Bengal cases.⁴²²

Moreover, ITLOS and the Annex VII arbitral tribunal were faced with a much less controversial situation as the Bay of Bengal is quite unique. The sea floor of the Bay of Bengal is covered by a thick layer of sediment some 14 to 22 kilometres deep originating in the Himalayas and the Tibetan Plateau,⁴²³ which covers practically the entire floor of the Bay of

⁴¹⁹ Constance Johnson and Alex G Oude Elferink, ‘Submissions to the CLCS in Cases of Unresolved Land and Maritime Disputes: The Significance of Article 76(10) of the LOS Convention’ (2006) 21 IJMLC 461.

⁴²⁰ *Bangladesh/Myanmar* (n 338) [379].

⁴²¹ Malcolm D Evans, ‘Maritime Boundary Delimitation: Whatever Next?’ in Barrett and Barnes (n 55) 77. In the recent *Ghana/Côte d’Ivoire* case, the Special Chamber of ITLOS also proceeded with delimitation in the absence of a recommendation for Côte d’Ivoire. Similar to the Bay of Bengal cases, both Ghana and Côte d’Ivoire are adjacent States, and neither contested the other’s entitlement to a continental shelf beyond 200 nm.

⁴²² *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections of the Republic of Colombia, Volume I, [7.16] <<http://www.icj-cij.org/docket/files/154/18778.pdf>> accessed 25 September 2018. Note, however, that the ICJ did not address this point in its Judgment on Preliminary Objections, nor did any of the judges in their Dissenting and Separate Opinions share their view on this issue.

⁴²³ *Bangladesh/Myanmar* (n 338) [444].

Bengal. Bangladesh, Myanmar and India had made their submissions to the Commission, in which three parties included data indicating that their entitlement to the continental margin extending beyond 200 nm was based on the thickness of sedimentary rocks pursuant to the formula contained in Article 76(4)(a)(i) of the Convention.⁴²⁴ Therefore, it was beyond any doubt that the parties had entitlement to an outer continental shelf based on the thickness of the sediment on its floor even when the CLCS had not issued its recommendations.

In cases which do not share the same characteristics as the Bay of Bengal, the delimitation effected by a dispute settlement body before the outer limits have been identified may in fact encroach on the work of the CLCS. In particular, first, delimitation must be based on overlapping entitlements.⁴²⁵ Therefore, by agreeing to proceed with delimitation, a tribunal implicitly recognises that at least one, or both parties, has entitlements beyond 200 nm and that these entitlements overlap. Supposing that the CLCS later finds that one or both of the parties' entitlements does not extend beyond 200 nm, or that their entitlements do not extend so far as to create overlapping entitlements, what remains of the delimitation effected by the international court? For this reason, Judge Ndiaye, in his Separate Opinion in *Bangladesh/Myanmar* believed that ITLOS 'should have referred the matter to the Commission at this stage in the proceedings [...] since the Tribunal should have considered itself unable to dispense justice in the circumstances of the case.'⁴²⁶

Second, the tribunals' recognition of the coastal State's entitlements beyond 200 nm may encourage the latter to use the outer limit lines contained in its submission even when they have not been validated by the CLCS. In *Bangladesh/Myanmar*, although ITLOS referred to the fact that submissions of Bangladesh and Myanmar to the Commission clearly indicated an overlap of entitlements in the area in dispute, the CLCS had neither confirmed nor rejected the scientific information contained in the submissions made. The claimed entitlements were, in Judge Ndiaye's words, 'founded more on presumptions than proof'.⁴²⁷ As a result, contrary to what

⁴²⁴ Continental Shelf Submission of the Union of Myanmar, 3 <http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf> accessed 25 September 2018; Submission by the People's Republic of Bangladesh to the Commission on the Limits of the Continental Shelf, para 6.5 <http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/Executive%20summary%20final.pdf> accessed 25 September 2018; The Indian Continental Shelf, Partial Submission to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Appendix 1 <http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind2009executive_summary.pdf> accessed 25 September 2018.

⁴²⁵ *Bangladesh/Myanmar* (n 338) [397].

⁴²⁶ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Sep. Op. Ndiaye) ITLOS Reports 2012, 4 [107].

⁴²⁷ *ibid* [119].

ITLOS insisted, its decision could in fact have the effect of legitimizing a claim to an outer continental shelf—a task that belongs to the Commission—and therefore, encroach on the functions of the Commission.⁴²⁸ As one commentator observed, in such cases, ‘the role of the Commission is somehow literally being reduced to declarative recommendations which would not necessarily correspond to an ordinary meaning of LOSC Article 76(8) in conjunction with Article 7 of Annex II to the LOSC.’⁴²⁹

Third, to justify its contention that its exercise of jurisdiction would not ‘be seen as an encroachment on the functions of the CLCS’,⁴³⁰ ITLOS drew an analogy between delimitation of the outer continental shelf effected through adjudication or arbitration and delimitation reached through negotiation. ITLOS said the latter would ‘not be seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations’.⁴³¹ In the same vein, the exercise of its jurisdiction to delimit the outer continental shelf could not be seen as an encroachment on the functions of the Commission. ITLOS’ analogy, however, does not stand up to examination as it overlooked the fundamental difference between dispute settlement through negotiation and through third-party settlement—flexibility and political compromises.⁴³² When States negotiate their boundary for the outer continental shelf, they may agree to set aside the absence of established outer limits and/or the lack of a recommendation of the Commission.⁴³³ In the course of negotiation, it is likely that the parties will have agreed to put in place some arrangement to deal with the absence of the outer limits, such as allowing for the subsequent identification of the terminus of the boundary,⁴³⁴ or adjustments to the boundary when the outer limits are identified at a later

⁴²⁸ Ted McDorman, ‘The Continental Shelf’ in Donald Rothwell et al (n 217) 192

⁴²⁹ Kunoy ‘The Admissibility of a Plea’ (n 410) 248.

⁴³⁰ *Bangladesh/Myanmar* (n 338) (n 343) [393].

⁴³¹ *ibid.*

⁴³² See Bjarni Mar Magnusson, *The Continental Shelf Beyond 200 nm: Delineation, Delimitation and Dispute Settlement* (Brill 2016) 138.

⁴³³ See, eg, Agreement between the Government of Solomon Islands and the Government of Australia Establishing Certain Sea and Seabed Boundaries (13 September 1988); Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas, 1654 UNTS 293 (18 April 1990); Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles UN Doc CLCS/78 (9 June 2000); Treaty Between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (24 November 2003) cited in Coalter G Lathrop, ‘Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf’ in David A Colson and Robert W Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff 2005) 4149.

⁴³⁴ See, eg, Treaty Fixing the Maritime Boundaries between the Republic of the Gambia and the Republic of Senegal (4 June 1975). See also: Magnusson (n 432) 187.

time.⁴³⁵ For example, when Iceland, Norway and Denmark (Faroes) negotiated the three maritime boundaries prior to filing submissions to the CLCS, the agreed minutes of the negotiations provide that if one or more of the States is unable to demonstrate ‘that the area of its continental shelf beyond 200 nautical miles corresponds in size, as a minimum, to the area that falls to the same State according to the agreed boundaries’, the boundaries would be adjusted on the basis of previously agreed terms also found in the minutes.⁴³⁶ The possibility of adjustment ensures that effect will be given to the recommendation of the CLCS, thus the parties’ agreement will not pre-empt the recommendation to be issued by the CLCS.

It is true that the flexibility found in negotiation may to a certain level extend to cases in which the parties only request the court or tribunal to advise them on the principles to be applied to effect a maritime boundary, like the *North Sea Continental Shelf* cases. A court or tribunal could in such an instance take into account the potential changes which could be brought about by the CLCS recommendation to the area of the seabed to which the States are entitled and provide guidance on how to these changes might affect the boundary to be established. However, in cases in which the court or tribunal is requested to delimit the actual the maritime boundary, the course of the boundary is fixed and the boundary becomes ‘final and binding’.⁴³⁷ The court or tribunal in question could theoretically leave open the possibility of boundary adjustment; or the parties may, if they so wish, negotiate to reach an agreement to adjust the boundary established by the international court in the event that the CLCS’s recommendation subsequently renders the boundary inequitable. Even then, in many cases, the court cannot draw a precise boundary without determining the extent of the entitlement in the first place, thus treading into what should be the CLCS’s realm of expertise.

One may argue that the tribunals would not encroach on the CLCS’ functions as nothing prevents the CLCS from issuing a recommendation on the outer limits of the continental shelf which contradicts the court’s finding on the scope of entitlement. This is true from a technical point of view; however, such practice would not be conducive to the implementation of UNCLOS and should thus be avoided. The Preamble of the Convention clearly states that the

⁴³⁵ See, eg, Agreement on Marine Delimitation between the Government of Australia and the Government of the French Republic (New Caledonia, Chesterfield Islands) (4 January 1982); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland Concerning the Delimitation of Areas of the Continental Shelf between the Two Countries (7 November 1988); Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone and Continental Shelf Boundaries (25 July 2004). See also: Magnusson (n 432) 211.

⁴³⁶ Lathrop (n 433) 4150.

⁴³⁷ Articles 59 and 60 of ICJ Statute provide that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case’ and that ‘[t]he judgment is final and without appeal [...]’ respectively. Article 296 UNCLOS also provide that ‘[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute’ and ‘[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute’.

goal of UNCLOS is to establish ‘a legal order for the seas’ in order to ‘promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources’. UNCLOS tribunals and the CLCS are new institutions set up with a view to realizing these goals, ie maintaining a legal order at sea. Discrepancies in the advice given to States by different treaty institutions on the same matter clearly do not serve this purpose. That is not to say that an international court or tribunal should never proceed to delimitation in the absence of a CLCS recommendation. UNCLOS tribunals in the Bay of Bengal were correct in finding that under certain geographical circumstances, delimitation effected by a court or tribunal would not prejudice the tasks of the CLCS. However, while delimitation effected by an UNCLOS tribunal might not technically prevent the CLCS from performing its function, it may lead to inconsistencies in the interpretation and application of the Convention, which runs counter to the object and purpose of UNCLOS.

One may also be tempted to further argue that when a tribunal delimits a maritime boundary beyond 200 nm, its role could be construed merely as advising the parties about the course of their boundary in the event that the CLCS eventually confirms their entitlements beyond 200 nm. In other words, the tribunal helps to indicate, not to conclusively determine the area in which a State can exercise their rights and obligations vis-à-vis the neighbouring States. This argument is, however, not tenable. In such a case, the existence of overlapping entitlements is still hypothetical. An international court or tribunal could advise States on what the law regulating a certain issue in an abstract manner or in hypothetical situations, but only in the context of advisory proceedings. In a contentious proceeding, the court or tribunal is asked to settle a ‘dispute’,⁴³⁸ and the fact that the ‘dispute’ between the parties may or may not exist, depending on whether they have entitlements beyond 200 nm, should render the case inadmissible and the court or tribunal should not exercise jurisdiction in such cases.⁴³⁹

In the two Bay of Bengal cases, the involvement of the CLCS might not have been crucial since the scientific evidence was clear and uncontested, enabling UNCLOS tribunals to determine that the parties had entitlement to an outer continental shelf. Therefore, the UNCLOS tribunals could have proceeded to delimitation before the issuance of the CLCS’s

⁴³⁸ Art 288(1) UNCLOS states that ‘A court or tribunal referred to in article 287 shall have jurisdiction over *any dispute* concerning the interpretation and application of this Convention which is submitted to it in accordance with this Part’. (emphasis added)

⁴³⁹ The ICJ in the *Northern Cameroons* cases declined to exercise jurisdiction over Cameroon’s request, stating that ‘The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.’ See: *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15 [33]–[34].

recommendation without much controversy. ITLOS itself admitted in *Bangladesh/Myanmar* that it ‘would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question’.⁴⁴⁰ This statement illustrates the awareness on the part of the tribunal of the special circumstances of the case before it and the threshold at which it would not exercise its function.

UNCLOS tribunals have provided an answer to the long-debated relationship between the two newly established institutions of UNCLOS, the dispute settlement bodies and the CLCS, thereby clarifying to a certain extent the application of Article 76(10) UNCLOS. However, while the approach adopted by UNCLOS tribunals was enlightening, the decisions reached were limited to the factual circumstances of the cases. Consequently, caution should be exercised when attempting to generalise the tribunal’s conclusions in the Bay of Bengal cases to all other situations.

III. THE METHOD OF DELIMITATION APPLICABLE TO THE OUTER CONTINENTAL SHELF

Using the argument that there is only one continental shelf, UNCLOS tribunals in the three cases *Bangladesh/ Myanmar*,⁴⁴¹ *Bangladesh/India*⁴⁴² and *Ghana/ Cote d’Ivoire*⁴⁴³ all stated that the delimitation method to be employed for the continental shelf within and beyond 200 nm should not differ. In other words, the delimitation method applicable to the outer continental shelf continued to be the equidistance/relevant circumstances method which has established itself as the favoured method of delimitation in international jurisprudence.⁴⁴⁴ ITLOS further explained in *Bangladesh/Myanmar* that the equidistance/relevant circumstances method was ‘rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf.’⁴⁴⁵ As one commentator noted, ‘[t]he approach of the ITLOS, including

⁴⁴⁰ *Bangladesh/Myanmar* (n 338) [443].

⁴⁴¹ *ibid* [455].

⁴⁴² *Bangladesh/India* (n 339) [465].

⁴⁴³ *Ghana/Côte d’Ivoire* (n 340) [526].

⁴⁴⁴ Note that Judge Gao argued that this method was betrayed in the delimitation of the continental shelf beyond 200 nm. See: *Bangladesh/Myanmar*, Separate Opinion of Judge Gao (n 358) [97]. Malcolm Evans also argues that both ITLOS and the Annex VII arbitral tribunal in the Bay of Bengal cases only paid lip-service to the equidistance/relevant circumstances approach in delimiting the maritime zones within and beyond 200nm, and instead reverted to the equitable approach. See Evans, ‘Maritime Boundary Delimitation’ (n 421) 41. This Chapter refrains from discussing whether the UNCLOS tribunals inadvertently or otherwise applied a different method of delimitation to that of equidistance/relevant circumstances. The analysis in this part is premised on the tribunals’ holding and understanding that they intended to apply the equidistance/relevant circumstances method to delimiting the area beyond 200 nm.

⁴⁴⁵ *Bangladesh/Myanmar* (n 338) [91].

the references to LOSC Article 83, gives strong support to the equidistance/relevant circumstances methodology *prima facie* applying to overlapping shelf claims beyond 200 nm.⁴⁴⁶

Judge Treves commended ITLOS in *Bangladesh/Myanmar*—as the first international tribunal to have proceeded with delimitation of the outer continental shelf—for having ‘[kept] in mind the need to ensure consistency and coherence’ by following the methodology developed by the ICJ and recent arbitral awards on delimitation, but still contributing ‘its own grain of wisdom and particular outlook’⁴⁴⁷ in applying the notion of relevant circumstances and in its decision to delimit the continental shelf beyond 200 miles. Judge Treves commented that ITLOS, in so doing, had ‘become an active participant in a collective interpretative endeavour of international courts and tribunals’.⁴⁴⁸

However, the question that arises is whether the equidistance/relevant circumstances method was in fact the appropriate method for the delimitation the outer continental shelf. Article 83 only specifies that the result for delimitation of the continental shelf, be it within or beyond 200nm, should be equitable; it does not say that the method has to be the same.⁴⁴⁹ Both ITLOS and the Annex VII tribunal relied on the ‘one continental shelf’ argument to determine that the equidistance/relevant circumstances method, which had been developed through case law for the delimitation of areas *within* 200nm only, was also applicable to the delimitation of areas *beyond* 200nm without undertaking a serious examination of its ability to produce an equitable outcome beyond this distance. Due to the differences between the inner and outer continental shelf in terms of the basis for entitlement, the criteria for establishing the limits as well as the role that the Convention assigns to the CLCS, the automatic application of the equidistance/relevant circumstances method by UNCLOS tribunals to delimiting the outer continental shelf may raise certain questions. In particular, it is questionable whether (i) equidistance should be used as the starting point; (ii) whether circumstances deemed relevant within 200nm continue to be appropriate beyond 200nm, and (iii) whether the proportionality test provides an accurate outcome in the absence of the outer limits.

⁴⁴⁶ Ted McDorman, ‘The Continental Shelf Regime in the Law of the Sea Convention: A Reflection on the First Thirty Years’ in David Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Brill 2013) 76.

⁴⁴⁷ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Decl. Treves) ITLOS Reports 2012 [2].

⁴⁴⁸ *ibid.*

⁴⁴⁹ Alex G Oude Elferink, ‘ITLOS’ Approach to the Delimitation of the Continental Shelf Beyond 200 Nautical Miles in the Bangladesh/Myanmar Case: Theoretical and Practical Difficulties’ in Rüdiger Wolfrum, Maja Seršić and Trpimir M. Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2016) 240.

First, the basis for entitlement for the inner continental shelf is distance from the coast. This differs from that for the outer continental shelf, which is the location of the outer edge of the continental margin determined by geomorphological and geological criteria. Within 200 nm, therefore, coastal geography plays a significant role in the process of delimitation. The use of the equidistance line as a point of departure for delimitation is assumed to be equitable as it is constructed based on geographical conditions of the relevant coasts and ‘divides the overlapping areas of the projections of the two coasts almost equally’.⁴⁵⁰ Moreover, within 200 nm, the existence of the EEZ and the tendency of States to establish a single maritime boundary mean that geographical factors have a particularly significant role in the delimitation process. As one commentator rightly observed:

A single line delimitation requires that geographical factors be placed at the heart of the process; geographical factors call for geometrical methods [...] since all geometrical methods based on the real geography belong, in the ultimate analysis to equidistance.⁴⁵¹

Beyond 200 nm, given that the coast no longer remains the basis to establish entitlement to an outer continental shelf, but it is instead the geomorphology and geology condition of the seabed that determines entitlement, it is not clear whether equidistance line should still retain its primacy as the first step in delimitation. The International Law Association Committee was of the opinion that ‘the fact that the basis for entitlement to continental shelf and its delimitation are linked suggests that the process of delimitation may be different within and beyond 200 nm’.⁴⁵²

Second, regarding relevant circumstances calling for the adjustment of the provisional boundary, both ITLOS and Annex VII arbitral tribunal only took into account those that had already been considered relevant for the areas of water within 200 nm, such as concavity of the coast producing cut-off effects. No mention was made to those that are peculiar to the areas beyond 200 nm, namely geological or geomorphological circumstances ITLOS in *Bangladesh/Myanmar* in fact rejected Bangladesh’ argument relating to ‘the most natural prolongation’ as a relevant circumstance in the delimitation of the outer continental shelf. This decision received support from Judges *ad hoc* Mensah and Oxman in their Joint Declaration in

⁴⁵⁰ Prosper Weil, *The Law of Maritime Delimitation—Reflections* (Maureen MacGlashan tr, Cambridge Grotius Publications Limited 1989) 282.

⁴⁵¹ Robert Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries, Introduction* (Martinus Nijhoff 2003) 261.

⁴⁵² Committee on ‘Legal Issues of the Outer Limits of the Continental Shelf’ (the ILA Committee) (Preliminary Report) in International Law Association Report of the Seventy Conference, (New Delhi, 2002) (International Law Association 2002) 741, 751.

Bangladesh/Myanmar. The two Judges believed that ‘[a]cceptance of this idea would, in our view, introduce a new element of difficulty and uncertainty into the process of maritime delimitation in this case’, and that ‘it could have an unsettling effect on the efforts of States to agree on delimitation of the continental shelf beyond 200 miles.’⁴⁵³

However, could ITLOS’ decision be read to mean, as one author contends, that ITLOS ‘rejects geology as a relevant circumstance for the delimitation of the outer continental shelf; in other words, geology is completely immaterial beyond 200 nm’?⁴⁵⁴ The answer seems to be no. ITLOS’ rejection of ‘the most natural prolongation’ argument flowed from a conclusion it adopted earlier that ‘natural prolongation’ could not constitute an independent criterion to prove entitlement to the outer continental shelf. In ITLOS’ view, therefore, Bangladesh could not claim that because it had more ‘natural prolongation’, it should be entitled to a bigger shelf. There is no basis to suggest that ITLOS’ rejection of the ‘most natural prolongation’ argument amounted to a complete rejection of the relevance of geological and/or geomorphological criteria in the delimitation process.

In fact, in the Bay of Bengal cases, neither ITLOS nor the Annex VII arbitral tribunal explicitly said anything to endorse or reject the relevance of geological factors in the delimitation of the outer continental shelf. In the course of the delimitation, no geological and geomorphological factors were taken into account. On the other hand, interestingly, in *Bangladesh/Myanmar*, ITLOS declined to accept that the Bengal depositional system was relevant to the delimitation of the EEZ and the continental shelf *within* 200 nm as:

The location and direction of the single maritime boundary applicable both to the seabed and subsoil and to the superjacent waters within the 200 nm limit are to be determined on the basis of geography of the coasts of the Parties in relation to each other and not on the geology or geomorphology of the seabed of the delimitation area.⁴⁵⁵

This holding is reminiscent of the statement made by the ICJ in *Libya/Malta* that there was no ‘reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation.’⁴⁵⁶ In fact, in no cases in which the delimitation of the continental shelf within 200 nm was at issue before the ICJ did the Court find geophysical factors put forward by the parties relevant.⁴⁵⁷ This would seem to

⁴⁵³ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Joint Decl. Mensah and Oxman) ITLOS Reports 2012, 4 [11].

⁴⁵⁴ See Magnusson (n 432) 170.

⁴⁵⁵ *Bangladesh/Myanmar* (n 338) [322].

⁴⁵⁶ *Libya v Malta* [40].

⁴⁵⁷ *Tunisia v Libyan* (n 369) [67]; *Gulf of Maine* (n 369) [45]; *Libya v Malta* (n 369) [34].

suggest that, *a contrario*, if a factor has a part to play in the establishment of the shelf, it should be taken into account. It follows that the decisions of international courts and tribunals to date, including those of UNCLOS tribunals, leave open the possibility that geological and geomorphological factors may be deemed relevant to delimitation on the outer continental shelf since they do have a role to play in forming the basis of entitlement to such an area.

Moreover, as UNCLOS tribunals reiterated, there is only ‘one continental shelf’, thus Article 76, including those paragraphs that pertain to the outer continental shelf, and Article 83 should have a close connection. This strengthens the contention that geological and geomorphological factors should have a role to play in the delimitation of the outer continental shelf. Of course, this does not suggest that geomorphological or geological factors ‘operate to the exclusion of other relevant facts in the delimitation of the outer continental shelf’.⁴⁵⁸ The decision as to which factor could be deemed relevant can only be made on a case-by-case basis, so long as the solution is equitable as required by Article 83. As geomorphological or geological factors have a clear role to play in establishing entitlement to the continental shelf beyond 200nm, arguably, they should at least have been considered and not completely ignored as in the Bay of Bengal cases.

The question as to what impact geological and geomorphological factors would have on the delimitation process is another issue altogether. Some commentators put forward the argument that ‘[i]f a major geomorphic or geological feature (eg, a trough or plate boundary) exists in the area to be delimited, then such a feature could be used as the basis for the alignment of the outer continental shelf boundary’.⁴⁵⁹ Such an argument was, in fact, adopted by the United Kingdom in the *Delimitation of the Anglo–France Continental Shelf Arbitration*, in which it argued that the ‘Hurd Deep’ or ‘Hurd Deep Fault Zone’, which was a trough or trench, should constitute a natural boundary between the French and British continental shelf. The arbitral tribunal did not accept this argument as, in its view, the trench or trough did not ‘disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region’.⁴⁶⁰ Thus, even though there is still uncertainty as to how geological and geomorphological factors could impact the delimitation line, it seems that at least States cannot merely argue that a factor that disrupts the natural prolongation of its submerged territory would constitute a boundary line. Instead, ‘States should be able to argue convincingly as to ‘why should such a naturalness (or

⁴⁵⁸ David A Colson, ‘The Delimitation of the Outer Continental Shelf between Neighboring States’ (2003) 97 AJIL 91, 100–03.

⁴⁵⁹ Schofield, Telesetsky and Lee (n 370) 375.

⁴⁶⁰ *Anglo-French Continental Shelf* (n 369) [107].

interruption therefore) presuppose the finding of an actual boundary line, and how could it support even a rudimentary location for that line?’⁴⁶¹

The last step in the equidistance/relevant circumstances method is a (dis)proportionality test in order to ensure that the boundary line drawn by the tribunal produces an equitable result for the parties concerned. The proportionality test requires the tribunal to check if the boundary line, whether adjusted or not, ‘results in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party’.⁴⁶² ITLOS already established that the relevant area should include maritime areas subject to overlapping entitlements of the parties.⁴⁶³ However, in both of the Bay of Bengal cases, the outer limits of the continental shelf had not been identified, giving rise to the question as to whether it was possible for the tribunals to have known definitively the total area of overlapping outer continental shelf of the two parties? ITLOS determined that the relevant maritime area for the purpose of the delimitation of the EEZ and the continental shelf between Bangladesh and Myanmar was that resulting from the projections of the relevant coasts of the Parties.⁴⁶⁴ No attention was paid to the outer limits of the shelf, or the lack thereof. In *Bangladesh/India*, the arbitral tribunal took cognisance of the outer limits of the continental shelf by referring to Bangladesh’s submission to CLCS in order to determine the south and southwest limits of the relevant area.⁴⁶⁵ However, this also meant that an Annex VII arbitral tribunal took upon itself to validate Bangladesh’s submission regarding its outer continental shelf limits, which, as analysed above, could prejudice the work of the CLCS.⁴⁶⁶ In *Ghana/Cote d’Ivoire*, ITLOS conceded that the size of the relevant area ‘can only be an approximation’ as ‘the outer limits of the continental shelf beyond 200 nm have not yet been finally established’.⁴⁶⁷ If the relevant maritime area could not be conclusively determined due to the lack of the outer limits of the continental, it is questionable whether the proportionality test could be performed or whether the final boundary line would ensure an equitable result.

In short, the delimitation method applicable to the continental shelf beyond 200 nm has been clarified, but many questions regarding its appropriateness and its ability to produce an equitable result as required by Article 83 remain unresolved.

⁴⁶¹ Keith Highet, ‘The Use of Geophysical Factors in the Delimitation of Maritime Boundaries’ in John Charney and Lewis Alexander (eds), *International Maritime Boundaries*, Vol 1 (Brill 1992) 180–81.

⁴⁶² *Bangladesh/Myanmar* (n 338) [240].

⁴⁶³ *ibid* [493].

⁴⁶⁴ *ibid* [489].

⁴⁶⁵ *Bangladesh/India* (n 339) [309], [310].

⁴⁶⁶ Kunoy, ‘The Admissibility of a Plea’ (n 410) 258.

⁴⁶⁷ *Ghana/Côte d’Ivoire* (n 340) [534].

IV. THE GREY AREA

The delimitation of the continental shelf beyond 200 nm in both of the Bay of Bengal cases gave rise to an area known as the ‘grey area’, in which sovereign rights over the seabed and the superjacent water belong to two different States. The grey area resulted from a situation in which the delimitation line which was not an equidistance line reached the outer limit of one State’s EEZ and continued beyond it in the same direction, until it reached the outer limit of the other State’s EEZ.⁴⁶⁸ In *Bangladesh/Myanmar*, which was the first case in which such an area was created by an international tribunal, this grey area was located beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of Myanmar, yet on the Bangladesh side of the delimitation line.⁴⁶⁹ Similarly, in *Bangladesh/India*, the grey area was beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of India, but again on the Bangladesh side of the delimitation line.⁴⁷⁰

It is worth noting that both Bangladesh and Myanmar were against the creation of a grey area.⁴⁷¹ Bangladesh argued that the differentiation of water-column rights and continental-shelf rights could cause great practical inconvenience, which was why ‘differential attribution of zone and shelf has hardly ever been adopted in State practice’.⁴⁷² Myanmar contended that ‘[a]ny allocation of area to Bangladesh extending beyond 200 [nm] off Bangladesh’s coast would trump Myanmar’s rights to EEZ and continental shelf within 200 [nm]’, which was ‘contrary to both the Convention and international practice’.⁴⁷³ In response, ITLOS merely noted that in a situation involving concurrent EEZ and continental shelf rights, each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other.⁴⁷⁴ ITLOS in the end left it to parties to determine the measures that they consider appropriate for this purpose.⁴⁷⁵ Similarly, the Annex VII tribunal also expressed its confidence that ‘the Parties will act, both jointly and individually, to ensure that each is able to exercise its rights and perform its duties within this area’.⁴⁷⁶ It is clear that the grey area was not favoured by the parties to the case; it was merely a by-product of the method of delimitation chosen by UNCLOS tribunals.

⁴⁶⁸ *ibid* [464].

⁴⁶⁹ *ibid* [463].

⁴⁷⁰ *Bangladesh/India* (n 339) [498].

⁴⁷¹ Note, however, that in the subsequent *Bangladesh/India*, Bangladesh changed its position regarding the grey area and endorsed the approach adopted by ITLOS in *Bangladesh/Myanmar*. India in this case did not address the question of the grey area. See *Bangladesh/India* (n 339) [501]–[502].

⁴⁷² *Bangladesh/Myanmar* (n 338) [467].

⁴⁷³ *ibid* [468].

⁴⁷⁴ *ibid* [475].

⁴⁷⁵ *ibid* [476].

⁴⁷⁶ *Bangladesh/India* (n 339) [508].

As the Bay of Bengal cases were the first instances in which a grey area was created by international tribunals, the tribunals' reasoning, albeit limited, posed interesting questions regarding the legal nature of the EEZ and continental shelf, as well as the relationship between these two maritime areas, both from doctrinal. The creation of the grey area also raises practical issues with regard to coastal States' implementation of their rights and obligations in the EEZ and continental shelf within the grey area. These two issues will be examined in turn.

1. Implication of the 'grey area' on the relationship between the EEZ and continental shelf

ITLOS and Annex VII tribunal adopted the same approach to explaining the legal basis for the 'grey area', as well as for the rights and obligations of the parties therein. With regard to the former, both tribunals invoked Article 56(3) which provides that 'the rights set out in this Article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI' and Article 68 which excludes sedentary species from the provisions relating to the EEZ.⁴⁷⁷ By relying on Articles 56(3) and 68, the tribunals seemed to have been saying that the Convention already envisioned the separation of the water column and the seabed within 200 nm. Further, ITLOS and the Annex VII arbitral tribunal called on the parties to exercise their rights and perform their duties with due regard to the rights and duties of the other States pursuant to the principle reflected in the provisions of Articles 56, 58, 78 and 79.⁴⁷⁸

In creating the grey area, UNCLOS tribunals practically severed Myanmar's and India's subsoil and seabed in the EEZ from their respective superjacent water, and allowed Bangladesh' 'outer' continental shelf to extend into what would have been the other two parties' 'inner' continental shelf. The implication of the tribunals' decisions is two-fold: (i) the regimes of EEZ and continental shelf are separable within 200nm; and (ii) a State's entitlement to an area beyond 200 nm can encroach on another state's entitlement to continental shelf within 200 nm of its coastal baselines. These implications are highly significant for the long-standing debate on the relationship between the EEZ and the continental shelf, as well as that between the 'inner' and 'outer' continental shelf. They also suggest that UNCLOS tribunals implicitly endorsed the primacy of the continental shelf over the EEZ regime. However, as will be shown below, the tribunals' scarce and unsatisfactory reasoning in support of the grey area seems to have raised more questions than answers.

⁴⁷⁷ *Bangladesh/Myanmar* (n 338) [473]; *Bangladesh/India* (n 339) [504].

⁴⁷⁸ *Bangladesh/Myanmar* (n 338) [475], *Bangladesh/India* (n 339) [507]. Note that UNCLOS tribunals did not give any guidance on the obligation to have 'due regard' under the Convention entailed. It was not until the *Chagos MPA* case that the contours of the obligation to give 'due regard' under Article 56(2) was clarified. See *Chagos MPA* (n 106) [518]–[519].

With regard to the relationship between the EEZ and the continental shelf, Article 56(1) states that the EEZ includes the exploration and exploitation of resources both ‘of the waters superjacent and *the seabed and its subsoil*’. It follows that when a coastal State has claimed an EEZ, the seabed and subsoil form an integral part of the EEZ. Since Article 56(3) provides that the rights in seabed and subsoil of the EEZ ‘shall be exercised in accordance with Part VI’, the EEZ and continental shelf regimes overlap within 200 nm.⁴⁷⁹ Thus, within 200 nm, as the ICJ in *Libya/Malta* acknowledged, the two institutions are ‘linked together in modern law’ and ‘[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.’⁴⁸⁰ In his partial Dissenting Opinion in *Bangladesh/India*, Judge Rao also opined that, ‘the sovereign rights of a coastal State over the water column and the seabed and its subsoil are considered as two indispensable and inseparable parts of the coastal State’s rights in the EEZ’.⁴⁸¹ Moreover, the rules governing the rights of the coastal States in the adjacent waters and the seabed are to a large extent uniform. For example, the coastal State’s sovereign rights over living and non-living resources, its rights and jurisdiction with regard to artificial islands, marine scientific research, as well as its obligations regarding environmental matters in the EEZ and continental shelf are almost identical.⁴⁸² All of the above point to the argument that the EEZ and continental shelf regimes constitute an integral system of rights and obligation within 200 nm.

As mentioned, ITLOS and the Annex VII arbitral tribunal suggested that the regimes for the superjacent water and for the seabed and subsoil within 200 nm are already separated by virtue of Articles 56(3) and 68. It is true that the regimes regulating the waters and seabed and subsoil within 200 nm are provided for in different parts of UNCLOS. However, paragraph (3) of Article 56 cannot be read in isolation. It should instead be interpreted within the context of Article 56 as a whole, including paragraph (1) and taking into account international jurisprudence which emphasises the similarities, even homogeneity, of regimes within the 200 nm zone.⁴⁸³ Article 56(3) was put in place in order to ‘remove the potential for confusion between the [EEZ] and the continental shelf’.⁴⁸⁴ This provision also highlights that

⁴⁷⁹ Proelss (n 78) 421.

⁴⁸⁰ *Libya/Malta* (n 369) [34].

⁴⁸¹ *Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)* (Award, Concurring and Dissenting Opinion of Dr. P.S. Rao) [31].

⁴⁸² For example, Article 246 regulates coastal State’s competence over marine scientific research in both the EEZ and continental shelf, Articles 60 and 80 relating to artificial islands, installations and structures are exactly the same, Part XII on the protection and preservation of the marine environment applies to all maritime zones.

⁴⁸³ Surya P Sharma, ‘The Single Maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone’ (1987) 2 Int’l J Estuarine & Coastal L. 203.

⁴⁸⁴ *Virginia Commentary*, vol II (n 134) 826.

notwithstanding the introduction of the EEZ, which significantly impacted the way the limits of the continental shelf are determined under UNCLOS as well as the delimitation method adopted by international tribunals within 200 nm, and despite the interconnectedness between the two regimes within 200 nm, the EEZ and continental shelf are still two distinct maritime zones. The EEZ regime does not cause the continental shelf regime to cease to exist, nor does the EEZ regime subsume the continental shelf regime.⁴⁸⁵ Article 56(3) thus protects the rights of the coastal States over the seabed within 200 nm under Part VI in cases in which a coastal State has not claimed an EEZ.⁴⁸⁶ It cannot serve as the legal basis for the separation and distribution of the waters to one State and the seabed and subsoil within 200 nm to another. In the only Dissenting Opinion rendered in *Bangladesh/Myanmar*, Judge Lucky also argued that ‘a strict interpretation of the law set out in Parts V and VI of the Convention prohibits the allocation of waters superjacent to the seabed and its subsoil, ie the continental shelf, to two different States.’⁴⁸⁷

Furthermore, by allowing Bangladesh’s continental shelf to extend into the seabed within 200 nm of the other two parties, UNCLOS tribunals seem to have provided a negative answer to the questions regarding whether there is a hierarchy of claims between the ‘inner’ and ‘outer’ continental shelf, and, as Evans queried, whether the 200 nm ‘inner’ shelf could be considered ‘an absolute entitlement, incapable of being encroached upon by the “outer” continental shelf of another State?’⁴⁸⁸ UNCLOS tribunals repeatedly used the argument that ‘there is only one continental shelf’ as the basis for their decisions. However, this ‘one continental shelf’ argument does not seem to stand up to scrutiny. While it is true that physically speaking, a continental shelf does not stop when it reaches the 200 nm limit, the continental shelf that is

⁴⁸⁵ The Exclusive Economic Zone, Working Sessions, ILA 61st Conference, 26 August–1 September 1984; Allot (n 47) 14; DP O’Connell, *The International Law of the Sea*, Vol II (Clarendon Press 1984) 580; Leanza and Caracciolo (n 77) 208.

⁴⁸⁶ While a coastal State is entitled to the rights in the continental shelf independent of any express declaration, it may only exercise its rights in the EEZ after a specific declaration to that effect has been made. Although UNCLOS does not expressly provide for this declaration, it emerges from a *contrario* reading of art 77(3). See Leanza and Caracciolo (n 77) 185. As of 2011, there are 16 states which have not claimed an EEZ or a Fisheries Zone, namely Albania, Bahrain, Benin, Bosnia and Herzegovina, Ecuador, El Salvador, Greece, Iraq, Jordan, Kuwait, Monaco, Montenegro, Peru, Saudia Arabia, Somalia and Sudan. <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf> accessed 25 September 2018.

⁴⁸⁷ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Dis Op Lucky) ITLOS Reports 2012, 4, 56.

⁴⁸⁸ Malcolm D Evans (n 421) 71. See also Malcolm D Evans, ‘Maritime Boundary Delimitation’ in Rothwell et al (n 428) 265. It is worth recalling that in *Barbados v Trinidad and Tobago*, Trinidad argued that its right to a continental shelf could not be ‘trumped’ by Barbados’ claim to an EEZ.⁴⁸⁸ Similarly, in *Nicaragua v Colombia* (2012), Nicaragua also argued that ‘an entitlement to continental shelf based on the distance criterion does not take precedence over an entitlement based on the criterion of natural prolongation’.⁴⁸⁸ The arbitral tribunal and ICJ did not address these questions.

regulated under UNCLOS is one of a juridical nature. As a result, there are in fact differences in the legal regime that governs the ‘inner’ and ‘outer’ parts of the shelf. Judge Rao, in *Bangladesh/India*, disagreed with the majority’s view that ‘no distinct inner and outer continental shelf exist’ and contended that this was true only ‘insofar as the resources the shelf encompasses and any regulation that goes with them’.⁴⁸⁹ Judge Rao’s comment is certainly correct, but only up to a point. As far as the regulation over resources is concerned, there are still differences in UNCLOS provisions regarding the coastal State’s rights over resources located on the seabed within and beyond 200 nm. For example, Article 82 UNCLOS requires the coastal State to ‘make payments or contributions in kind with respect to the exploitation of non-living resources of the continental shelf beyond 200 nm’ while no such requirement is in place for activities conducted within 200 nm. In addition, while the coastal State has the discretion to regulate marine scientific research conducted on the continental shelf within 200 nm, in accordance with Article 246(6), the coastal State may not withhold consent for research undertaken beyond 200 nm. The discrepancies in the legal regimes regulating the continental shelf within and beyond 200 nm show that there might be one natural physical continental shelf in a scientific sense, but not one continental shelf in a legal sense as provided for under UNCLOS. Consequently, UNCLOS tribunals’ use of the continental shelf unity to override the EEZ and continental shelf unity within 200 nm may not be tenable from a legal point of view.

The preceding discussion shows that UNCLOS tribunals’ decisions to draw a delimitation line which separated Myanmar’s and India’s seabed and subsoil from the adjacent waters within 200 nm of their coasts paid little attention to the theory of parallelism between the EEZ and continental shelf which has received widespread support since the entry into force of UNCLOS.⁴⁹⁰ Instead, UNCLOS tribunals gave more weight to preserving the continental shelf regime. Even though the Bay of Bengal decisions appear to have at first sight resolved the difficult issue regarding the relationship between the EEZ and continental shelf regimes, the rather simplistic explanation that the tribunals provided did not satisfactorily address the concerns raised above.

2. Practical difficulties caused by the ‘grey area’

Apart from raising doctrinal and legal questions, the separation of the water column and the seabed within 200 nm also creates practical difficulties for the parties in exercising their rights

⁴⁸⁹ Concurring and Dissenting Opinion of Dr RP Rao (n 481) [32].

⁴⁹⁰ For a summary of the different theories regarding the nature of the relationship between the EEZ and the continental shelf, see Malcolm D Evans, ‘Delimitation and the Common Maritime Boundary’ (1993) 64(1) BYBIL 283, 286–93.

and jurisdiction within the grey area. It should be recalled that Barbados, in objecting to the arbitral tribunal's jurisdiction to hear Trinidad's claim to an outer continental shelf in *Barbados v Trinidad and Tobago* argued that a grey area would create 'an unprecedented and unworkable situation of overlap between seabed and water column rights.'⁴⁹¹ Although Barbados did not elaborate on what 'unworkable situation' it had in mind, it is not difficult to contemplate a few such situations in the grey area. For example, supposing Bangladesh placed a mobile oil rig in the waters of Myanmar's EEZ for the purposes of exploring and exploiting its oil resources in the seabed and the latter alleged that this oilrig in conducting its activities on the seabed was causing pollution to its waters, would Article 208 relating to pollution from seabed activities or Article 211 relating to pollution from vessels apply? Article 208 meant that Bangladesh would have the jurisdiction over the vessel, while Article 211 would confer jurisdiction on Myanmar in accordance with Article 220. Likewise, India, under Article 60, has the exclusive right and jurisdiction over artificial islands, installations and structure in its EEZ. But supposing that the construction of those structures involved the dredging of the seabed, which damaged the living resources on the continental shelf of Bangladesh, which State would have enforcement power in this case?

These are just some of the many difficulties that coastal States would face due to the bifurcation of rights and obligations in the EEZ and continental shelf within 200 nm. Within this distance, the effective exercise of many of the sovereign rights under UNCLOS to a certain extent depends on the fact that only one coastal State is exercising those rights. The arbitral tribunal in *Barbados v Trinidad and Tobago* held that a maritime boundary should be 'both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome'.⁴⁹² It seems evident that UNCLOS tribunals in the Bay of Bengal cases were occupied with adopting the method of delimitation deemed to bring an equitable outcome for the parties,⁴⁹³ while overlooking the impractical consequences of their decisions.

Finally, the problems raised above may not be so significant if the States have actually agreed to the separation of their rights in the grey area. Some States have in practice agreed, in their maritime boundary delimitation treaties, to an area in which the EEZ belongs to one State and the continental shelf to another. These treaties, however, always include arrangements

⁴⁹¹ *Barbados v Trinidad and Tobago* (n 337) [180].

⁴⁹² *ibid* [244].

⁴⁹³ *Bangladesh/Myanmar* (n 338) [498].

regarding the exercise of the States' rights and jurisdiction in such areas.⁴⁹⁴ Where jurisdiction is separated, 'the arrangements are heavily dependent upon the goodwill and active cooperation of the State parties'.⁴⁹⁵ In the Bay of Bengal cases, not only did the parties object to the creation of a grey area, they also resorted to adjudication and arbitration in the hope of definitively settling long-standing disputes. Instead, Bangladesh, Myanmar and India have now been directed back to the negotiation table to find a solution for unprecedented tribunal-created areas of waters. UNCLOS tribunals seem to have ignored the fact that it was precisely because negotiations had failed to produce any tangible results in the past decades that the parties had resorted to third-party settlement. As the grey area was not envisioned by the parties when submitting the cases, it would have been more desirable if the tribunal had acknowledged the difficulties in exercising of rights in the grey area and provided some guidance for the States concerned to deal with them. Both Judge Lucky and Judge Rao regarded the decisions to leave the issues involving the grey areas unresolved and to refrain from offering any comment or suggestions to the parties to resolve the matter 'a failure on the part of the UNCLOS tribunals to definitively resolve the disputes brought before them.'⁴⁹⁶ Although there are no provisions under UNCLOS to govern the situation where the two regimes overlap, Judge Lucky argued that '[w]here the law is not clear or there are no specific provisions, a judge must be innovative [...] If the law does not specify a solution, then the judge must, by applying the law, find one.'⁴⁹⁷ Judge Lucky's opinion regarding the role of the judge in developing the law is perhaps not without controversy. However, there are merits in his argument that as UNCLOS tribunals had gone far enough to create a zone for which the legal basis under UNCLOS is murky, they should also have spelled out the manner in which such a zone should be regulated.

V. CONCLUDING REMARKS

UNCLOS tribunals were the pioneers in examining issues concerning the legal regime of the outer continental shelf—an issue which had been avoided, or only superficially examined, by other international courts or tribunals. As such, they gave substance to Article 76, specifically

⁴⁹⁴ For example, the Torres Strait Treaty between Australia and Papua New Guinea requires that residual jurisdiction, ie jurisdiction over the seabed or fisheries not related to the exploration and exploitation of these areas, is shared by the parties in the area of overlap and neither party can exercise this jurisdiction without the concurrence of the other. The Australian–Indonesia Maritime Boundary Treaty also recognizes areas in which the Australian continental shelf overlapping with the Indonesian EEZ, and art 7 provides for the regulation of this area. See Stuart Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice' (1998) 19 *AuYBIL* 49.

⁴⁹⁵ Kaye (n 494) 71.

⁴⁹⁶ Concurring and Dissenting Opinion of Dr RP Rao (n 481) [35]–[36]

⁴⁹⁷ *Bangladesh/Myanmar*, Dissenting Opinion of Judge Lucky (n 487) 56–60. Judge Lucky's argument relating to the power of the judge to find a legal solution in the absence of the law follows the broad approach he adopted in the *Advisory Opinion on IUU Fishing*, in which he used the argument of 'UNCLOS as a living treaty' to conclude that ITLOS had advisory jurisdiction even when UNCLOS does not explicitly provide for such jurisdiction. See Chapter 5, V.1.

its paragraphs 1, 4 and 10, thereby answering questions which lie at the heart of the outer continental shelf regime. In particular, ITLOS's analysis of the term 'natural prolongation' provides authoritative guidance on the meaning of this undefined term in establishing entitlement to the outer continental shelf. Also, by establishing a close connection between paragraphs (1) and (4) of Article 76, ITLOS confirmed that under UNCLOS, entitlement for an outer continental shelf is based on the existence of a continental margin as defined under Article 76(3) beyond 200 nm. This further underlines the fact that the concept of the continental shelf under UNCLOS is largely of juridical nature.

Second, UNCLOS tribunals were also the first to examine in detail the relationship between Articles 76 and 83. ITLOS drew a clear distinction between delimitation and delineation under UNCLOS, thereby confirming the independent relationship between UNCLOS dispute settlement bodies and the CLCS. The fact that the ICJ in the 2016 *Nicaragua v Colombia* case adopted a similar approach to that of UNCLOS tribunals, despite having refused to do so in 2012, may signify that some sort of judicial dialogue between different courts has taken place.⁴⁹⁸ What could have been perceived as fragmentation of the law of the sea did not in the end materialise.

Third, as the first international tribunals to apply Article 83 to the delimitation of the continental shelf beyond 200 nm, UNCLOS tribunals also elucidated on the method of delimitation applicable to the delimitation of the outer continental shelf, which is the equidistance/relevant circumstances method. Even though the decisions are only binding on the parties to the case, some scholars have predicted that 'the ITLOS decision may prove to be influential in the context of future dispute resolution, whether through third party adjudication or not'.⁴⁹⁹

On the other hand, one ought to be careful about drawing broad implications from or generalizing the findings in the Bay of Bengal cases. Some of UNCLOS tribunals' pronouncements regarding the interpretation of Article 76 should be assessed against an important caveat—the uniqueness of the Bay of Bengal. ITLOS' conclusion regarding the non-prejudicial nature of the interaction between UNCLOS tribunals and the CLCS, for example, may not hold true in cases in which the States involved have opposite coasts; or the requirement

⁴⁹⁸ Judge Golitsyn, President of ITLOS, indicated that when the delegation of ICJ judges, including President Peter Tomka, Judges Owada, Trindade, Xue, Gaja and Sebutinde, visited the Tribunal on 26 and 27 January 2015, one of the issues which the ICJ judges were interested in discussing with ITLOS judges was the delimitation of the outer continental shelf. See: Judge Golitsyn, Expert Roundtable 'ITLOS at 20: Impacts of the International Tribunal for the Law of the Sea' London Centre for International Law and Practice, London (23 May 2016), Q&A Session (author's notes).

⁴⁹⁹ Shaun Lin and Clive Schofield, 'Lessons from the Bay of Bengal ITLOS case: Stepping Offshore for a 'Deeper' Maritime Political Geography' (2014) 180(3) *The Geographical Journal* 260, 263.

for evidence of entitlement to an outer continental shelf may have to be more stringent where scientific evidence regarding the existence of an outer continental shelf is not so clear-cut. In other words, the jurisprudential value and enduring significance of the ITLOS judgment and Annex VII arbitral tribunal remains to be seen, especially in cases in which scientific evidence is still in doubt and the existence of outer continental shelf claimed by both parties is subject to much more uncertainty.

The application of Article 83 also raises difficult issues. UNCLOS tribunals' use of the equidistance/relevant circumstances method for the delimitation of the outer continental shelf manifested several substantive shortcomings, including the lack of proper acknowledgement of the basis of entitlement to an outer continental shelf, the lack of regard for geological factors as potential relevant circumstances in adjusting the provisional boundary line and, in the absence of the outer limits of the continental shelf, the inability to conclusively determine the relevant areas for the purposes of the performing the proportionality test. These deficiencies pose a serious challenge to the assumption that the equidistance/relevant circumstances method could automatically be applicable to the delimitation of the outer continental shelf to provide an equitable outcome. Last but not least, the tribunals' creation the grey area raises both doctrinal and practical questions which they failed to adequately address in their decisions.

In conclusion, UNCLOS tribunals made the first foray into clarifying important, but ambiguous or controversial, legal concepts under Article 76 and shedding light on the method of delimitation for the outer continental shelf under Article 83. At the same time, it should be acknowledged that not all of the tribunals' answers or their accompanying reasoning were provided in a cogently manner, and some of the tribunals' findings were further confined to the particular circumstances of the cases, potentially limiting their jurisprudential value. The significance of these contributions, therefore, lies more in the fact that they laid the first building blocks to understanding these articles and lent authority to certain interpretations of the legal concepts under these articles amidst various competing ways to understanding them. In consequence, the relevant pronouncements of UNCLOS tribunals have the potential normative power to influence the future development of the outer continental shelf regime. In other words, even with the limitations, they have set out a course for the law regulating the outer continental shelf to develop and take shape. It now remains to be seen whether that course will be followed by other international actors; the first signs from the ICJ, at least at the jurisdictional phase, seems to be in the positive.

CHAPTER 4 DEVELOPMENT OF THE LAW ON MARINE ENVIRONMENTAL PROTECTION

The protection of marine environment assumes a special place under UNCLOS. Not only does the Convention prescribe States' rights and obligations regarding the conservation of marine resources in the maritime zones falling under their jurisdiction, it also devotes an entire Part XII to the 'Protection and Preservation of the Marine Environment'. Part XII begins with a general obligation on States to 'protect and preserve the environment' and subsequently proceeded to provide for States' obligations with regard to different forms of marine pollution. However, while innovative, it is noteworthy that Part XII merely provides a general framework for the protection of the marine environment, and indeed, Article 237 UNCLOS gives preference to specific obligation assumed by States under other special agreements over those contained under this Part.

To date, ITLOS has not had the opportunity to deal with the protection of the marine environment in any contentious proceedings, but only in provisional measures and advisory opinion proceedings. Annex VII arbitral tribunals, for their part, did not have the opportunity to make any substantive contributions to the development of marine environment protection in the first two decades following the Convention's entry into force.⁵⁰⁰ It was not until the recent *Chagos MPA* in 2015 and *South China Sea* in 2017 that Annex VII arbitral tribunals were able to deal with the legal rules relating to the protection of the marine environment. Despite the limited number of cases, ITLOS and Annex VII arbitral tribunals' decisions have contributed to clarifying important principles under international environmental law, namely the precautionary principle, the duty to cooperate, the obligation of due diligence and the obligation to conduct environmental impact assessment. The following sections will examine the ways in which the tribunals dealt with each of these principles and assess the contributions made to the development of these principles.

I. THE PRECAUTIONARY PRINCIPLE

Even though the precautionary principle can be found in many international instruments,⁵⁰¹ its status under international law as well as its normative content remains unclear due to a variety

⁵⁰⁰ When the cases concerning the marine environment, such as *Southern Bluefin Tuna*, *MOX Plant*, *Land Reclamation*, eventually proceeded to arbitration, they were either terminated and or rejected by the arbitral tribunals due to the lack of jurisdiction or consideration of comity to other courts.

⁵⁰¹ See in general, Arie Trouwbot, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International 2002).

of reasons. First, there is a lack of a single universally accepted definition of the principle. Second, the specific requirements for the elements commonly present in the formulation of the precautionary principle, namely the existence of scientific uncertainty,⁵⁰² the threshold of risk,⁵⁰³ and precautionary action,⁵⁰⁴ vary in different agreements. Third, different versions of the principle may entail different levels of commitment on the part of States.⁵⁰⁵ Finally, the precautionary principle also generates disagreement regarding its effects. It is not clear whether the precautionary principle lowers the standard of proof of harm to the environment to trigger response,⁵⁰⁶ or reverses the burden of proof, by shifting the burden of proof from the party opposing the planned activity to prove that harm will be caused to the party wishing to take certain actions to prove that the actions will not cause harm to the environment.⁵⁰⁷

Due to the disparity in the formulation of the precautionary principle, its application is specific to the convention or treaty under which it is stipulated. UNCLOS, however, is not among those conventions; UNCLOS does not contain explicit references to the precautionary principle.⁵⁰⁸ Notwithstanding the absence of the precautionary principle under UNCLOS, it has

⁵⁰² Some instruments require ‘lack of full scientific uncertainty’. See, eg, Rio Declaration (n 301) Principle 15; Bergen Declaration, Ministerial Declaration on Sustainable Development in the ECE Region, A/CONF/151/PC/10. Others set the level of uncertainty at ‘no conclusive evidence’. See, eg, Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), 2354 UNTS 67, Article 2.2; Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1507 UNTS 167, Article 3.2.

⁵⁰³ A precautionary measure would only be triggered when the threshold of risk is crossed. This threshold comprises of two requirements, the severity of potential risk and the probability of the risk. The severity of risk varies between ‘significant’, ‘serious’ or ‘irreversible’, while the probability of risk could be ‘reasonable grounds to believe’ or none at all. See, eg, Rio Declaration (n 301), Principle 15; United Nations Framework Convention on Climate Change, 1771 UNTS 170, Article 3.3; Cartagena Protocol on Biosafety to the Convention on Biological Diversity 39 ILM 1027 (2000), Article 10.6.

⁵⁰⁴ Most instruments do not specify the types of measures required in response to the risk. The rare exception is found under Principle 15 of the Rio Declaration which specifies ‘cost-effective measures to prevent environmental degradation’. Rio Declaration (n 301) Principle 15.

⁵⁰⁵ The precautionary principle has been argued to function in two ways: (i) as a justification to take action, but not as a basis to compel action, in the face of scientific uncertainty, or (ii) as a duty to act, ie a duty to take preventative measures in cases of scientific uncertainty. See Antônio Augusto Cançado Trindade, ‘Precaution’ in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 408.

⁵⁰⁶ Alan Boyle, ‘The Environmental Jurisprudence of the ITLOS’ (2007) 22 IJMCL 369; Arie Trouwborst, ‘The Precautionary Principle in General International Law: Combating the Babylonian Confusion’ (2007) 16 RECIEL 185.

⁵⁰⁷ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, CUP 2012) 222; Cançado Trindade (n 505) 409.

⁵⁰⁸ There have been several suggestions, however, that the precautionary principle is not completely absent in UNCLOS. One contended that the concept of the precautionary principle can be read into UNCLOS by establishing the link between the precautionary principle and the prevention principle. See Bénédicte Sage-Fuller, *The Precautionary Principle in Marine Environmental Law: With Special Reference to High Risk Vessels* (Routledge 2013) 68. Another argument is that a trace of the precautionary principle can be seen in Articles 61(2) and 119 which create the assumption that that if scientific evidence is not available, conservative obligations under the Convention prevail, which is the essence of the precautionary principle. See Gerd Winter (ed), *Towards Sustainable Fisheries Law: A Comparative Analysis* (IUCN 2009) 15. Churchill argues that there is an ‘embryonic use’ of the principle in the definition of marine pollution under Article 1(1)(4) UNCLOS as including the introduction of substances or energy into the marine environment that not only results in deleterious

arisen in several cases concerning the protection of the marine environment before UNCLOS tribunals, particularly ITLOS. The tribunal has dealt with the principle, however, with varying degrees of elaboration and clarity.

1. UNCLOS tribunals and the precautionary principle

The *Southern Bluefin Tuna* case was the first instance in which the precautionary principle was invoked before ITLOS. In this case, Australia and New Zealand alleged that Japan, by unilaterally designing and undertaking an experimental fishing programme, failed to comply with obligations to conserve and cooperate in the conservation of the SBT stock under UNCLOS, the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and ‘rules of customary international law’.⁵⁰⁹ By ‘customary international law’, Australia and New Zealand were referring specifically to the precautionary principle.⁵¹⁰ Pending the constitution of Annex VII arbitral tribunal, the Applicants requested that ITLOS prescribe provisional measures, inter alia, to ensure that ‘the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute’.⁵¹¹

The Applicants invoked under UNCLOS Articles 64, 116 and 119, found in Parts V and VII of UNCLOS concerning the conservation of living resources in EEZ and high seas respectively. While the Applicants did not base their claims on any provisions of Part XII, in the Order for provisional measures, ITLOS confirmed that ‘the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment’.⁵¹² This paved the way for ITLOS to take into account environmental principles to deal with the conservation of living resources. The Tribunal acknowledged that the SBT ‘is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern’.⁵¹³ On this basis, it held that ‘the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent

effects but also that ‘is likely to result’ in such effects. See Robin Churchill, ‘The LOSC Regime For Protection of the Marine Environment – Fit For The Twenty-First Century?’ in Rosemary Gail Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar 2015) 9.

⁵⁰⁹ *Southern Bluefin Tuna* Order (n 227) [45]. Convention for The Conservation of Southern Bluefin Tuna, 819 UNTS 360 (10 May 1993).

⁵¹⁰ Australia and New Zealand asked ITLOS in their written pleadings to take into account ‘the parties’ obligations under general international law, in particular the precautionary principle’. See Request for the Prescription of Provisional Measures Submitted by New Zealand, para. 1 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/request_new_zealand_eng.pdf> accessed 25 September 2018; Request for the Prescription of Provisional Measures Submitted by Australia, para. 1, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/request_australia_eng.pdf> accessed 25 September 2018.

⁵¹¹ Order (n 227) [34].

⁵¹² *ibid* [70].

⁵¹³ *ibid* [71].

serious harm to the stock of SBT'.⁵¹⁴ Most importantly, ITLOS held in paragraphs 79 and 80, which deserve to be quoted in full, that:

Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

Considering that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.⁵¹⁵

Although ITLOS did not explicitly refer to the precautionary principle, there are elements in these two paragraphs which signalled the application of this principle.⁵¹⁶ ITLOS highlighted the lack of scientific certainty regarding the measures to be taken and their effectiveness in conserving the stock, but nonetheless still decided to prescribe measures in order to prevent further deterioration to the stock. The decision to take action despite scientific uncertainty clearly paid heed to the precautionary principle as provided for in various instruments mentioned above.⁵¹⁷ Coupled with the reference to 'caution and prudence', it does not seem difficult to conclude that ITLOS intended to apply the precautionary principle. In fact, the two paragraphs cited above show that the precautionary principle served as the main basis for the prescription of provisional measures in this case. As one scholar commented:

The precautionary principle or approach was relevant in the *Southern Bluefin Tuna* order in two senses: first as a specific rule or norm regulating the conduct of the parties,

⁵¹⁴ *ibid* [77].

⁵¹⁵ *ibid* [79], [80].

⁵¹⁶ Several judges confirmed in their separate and dissenting opinions that the prescription of the provisional measure was based upon the considerations of the precautionary principle. See *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999, Sep. Op. Treves) ITLOS Reports 1999, 280 [8]; *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999, Sep. Op. Laing) ITLOS Reports 1999, 280 [19]; *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999, Sep. Op. Shearer) ITLOS Reports 1999, 280, 6.

⁵¹⁷ Note that Judge Laing argued that ITLOS did not adopt the precautionary principle but merely the precautionary approach. In his view, 'adopting an approach, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making premature pronouncements about desirable normative structures.' However, it is generally agreed that the use of either of these terms carries little difference in terms of the function that it plays. See also: Cançado Trindade (n 505) 412; Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 92.

and second as an organizing principle to guide the Tribunal's assessment of Australia and New Zealand's request for interim order.⁵¹⁸

It should be noted, however, that ITLOS did not confirm the status of the precautionary principle as a rule of customary international law as contended by the Applicants. Judge Treves in his Separate Opinion attempted to account for this oversight, stating that 'in order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the present case, it is not necessary to hold the view that this approach is dictated by a rule of customary international law.'⁵¹⁹ Instead, 'the requirement of urgency is satisfied only in the light of such precautionary approach'⁵²⁰ and thus, 'a precautionary approach seems to be inherent in the very notion of provisional measures.'⁵²¹ Judge Treves' reasoning implied that, in his view, the basis for the application of the precautionary principle was found in the Convention itself, particularly in the requirement of 'urgency' under Article 290(5). This view has received support from another scholar, who argues that the inclusion of the 'serious harm to the marine environment' as a basis for the prescription of provisional measure enhances the precautionary aspect of provisional measures.⁵²² Judge Laing went even further than Article 290(5) and contended that 'UNCLOS adopts a precautionary approach in preambular paragraph 4, articles 61, 63 to 64, 116, 117, 118, 119 and 290(1).'⁵²³

When the case proceeded to the Annex VII arbitration, the arbitral tribunal found that it did not have jurisdiction.⁵²⁴ In the face of scientific uncertainty which could have laid the ground for the application of the precautionary principle, the fact that the arbitral tribunal declined to exercise jurisdiction was considered 'a blow to the environmental movement'.⁵²⁵ However, it should be noted that the arbitral tribunal rejected the case on grounds of jurisdiction and not on the merits. In fact, the arbitral tribunal praised the provisional measures prescribed by the ITLOS, and held that the revocation of the provisional measure did not mean that 'the parties may disregard the effects of that Order and their own decisions made in conformity with it'.⁵²⁶

⁵¹⁸ Tim Stephens, *International Courts and Environmental Protection* (CUP 2009) 225.

⁵¹⁹ *Southern Bluefin Tuna*, Separate Opinion of Judge Treves (n 516) [9].

⁵²⁰ *ibid* [8].

⁵²¹ *ibid* [9].

⁵²² Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (CUP 2013) 268.

⁵²³ *Southern Bluefin Tuna*, Separate Opinion of Judge Laing (n 516) [17].

⁵²⁴ *Southern Bluefin Tuna Award* (n 290) [57].

⁵²⁵ Leah Sturtz, 'Southern Bluefin Tuna Case: Australia and New Zealand v. Japan' (2001) 28 *Ecology Law Quarterly* 455; Tim Stephens (n 518) 228.

⁵²⁶ *Southern Bluefin Tuna Award* (n 290) [67].

The precautionary principle also arose in *MOX Plant* concerning Ireland's challenge to the commission and operation of the MOX Plant by the UK.⁵²⁷ In its Written Request, Ireland contended that the precautionary principle had attained the status of a customary international rule and, as such, it was binding on both parties.⁵²⁸ In the context of a provisional measures proceeding before ITLOS, Ireland argued that the precautionary principle should inform the Tribunal's assessment of the urgency of the measures that it was required to take in respect of the operation of the MOX plant.⁵²⁹ The UK, on the other hand, maintained that due to the lack of proof and on the facts of this case, the precautionary principle had no application.⁵³⁰

ITLOS in this case adopted a more cautious approach when dealing with the precautionary principle than in *Southern Bluefin Tuna*. Despite both parties' reference to the legal status of the principle and to the insufficiency of scientific data, ITLOS did not address any of these issues in its Order. ITLOS rejected Ireland's request for provisional measures due to the lack of urgency of the situation required provisional measures under Article 290(5).⁵³¹ However, in the Provisional Measures Order, the Tribunal still used the term 'prudence and caution' seen in *Southern Bluefin Tuna* in order to require the parties to cooperate 'in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them'.⁵³² The use of 'prudence and caution' was not supported by any discussion, particularly on scientific uncertainty or risk of harm, thus it is unclear as to whether ITLOS actually intended to invoke the precautionary principle in this case. If, for the sake of argument, ITLOS had intended to do so, the precautionary principle would have served as a basis for the prescription of procedural obligations, as opposed to substantive obligations. Such use of the precautionary principle would have constituted a new way of applying the precautionary principle unseen in the case law of other tribunals before.⁵³³ In any event, ITLOS' refusal to take apply the precautionary principle to grant Ireland the requested provisional measures could be seen as a retreat from the strong endorsement that ITLOS had shown for the principle in *Southern Bluefin Tuna*. As argued by one commentator, the characteristics of the MOX Plant dispute suggested

⁵²⁷ *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95. [MOX Plant Order]

⁵²⁸ Request for Provisional Measures and Statement of Case Submitted on Behalf of Ireland, para 97 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/request_ireland_e.pdf> accessed 25 September 2018.

⁵²⁹ *ibid.*

⁵³⁰ *MOX Plant Order* (n 527) [75].

⁵³¹ *ibid* [81].

⁵³² *ibid* [84].

⁵³³ Note, however, that Judge Treves in his Separate Opinion queried whether 'a precautionary approach is appropriate as regards the preservation of procedural rights'. See *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001, Sep. Op. Treves) ITLOS Reports 2001, 95 [8].

that it was a ‘text book’ example of a situation that would require the precautionary principle.⁵³⁴ ITLOS, therefore, missed an important opportunity to make a meaningful contribution to clarifying this increasingly important but still rather vague principle of environmental law.

Judge *ad hoc* Székely was critical of ITLOS’ decision to disregard the applicability of the precautionary principle. In his view, the UK did not provide ITLOS with evidence to substantiate its allegations that the commission and operation of the MOX Plant would not cause irreparable harm to the marine environment.⁵³⁵ He contended that in the face of such uncertainty, there was place for the application of the precautionary principle, which would have led to the granting of provisional measures regarding the suspension of the commissioning of the plant.⁵³⁶

Judge Wolfrum, in contrast, agreed with ITLOS’ decision as, in his view, the application of the precautionary principle would have resulted in the fact that:

The granting of provisional measures becomes automatic when an applicant argues with some plausibility that its rights may be prejudiced or that there was serious risk to the marine environment. This cannot be the function of provisional measures, in particular since their prescription has to take into consideration the rights of all parties to the dispute.⁵³⁷

It is interesting to contrast Judge Wolfrum’s statement with that of Judge Treves in the *Southern Bluefin Tuna* case mentioned above, in which the latter contended that ‘a precautionary approach seems to be inherent in the very notion of provisional measures’.⁵³⁸ The fact that the two prominent judges adopted very different views on the implication of precaution on the prescription of provisional measures seems to further buttress the controversial nature of the precautionary principle.

In the *Land Reclamation* case concerning Malaysia’s allegations that Singapore had violated UNCLOS for conducting land reclamation activities in the Straits of Johor, Malaysia also invoked the precautionary principle when requesting provisional measures. In addition to various provisions under UNCLOS, Malaysia cited, as the legal basis for its claims, ‘the precautionary principle, which under international law must direct any party in the application

⁵³⁴ Tim Stephens, *International Courts and Environmental Protection* (n 518) 234; Ted McDorman, ‘International Tribunal for the Law of the Sea’ (2001) 21 YBIEEL 531.

⁵³⁵ *ibid* [18].

⁵³⁶ *ibid* [22].

⁵³⁷ *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001, Sep. Op. Wolfrum) ITLOS Reports 2001, 95, 3.

⁵³⁸ *Southern Bluefin Tuna*, Separate Opinion of Judge Treves (n 516) 8.

and implementation of those obligations'.⁵³⁹ Singapore rejected this submission and argued that there was no room to apply the precautionary principle in the case in question.⁵⁴⁰ Similar to the approach taken in the *MOX Plant* case, ITLOS did not discuss the precautionary principle when considering Malaysia's allegations that Singapore's activities in the Straits of Johor could cause irreparable prejudice to the Malaysia's rights or serious harm to the marine environment. The Provisional Measure Order dealt with the activities carried out in the sector of Tuas to the west and Pulau Tekong to the east separately. In the area of Tuas, ITLOS was not convinced by the evidence presented by Malaysia that its rights would suffer irreversible damage, and thus rejected provisional measures.⁵⁴¹ In the eastern part, in contrast, the Tribunal found that that environmental impact assessment had not been conducted,⁵⁴² and came to the conclusion that 'the land reclamation works may have adverse effects on the marine environment'.⁵⁴³ Despite such findings, ITLOS did not find it appropriate to apply the precautionary principle to suspend Singapore's ongoing activities, at least until the results of a more concrete assessment of the environmental impacts of the land reclamation activities would be published. Instead, ITLOS only recalled the familiar phrase 'prudence and caution' to require the parties to 'establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned'.⁵⁴⁴ The use of the phrase 'prudence and caution' bore resemblance to that used in *MOX Plant*. Again had the precautionary principle been intended to be used at all, it was only in connection with procedural obligations.

Finally, the *Advisory Opinion on Responsibilities and Obligations of States with respect to Activities in the Area* presented the occasion in which ITLOS came the closest to endorsing the status of the precautionary principle. The Seabed Dispute Chamber ('SDC' or 'the Chamber') was requested to answer three questions submitted by the International Seabed Authority (ISA) concerning the responsibilities, obligations and liability of UNCLOS States Parties with respect to the sponsorship of activities in the Area. Unlike previous cases in which the precautionary principle was invoked as a matter of customary international law due to the lack of provision under UNCLOS, in this Advisory Opinion, the precautionary principle is clearly stipulated in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Nodules

⁵³⁹ *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 10. [Land Reclamation Order]

⁵⁴⁰ *ibid* [75].

⁵⁴¹ *ibid* [72]–[73].

⁵⁴² *ibid* [95].

⁵⁴³ *ibid* [96].

⁵⁴⁴ *ibid* [99].

Regulations), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (Sulphides Regulations) which are binding instruments and are applicable to exploration activities in the Area.⁵⁴⁵ As a result, the SDC found that the implementation of precautionary approach as defined in these Regulations was a binding obligation on sponsoring States.⁵⁴⁶

Moreover, the precautionary principle is further inscribed in a ‘standard clause’ for exploration contracts contained in Annex 4 of the Sulphides Regulations, which re-emphasises the importance of the principle in the conduct of activities in the Area. A parallel standard clause for exploration contracts in the Nodules Regulations does not, however, contain the precautionary principle.⁵⁴⁷ As a result, although the general obligation to implement the precautionary principle already exists in the Sulphides Regulation, perhaps it was this absence that prompted the SDC to engage in a discussion on the status of the principle under international law. The SDC, in what could be described as an *obiter dictum*, held that:

[T]he precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.⁵⁴⁸

Even though the SDC did not explicitly state that the principle was a customary rule, this statement came closer to accepting the customary nature of the principle than any other tribunals had, and have, to date.

The SDC also took the opportunity to shed some light on the meaning and application of this principle, albeit only in relation to the activities provided for in the Regulations. The Chamber explained that Principle 15 of the Rio Declaration contained two sentences, of which the second specified the scope of application of the precautionary principle. In particular, the second sentence of Principle 15 of the Rio Declaration set the scale of harm to ‘serious or irreversible damage’ and limited the measures to be taken to only ‘cost-effective measures’.⁵⁴⁹

⁵⁴⁵ Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/19/C/17 (amended) (22 July 2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA/16/C/L.5 (6 May 2010). Regulation 31, paragraph 2 of the Nodules Regulations and Regulation 33, paragraph 2 of the Sulphides Regulations require sponsoring States as well as the Authority to ‘apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration’ in order ‘to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area’. See *Advisory Opinion on Activities in the Area* (n 235) [125].

⁵⁴⁶ *ibid* [127].

⁵⁴⁷ *ibid* [134].

⁵⁴⁸ *ibid* [135].

⁵⁴⁹ *ibid* [128].

Moreover, the Chamber also noted that the Rio Declaration also allowed for certain flexibility in the application of the principle, in light of the phrase ‘applied by States according to their capabilities’.⁵⁵⁰ The SDC interpreted this to mean that, in the context of the Advisory Opinion, ‘the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States’.⁵⁵¹ This statement created a link between the precautionary principle and the principle of ‘common but differentiated responsibility’ widely recognised under international environmental law.⁵⁵² In addition, the SDC also stated that ‘the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States’.⁵⁵³ This was the first time in which an international tribunal analysed the structure and meaning of the precautionary principle as contained in Principle 15 of the Rio Declaration in any detail, providing an important clarification of the meaning and application of this principle.

2. Some observations regarding the precautionary principle

A perusal of ITLOS’ cases shows that ITLOS was the first tribunal to have applied the precautionary principle in *Southern Bluefin Tuna* in 1999, albeit without calling it by name. It should be noted that the precautionary principle is recognised in almost all fisheries instruments post-UNCLOS.⁵⁵⁴ Such widespread recognition perhaps gave ITLOS the incentive to be more readily accepting of the precautionary principle in fisheries conservation cases, such as *Southern Bluefin Tuna*, as compared to marine pollution cases, such as *MOX Plant* or *Land Reclamation*. Even though ITLOS did not extend the strong support that it had shown for the precautionary principle in *Southern Bluefin Tuna* to these two subsequent cases when there was arguably room for the application of the principle, it seems that the principle was never completely dismissed. Some have argued that the Provisional Measures Orders in *MOX Plant* and *Land Reclamation* had a certain precautionary character as they were premised on considerations of ‘prudence and caution’.⁵⁵⁵ The *Advisory Opinion on Activities in the Area*, in turn, came closest to endorsing the status of the precautionary principle seen in any international decisions. Even though ITLOS did not explicitly state that the precautionary principle had become part of customary international law, the SDC’s view that there was now a trend towards

⁵⁵⁰ *ibid* [129].

⁵⁵¹ *ibid* [161].

⁵⁵² Philippe Cullet, ‘Common but Differentiated Responsibility’ in Viñuales, *The Rio Declaration* (n 505) 229.

⁵⁵³ *Advisory Opinion on Activities in the Area* (n 235) [131].

⁵⁵⁴ This has prompted the argument that even though precaution in fisheries management has yet to reach the status of customary international law, a new norm of marine living resources management is emerging. See: Kaye, *International Fisheries Management* (n 70) 261.

⁵⁵⁵ Sands and Peel (n 507) 225.

making this approach part of customary law was the boldest acknowledgement of the principle by any international tribunal. ITLOS, therefore, can be said to be the forerunner in the adoption of the precautionary principle.

This becomes even more apparent when one compares ITLOS' approach with that of other international courts and tribunals when faced with the precautionary principle. In cases such as *Gabcikovo/Nagymaros*,⁵⁵⁶ and more recently, the *Whaling*,⁵⁵⁷ the ICJ did not once endorse or apply the principle. It only engaged in a brief discussion of the precautionary principle in *Pulp Mills* in 2010, acknowledging that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute'.⁵⁵⁸ This statement notwithstanding, the ICJ still required Argentina, which was opposed to the operation of the *Pulp Mills*, to show clear evidence for the existence harmful substance to the factory.⁵⁵⁹ One can only find references to the principle in the dissenting or separate opinions of the judges, most noticeably those of Judge Weeramantry in *Nuclear Tests*,⁵⁶⁰ Judge Cancado Trindade in *Pulp Mills*,⁵⁶¹ and Judge Charlesworth in *Whaling*.⁵⁶²

The WTO Appellate Body has likewise been rather cautious whenever the precautionary principle arose in its case law. So far, it has not recognised the principle as a customary rule, calling the status of the principle as 'less than clear'.⁵⁶³ The WTO Appellate Body in the *EC–Hormones* only acknowledged that the precautionary principle had been 'incorporated and given a specific meaning in article 5.7 of the SPS Agreement'⁵⁶⁴ but declined to comment on the question of the status of the principle, opining that such a question was 'important' but 'abstract'.⁵⁶⁵

⁵⁵⁶ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 [112].

⁵⁵⁷ *Whaling* (n 269). Smith argues, however, that the *Whaling* decision still advances the precautionary approach in two ways. First, the elements of the standard of review of the design and implementation elements for a lethal research whaling programme were substantially precautionary. Second, the requirement that a proponent for scientific whaling must cooperate and consult in depth with the governing entity and take account of the research methods and interests of that body was how the precautionary approach is best realised. Jeffrey J Smith, 'Evolving to Conservation? The International Court's Decision in the Australia/Japan Whaling Case' (2014) 45(4) ODIL 301, 318.

⁵⁵⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] CJ Rep 14 [257].

⁵⁵⁹ *ibid* [164].

⁵⁶⁰ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case*, Dissenting Opinion of Judge Weeramantry, 342.

⁵⁶¹ *Pulp Mills*, Separate Opinion of Judge Cancado Trindade, [62]–[92].

⁵⁶² *Whaling in the Antarctic*, Separate Opinion of Judge ad hoc Charlesworth, [6]–[9].

⁵⁶³ *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (16 January 1998).

⁵⁶⁴ *ibid* [120].

⁵⁶⁵ *ibid* [123].

Notwithstanding ITLOS' acknowledgment of the precautionary principle, due to the fact that the principle has been dealt with only in the provisional measure and advisory proceedings, the Tribunal's contribution to the development of the normative content of the principle has been rather limited. The application of the precautionary principle seems to have been informed by the nature of provisional measures proceedings. In terms of the threshold for the severity of harm, in *Southern Bluefin Tuna*, ITLOS read the gravity of harm contained in Article 290, ie 'serious harm', as the triggering point for the application of the precautionary principle. In *MOX Plant* and *Land Reclamation*, whether 'serious harm' occurred to the marine environment was also examined, interchangeably with 'irreversible harm' or 'significant impact'. However, as ITLOS did not invoke the precautionary principle as the basis for its provisional measures in these cases, it seems that the discussion on the level harm was part of the examination of Article 290(5), not of the precautionary principle.

With regards to the burden of proof, the provisional measures cases all seem to indicate that ITLOS did not reverse the burden of proof. The applicants still bore the obligation to prove 'serious harm' to the environment when requesting precautionary measures from the respondents. However, it is arguable that, as Judge Wolfrum acknowledged in *MOX Plant*,⁵⁶⁶ the reversal of the burden of proof was not undertaken in the case because ITLOS was only required to establish *prima facie* jurisdiction in provisional measures. Therefore, the refusal to reverse the burden of proof in ITLOS case law was dictated by the exceptional nature of provisional proceedings.⁵⁶⁷ It is not possible, therefore, to draw a definitive conclusion from ITLOS' decisions regarding the impact of the precautionary principle on the reversal of the burden of proof in other contexts beyond provisional measure.

Even though ITLOS was prepared to apply the precautionary principle in *Southern Bluefin Tuna*, it is worth asking whether Judge Treves' statement that 'the precautionary principle is inherent in provisional measure' holds true, particularly in the context of fisheries conservation. Article 290(5) requires that provisional measures could be prescribed only when 'the urgency of the situation so requires'. This means that the party requesting the provisional measure must show that damage would occur in the limited window of time, although ITLOS' decisions are inconsistent as to whether this limited time is between the provisional measure proceedings and the constitution of the arbitral tribunal,⁵⁶⁸ or between the provisional measure proceedings and consideration of the merits of the case by the Annex VII arbitral tribunal.⁵⁶⁹ This requirement,

⁵⁶⁶ *MOX Plant*, Separate Opinion of Judge Wolfrum (n 537) 3.

⁵⁶⁷ It should be noted that a refusal to reverse the burden of proof could also be seen in the *Pulp Mills* case by the ICJ in the context of a contentious proceeding. See *Pulp Mills* (n 558) [164].

⁵⁶⁸ *Southern Bluefin Tuna Order* (n 227) [81].

⁵⁶⁹ *Land Reclamation Order* (n 539) [72].

if read into the precautionary principle, would seem to add an extra element, ie the temporal element, to the threshold for the application of the precautionary principle. This may create a situation of dilemma where on the one hand, the precautionary principle encourages environmental-friendly actions even in the face of scientific uncertainty; and on the other hand, the lack of scientific certainty regarding the possible harm to the environment may make it impossible to predict urgency of the situation. This scenario is especially prone to happen in cases involving the protection of marine living resources where it is inherently difficult to be certain of the level of stocks that is available or depleted.⁵⁷⁰ One scholar has argued that ‘[s]cientific uncertainty is normally the rule in fisheries management and a straightforward application of the precautionary principle would have resulted in the impossibility of proceeding with any activity relating to marine fisheries’.⁵⁷¹

In the context of an advisory proceeding, the *Advisory Opinion on Activities in the Area* was among the first to clarify link between the precautionary principle and several other environmental obligations. In earlier cases, namely *MOX Plant* and *Land Reclamation*, ITLOS already hinted at the link between the precautionary principle and procedural obligations, using ‘prudence and caution’ as the basis for prescribing provisional measures which were of a procedural nature, such as the duty to cooperate.⁵⁷² The SDC, however, expanded the relationship between the precautionary principle not only to the duty to cooperate, but also to the principle of ‘common but differentiated responsibility’ and due diligence. As ITLOS was only required to examine the precautionary principle in the abstract in an advisory proceeding, it did not elaborate more on the peculiarities of these links.

In short, ITLOS’ decisions have added an authoritative voice to endorsing the status and applicability of the precautionary principle to marine environment protection under UNCLOS. ITLOS has also contributed to clarifying certain elements of the principle’s normative content, although the contribution was limited by the nature of the proceedings in which the principle was examined.

⁵⁷⁰ Simon Marr, ‘The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources’ (2000) 11(4) EJIL 815, 822.

⁵⁷¹ Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (CUP 1999) 157.

⁵⁷² Note, however, that ITLOS’ prescription of procedural measures not requested by the applicants, was not without criticism, both by the individual judges and some commentators. See Donald L Morgan, ‘A practitioner’s critique of the Order Granting Provisional Measures in the Southern Bluefin Tuna case’ in Moore and Nordquist (n 74) 182.

II. DUTY TO COOPERATE

Unlike the precautionary principle which is not expressly provided for under UNCLOS, the duty to cooperate to protect the environment is clearly set out in various provisions in the Convention.⁵⁷³ The duty to cooperate has come up before UNCLOS tribunals in two contexts, in the conservation and management of marine resources and the prevention of pollution to the marine environment.

1. UNCLOS tribunals and the duty to cooperate

ITLOS' decisions relating to the duty to cooperate in conserving marine sources have been analysed extensively in Chapter 2. It suffices here to recall the conclusion that ITLOS acknowledges and places great emphasis on duty to cooperate in the conservation and management of resources. However, ITLOS stopped short of giving meaningful content to this duty, which resulted in cooperation becoming more of a policy aspiration than a binding legal obligation. The separate opinions of the judges seem more helpful in this regard and have gone further in clarifying the content of the duty to cooperate. The remainder of this Part will focus on UNCLOS decisions' relating to the duty to cooperate in the prevention of marine pollution

The duty to cooperate took centre stage in the *MOX Plant* and *Land Reclamation* cases. In *MOX Plant*, Ireland alleged that, *inter alia*, the UK breached its obligations under Articles 123 and 197.⁵⁷⁴ Article 123 requires State Parties to cooperate in enclosed or semi-enclosed seas either directly or through an appropriate regional organisation; Article 197 imposes on them an obligation to cooperate in formulating and elaborating international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment. It is interesting to note that while these articles do not specify what would be required of State Parties to fulfil the obligation to cooperate, Ireland's claim incorporated into them other duties also found under UNCLOS, such as the duty to exchange information and to carry out EIA. Although ITLOS did not find that there was urgency requiring the provisional measure requested by Ireland, it still prescribed provisional measures requiring both parties to cooperate and enter into consultations regarding several issues. In one of the most important paragraphs of the Order, ITLOS stated that:

The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and

⁵⁷³ See, eg, Articles 43, 61(1), 64(1), 65(1), 100, 118, 123.

⁵⁷⁴ *MOX Plant Order* (n 527) [26].

that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.⁵⁷⁵

In saying so, ITLOS affirmed that the duty to cooperate existed beyond the confines of UNCLOS and had become part of general international law. Interestingly, ITLOS seems to have been saying that the duty to cooperate created a corresponding right on other States to request for cooperation, the latter in need of preservation for the purposes of Article 290.

Furthermore, ITLOS further held that ‘prudence and caution require that Ireland and the UK cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate’.⁵⁷⁶ As already mentioned, ITLOS used precaution as the basis for the need to cooperate, which in turn, required the exchange of information between the parties. In prescribing its provisional measure, ITLOS held that ‘Ireland and the UK shall cooperate and shall, for this purpose, enter into consultations [...]’.⁵⁷⁷ One author argued that the insertion of the phrase ‘for this purpose’ indicated that the duty to enter into consultation was a method of fulfilling the duty to cooperate.⁵⁷⁸ The duty to cooperate in this case, thus, included the obligation to exchange information and to enter into consultation.

The importance of the duty to cooperate is further highlighted in the separate declarations and opinions of the judges. In particular, Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus stated that their support for the Order of the Tribunal was a response to ‘the almost complete lack of cooperation between the Governments of Ireland and the UK with respect to the environmental impact of the planned operations.’⁵⁷⁹ The judges believed that requiring the parties to cooperate was the most effective measure that could have been adopted.⁵⁸⁰ The joint declaration helped shed light on underlying reason for the adoption of a provisional measure that vastly differed from what the applicant had requested, further highlighting the importance of the duty to cooperate in the consideration of the Tribunal in general.

Also supportive of ITLOS’ emphasis on the duty to cooperate, Judge Wolfrum added that the duty was the ‘Grundnorm’ of Part XII of the Convention, as well as of customary

⁵⁷⁵ *ibid* [82].

⁵⁷⁶ *MOX Plant Order* (n 527) [84].

⁵⁷⁷ *ibid*, operative paragraph 1.

⁵⁷⁸ Seokwoo Lee, ‘UNCLOS and the Obligation to Cooperate’ in Clive Schofield, *Maritime Energy Resources in Asia: Legal Regimes and Cooperation*, National Bureau of Asian Research 2012.

⁵⁷⁹ *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001, Joint Decl. Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus) ITLOS Reports 2001, 95, 113.

⁵⁸⁰ *ibid*.

international law for the protection of the environment, as it moved the emphasis from States sovereignty and individual interests to the environment and community interests.⁵⁸¹ More interestingly, Judge Wolfrum observed that although the obligation to cooperate with other States existed under UNCLOS as a multilateral convention, the creation of rights, as a corollary, for every other individual State Party of the Convention should be cautioned against.⁵⁸² Here again, the relationship between the obligation and the right to cooperate resurfaced. The implication of Judge Wolfrum's statement seems to be that the duty to cooperate did not exist as an *erga omnes* or even *erga omnes partes* obligation,⁵⁸³ and that a State can only require cooperation from another State in specific cases where its rights may be at stake.

Judge Anderson was also critical of the tribunal's provisional order calling for parties to cooperate and enter into consultation. Even though he agreed that there was room for heightened bilateral cooperation between the two parties, he did not find that Article 123 was the appropriate legal basis for such a requirement. In his view, Article 123 'does not require cooperation to be at the bilateral level so long as there is cooperation through an appropriate regional body'.⁵⁸⁴ Such an interpretation of Article 123 does, however, not seem tenable. A closer reading of Article 123 suggests that the existence of an appropriate region body does not render bilateral cooperation redundant. The means through which cooperation is taken is not determinative to the fulfilment of Article 123, the key point to consider under Article 123 is whether the States in question have endeavoured to cooperate and coordinate in the conducting the activity in question. Judge Anderson's opinion on the irrelevance of Article 123 also touched upon an ongoing debate concerning the normative force of this article due to the weak language that it employs, ie that States are merely under the obligation to 'endeavour' to coordinate, a point to which ITLOS could perhaps have paid more attention in its Order.⁵⁸⁵

It can be seen that the declarations and separate opinions of some of the judges showed a certain level of disagreement with ITLOS' provisional measure directing both parties to cooperate and consult. However, the criticism was mostly directed at whether asking the parties to cooperate was appropriate as a provisional measure in light of the requirements of Article 290 or the legal basis of such an obligation. None of them questioned the significance of the

⁵⁸¹ *MOX Plant Order*, Separate Opinion of Judge Wolfrum (n 537) 135.

⁵⁸² *ibid.*

⁵⁸³ James Crawford, *Third Report on State Responsibility*, A/CN.4/507 and Add. 1-4*, para 106 .

⁵⁸⁴ *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001, Sep Op Anderson) ITLOS Reports 2001, 95, 129.

⁵⁸⁵ Erik Franx and Marco Bernatar, 'The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas' (2013) 31 Chinese (Taiwan) Yearbook of International Law and Affairs 66.

duty to cooperate in cases of transboundary harm, which contributed to reaffirming the importance attached to cooperation.

ITLOS' approach in *MOX Plant* was subsequently adopted in *Land Reclamation*. It should be noted, however, that this case was not entirely similar to *MOX Plant*. Firstly, Malaysia when requesting provisional measure did not bring up the issue of cooperation, at least by name. In its Request, Malaysia asked the Tribunal to order Singapore to provide Malaysia with full information concerning the current and projected works, to afford Malaysia a full opportunity to comment upon the works and their potential impacts; and to agree to negotiate with Malaysia concerning any remaining unresolved issues.⁵⁸⁶ All of these may be part of the duty to cooperate, as has been held in the *MOX Plant* case, but some of them also exist as independent obligations under UNCLOS. Secondly, in response to several of Malaysia's requests, Singapore gave assurances and undertakings which indicated Singapore's readiness and willingness to enter into negotiations, to give Malaysia a full opportunity to comment on the reclamation works and their potential impacts, and to notify and consult Malaysia before it proceeded to construct any transport links. Singapore also extended an explicit offer to share the information that Malaysia requested, and re-examine its works in the case that Malaysia was not convinced by the evidence supplied.⁵⁸⁷ All these assurances corresponded to the various obligations found under UNCLOS, namely obligation to consult, obligation to notify environmental damage, obligation to exchange information and data.

Despite placing Singapore's commitments on records, ITLOS still found the level of cooperation between the parties insufficient. ITLOS recalled the statement made in the *MOX Plant* case that 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law'.⁵⁸⁸ In almost identical wording to the *MOX Plant* case, ITLOS then held that 'prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned'.⁵⁸⁹

The provisional measures eventually prescribed echoed many of Singapore's commitments. ITLOS required Malaysia and Singapore to cooperate, for the purposes of which,

⁵⁸⁶ Request for Provisional Measure Submitted by Malaysia, para 13 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/request_malaysia_eng.1.pdf> accessed 25 September 2018.

⁵⁸⁷ *Land Reclamation Order* (n 539) [76].

⁵⁸⁸ *ibid* [92].

⁵⁸⁹ *ibid* [99].

to enter into consultations, exchange information, assess risks and most importantly, establish a group of independent experts with a mandate to conduct a study to determine the effects of Singapore's land reclamation, to propose measures to deal with any adverse effects of such land reclamation; and to prepare an interim report on the subject of infilling works in Area D at Pulau Tekong.⁵⁹⁰ The duty to cooperate in this case thus included the duty to exchange information regarding the activities as well as their possible consequences, the duty to consult with other States that may be affected by the planned activities and to devise appropriate measures as deemed necessary for the protection of the marine environment. Although the duty to cooperate was not invoked by the Malaysia in its submissions, the whole case in the end revolved around this duty.

The duty to cooperate have also manifested itself in a different form in other cases, in particular in the duty to have regards to the rights of other States. In *Chagos MPA* before an Annex VII arbitral tribunal, Mauritius claimed that the manner in which the UK declared the establishment of a marine protected area (MPA) around the Chagos Archipelago violated several provisions under UNCLOS, including Article 194(4) concerning the obligation to give due regards to the rights of Mauritius.⁵⁹¹ In response, the arbitral tribunal explained that the requirement under Article 194(4) that a State 'refrain from unjustifiable interference' when taking measures to prevent, reduce or control pollution of the marine environment could be considered functionally equivalent to the obligation to give 'due regard' as set out in Article 56(2).⁵⁹² The arbitral tribunal then interpreted the obligation 'to give due regard' as entailing at least consultation and a balancing exercise with its own rights and interests.⁵⁹³ To the extent that the obligations to enter into consultation, to make information available, to exchange information are part of the duty to cooperate, there is clearly a level of overlap between the duty to have regard as interpreted by the arbitral tribunal and the duty to cooperate. The ICJ in *Whaling* in fact confirmed this overlap. The Court held that Japan had an obligation to give due regard to the resolutions and guidelines of the International Whaling Commission (IWC).⁵⁹⁴

⁵⁹⁰ *ibid* [106].

⁵⁹¹ *Chagos MPA* (n 106) [485].

⁵⁹² *ibid* [540]. Under Article 56(2), coastal States are required, in exercising their rights and performing their duties under the Convention in the EEZ, to have due regard to the rights and duties of other States.

⁵⁹³ *ibid* [534]. One author has contended that that there are no provisions under UNCLOS which expressly require States to have due regard to the rights of other States concerning planned activities under the jurisdiction and control of one State that may pollute the environment of another State. However, the arbitral tribunal's interpretation of Article 194(1) in *Chagos MPA* shows that elements of the obligation 'to have due regard' are in fact present in Part XII. See Robert Beckman, 'State Responsibility and Transboundary Marine Pollution' in S. Jayakumar, Tommy Koh, Robert Beckman and Hao Duy Phan (eds) *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar 2015) 144.

⁵⁹⁴ *Whaling in the Antarctic* (n 269) [83].

The obligation to give due regards in the view of the ICJ stemmed from the obligation to cooperate with the IWC and the Scientific Committee set up by the ICW as provided for under ICRW itself.⁵⁹⁵ The difference between the duty to give due regards in *Whaling* case and in *Chagos MPA* is that the former is owed by the State party to the international organisation, ie the IWC, and not to another State as in the latter.

In addition, the duty to cooperate has been argued to exist under Article 194(1) by virtue of the obligation to ‘endeavour to harmonize policies’ in preventing pollution of the marine environment. In *Chagos MPA*, Mauritius argued that this obligation required the sharing of information, the exchange of ideas, and some degree of consultation with a view to making pollution-related policies for the Chagos Archipelago consistent or compatible with those of other States in the region.⁵⁹⁶ The UK, on the other hand, contended that Article 194(1) was ‘simply the chapeau to the more specific treatment of different sources of marine pollution set out in paragraph (3)’.⁵⁹⁷ The arbitral tribunal unfortunately did not elaborate on the meaning of the term ‘to harmonize policies’ nor did it specify what this obligation imposed on States. If Mauritius’ interpretation had been adopted, this would have suggested that Article 194(1) provided another basis for the duty to cooperate under UNCLOS in the context of marine environment pollution.

2. Some observations on the duty to cooperate

The fact that the duty to cooperate was at the core of various cases concerning the marine environment before ITLOS attested to the significance of this particular duty in the protection of the marine environment. ITLOS’ decisions on the duty to cooperate have made some important contributions to the status and content of the duty. The duty to cooperate is now acknowledged to be part of general international law, as held by ITLOS in *MOX Plant* and confirmed in *Land Reclamation*. The duty to cooperate is found to be applicable to all aspects of the protection of the marine environment, including the conservation of marine resources as affirmed in the *Southern Bluefin Tuna* case and the prevention of transboundary pollution as in *MOX Plant*, *Land Reclamation* and *Chagos MPA*.

The scope of the duty to cooperate has also been clarified to a certain extent. The duty to cooperate, at least in the prevention of marine pollution, comprises more concrete obligations,

⁵⁹⁵ The ICJ only examined the obligation to cooperate under the ICRW and did not make any general pronouncements on the obligation beyond this Convention. See generally: Margaret A Young and Sebastián Rioseco Sullivan, ‘Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice’ (2015) 16(2) *MUJIL* 1.

⁵⁹⁶ *Chagos MPA* (n 106) [483].

⁵⁹⁷ *ibid* [488].

namely, the obligations to exchange information, to consult with other States potentially affected by the planned activities, to jointly study the impacts of the activity on the marine environment, monitor risks or the effects of the operation and devise measures to prevent pollution of the marine environment. It should be noted that these obligations already exist as separate obligations under UNCLOS and under general international law. What ITLOS did was to incorporate these independent obligations under the umbrella of the duty to cooperate. UNCLOS tribunals also clarified that interaction between the duty to cooperate and other duties under Part XII such as the duty to give due regard to the rights of other States, making clear that they share similar normative content. When it comes to the conservation of marine resources, however, ITLOS has been less successful in defining the contours of the obligation to cooperate with regards to shared stocks.

It is evident that the emphasis on the duty to cooperate helped the parties to resolve their differences in some cases. For example, the establishment of an independent group of experts as required in *Land Reclamation* enabled the parties to reach a Settlement Agreement in their own terms.⁵⁹⁸ Similarly, before the Annex VII arbitral tribunal that was established to hear the merits of the *MOX Plant* case, Ireland acknowledged that there had been some improvement in the processes of co-operation and the provision of information. The arbitral tribunal, in turn, stated that it was ‘satisfied that since December 2001, there has been an increased measure of co-operation and consultation, as required by the ITLOS Order’.⁵⁹⁹

This acknowledgment notwithstanding, it is noteworthy that the arbitral tribunal in *MOX Plant* also pointed out problems, both before and after the ITLOS Order, concerning ‘the absence of secure arrangements, at a suitable inter-governmental level, for coordination of all of the various agencies and bodies involved.’⁶⁰⁰ This statement highlights the issue commonly found in the decisions of UNCLOS tribunals concerning the duty to cooperate. With the exception of *Land Reclamation* in which ITLOS prescribed at least one concrete measure to be taken by the parties to discharge of the duty to cooperate, UNCLOS tribunals were generally much more general or, in the words of Judge *ad hoc* Shearer in the *Southern Bluefin Tuna* case, too ‘diplomatic’, with regard to the measures to be taken so as to fulfil the duty to cooperate. UNCLOS tribunals have a tendency to call on the relevant parties to enter into consultations

⁵⁹⁸ *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Award on Agreed Terms <http://www.pca-cpa.org/MAS1%20Awardb1ca.pdf?fil_id=364> accessed 25 September 2018.

⁵⁹⁹ *MOX Plant (Ireland v United Kingdom)*, Order N° 3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures [66]

<http://www.pca-cpa.org/MOX%20Order%20no3a614.pdf?fil_id=81> accessed 25 September 2018.

⁶⁰⁰ *ibid.*

and exchange information as a means of cooperation. States retain wide discretion as to the manner in which to fulfil their duty to cooperate. Consequently, although UNCLOS tribunals have clarified the scope of the duty by reading other independent obligations into the obligation to cooperate, there is still room for further contribution on the part of the tribunals.

III. ENVIRONMENTAL IMPACT ASSESSMENT

1. UNCLOS tribunals' decisions on environmental impact assessment

The obligation to carry out environment impact assessment (EIA) is provided for in Article 206 UNCLOS.⁶⁰¹ Beyond the Convention, the ICJ in *Pulp Mills* recognised that this obligation also existed under general international law 'where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource'.⁶⁰² The status of this obligation under international law is, therefore, no longer subject to debate. It is the content of the obligation that is still shrouded in uncertainty. UNCLOS tribunals have had the opportunity to deal with the duty to conduct EIA in several cases, with varying degree of specificity. In earlier cases, the contribution of ITLOS to clarifying the content of this obligation was limited; and it was not until the recent *South China Sea* arbitration that the Annex VII arbitral tribunal managed to engage in a more detailed analysis of this obligation.

In *MOX Plant*, one of Ireland's allegations was that UK had refused to carry out a proper assessment of the impacts on the marine environment of the MOX plant and associated activities.⁶⁰³ Ireland argued that even though the UK in 1993 had carried out EIA on the basis of which the commission of MOX Plant was authorised, the 1993 Impact Assessment Statement was not adequate as it did not address the potential harm of the MOX Plant to the marine environment of the Irish Sea.⁶⁰⁴ Meanwhile, the UK contended that it had adduced evidence to establish that the risk of pollution from the operation of the MOX plant would be infinitely small and that the commissioning of the MOX plant would not cause serious harm to the marine environment or irreparable prejudice to the rights of Ireland.⁶⁰⁵ ITLOS, for its part, did not

⁶⁰¹ Article 206 UNCLOS provides that: When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results.

⁶⁰² *Pulp Mills* (n 558) [83].

⁶⁰³ *MOX Plant Order* (n 527) [26].

⁶⁰⁴ *ibid.*

⁶⁰⁵ *ibid* [72]–[73].

address the adequacy or lack thereof of the 1993 Impact Assessment Statement in its Provisional Measure Order.

Judge *ad hoc* Székely took issue with the majority's decision with regard to the lack of attention to EIA. He was deeply unimpressed by the UK's 1993 Environmental Impact Statement, calling it 'surprisingly empty and superficial'.⁶⁰⁶ Emphasising that 'EIA is a central tool of the international law of prevention', Judge Székely believed that the inadequacy of the UK's EIA, constituting a violation of Ireland's substantive rights under Article 206, should have been sufficient for the prescription of the provisional measures.⁶⁰⁷ In contrast, Judge Mensah argued that a violation of the duty to conduct EIA was not of substantial significance for the purposes of prescribing provisional measures, as it could not have led to irreversible damage pending the constitution of Annex VII arbitral tribunal.⁶⁰⁸ He argued that violations of procedural rights, including the duty to undertake appropriate EIA, were capable of being made good by reparations that the arbitral tribunal to be constituted may consider appropriate. Judge Mensah did not seem to object to the obligation to conduct EIA *per se*, but rather queried its applicability in a provisional measure proceeding.

In *Land Reclamation*, Malaysia also alleged that Singapore had not, prior to commencing its current land reclamation activities, conducted and published an adequate assessment of their potential effects on the environment and on the affected coastal areas.⁶⁰⁹ Even though Singapore argued that the land reclamation had not caused any adverse impact on Malaysia, the Tribunal found that EIA had not been undertaken by Singapore.⁶¹⁰ This fact proved to be crucial in the granting of provisional measures as ITLOS held that in the absence of the EIA, it could not be excluded that the land reclamation works might have adverse effects on the marine environment.⁶¹¹ Consequently, although ITLOS did not order Singapore to suspend its land reclamation activities as requested by Malaysia, it ordered the establishment of a group of experts whose mandate was to 'study the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation'.⁶¹² The task assigned to this group was in effect that of EIA, the results of which would form the basis for any actions as agreed by the two parties. Similar to *MOX Plant*, the lack of EIA did

⁶⁰⁶ *MOX Plant Order*, Separate Opinion of Judge *ad hoc* Székely (n 537) 13].

⁶⁰⁷ *ibid* [16].

⁶⁰⁸ *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001, Sep. Op. Mensah) ITLOS Reports 2001, 95, 12.

⁶⁰⁹ *Land Reclamation Order* (n 539) [22].

⁶¹⁰ *ibid* [95].

⁶¹¹ *ibid* [96].

⁶¹² *ibid* [106].

not prompt ITLOS to grant the applicant the provisional measures that the latter had requested. However, EIA formed the crux of the provisional measure that ITLOS eventually prescribed.

In the *Advisory Opinion on Activities in the Area*, ITLOS—free from the constraints of provisional measures proceedings—managed to shed further light on the obligation to conduct EIA. With regard to activities in the Area, the obligation to carry out an EIA, besides finding basis in Article 206, is also found in the Annex to the 1994 Agreement as well as the Nodules Regulations and the Sulphides Regulations.⁶¹³ Notwithstanding this fact, the SDC still added that an obligation to conduct an EIA was a general obligation under customary international law.⁶¹⁴ It recalled the statement made by the ICJ concerning EIA in *Pulp Mills*, but stated that although EIA in that case was discussed in a transboundary context, the obligation to conduct EIA:

[M]ay also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to 'shared resources' may also apply to resources that are the common heritage of mankind.⁶¹⁵

With regard to the content of the obligation to conduct an EIA, the SDC did not leave it open as did the ICJ in *Pulp Mills*. The SDC held that this obligation was one of the 'direct obligations' imposed on sponsoring States, meaning 'obligations with which sponsoring States have to comply independently of their obligations to ensure a certain behavior by the sponsored contractor'.⁶¹⁶ In the specific context of activities in the Area, the SDC pointed out that the content of the obligation to conduct an EIA was specified in the Nodules Regulations, Sulphides Regulations and the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area.⁶¹⁷ Furthermore, the SDC held that 'EIAs should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to resource deposits in the Area which lie across limits of national jurisdiction.'⁶¹⁸ There has been uncertainty regarding the relationship between EIA and other procedural obligations,

⁶¹³ The relevant provisions of these Regulations require the sponsoring States not only to individually ensure compliance by the sponsored contractor with this obligation but also to cooperate with the Authority in the establishment and implementation of impact assessments. *Advisory Opinion on Activities in the Area* (n 235) [141].

⁶¹⁴ *ibid* [145].

⁶¹⁵ *ibid* [148].

⁶¹⁶ *Advisory Opinion on Activities in the Area* (n 235) [121].

⁶¹⁷ *ibid* [149].

⁶¹⁸ *ibid* [148]. The Recommendations are issued by the Legal and Technical Commission which is mandated by the Regulations to provide recommendations of a technical or administrative nature to contractors to assist them in the implementation of the rules, regulations and procedures of the Authority. Despite having no binding effect, these Recommendations are to be taken into account by States. See: <https://www.isa.org.jm/files/documents/EN/7Sess/LTC/isba_7ltc_1Rev1.pdf> accessed 25 September 2018.

particularly consultation with and notification to the affected population. Dupuy and Viñuales contend that this ‘depends on the source of the obligation’ but that ‘outside the treaty and administrative framework, the question is less clear’;⁶¹⁹ while Okanawa maintains in a more general manner that EIA is implicit in the duty to consult and notify other States of proposed activities that may entail harm.⁶²⁰ The SDC’s abovementioned statement confirmed that EIA under UNCLOS was part of the obligation to consult and notify, insofar as activities in areas beyond national jurisdiction are concerned. The ICJ in 2015 in fact confirmed this close relationship between the obligation to conduct EIA and the obligation to notify and consult in *Construction of a Road*. Having established that Nicaragua was not under an international obligation to carry out EIA, the Court held that it was not required to notify, or consult with, Costa Rica.⁶²¹ An *contrario* reading of this statement indicates that if the obligation to conduct EIA arises, the State will also bear the obligation to consult and notify with the State affected by the activity.

The Annex VII arbitral tribunal’s analysis of the obligation to carry out EIA under Article 206 in *South China Sea* further shed light on the relationship between these two obligations. In dealing with the Philippines’ allegation that China’s construction activities on several features in the South China Sea violated the latter’s obligation to protect and preserve the marine environment, the tribunal recalled what the ICJ had stated in *Construction of a Road* that the mere assertion of the existence of assessment was not the same as conducting the assessment itself.⁶²² While China claimed that it had undertaken thorough studies, the documents that the tribunal managed to locate from China or elsewhere concerning the environmental impact of China’s island-building activities were found to fall short of the criteria for EIA under Chinese domestic regulation, as well as international standards reviewed by international courts or referred to in the Chinese reports themselves.⁶²³ The tribunal was not able, therefore, to conclude whether China had indeed prepared an EIA. It nevertheless stated that ‘[t]o fulfil the obligations of Article 206, a State must not only prepare an EIA but also must communicate it.’⁶²⁴ On that basis, the tribunal found a violation of Article 206 on the part of China due to the

⁶¹⁹ Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (CUP 2015) 70.

⁶²⁰ Phoebe Okanawa, ‘Procedural Obligations in international environmental agreements’ (1997) 67 BYBIL 275; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 105.

⁶²¹ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 665 [110].

⁶²² *South China Sea (Philippines v China)*, Arbitral Award on the Merits [1989] <<https://www.pcacases.com/web/sendAttach/2086>> accessed 25 September 2018.

⁶²³ *ibid* [991].

⁶²⁴ *ibid*.

fact that it had never communicated its EIA report to the tribunal or any other international organisations.⁶²⁵

2. Some remarks on the obligation to conduct EIA

In all the cases brought before UNCLOS tribunals, none of the parties disputed the necessity of EIA or the existence of the obligation to conduct an EIA under international law. Their arguments instead only revolved around whether EIA had been conducted and if so, whether it was adequate and the results reliable. This clearly shows a high level of consensus among States regarding the existence of such obligation under international law and its importance in cases of potential environmental harm.

When it came to the scope and content of the duty, ITLOS' decisions concerning EIA threw little new light on what the duty involves or the criteria based on which an EIA would be considered satisfactory. Both the *MOX Plant* and the *Land Reclamation* cases involved submissions requiring the interpretation and application of Article 206. In neither of the cases, however, was the alleged lack of EIA considered for the prescription of provisional measures. The only exception was the *Advisory Opinion on Activities in the Area*, in which the SDC was able to clarify the content of the duty to conduct EIA thanks to the specific Rules and Regulations concerning the activities in the Area. These Rules and Regulations, however, contain criteria that are applicable in a very limited context with specific actors, and thus may not readily be extended to other instances in which the duty also arises.

The South China Sea arbitral tribunal was the first to deal with Article 206 in a contentious case and the only case to date in which a violation of the duty to conduct EIA under Article 206 has been found. The tribunal's analysis raises interesting points for the broader application of this obligation. First, the tribunal made clear that a State cannot claim to have conducted EIA without showing proof of it. This was highlighted by the statement that the assertion of an assessment was not sufficient as evidence that the EIA has been conducted. Second, by emphasising the obligation to communicate the findings of EIA, it reaffirmed the connection between the obligation to conduct EIA and the obligation to consult and notify with the potentially affected State. Third, while the tribunal did not get the chance to elaborate on what should be included in an EIA as there was no EIA report available for scrutiny, it seemed to have placed particular emphasis on the criteria for EIA stipulated in Chinese domestic regulation and the comprehensiveness of EIA reviewed by international courts.

⁶²⁵ *ibid.*

The third point is particularly interesting in light of the fact that despite requiring the conduct of an EIA, Article 206 of UNCLOS does not elaborate on the content of this obligation. In their written submissions to the Annex VII arbitral tribunal in *MOX Plant*, both Ireland and the UK elaborated on their views with regards to the specific content of the obligation to conduct EIA. Ireland was particularly mindful of the fact that Article 206 did not impose any specific obligations on the UK regarding EIA, but argued nonetheless that the arbitral tribunal, in interpreting and applying Article 206, ‘should take into account the common standards of EIA in other instruments such as the UNEP EIA Principles or the Espoo Convention’.⁶²⁶ The UK, for its part, argued that by virtue of the terms ‘reasonable grounds’ and ‘as far as practicable’ under Article 206, States retained the discretion as to the manner in which EIA should be carried out.⁶²⁷ As the arbitration was suspended by the Annex VII arbitral tribunal, it remains open as to which of the two views should prevail. The disagreement between Ireland and the UK raises the question as to whether and to what extent Article 206 can be informed by existing standards of EIA found in other international instruments.⁶²⁸ This question is part of an even broader discussion concerning whether transboundary EIA is part of international law, in particular of the requirement of Principle 21 of 1972 Stockholm Declaration,⁶²⁹ or whether it is an outgrowth of domestic EIA regulations.⁶³⁰ If it is the former, there should be a general standard for EIA imposed on States, whereas if it is the latter, States retain large discretion as to how to carry out their EIA. In *Pulp Mills*, the ICJ held that ‘general international law does not specify the scope and content of EIA’,⁶³¹ implying that the content is the obligation ‘is set by the domestic law of States’.⁶³² The reference to both domestic law and international standards in the *South China Sea Award* did little to help clarify this issue, although the reference to international standards could arguably be taken as hinting at an inclination to restrict the absolute discretion of States in conducting EIA.

With regard to the question as to whether the standard for EIA contained in other international instruments could be read into Article 206 UNCLOS, there are tools available for

⁶²⁶ *MOX Plant*, UNCLOS Annex VII Arbitration, Memorial of Ireland, [7.16] <http://www.pca-cpa.org/Ireland%20Memorial%20Part%20II2340.pdf?fil_id=223> accessed 25 September 2018.

⁶²⁷ *ibid* [5.14]–[5.32].

⁶²⁸ Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (CUP 2008) 120.

⁶²⁹ Principle 21 of 1972 Stockholm Declaration requires States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF 48/14/Rev.1, pp. 2ff.

⁶³⁰ John H Knox, ‘The Myth and Reality of Transboundary Environmental Impact Assessment’ (2002) 96 AJIL 291.

⁶³¹ *Pulp Mills* (n 558) 205.

⁶³² Dupuy and Viñuales (n 619) 70.

UNCLOS tribunals to refer to relevant standards contained in other international instruments to shed light on in provisions of the Convention whose wording may be too vague and general.⁶³³ It is interesting to note that the SDC in its *Advisory Opinion on Activities in the Area* was willing to interpret the Nodules Regulations in light of the development of the law contained in the subsequent Sulphides Regulations. More specifically, the Nodules Regulations did not mention precautionary principle and only contained a very general provision on ‘best environmental practice’. Nevertheless, the SDC had no hesitation in reading the precautionary principle and the requirement to apply ‘best environmental practices’ found under the Sulphides Regulations into the Nodules Regulations.⁶³⁴ Admittedly, the context for the application of the Sulphides Regulations and the Nodules Regulations was almost identical, thus such an incorporation made sense. In the *South China Sea Jurisdiction and Admissibility Award*, the arbitral tribunal stated that although it did not have jurisdiction to decide on violations of the Convention on Biodiversity (CBD) it could consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.⁶³⁵ This was of course facilitated by the fact that both the Philippines and China are parties to the CBD. The use of standards contained in external treaties for the purposes of interpreting provisions of UNCLOS, according to the tribunal, was made possible thanks to Article 293(1) UNCLOS on Applicable Law and Article 31(3) of the VCLT.

In conclusion, the most significant contribution of UNCLOS tribunals to the development of the duty to conduct EIA has been the strengthening of its status and importance in cases of transboundary harm. In terms of the normative content of the obligation, there are perhaps merits in the comments of one scholar that ITLOS case law on EIA ‘has barely scratched the surface’.⁶³⁶ ITLOS in some of its earliest cases did not manage to contribute much to clarifying normative content of this obligation, primarily due to the constraints of provisional measure proceedings. The *Advisory Opinion on Activities in the Area* went somewhat further but its general applicability was more restrained. The *South China Sea* arbitral tribunal, on the other hand, managed to shed some important light on the measures that States would have to

⁶³³ It is worth noticing that this approach has been adopted by other international tribunals, albeit in different contexts. The Appellate Body of the WTO in the *US – Shrimps* case held that Article XX(g) of GATT was to be interpreted by drawing on, in addition to relevant WTO agreements, UNCLOS and the CBD. See *United States-Shrimps* (n 283) [129]. The use of external sources to interpret a certain Convention also received support from several judges in the *Whaling* case before the ICJ, in which the question of whether some of the provisions of CITES and the CBD, could have been relevant in interpreting the *ICRW* also arose. *Whaling*, Separate Opinion of Judge Cancado Trindade [25].

⁶³⁴ *Advisory Opinion on Activities in the Area* (n 235) [136]–[137].

⁶³⁵ *South China Sea (Philippines v China)*, Arbitral Award on Jurisdiction and Admissibility [176] <<http://www.pcacases.com/web/sendAttach/1506>> accessed 25 September 2018.

⁶³⁶ Boyle, ‘The Environmental Jurisprudence of ITLOS’ (n 506) 378.

undertake to fulfil the obligations of Article 206, but did not have, or take, the opportunity to clarify the content of EIA under UNCLOS.

IV. THE PRINCIPLE OF DUE DILIGENCE

The principle of due diligence holds an important place under environmental law and a key component of the obligation to prevent environmental harm.⁶³⁷ The content of this principle is not subject too much controversy. ICJ already explained in *Pulp Mills* that the due diligence obligation entails:

not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.⁶³⁸

However, what is worth noticing is that UNCLOS does not explicitly provide for the principle of due diligence. UNCLOS tribunals have nonetheless read this obligation into various provisions of the Convention regulating the obligation of States over activities of different nature.

In the *Advisory Opinion on Activities in the Area*, the SDC held that with respect to the sponsorship of activities in the Area, sponsoring States have two kinds of obligations under the Convention, both of which relate to the obligation of due diligence. The first kind of obligation was the ‘obligation to ensure’ under Article 139 and the second was ‘direct obligations’ with which sponsoring States were to comply independently of their ‘obligation to ensure’ as ‘compliance with these obligations may also be seen as a relevant factor in meeting the “due diligence” obligation of the sponsoring State’.⁶³⁹ These independent obligations included the precautionary principle, the obligation to cooperate, the obligation to conduct EIA and the obligation to apply ‘best environmental practices’.⁶⁴⁰

The SDC devoted a substantial part of this Advisory Opinion to examining the ‘obligation to ensure’ under Article 139 UNCLOS.⁶⁴¹ It held that this ‘obligation to ensure’ was an

⁶³⁷ International Law Association Study Group on Due Diligence in International Law, First Report of 7 March 2014 <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045> accessed 25 September 2018.

⁶³⁸ *Pulp Mills* (n 558) [217].

⁶³⁹ *Advisory Opinion on Activities in the Area* (n 235) [23].

⁶⁴⁰ *ibid* [121]–[140].

⁶⁴¹ Article 139 provides in relevant parts: States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part.

obligation of due diligence and an obligation of conduct.⁶⁴² Recalling *Pulp Mills*, the SDC held that the connection between the obligation of due diligence and obligation of conduct meant that the sponsoring State was not obliged to achieve, in each and every case, the result that the sponsored contractor complies with the obligations. Rather, it was an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.⁶⁴³ In terms of what the ‘obligation to ensure’ entailed, the SDC, again echoing *Pulp Mills*, stated that it was not possible to describe the content of ‘due diligence’ in precise terms, as the standard of due diligence varied over time and depended on the level of risk and on the activities involved.⁶⁴⁴ At the minimum, ITLOS stated that sponsoring States were under the obligation to take measures within their legal system, which must consist of laws and regulations and administrative measures. The applicable standard was that the measures must be ‘reasonably appropriate’.⁶⁴⁵ The SDC’s interpretation of the due diligence obligation was very much in line with that of the ILC in its Commentary to Article 3 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.⁶⁴⁶

In respect of the independent obligations, two issues are particularly noteworthy. First, with regard to the precautionary principle, the SDC, recalling that the ITLOS’ *Southern Bluefin Tuna Cases Order* implicitly acknowledged a link between an obligation of due diligence and the precautionary approach, added that the precautionary approach was an integral part of the general obligation of due diligence of sponsoring States.⁶⁴⁷ The link between the precautionary principle and the obligation of due diligence means that sponsoring States would be required to consider preventative measures not only when the risks of harm are apparent, but also when there are only plausible indications of potential risks.⁶⁴⁸ This statement suggested a different approach to the way due diligence has traditionally been understood, namely, as a component of the prevention principle requiring preventative actions in the face the foreseeable harm.⁶⁴⁹

Second, the SDC rejected the contention that sponsoring States that were developing States were entitled to some preferential treatment which included a less stringent standard concerning the obligation of due diligence. This conclusion stood in stark contrast with the commentary of the ILC on Article 3 of the Draft Articles on Prevention of Transboundary Harm from

⁶⁴² *Advisory Opinion on Activities in the Area* (n 235) [110].

⁶⁴³ *ibid.*

⁶⁴⁴ *ibid* [117].

⁶⁴⁵ *ibid* [242].

⁶⁴⁶ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc A/RES/5683 (12 December 2011).

⁶⁴⁷ *Advisory Opinion on Activities in the Area* (n 235) [131].

⁶⁴⁸ *ibid.*

⁶⁴⁹ International Law Association Study on Due Diligence (n 637).

Hazardous Activities, in which the ILC opined that ‘the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence’.⁶⁵⁰ The Chamber’s rejection of the relevance of economic development for States’ compliance with the obligation of due diligence seem, however, reasonable in light of the reality of deep seabed mining activities. The SDC observed that the differential treatment between developed and developing countries would only encourage sponsoring States of convenience, which would not ensure the highest standards of marine environment protection.⁶⁵¹ Given the persistent problem of State of convenience, as demonstrated by flags of convenience in the field of fisheries, it is arguable that the SDC’s interpretation of ‘capabilities’ would be better suited to ensuring States’ compliance with the obligations to protect the marine environment in the Area.

Even though, as stated above, the SDC itself implied that there can be no one-size-fits-all standard of due diligence, its elaboration of the ‘obligation to ensure’ and the exposition of the relationship between the independent obligations and the due diligence obligation in the *Advisory Opinion on Activities in the Area* provided some important guidance on the content of the due diligence principle under UNCLOS with respect to activities in the Area. Although the contours of the obligation of due diligence merely followed those expounded by the ICJ in *Pulp Mills*, it added substance to the vague ‘obligation to ensure’ found in Article 139. At the same time, it also made clear that obligation of due diligence under UNCLOS is broader than just the ‘obligation to ensure’. It instead encompasses other core procedural obligations and the fulfilment of each of these duties is prerequisite to the discharge of the due diligence obligation.

The obligations of due diligence as elaborated in the *Advisory Opinion on Activities in the Area* was enthusiastically endorsed by ITLOS in the *Advisory Opinion on IUU Fishing*, albeit in a different context. ITLOS, in considering the flag States’ obligations with regards to IUU activities, held that Articles 58(3), 62(4) and 192 UNCLOS imposed on flag States an obligation ‘to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities’.⁶⁵² In clarifying the content of flag States’ ‘obligation to ensure’, ITLOS stated that the SDC’s exposition of the ‘responsibility to ensure’ and the interrelationship between the notions of ‘obligation of due diligence’ and ‘obligations of conduct’ were ‘fully applicable in the present case’.⁶⁵³ However, as analysed in Chapter 2,

⁶⁵⁰ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 646) para 13.

⁶⁵¹ *Advisory Opinion on Activities in the Area* (n 235) [159].

⁶⁵² *Advisory Opinion on IUU Fishing* (n 216) [124].

⁶⁵³ *ibid* [125].

ITLOS still took the opportunity to shed light on the meaning of ‘due diligence obligation’ in the specific context of flag States’ obligations towards IUU fishing conducted by their fishing vessels.⁶⁵⁴

Beyond advisory opinions, the arbitral tribunal in *South China Sea* was the first tribunal to have had the opportunity to apply the due diligence principle as elaborated by ITLOS in a contentious proceeding. It held that the flag State—in this case China—had failed to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal. While acknowledging the difficulties that flag States face to effectively exercise due diligence over their vessels, since ‘unlawful fishing will be carried out covertly, far from any official presence’,⁶⁵⁵ the tribunal found that China had in fact escorted, organised and coordinated the fishing activities.⁶⁵⁶

Apart from illegal fishing, the arbitral tribunal extended the due diligence principle to include coastal States’ obligations to prevent their vessels from harvesting ‘species that are recognised internationally as being at risk of extinction and requiring international protection’. This obligation, according to the tribunal, followed from Article 192. Read in conjunction with Article 194(5),⁶⁵⁷ the arbitral tribunal held that Article 192 imposes an obligation of due diligence on flag States, which means that ‘in addition to preventing the direct harvesting of species recognised internationally as being threatened with extinction, Article 192 extends to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat.’⁶⁵⁸ More specifically, the tribunal held that flag States had the obligation under the Convention to ‘include a duty to adopt rules and measures to prevent such acts and to maintain a level of vigilance in enforcing those rules and measures’.⁶⁵⁹ The tribunal placed particular emphasis on the latter component of the due diligence obligation in this case. Despite acknowledging that China had put in place legislation which prohibited the catching and killing of state-protected wild-life,⁶⁶⁰ the tribunal emphasised that ‘adopting appropriate rules and measures to prohibit a harmful practice is only one component of the due diligence required by States’.⁶⁶¹ On that basis, having found that China had not taken ‘any steps to enforce those rules and measures against fishermen engaged in poaching of endangered

⁶⁵⁴ See Chapter 2, Part II.2.

⁶⁵⁵ *South China Sea*, Merits (n 622) [754].

⁶⁵⁶ *ibid* [755].

⁶⁵⁷ *ibid* [956].

⁶⁵⁸ *ibid* [959].

⁶⁵⁹ *ibid* [961].

⁶⁶⁰ *ibid* [963].

⁶⁶¹ *ibid* [964].

species', the tribunal came to the conclusion that China had breached its obligations under Articles 192 and 194(5).⁶⁶² The arbitral tribunal's examination of China's obligations clarifies that while Article 192 prescribes, as its title suggests, a 'general obligation', it is not purely hortatory. Instead, it imposes substantive obligations on States parties to UNCLOS to protect and preserve the marine environment, including the obligation of due diligence.

In the same vein, the arbitral tribunal also held that China as the flag State had an obligation to ensure that its fishing vessels 'do not take measures to pollute the marine environment' based on a reading of Articles 192, 194(2) and 194(5) of the Convention.⁶⁶³ However, due to the lack of 'evidence in the case record about the use of explosives and cyanide over the last decade or Philippine complaints about its use', the tribunal gave China the benefit of the doubt and held that the absence of evidence 'suggests China may have taken measures to prevent such practices in the Spratly Islands.'⁶⁶⁴

In short, ITLOS' two Advisory Opinions and the *South China Sea* arbitration have contributed to clarifying the content of the due diligence principle with regard to the protection of the marine environment in two ways. First, UNCLOS tribunals' decisions were not the first serious judicial exposition of the obligation of due diligence. Indeed, in the ICJ's *Pulp Mills* judgment handed down just a year before the 2011 *Advisory Opinion on Activities in the Area*, the ICJ had already elaborated on the nature and content of the obligation of due diligence. The approach of ITLOS in the Advisory Opinions did not differ to a great extent to that adopted in *Pulp Mills*, and indeed ITLOS made extensive reference to the *Pulp Mills* judgment. What was noteworthy about UNCLOS tribunals' decisions was their willingness to read the principle of due diligence into various articles of UNCLOS which do not expressly provide for such principle. By interpreting sponsoring States' 'obligation to ensure' contained in Article 139(1) UNCLOS and Article 4(4) Annex III, flag States' obligations under Article 58(3), 62(4) 192 and 194 as having a due diligence nature, UNCLOS tribunals paved the way for the principle to become an essential obligation in the protection of the marine environment under UNCLOS. Second, the Annex VII tribunal's application of the obligation of due diligence in *South China Sea* clarified the content of the obligation, requiring not only legislative measures, but more importantly, enforcement measures to be taken on the part of States. Lastly, as the principle of due diligence establishes a mechanism through which the rules of the Convention become

⁶⁶² *ibid.*

⁶⁶³ *ibid* [971].

⁶⁶⁴ *ibid* [975].

effective for private entities, UNCLOS tribunals' decisions contribute to developing a common standard for due diligence, which could be applicable to other areas of international law.

V. CONCLUDING REMARKS

UNCLOS tribunals' decisions concerning the protection of the marine environment have made some important contributions to the law concerning the protection of the marine environment. These contributions initially came from ITLOS but in recent years, the Annex VII arbitral tribunals have also managed to add their voice to clarifying the law on the protection of the marine environment.

First, UNCLOS tribunals have not adopted a narrow or fragmented interpretation of marine environment protection. Instead, they have opted for a more holistic understanding of what marine environmental protection comprises. Both ITLOS in *Southern Bluefin Tuna* and the Annex VII tribunal in *Chagos MPA* regarded the conservation of marine living resources,⁶⁶⁵ despite not explicitly provided for in Part XII, as a component of marine environment protection. The obligations concerning the conservation of marine resources and prevention of marine pollution are scattered in different parts of UNCLOS, primarily due to the zonal approach that the Convention adopts. By bringing them together, UNCLOS tribunals confirmed that they are integral components of marine environmental protection. Such an approach has enabled UNCLOS tribunals to extend obligations found under Part XII concerning primarily the prevention of marine pollution to the conservation of fisheries.⁶⁶⁶

The most significant contribution of ITLOS towards the development of the law on marine environment protection is the clarification of the status of several principles of environmental law. In particular, UNCLOS tribunals have confirmed that the duty to cooperate, the obligation of due diligence and the obligation to conduct an EIA are now all part of general international law. It is not immediately clear whether the tribunals' use of the term 'general international law' implied customary international law. Scholars have different opinions as to what sources of law are encompassed in this term. Some argue that general international law comprises both customary and conventional rules of international law,⁶⁶⁷ while others contend that general international law contains multilateral treaties of universal application such as the UN Charter, *jus cogens*, customary international law and general principles of law.⁶⁶⁸ Although UNCLOS tribunals did not specify which one it intended to refer to when stating that a certain principle

⁶⁶⁵ *Southern Bluefin Tuna Order* (n 227) [70]; *Chagos MPA* (n 106) [538].

⁶⁶⁶ *Advisory Opinion on IUU Fishing* (n 216) [216]–[217].

⁶⁶⁷ Gregory Tunkin, 'Is General International Law Customary Only?' (1993) EJIL 4 534.

⁶⁶⁸ Christian Tomuschat, 'What is General International Law' <<http://legal.un.org/avl/ls/Tomuschat.html#>> accessed 25 September 2018.

belongs to 'general international law', it is clear that in the view of the tribunals, these principles also exist independently of UNCLOS. With regard to the controversial precautionary principle, while not explicitly acknowledging its customary status, ITLOS is the only international tribunal to date which has given a green light to the precautionary principle belonging to the corpus of general international law, as demonstrated in the *Advisory Opinion on Activities in the Area*.

It is important to note that not all of the environmental principles with which the UNCLOS tribunals have dealt can be found under UNCLOS; in fact only the obligation to cooperate and the obligation to conduct EIA are expressly provided for under the Convention. Nevertheless, UNCLOS tribunals have been willing to read principles such as the precautionary principle and the obligation of due diligence into UNCLOS provisions whose wording does not mention any of them. The keenness of UNCLOS bodies to accept emerging principles which are either still controversial or vague in their content and bring them into the corpus of UNCLOS shows that the tribunals are open to treating the Convention as having an evolving nature, and that they are willing to interpret UNCLOS in line with new developments in the field. This approach is highly welcome and reasonable, for UNCLOS came into being at a time when international environmental law was not yet fully developed and had only started to gather attention.

However, the fact that international courts and tribunals acknowledge and confirm the existence of environmental principles may not necessarily mean they have meaningfully shed light on normative content of these principles. International courts have had the tendency to pay lip-service to environmental principles, partly contributing to what one commentator terms as the 'myth system' of international environmental law—a set of ideas often considered part of customary international law but do not reflect state practice, and instead merely 'collective ideals of the international community' which 'have the quality of fictions or half-truth.'⁶⁶⁹ Therefore, unless the normative content of the principles is clarified so as to expose clear obligations on States, the customary status or otherwise of the principles is of little meaning in practice. Regrettably, the contributions of UNCLOS tribunals have been rather modest in this regard.

ITLOS was the first and the only international tribunal which has applied the precautionary principle to date in *Southern Bluefin Tuna*. However, as the principle was applied in a provisional measure proceeding, its normative content, such as the threshold to trigger the

⁶⁶⁹ Daniel M Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995) 3(1) *Ind J Global Legal Stud* 105.

application of the precautionary principle under UNCLOS, was informed by Article 290. This may restrict the applicability of the conclusions to other cases. ITLOS also shed light on the precautionary principle as provided for under Principle 15 of the Rio Declaration, establishing a connection between the precautionary principle and the principle of common but differentiated responsibility, and the principle of due diligence. All these aspects of the precautionary principle had not been discussed to a great extent in international jurisprudence before and thus, mark an important contribution of ITLOS to the development of the principle.

In respect of the obligation to cooperate, UNCLOS tribunals managed to clarify its content in the context of prevention of marine pollutions, but not in the conservation of marine resources. More specifically, UNCLOS tribunals confirmed the link between the duty to cooperate and other duties such as the duty to conduct consultation, duty to exchange information, duty of prior notification, in the context of preventing marine pollution. In the conservation of marine resources, UNCLOS tribunals, however remain overly coy when it comes to specifying concrete measures for States to fulfil the duty to cooperate, leaving much room to be filled. Similarly, UNCLOS tribunals did not manage to shed much light on the obligation to conduct EIA. Except for the link between EIA and the duty to consult and notify relevant stakeholders, the content of the obligation to conduct EIA under Article 206 UNCLOS remains unclear, as is the question as to whether there is a common global minimum for the standards of EIA or whether it is at the discretion of States.

The only principle whose content was clarified to a great extent was the due diligence principle to the protection of the marine environment under UNCLOS. UNCLOS tribunals not only read this obligation into the obligation of sponsoring States for activities in the Area and flag States for various activities such as preventing IUU fishing, protecting fragile marine habitat or preventing marine pollution, but also specified the extent to which States must adopt measures to fulfil the due diligence requirement.

Finally, it is worth noticing that Article 290 requires ITLOS to prescribe provisional measures to either preserve the rights of the parties or prevent serious harm to the marine environment. However, one scholar has argued that it is States that bring the cases, not the marine environment, therefore, there is no guarantee that the marine environment may benefit from the measures prescribed or that the development of principles of marine environment protection may occur during the process of dispute resolution.⁶⁷⁰ As *Land Reclamation* shows,

⁶⁷⁰ Gwenaële Rashbrooke, 'The International Tribunal for the Law of the Sea: A Forum for the Development of Principles of International Environmental Law?' (2004) 19(4) IJMCL 515.

provisional measures requiring serious and meaningful cooperation played an important role in not only resolving disputes between the parties but also in the protection of the marine environment in the Straits of Johor.⁶⁷¹ It follows that the protection of the parties' interests and the goal of protecting the marine environment are not mutually exclusive. Provisional measures ordering the disputing parties to undertake a joint monitoring or EIA or requiring the parties to cooperate to ensure conservation and optimum utilisation of a fish stock and to devise measures to prevent land-based marine pollution 'can contribute to enforce community interests regarding marine environmental protection,⁶⁷² while at the same time, serve to protect the rights of the parties. ITLOS' decisions in provisional measures proceedings, therefore, have shown that, despite their limitations, they can still play an important role in advancing environmental interests.

⁶⁷¹ Tullio Treves, 'A System for Law of the Sea Dispute Settlement' in Freestone, Barnes and Ong (n 48).

⁶⁷² Yoshifumi Tanaka, 'Provisional Measures Prescribed by ITLOS and Marine Environmental Protection' (2014) 108 Proceedings of the Annual Meeting of the American Society of International Law 365.

CHAPTER 5 FACTORS THAT IMPACT THE PERFORMANCE OF UNCLOS TRIBUNALS

The contribution that UNCLOS tribunals have made to the development of the law, as can be seen in the previous chapters, is not equally felt in different areas of the law of the sea, nor is the type of contribution the same in every field. The question is, then, can these differences be accounted for? In other words, what are the factors that potentially impact the contribution of UNCLOS tribunals to the development of the law of the sea? This chapter will attempt to answer this question.

The judges and arbitrators of ITLOS and Annex VII tribunals, similar to those of any other court and tribunal, are not ‘free agents with unfettered discretion to weigh into all aspects of international law’.⁶⁷³ There are, of course, boundaries and limitations on their authority. As shown in Chapter 1, the development of the law, while important, is not the primary role given to UNCLOS tribunals. Therefore, they can only perform this task if the legal framework in which they operate facilitates the role *and* if they are willing to engage in developing the law. Accordingly, this chapter will examine the factors that impact the ability and the willingness of UNCLOS tribunals to develop the law of the sea. In particular, it analyses the following factors: (i) the scope of jurisdiction that UNCLOS confers on the tribunals, (ii) the institutional structure of UNCLOS, (iii) the interpretative methods that UNCLOS tribunals employed in deciding their cases and (iv) their perception of the roles that the tribunals should perform when hearing cases. The first two factors determine the room available for UNCLOS tribunals to take on the role of developing the law. The remaining two help us to understand whether UNCLOS tribunals displayed a conscious endeavour to contribute to the development of the law and if so, how this impacted the way the cases were decided.

I. JURISDICTIONAL SCOPE OF UNCLOS TRIBUNALS

The contribution of UNCLOS tribunals—as dispute settlement bodies—to the development of the law transpires through the decisions rendered in the course of settling disputes or issuing advisory opinions. It should be acknowledged that the decision to bring cases or advisory requests to international courts and tribunals rests entirely with States. It is impossible to predict with any degree of certainty when States are willing to do so, and the proceedings under Part XV of UNCLOS have indeed been rather haphazard in nature. However, even when States are

⁶⁷³ Rosa Aloisi and James Meernik, *Judgment Day: Judicial Decision Making at the International Criminal Tribunals* (CUP 2017) 21.

able to reach an agreement to resort to UNCLOS tribunals to settle their disputes, the extent to which UNCLOS tribunals could engage in the development of the law is still informed by the type of proceeding and the tribunals' jurisdictional scope in each of the proceedings. In relation to the former, the majority of decisions that ITLOS has rendered to date are provisional measures orders and prompt release judgments. The incidental nature of these proceedings, and the ensuing limitations on what ITLOS could examine in each proceeding, necessarily restrict ITLOS' ability to touch upon, a wide range of legal issues under UNCLOS. This in turn has a bearing on the power of ITLOS to develop the law. As the previous chapters show, this does not mean that ITLOS was not able to make important contributions to the development of the law of the sea in the course of these proceedings. What it does mean, however, is that contributions can only be made to a limited number of issues.

UNCLOS tribunals in general have also had the chance to deal with contentious proceedings and, in the case of ITLOS, to render advisory opinions. In these types of proceedings, the tribunals are less constrained. UNCLOS tribunals are given compulsory jurisdiction, which seems to provide a useful tool for the tribunals to play a more active role in developing the law. However, there are important limitations to the exercise of the tribunals' compulsory jurisdiction under UNCLOS. Taking this into account, the remainder of this part will examine the jurisdictional parameters that UNCLOS tribunals have determined for themselves both in contentious and in advisory opinion proceedings, and assess their impact on the ability of UNCLOS tribunals to develop the law of the sea.

1. Jurisdiction over contentious proceedings

The conditions for UNCLOS tribunals to exercise jurisdiction to hear contentious cases can be categorised into three main groups, corresponding to the three Sections under Part XV UNCLOS. First, under Section 1, UNCLOS tribunals can hear a dispute only when the parties have not chosen another means to settle their dispute, be they negotiations or through bilateral, regional or general agreements. Under Section 2, Article 288(1) makes clear that UNCLOS tribunals only have jurisdiction 'over the interpretation and application of the Convention'. Finally, Articles 297 and 298 of Section 3 contain the lists of disputes which are excluded from the jurisdiction of UNCLOS tribunals automatically and by declaration. As will be shown, UNCLOS tribunals have interpreted the conditions in each of these groups in a manner which has, more often than not, enabled the tribunals to exercise jurisdiction under Part XV.

1.1. General provisions under Section 1

The three most important provisions of Section 1 are Articles 281, 282 and 283, each of which sets out a scenario involving the use of another means of dispute settlement which would deprive UNCLOS tribunals of jurisdiction.

Article 281 essentially provides that, when the parties have agreed to another means of dispute settlement, UNCLOS tribunals can only exercise jurisdiction if the parties have not been able to settle the dispute between them using the means agreed *and* the parties have not agreed to exclude further procedures, including recourse to the UNCLOS dispute settlement procedures. This second requirement of Article 281 was at issue in one of the first cases before UNCLOS tribunals, *Southern Bluefin Tuna*. Japan in this case argued that the jurisdiction of UNCLOS tribunals could not be triggered because the parties had already agreed to use the dispute settlement procedures under Article 16 CCSBT which excluded recourse to UNCLOS dispute settlement procedures.⁶⁷⁴ The majority in *Southern Bluefin Tuna* agreed, holding that although Article 16 of the CCSBT did not expressly exclude the applicability of the procedures of Section 2 Part XV of UNCLOS, ‘the absence of an express exclusion of any procedures in Article 16 is not decisive’.⁶⁷⁵ What was important in the tribunal’s view was that paragraph (2) of Article 16 provided for an express obligation to continue to seek resolution of the dispute by the means listed in paragraph (1).⁶⁷⁶ The tribunal’s interpretation of Article 281 meant that the existence of any list of dispute settlement methods and a commitment to resolving the dispute by peaceful means would suffice as an agreement to exclude resort to UNCLOS procedures.⁶⁷⁷

This interpretation was heavily criticised by Judge Keith in his Separate Opinion, in which he argued that the wording of Article 281, the structure of Part XV UNCLOS, and the object and purpose of UNCLOS as a whole pointed to the conclusion that ‘strong and particular wording’ would have to be included in Article 16 CCSBT to prevent the arbitral tribunal from exercising jurisdiction.⁶⁷⁸ Several scholars subsequently endorsed Judge Keith’s interpretation of Article 281 instead of that of the majority.⁶⁷⁹ As a result, there was serious uncertainty

⁶⁷⁴ *Southern Bluefin Tuna Award* (n 290) [34].

⁶⁷⁵ *ibid* [57].

⁶⁷⁶ *Ibid*.

⁶⁷⁷ Robin Churchill, ‘Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade’ in Barnes, Freestone and Ong (n 48) 403.

⁶⁷⁸ *Southern Bluefin Tuna Award*, Separate Opinion of Judge Kenneth Keith [18], 19].

⁶⁷⁹ Deborah Horowitz, ‘The Catch of Poseidon’s Trident: The Fate of High Seas Fisheries in the Southern Bluefin Tuna Case’ (2001) 25 MULR 810; Alan Boyle, ‘The Southern Bluefin Tuna arbitration’ (2001) 50 ICLQ 447; David A Colson and Peggy Hoyle, ‘Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal get it Right?’ (2003) 34 ODIL 59; Bernard Oxman, ‘Complementary Agreements and Compulsory Jurisdiction’ (2001) 95 AJIL 277, 277, 304; Karaman (n 8) 260. But see also: Klein, *UNCLOS Dispute Settlement System* (n 7) 35–43; Barbara

regarding the scope of Article 281, despite it being the only judicial authority on the matter for a long period of time.⁶⁸⁰

In 2016, the majority's interpretation of Article 281 in *Southern Bluefin Tuna* was explicitly rejected by the *South China Sea* arbitral tribunal when deciding whether Article 281 applied to exclude the tribunal's jurisdiction to hear the dispute brought by the Philippines against China concerning the South China Sea, given that there were several instruments containing the parties' agreement to settle their disputes by a variety of peaceful means.⁶⁸¹ The tribunal stated that it shared the view of Judge Keith in *Southern Bluefin Tuna*, and concluded that 'Article 281 requires some clear statement of exclusion of further procedures'.⁶⁸² This has been the only instance to date in which an UNCLOS tribunal explicitly rejected the interpretation adopted by another tribunal in a previous case concerning the same UNCLOS provision. The *South China Sea* arbitral tribunal's decision to embrace the approach of Judge Keith in interpreting Article 281 arguably made more sense, as the interpretation adopted by the majority in the *Southern Bluefin Tuna* would render Article 281 a near impossible obstacle to overcome, thereby defeating the whole purpose of a compulsory dispute settlement system under UNCLOS. The *South China Sea* tribunal's decision meant that the bar for the invocation of Article 281 to exclude the jurisdiction of UNCLOS tribunals has now been set relatively high.

Turning to Article 282,⁶⁸³ the requirements for the invocation of Article 282 were explained for the first time in *South China Sea*.⁶⁸⁴ These requirements are that (a) the parties have agreed through a 'general, regional or bilateral agreement or otherwise' that, (b) at the request of any party to the dispute, (c) the dispute shall be submitted to a procedure 'that entails a binding decision' and (d) the parties have not otherwise agreed to retain access (ie, to opt back in) to the Part XV, Section 2 procedures.⁶⁸⁵ The arbitral tribunal found that the applicable

Kwiatkowska, 'The Southern Bluefin Tuna Arbitral Tribunal did get it right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle' (2003) 34 ODIL 369.

⁶⁸⁰ MD. Saiful Karim, 'Litigating law of the sea disputes using the UNCLOS dispute settlement system' in Klein, *Litigating International Law Disputes* (n 17) 270.

⁶⁸¹ *South China Sea*, Jurisdiction and Admissibility (n 635) [196].

⁶⁸² *ibid* [223].

⁶⁸³ Article 282 provides that: If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

⁶⁸⁴ Article 282 was brought up but was not dealt with in detail by ITLOS in the *Southern Bluefin Tuna* and *MOX Plant* Provisional Measure Orders. Thus these cases did not provide any guidance on the interpretation and application of this Article.

⁶⁸⁵ *South China Sea*, Jurisdiction and Admissibility (n 635) [291].

instruments between the Philippines and China did not contain a *binding* dispute settlement mechanism (point (a)),⁶⁸⁶ even when the mechanism itself may be *compulsory* (point (c)) and that the parties in this case had not requested to invoke these instruments to exclude the jurisdiction of the tribunal under Article 282 (point (b)). With regard to point (d), the tribunal clarified that as ‘Part XV procedures are excluded by the alternative compulsory binding procedure’, Article 282 required the parties to ‘opt back in’ to using UNCLOS procedures ‘by “agreeing otherwise”’.⁶⁸⁷ However, as the tribunal did not need to consider this point, having decided that the other points were already not satisfied, it remains open to question what language would be required to demonstrate the parties’ intention to ‘opt back in’, and whether the ‘opt-in’ could be implied or explicit as in the case of Article 281. What is clear is that under Article 282, the jurisdiction of UNCLOS tribunals is not automatically excluded by virtue of the mere existence of other compulsory dispute settlement procedures. Instead, a specific act of the parties to invoke them is further required.

Finally, Article 283 has been the most frequently invoked article in Section 1 for the purpose of objecting to UNCLOS tribunals’ jurisdiction.⁶⁸⁸ As a result, the tribunals have had ample opportunity to shed light on the requirements contained in this article. For example, ITLOS has clarified that ‘a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted’.⁶⁸⁹ This interpretation turned the obligation to exchange views under Article 283 into an obligation of conduct, and not one of result. This interpretation, however, did not shed light on the question

⁶⁸⁶ The question as to what constitutes an agreement to exclude the jurisdiction of UNCLOS tribunals was recently addressed in *Somalia v Kenya* before the ICJ. Kenya had made an optional clause declaration pursuant to Article 36(2) of the ICJ Statute which included a reservation to exclude ‘[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement’. The Court had to consider whether the parties’ optional clause declarations formed an agreement to appear before the ICJ and consequently excluded the UNCLOS dispute settlement system by virtue of Article 282 UNCLOS, despite the Kenyan reservation. The Court came to the conclusion that Article 282 should be interpreted ‘so that an agreement to the Court’s jurisdiction through optional clause declarations falls within the scope of that Article and applies “in lieu” of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya’. See *Somalia v Kenya* (n 335) [130]. Judge Robinson, however, argued that ‘by reason of Kenya’s reservation, the optional clause declarations of the Parties do not constitute an agreed procedure under Article 282 of UNCLOS’. *Somalia v Kenya*, Dissenting Opinion of Judge Robinson, [38] <<http://www.icj-cij.org/files/case-related/161/19338.pdf>>. For a critical comment on the implication of the ICJ’s conclusion: Marco Benatar and Erik Franckx ‘The ICJ’s Preliminary Objections Judgment in *Somalia v. Kenya*: Causing Ripples in Law of the Sea Dispute Settlement?’ EJIL Talk! (22 February 2017) <<https://www.ejiltalk.org/the-icjs-preliminary-objections-judgment-in-somalia-v-kenya-causing-ripples-in-law-of-the-sea-dispute-settlement/>> accessed 25 September 2018; Nigel Bankes, ‘Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention’ (2017) 48(3-4) ODIL 239 .

⁶⁸⁷ *South China Sea*, Jurisdiction and Admissibility (n 635) [224].

⁶⁸⁸ Article 283 provides that: When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means

⁶⁸⁹ *Southern Bluefin Tuna Order* (n 227) [56]–[61]; *MOX Plant Order* (n 527) [60].

regarding the content required of the exchange of views. In this regard, the *Chagos MPA* award was particularly instructive. In the tribunal's view, Article 283 only imposed on State parties the obligation to negotiate the method to resolve the dispute, not the obligation to negotiate the *substance* of the dispute.⁶⁹⁰ It follows, therefore, that as long as the parties expeditiously conduct an exchange of views on the method to resolve the dispute, Article 283 would be satisfied. UNCLOS tribunals up to this case had adopted a relatively low threshold for meeting the requirement of Article 283. The tribunal in *Chagos MPA*, by requiring the parties only to exchange views on the method of dispute settlement, seemed to have lowered it even further.

In short, UNCLOS tribunals have adopted low thresholds for the satisfying of the requirements in Section 1. As a result, while Section 1 seems to give priority to the parties' choice of forum, it is now not difficult for the tribunals to overcome the jurisdictional barriers envisioned in these articles. In other words, the interpretation and application of these articles in the case law of UNCLOS tribunals have increased the opportunity for UNCLOS tribunals to be able to hear cases brought before them.

1.2. Subject-matter of jurisdiction

Article 288(1) states that UNCLOS tribunals can only exercise jurisdiction over disputes concerning the 'interpretation and application of the Convention'. This article thus sets the parameters, in terms of the subject-matter, within which UNCLOS tribunals are to operate. ITLOS in *M/V Louisa* made clear that in order for a dispute to fall within the jurisdiction of an UNCLOS tribunal, it was necessary to 'establish a link between the facts advanced by [the Applicant] and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by [the Applicant]'.⁶⁹¹ However, UNCLOS tribunals have had to consider issues which are not regulated under the Convention, such as the use of force in *M/V Saiga*, and *Guyana v Suriname*, territorial sovereignty in *Chagos MPA* and *South China Sea*. The way in which UNCLOS tribunals have proceeded with regard to establishing jurisdiction over issues beyond the scope of UNCLOS has not been entirely consistent, primarily due to the confusion between Article 288 on jurisdiction and Article 293 on applicable law.

In *M/V Saiga*, ITLOS acknowledged that UNCLOS did not contain 'express provisions on the use of force in the arrest of ships', but nevertheless asserted that it had jurisdiction to consider whether Guinea had used excessive and unreasonable force in stopping and arresting

⁶⁹⁰ *Chagos MPA* (n 106) [378].

⁶⁹¹ *M/V 'Louisa' (Saint Vincent and the Grenadines v Kingdom of Spain)* (Judgment) ITLOS Reports 2013, 4 [99].

the *Saiga* because ‘international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances’.⁶⁹² ITLOS thus used Article 293 on the applicable law as the basis to bring issues which were not provided for under UNCLOS into its jurisdictional ambit. Similarly, in *Guyana/Suriname*, the Annex VII tribunal, recalling ITLOS’ above statement, held that it had the competence, under Article 293, to decide on matters that concerned the UN Charter and general international law on the use of force.⁶⁹³

In contrast, the arbitral tribunal in *MOX Plant* adopted an opposite understanding of the relationship between Articles 288(1) and 293. It held that ‘there is a cardinal distinction between the scope of its jurisdiction under Article 288, paragraph 1 of the Convention, on the one hand, and the law to be applied by the Tribunal under Article 293 of the Convention on the other hand’.⁶⁹⁴ It would appear that the *MOX Plant* tribunal’s approach is more tenable. Although Article 293 allows judges or arbitrators to resort to legal rules and principles contained under general international law to settle a dispute, such use should be strictly limited to assisting them to decide a dispute that arises under the Convention, not as the basis for jurisdiction to hear that dispute.⁶⁹⁵ In *Guyana v Suriname*, for example, the question of whether a State has resorted to the use of force in violation of general international law is not regulated by UNCLOS but is in itself a stand-alone dispute that does not require the interpretation of the Convention. Nor was it necessary for ITLOS or the Annex VII arbitral tribunal in the abovementioned cases to consider this question of the use of force before it could settle a dispute concerning the Convention.

Among the most controversial issues concerning UNCLOS tribunals’ scope of jurisdiction is perhaps the question relating to whether the tribunals have competence to decide on disputes over territorial sovereignty.⁶⁹⁶ In *Chagos MPA*, the parties disagreed as to whether a dispute concerning the status of the UK or Mauritius as the ‘coastal State’ with regard to the

⁶⁹² *Saiga* (No. 2) (n 89) [155].

⁶⁹³ *Arbitration between Guyana and Suriname (Guyana/Suriname)* (2007) RIAA XXX 1 [406].

⁶⁹⁴ *MOX Plant*, Order N° 3 (n 599) [19]. The Annex VII arbitral tribunal in *Arctic Sunrise (Netherlands v Russia)*, Award on Jurisdiction [188], [191] <<http://www.pcacases.com/web/sendAttach/1325>> accessed 25 September 2018.

⁶⁹⁵ Michael Wood, ‘The International Tribunal for the Law of the Sea and General International Law’(2007) IJMCL 351, 353.

⁶⁹⁶ Irina Buga, ‘Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals’ (2012) 27 IJMCL 59; Robert W Smith and Bradford L Thomas, ‘Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes’ in (1998) 2(4) Maritime Briefings.

Chagos Archipelago⁶⁹⁷ was one that concerned the ‘interpretation and application of UNCLOS.’⁶⁹⁸ The arbitral tribunal proceeded to deal with this issue in two steps. It first examined the nature of the dispute in order to identify what ‘the real dispute’ and the ‘object of the claim’ were.⁶⁹⁹ Second, if the real dispute concerned the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) could extend to ‘ancillary determinations of law’ that are necessary to resolve the disputes. If, on the other hand, the real dispute did not relate to the interpretation or application of the Convention, then ‘an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)’.⁷⁰⁰ Applying this two-step test, the tribunal decided that the real dispute between the parties primarily concerned sovereignty, with the UK’s actions as a ‘coastal States’ merely representing a manifestation of that dispute.

The tribunal then considered ‘the extent to which a dispute over land sovereignty touching in some ancillary manner on matters regulated by the Convention could fall under its jurisdiction’.⁷⁰¹ In order to answer this, the tribunal looked to Article 298(1)(a)(i) as this is the only article in the Convention in which jurisdiction over sovereignty disputes is mentioned. Mauritius contended, as several commentators had before,⁷⁰² that an *a contrario* reading of this article implied that sovereignty disputes would be subject to compulsory dispute resolution in the absence of a declaration to that effect.⁷⁰³ The tribunal, however, by three votes to two, dismissed such a broad reading and held that since the context of Article 298(1)(a)(i) concerned maritime boundary and historic title, at most an *a contrario* reading of this paragraph could only suggest that an issue of land sovereignty might be within the jurisdiction of a Part XV court or tribunal if it was genuinely ancillary to a dispute over a maritime boundary or a claim of historic title.⁷⁰⁴ The tribunal also interpreted the negotiating history of the Convention, which did not explicitly address jurisdiction over territorial sovereignty, as suggesting that none of the Conference participants expected that a dispute over territorial sovereignty would be considered

⁶⁹⁷ *Chagos MPA* (n106) [158].

⁶⁹⁸ *ibid* [164].

⁶⁹⁹ *ibid* [206].

⁷⁰⁰ *ibid* [220].

⁷⁰¹ *ibid* [213].

⁷⁰² Tullio Treves, ‘What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?’ in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff 2006) 77; Philippe Gautier, ‘The International Tribunal for the Law of the Sea: Activities in 2005’ (2006) 5 *CJIL* 390; Alan Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’ (1997) 46 *ICLQ* 44.

⁷⁰³ *Chagos MPA* (n106) [218].

⁷⁰⁴ *ibid*.

as a dispute ‘concerning the interpretation or application of the Convention’ and if they had, they would have excluded it from compulsory jurisdiction in the same manner as maritime delimitation disputes, due to the sensitivity of the issue.⁷⁰⁵ The majority’s approach showed that territorial disputes are not definitively excluded from the jurisdiction of an UNCLOS tribunal, the key is that the sovereignty question has to be ancillary or incidental to a dispute that has a nexus to UNCLOS.⁷⁰⁶

The majority’s conclusion on jurisdiction over territorial sovereignty was met with strong criticism from the dissenting arbitrators Kateka and Wolfrum. Judges Kateka and Wolfrum contended that Mauritius only raised the question of the competence of the UK as a coastal State in relation to the establishment of an MPA.⁷⁰⁷ The real dispute for the dissenting judges, therefore, was not one of territorial sovereignty,⁷⁰⁸ but was instead concerned with the interpretation of Article 56, which plainly fell within the jurisdiction of the Tribunal.⁷⁰⁹ In addition, the two Judges were critical of the majority’s interpretation of Article 298(1)(a)(i). They found it difficult to accept the majority’s argument that because the drafters of the Convention had not foreseen the possibility of a sovereignty dispute falling within the ambit of UNCLOS, this meant that the drafters had intended to exclude it from compulsory jurisdiction.⁷¹⁰ Instead, they argued that jurisdiction over sovereignty disputes was touched upon during the negotiations of the Convention but that the drafters deliberately chose not to automatically exclude them from compulsory jurisdiction.⁷¹¹ The debate over whether an UNCLOS dispute settlement body has jurisdiction over territorial sovereignty disputes was expected by many to be settled with *Chagos MPA*,⁷¹² but given the split between the majority and minority, the uncertainty does not seem to have been entirely resolved.

In the more recent *South China Sea* case, an Annex VII arbitral tribunal also had to consider the question of whether the case brought by the Philippines was by nature one that concerned sovereignty. The tribunal, similar to *Chagos MPA*, took cognisance of the existence

⁷⁰⁵ *ibid* [215]–[217].

⁷⁰⁶ Lan Ngoc Nguyen, ‘The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?’ (2016) 31(1) *IJMCL* 120, 142; James Harrison, ‘Defining Disputes and Characterizing Claims: Subject- Matter Jurisdiction in Law of the Sea Convention Litigation’ (2017) 48(3-4) *ODIL* 269.

⁷⁰⁷ *Chagos MPA*, Dissenting and Concurring Opinion of Judges James Kateka and Judge Rudiger Wolfrum [10].

⁷⁰⁸ *ibid* [15].

⁷⁰⁹ *ibid* [46].

⁷¹⁰ *ibid* [27].

⁷¹¹ *ibid* [37].

⁷¹² Buga, ‘Territorial Sovereignty Issues in Maritime Disputes’ (n 696), Peter Prows, ‘Mauritius Brings UNCLOS Arbitration Against The United Kingdom Over The Chagos Archipelago’, *ASIL Insights*, Volume 15(8) <<http://www.asil.org/insights/volume/15/issue/8/mauritius-brings-unclos-arbitration-against-united-kingdom-over-chagos>> accessed 25 September 2018.

of a territorial sovereignty dispute between the Philippines and China,⁷¹³ and examined the relevance of the existing sovereignty dispute to the disputes before it.⁷¹⁴ The tribunal found that sovereignty was not the issue at stake in the case as the tribunal would not have to decide on territorial sovereignty issues in order to resolve the Philippines' claims, nor was the Philippines' actual objective to advance its position regarding sovereignty.⁷¹⁵

However, the most interesting aspect relating to the tribunal's jurisdiction in *South China Sea* perhaps related to Submissions 1 and 2. In these submissions, China claimed that their entitlements in the South China Sea were based on an understanding of 'historic rights existing independently of, and allegedly preserved by, the Convention'.⁷¹⁶ The Philippines' position, on the other hand, was that 'UNCLOS supersedes and nullifies any "historic rights" that may have existed prior to the Convention.'⁷¹⁷ The tribunal then stated that:

This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.⁷¹⁸

The tribunal in this instance did not occupy itself with the question as to which particular provision of UNCLOS was at stake. Instead, while accepting that historic rights existed independently under general international law, the tribunal still found that it had jurisdiction to consider the question regarding whether this right was protected under the Convention. This was a new approach to interpreting Article 288(1). At first glance, this approach would seem to widen the jurisdictional scope of UNCLOS tribunals. However, on a closer look, the tribunal was not asked to shed light on the concept of 'historic rights', but on whether these rights were preserved under the Convention in some form or another. As the tribunal correctly noted, this involved the interpretation of the content and scope of relevant UNCLOS provisions concerning the extent of coastal States' maritime entitlement under the Convention.

In short, the decisions of UNCLOS tribunals relating to the scope of their jurisdiction under Article 288(1) show that UNCLOS tribunals have become more cautious and restrictive

⁷¹³ *South China Sea*, Jurisdiction and Admissibility (n 635) [152].

⁷¹⁴ *ibid* [153] – [154].

⁷¹⁵ *ibid* [153].

⁷¹⁶ *ibid* [168].

⁷¹⁷ *ibid*.

⁷¹⁸ *ibid*.

in deciding which issues may fall within their competence. In earlier cases such as *Saiga (No 2)* or *Guyana v Suriname*, the tribunals were not hesitant to exercise jurisdiction over issues not provided for under UNCLOS, frequently using Article 293 on applicable law to expand their jurisdiction. In more recent cases, however, the tribunals seem to have been keener to establish that the disputes brought before them, even when they might raise issues not found under UNCLOS, involve the ‘interpretation and application of the Convention’ as required by Article 288(1) before confirming jurisdiction. Thus, it could be concluded that UNCLOS tribunals have taken a relatively more stringent approach with regard to the legal issues that could fall within their jurisdiction.

1.3 . Exclusions and limitations under Section 3

Articles 297 and 298 set out the limitations and exclusions to compulsory jurisdiction respectively. The limitations under Article 297 are automatically applicable, while those contained under Article 298 are optional. The categories of disputes contained in Article 298 are excluded from compulsory jurisdiction only when the States concerned have made a declaration to that effect.

The *Chagos MPA* arbitration was the first time an UNCLOS tribunal had the opportunity to clarify the scope and meaning of Article 297(1) and (3). First, the arbitral tribunal observed that while located in an article relating to limitations to jurisdiction, paragraph (1) of Article 297 affirmed the tribunal’s jurisdiction not only over the three categories of disputes enumerated in sub-paragraphs (a)-(c) but also other ‘disputes concerning the exercise of sovereign rights and jurisdiction in other cases’ so long as they did not fall under the exceptions in paragraphs (2) and (3).⁷¹⁹ Moreover, the tribunal noted that Article 297(1) expanded the tribunal’s jurisdiction to disputes involving the contravention of not only UNCLOS but also other legal instruments.⁷²⁰ These statements in essence broadened the scope of Article 297(1) beyond the express wording of this paragraph, and stood in stark contrast with long-held scholarly views that other than in the cases enumerated in Article 297(1), a coastal State was immune from challenge with regard to the exercise of its sovereignty rights and jurisdiction.⁷²¹ Second, the tribunal shed light on several key terms contained in Article 297(1)(c), such as

⁷¹⁹ *Chagos MPA* (n106) [317]

⁷²⁰ *ibid* [316].

⁷²¹ Stephen Allen, ‘Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction’ (2017) 48(3-4) ODIL 313, citing Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 455; Bernard Oxman, ‘Courts and Tribunals: The ICJ, ITLOS and Arbitral Tribunals’ in Rothwell et al (n 210) 394, 404.

‘international rules and standards’⁷²² and ‘protection and preservation of the marine environment’,⁷²³ which again resulted in giving Article 297(1) a broader scope than its wording might suggest. Finally, it found that Article 297(1)(c) gives UNCLOS tribunals jurisdiction over disputes relating to violations of procedural obligations concerning the protection of the environment.⁷²⁴ The combined effect of these findings is that Article 297(1) confers on UNCLOS tribunals a broader scope of jurisdiction than first meets the eye.

Turning to Article 297(3), the complicated design of the Convention regarding fisheries competences means that the scope of application of Article 297(3) is not always clear. The *Chagos MPA* arbitral tribunal made important contributions to elucidating on several important aspects of this paragraph. First, the tribunal clarified that even when a dispute was deemed to fall under Article 297(1), the limitations under Article 297(3) would not cease to apply, meaning that any aspects of the dispute pertaining to fisheries in the EEZ would still be excluded from the jurisdiction of the tribunal.⁷²⁵ The tribunal thus rejected Mauritius’ attempt to use Article 297(1) to trump the limitations set out under UNCLOS concerning fisheries in the EEZ. At the same time, it prevented the UK from using an expansive interpretation of the limitations under Article 297(3) to avoid jurisdiction altogether. Second, the tribunal rejected Mauritius’ contention that Article 297(3) could exclude disputes concerning sovereign rights of the coastal state with respect to living resources in the EEZ, but not those involving the rights of other States in the EEZ, as the tribunal believed that these two categories of rights are deeply intertwined, making such a distinction was artificial.⁷²⁶

Third, the tribunal confirmed that the limitations contained in Article 297(3) still applied to the straddling fish stocks that were found in the EEZ of the coastal State, despite acknowledging the shortcoming of a jurisdictional separation between disputes relating to fisheries in the EEZ and those in the high seas in view of the need to manage the fish stocks as a biological unit.⁷²⁷ The arbitral tribunal, relying on the *Barbados v Trinidad and Tobago* arbitral award,⁷²⁸ held that the limitations under Article 297(3) also applied to procedural obligations, including the obligations to consult and coordinate pursuant to Articles 63, 64 and 194 of the Convention and Article 7 of the 1995 UNFSA.⁷²⁹ This meant that disputes

⁷²² *ibid* [321], [322]

⁷²³ *ibid* [320].

⁷²⁴ *ibid* [322].

⁷²⁵ *ibid* [97], [300].

⁷²⁶ *ibid* [297].

⁷²⁷ *ibid* [301]

⁷²⁸ *ibid* [300].

⁷²⁹ *ibid*.

concerning alleged violations of procedural obligations in fisheries would fall beyond reach of UNCLOS tribunals. This reliance on the *Barbados v Trinidad and Tobago* arbitration seemed, however, to have been misplaced. The right alleged to have been violated in that case was the right of Barbadian fishermen to have access to the resources in the EEZ of Trinidad and Tobago.⁷³⁰ Clearly this was not a procedural right and it encroached on the right of Trinidad and Tobago to exercise exclusive sovereign rights over its fisheries resources in its EEZ. In contrast, in this case, Mauritius claimed that the UK had failed to seek agreement on the measures necessary to co-ordinate and ensure the conservation and development of stocks of tuna under Article 63(1), and that it had failed to agree upon the measures necessary for the conservation of stocks of tuna in the area adjacent to the MPA under Article 63(2) and to cooperate directly with Mauritius and other States, or through appropriate international organisations, with regards to highly migratory species throughout the Indian Ocean region beyond the EEZ under Article 64(1). The obligations to seek to agree and to cooperate do not prejudice or compromise the exercise of sovereign rights of the UK over the fish stocks in the EEZ of the Chagos Archipelago. They are, therefore, different in nature to those discussed in *Barbados v Trinidad and Tobago*. In any case, as Judges Kateka and Wolfrum correctly pointed out, Article 297(3)(a) cannot be used as a blanket limitation to exclude all fisheries disputes, including those pertaining to procedural obligations.⁷³¹

The tribunal's view also stood in contrast with the opinion appended by Judge Paik in the *Advisory Opinion on IUU Fishing* before ITLOS. He observed that disputes arising from Article 63(1), unlike disputes concerning coastal States' sovereign rights over living resources, 'can be submitted to the compulsory procedure under Part XV, section 2, of the Convention'.⁷³² Even though the arbitral tribunal's conclusion reaffirmed the importance of procedural rules in the protection of the environment, including the marine environment, it is arguable that the tribunal wrongly narrowed the scope of its compulsory jurisdiction by expanding the applicability of Article 297(3) to include procedural obligations.

Article 298, in turn, came under scrutiny in *Arctic Sunrise* between Netherlands and Russia concerning the latter's boarding, arrest and detention of a vessel flying the Dutch flag and its crew.⁷³³ In this case, the arbitral tribunal had to consider whether a declaration which

⁷³⁰ *Barbados v Trinidad and Tobago* (n 337) [276].

⁷³¹ *Chagos MPA*, Dissenting Opinion of Judges Wolfrum and Kateka (n 707) [58].

⁷³² *Advisory Opinion on IUU Fishing*, Separate Opinion of Judge Paik (n 242) [37].

⁷³³ Article 298 first came up in *Chagos MPA*. However, Article 298 was examined in order to shed light on the question regarding whether the arbitral tribunal had jurisdiction to entertain territorial sovereignty disputes under Article 288(1). The tribunal did not scrutinise any of the exceptions contained in this article.

excluded all ‘disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction’,⁷³⁴ was permissible under Article 298. The arbitral tribunal’s response was in the negative.⁷³⁵ States could only exclude disputes relating to marine scientific research or fisheries, which were ‘the only areas in which the jurisdiction of a court or tribunal can validly be excluded pursuant to Articles 297(2) and 297(3) read with 298(1)(b) of the Convention’.⁷³⁶ The *Arctic Sunrise* award thus rejected an expansive interpretation of Article 298.

To date, the *South China Sea* arbitration has provided the most comprehensive examination of the exclusions under Article 298. The Annex VII arbitral tribunal adopted a narrow interpretation of all the exclusions under this article and found only one exclusion relating to military activities under Article 298(1)(b) applicable to the case before it. The tribunal held that Article 298(1)(a) excluding disputes concerning maritime delimitation ‘does not reach so far as to capture a dispute over the existence of entitlements that may—or may not—ultimately require delimitation’.⁷³⁷ As for the exclusion of disputes concerning ‘historical bays or titles’ under Article 298(1)(a)(i), the tribunal found that this proviso should properly be understood as excluding ‘disputes...involving historic bays or titles’,⁷³⁸ not only disputes concerning ‘delimitation...involving historic bays or titles’ as the Philippines had argued. The tribunal also made an important distinction between ‘historic titles’ within the meaning of Article 298(1)(a)(i) and ‘historic rights’ claimed by China as the basis for its entitlement in the South China Sea.⁷³⁹ It thus restricted the scope of Article 298(1)(a)(i) by concluding that the latter was not intended to exclude jurisdiction over ‘a broad and unspecified category of possible claims to historic rights falling short of sovereignty’.⁷⁴⁰

In interpreting the exclusions contained in Article 298(1)(b) concerning law enforcement activities, whose scope was to be determined with reference to the exceptions under Article 297, the tribunal made a particular noteworthy observation that Articles 297(3) and 298(1)(b) ‘do not apply where a State is alleged to have violated the Convention in respect

⁷³⁴ *Arctic Sunrise* (n 694) [51].

⁷³⁵ *ibid* [69].

⁷³⁶ *ibid* [76].

⁷³⁷ *South China Sea*, Merits (n 622) [204]. Note, however, that in the *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, the Conciliation Commission considered that the question of transitional period and provisional arrangements of practical nature pending delimitation were excluded from compulsory jurisdiction. See: *Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia*, Decision on Australia’s Objection to Competence (19 September 2016), para 97 <<https://pcacases.com/web/sendAttach/1921>> accessed 25 September 2018.

⁷³⁸ *ibid* [216].

⁷³⁹ *ibid* [225].

⁷⁴⁰ *ibid* [226].

of the exclusive economic zone of another State'.⁷⁴¹ At first glance, this statement seems to be in contradiction with the *Chagos MPA* tribunal's holding relating to Article 297(3). To recall, the tribunal in *Chagos MPA* rejected of the distinction between disputes concerning the coastal State's sovereign rights over living resources in its EEZ and disputes concerning other State's claimed rights in the coastal State's EEZ. However, a closer examination of the two arbitral tribunals' reasoning reveals that they envision two different scenarios. In *Chagos MPA*, the UK was the coastal State within the meaning of Article 297(3) and the challenge was brought by Mauritius against the UK, ie the non-coastal State against the coastal State, regarding the coastal State's failure to fulfil its undertakings regarding its resources in its EEZ. In *South China Sea*, the challenge was brought by the Philippines against China, ie the coastal state against the non-coastal State, regarding the non-coastal State's violation of the coastal State's sovereign rights in the latter's EEZ. In any case, the implication of the combined statements of the *Chagos MPA* and *South China Sea* arbitral tribunals is that the coastal State's sovereign rights in the EEZ are firmly insulated from compulsory jurisdiction.⁷⁴²

Finally, in relation to Article 298(1)(b) relating to military activities, the tribunal held that 'Article 298(1)(b) applies to "disputes concerning military activities" and not to "military activities" as such.' As a result, what is pertinent for the purposes of Article 298(1)(b) is 'whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute'.⁷⁴³ This interpretation prevented the scope of Article 298(1)(b) from becoming all-inclusive, excluding all military activities from the purview of the tribunal.

In short, UNCLOS tribunals have had the opportunity to clarify the scope of application of the limitations and exceptions contained under Articles 297 and 298 in only a handful of cases. What has become clear, however, is that UNCLOS tribunals have taken different approaches to interpreting Article 297 and Article 298. UNCLOS tribunals confirmed that Article 297(1) established—not excluded—the jurisdiction of the tribunal as its title might suggest and also took an expansive view of Article 297(1)(c) to bring more categories of disputes into the ambit of UNCLOS tribunals. At the same time, the arbitral tribunal in *Chagos MPA* also gave the fisheries limitation in Article 297(3) a broad scope, excluding from the tribunal's jurisdiction disputes relating to fisheries that are not apparent from its wording, such as disputes concerning

⁷⁴¹ *ibid* [695].

⁷⁴² Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32(2) *IJMCL* 332, 351.

⁷⁴³ *South China Sea*, Merits (n 622) [1158].

procedural obligations or straddling stocks.⁷⁴⁴ When it comes to the exclusions contained in Article 298, in contrast, UNCLOS tribunals adopted a more restrictive approach, limiting the reach of the optional exclusions regarding disputes over maritime delimitation, law enforcement and military activities.

The expansive approach to interpreting Article 297(1) and restrictive approach to interpreting Article 298 combined meant that the jurisdictional scope of UNCLOS tribunals has been left rather broad, creating more room for the tribunals to exercise their jurisdiction over law of the sea disputes. However, disputes relating to coastal States' sovereign rights in the EEZ are still firmly shielded from the jurisdictional reach of UNCLOS tribunals.⁷⁴⁵

2. Advisory jurisdiction

It has been argued that advisory proceedings are more likely to give international courts and tribunals leeway to develop the law.⁷⁴⁶ As the legal questions submitted for advisory opinions are usually formulated in a more abstract and general manner, and not confined to the facts of the case, the interpretation and clarification of the law in advisory proceedings have the potential to transcend the particular instance and have wider applicability. As with the ICJ, ITLOS as the permanent court established under UNCLOS also has the jurisdiction to give advisory opinions. However, unlike the ICJ, the advisory function is not explicitly conferred upon ITLOS as a whole but only on the SDC. According to Article 191 UNCLOS, the SDC is mandated to 'give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities'. The SDC has indeed exercised this advisory jurisdiction in one instance and as shown in Chapter 4 contributed to clarifying important principles relating to activities in the Area.

More controversial has been the question regarding whether ITLOS as a full tribunal also has jurisdiction to give advisory opinions? This had been a topic of much debate in the scholarly community as UNCLOS does not explicitly provide for such jurisdiction as in the case of the SDC.⁷⁴⁷ ITLOS finally resolved this issue in 2015 in the *Advisory Opinion on IUU Fishing*.

⁷⁴⁴ See Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts And Tribunals' (2016) ICLQ 65(4) 927.

⁷⁴⁵ Natalie Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions' (2016) 15 Chinese Journal of International Law 403, 410.

⁷⁴⁶ Manfred Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law', (1983) 10 Syracuse Journal of International Law and Commerce 239, 249; James L. Kateka, 'Advisory Proceedings before the Seabed Disputes Chamber and before the ITLOS as a Full Court' (2013) 17(1) MPYBUNLO 159, 161; Kerin Oellers-Frahm, 'Lawmaking Through Advisory Opinions?' in von Bogdandy and Venzke (n 18) 86.

⁷⁴⁷ See, eg, Doo-yong Kim, 'Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations

ITLOS founded its advisory jurisdiction on the basis of a combined reading of Article 288(1) of UNCLOS, Article 21 of ITLOS Statute and Article 138 of the Rules of Procedure of ITLOS. More specifically, ITLOS held that Article 21 of ITLOS Statute, existing independently of Article 288 of the Convention,⁷⁴⁸ allows the tribunals to exercise jurisdiction over not only ‘disputes’ and ‘applications’ but also ‘all matters provided for in any other agreement which confers jurisdiction on the Tribunal’.⁷⁴⁹ The words ‘all matters’ in ITLOS’s view, ‘must mean something more than only “disputes”’ and ‘that something more must include advisory opinions if specifically provided for in any other agreement’.⁷⁵⁰ ITLOS also found that ‘the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction’ under Article 138 of the Rules were further met in that instance.⁷⁵¹

ITLOS’ decision to establish advisory jurisdiction despite the lack of express authorisation under UNCLOS has been faced with much opposition by States—as evident in the proceedings of the Advisory Opinion on IUU Fishing, and scholarly criticism.⁷⁵² However, the fact that the full ITLOS tribunal’s advisory jurisdiction has certainly appeared to have opened a wider door for ITLOS to examine questions of law of the sea.⁷⁵³ It is worth noting nonetheless that even then, its power to give advisory opinions is limited to agreements other than UNCLOS that give it such jurisdiction. As things currently stand, there seems to be only one such agreement, i.e. the MCA Convention mentioned above. It is unclear therefore whether ITLOS will have the opportunity to exercise this jurisdiction any time soon. ITLOS’s eagerness to establish advisory jurisdiction, however, could be taken to denote its desire to play a more active role in developing the law.

In conclusion, the fact that UNCLOS tribunals have been given compulsory jurisdiction has undoubtedly paved the way for the tribunals to be able to hear a higher number of disputes,

Convention on the Law of the Sea’ (2010) 11 *Issues in Legal Scholarship* 1; J.L. Jesus, ‘Commentary on Article 138 of the Rules of the Tribunal’ in P Chandrasekhara Rao and Ph Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff 2006) 39; Shabtai Rosenne, ‘International Tribunal for the Law of the Sea: 1996–97 Survey’ (1998) 13 *IJMCL* 487-514; KJ You, ‘Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited’, (2008) 39 *ODIL* 360; Tafsir Malick Ndiaye, ‘The Advisory Function of the International Tribunal for the Law of the Sea’ (2010) 9 *CJIL* 565.

⁷⁴⁸ *Advisory Opinion on IUU Fishing* (n 216) [52].

⁷⁴⁹ *ibid* [4].

⁷⁵⁰ *ibid* [56].

⁷⁵¹ *ibid* [59].

⁷⁵² Ruys and Soete (n 251); Massimo Lando, ‘The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission’ (2016) 29(2) *LJIL* 441.

⁷⁵³ Robin Churchill, while critical of the extent to which UNCLOS tribunals have contributed to the development of the law, acknowledged that the development of the sea by UNCLOS tribunals has been greater in the two advisory opinions. See: Robin Churchill, ‘Compulsory’ Dispute Settlement under the United Nations Convention on the Law of the Sea – How has it operated?’ (Dispute Settlement in the Law of the Sea and Beyond, University of Tromsø, 26–28 May 2016) <<http://www.jus.uio.no/pluricourts/english/blog/guests/2016-06-09-churchill-unclos-pt-2.html>> accessed 25 September 2018.

especially those which otherwise would not have been subject to litigation due to one of the parties' hostility towards third-party settlement. This compulsory jurisdiction has been reinforced by UNCLOS tribunals through their decisions by adopting a restrictive interpretation of the exceptions to jurisdiction and establishing a high threshold for the invocation of other dispute settlement procedures. As a result, UNCLOS tribunals have been able to hear the majority of cases brought before them, thereby giving them the opportunity to develop the law. Put differently, the jurisdictional scope of UNCLOS tribunals does not appear to be a factor that limits the ability of UNCLOS tribunals to contribute to developing the law.

Moreover, from a jurisdictional perspective, it might be reasonable to assume that the contribution of UNCLOS tribunals to the development of the law would be more limited in areas which are excluded from the jurisdiction of the tribunals. It might be expected, therefore, that UNCLOS tribunals would have a limited role to play in the law regulating the coastal States' fisheries and marine scientific research in the EEZ by virtue of Article 297, as well as law enforcement with regard to fisheries in the EEZ, military activities and maritime delimitation by virtue of Article 298. However, it is worth bearing in mind that, first, the exceptions in Article 298 are optional. Not all states have made a declaration under Article 298, and not all declarations have excluded all the categories contained therein.⁷⁵⁴ Therefore, the possibility of Article 298 restricting the jurisdiction of UNCLOS tribunals is already more limited than it might seem. In practice, as mentioned, the only limitation which has successfully been invoked is that relating to fisheries in the EEZ under Article 297(3). But as Chapter 2 shows, the extent to which UNCLOS tribunals have contributed to the rules regarding fisheries in the EEZ is quite significant. This seemingly contradictory reality reminds us that the limitation under Article 297(3) does not cover *all* fisheries-related disputes, only sub-categories of it. So while this limitation has in fact impeded UNCLOS tribunals from considering issues concerning sovereign rights of coastal States over fisheries resources in the EEZ, even in a transboundary context in cases like *Barbados v Trinidad and Tobago*, *Chagos MPA* or in the *Advisory Opinion on IUU Fishing*, there is still ample room for UNCLOS tribunals to contribute to clarifying other aspects of fisheries disputes such as the coastal State's regulatory enforcement power, the flag State's obligations in respect of fisheries in the EEZ, or the law regulating high seas fisheries.

⁷⁵⁴ As of December 2017, there are only nearly 40 declarations appended under Article 298, the majority of which do not exclude all the categories of disputes provided under Article 298. See Declarations and Statements under Articles 287, 298 and 310 of the Convention <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en> accessed 25 September 2018.

II. INSTITUTIONAL DESIGN OF UNCLOS

The law of the sea is indisputably one of the oldest and most developed fields of public international law. The maturity of the law of sea is evident in the large number of rules that exist to regulate oceans-related issues, whether as customary law, treaty law or soft-law instruments, as well as the existence of several institutions in regulating and developing the law. The law of the sea can perhaps be best described as a highly intricate web, at the centre of which is UNCLOS. As one scholar describes, '[UNCLOS] was not intended to deal with all ocean governance matters afresh. It was designed to work with existing rules and institutions, shaping where necessary and harnessing them where appropriate'.⁷⁵⁵ Indeed, many UNCLOS provisions that are vague or general have subsequently been supplemented by implementing agreements such as the UNFSA and other instruments concluded under the auspices of various other institutions of a soft-law nature, such as the FAO documents on IUU fishing, port State control, the International Maritime Organization (IMO) guidelines on vessel-source pollution. This intricate network does not, as it transpires, necessarily mean that the rules are always sufficiently clear in their content and meaning for immediate application. However, it is important to bear in mind that UNCLOS tribunals operate, along with other international institutions, within this finely woven fabric of the law of the sea. Treves observed that 'the law of the sea system of institutions is a rather asystematic system [...] Its strength does not lie in its structural consistency and cohesiveness, but in its functional destination to the implementation of the Convention.'⁷⁵⁶ Thus each of these institutions plays a distinct role in ensuring the effective implementation of the Convention, and ultimately 'in ensuring the evolution of the Convention since its entry into force'.⁷⁵⁷

The existence of other actors in the field, all equipped with the competence to develop rules and regulations concerning the law of the sea within their sphere of expertise, would suggest that any law-development role that UNCLOS tribunals—which only have the explicit mandate to settle disputes—are to assume would need to be assessed in their interaction with other institutions. The work of these institutions, and the demarcation of power thus influence the room available for UNCLOS tribunals, or at least could affect their willingness, to engage in the development of the law. Accordingly, this Part examines the ways in which institutions involved in the law of the sea could change or develop the law of sea, with a view to

⁷⁵⁵ Barnes, Freestone and Ong (n 48) 15.

⁷⁵⁶ Tullio Treves, 'The Law of the Sea "System" of Institutions' (1998) 2(1) MPYBUNLO, 325, 340.

⁷⁵⁷ James Harrison, 'The Law of the Sea Convention Institutions' in Rothwell et al (n 210) 374.

understanding whether and how this might impact UNCLOS tribunals in developing the law of the sea.

1. States parties to UNCLOS

States are the main actors behind the creation of new rules under international law, and thus they have the power to change the law under UNCLOS. State parties to UNCLOS could in theory invoke the amendment procedure provided for under Articles 312 to 314 UNCLOS. However, in practice, this motion has never been triggered. As the requirements for a proposed amendment to be adopted, whether by normal or simplified procedure, are extremely difficult to satisfy,⁷⁵⁸ it is highly unlikely that these are the tools which States would choose in order to change or develop the law under UNCLOS.⁷⁵⁹ State parties, however, still influence the development of the law of the sea in other ways. States parties to UNCLOS make unilateral decisions or enact legislation on a wide range of matters, and in implementing UNCLOS on the ground, States generate practice which reflects their understanding of UNCLOS provisions. The unilateral acts of States thus play an important role in the interpretation of UNCLOS. As held by ITLOS in the *Advisory Opinion on IUU Fishing*, the laws and regulations of States parties in conformity with UNCLOS, constitute ‘part of the legal order for the seas and oceans established by the Convention’.⁷⁶⁰ In practice, ITLOS has referred to State practice relating to the issue under scrutiny to shed light on the provisions of the Convention.⁷⁶¹ In that sense, uniform State practice provides the material for UNCLOS tribunals in interpreting UNCLOS provisions.

When State practice diverges and there is disagreement among States on the scope or meaning of the rights and obligations under the Convention, as analysed in Chapter 1, UNCLOS tribunals may still contribute to the development of the law by deciding between competing views and choose one amidst a diverging body of practice. However, diverging State practice may mean that a concrete rule of law has yet to emerge, and the tribunals would have to be more vigilant in deciding on the meaning to be given to a provision of UNCLOS, so as not to be seen as undertaking a legislative role. In this scenario, State practice still provides the important material on which UNCLOS tribunals could and should draw to interpret the law.

Apart from unilateral State practice, another way in which States may influence the work of UNCLOS tribunals is collectively through multilateral conferences. The most

⁷⁵⁸ See Articles 312 and 313 UNCLOS.

⁷⁵⁹ Freestone and Elferink, ‘Flexibility and Innovation’ (n 265).

⁷⁶⁰ *Advisory Opinion on IUU Fishing* (n 216) [102].

⁷⁶¹ *Tomimaru* (n 113) [72]; *Virginia G* (n 91) [218]. For more detail, see Section 3.

prominent among these are the Meeting of State parties to UNCLOS and the United Nations General Assembly (UNGA). The Meeting of State Parties is in fact not an organ of UNCLOS; instead it is convened by the UN Secretary-General pursuant to Article 319(2)(a). According to its Rules of Procedure,⁷⁶² the functions of the Meeting of State Parties only include electing the members of ITLOS and of the CLCS, considering the annual report of ITLOS and dealing with budgetary and administrative matters.⁷⁶³ The report of ITLOS is delivered annually by the President of ITLOS and provides the State parties with an opportunity to comment on the decisions taken by ITLOS in that year. It has been argued that this reporting system establishes a clear link between ITLOS and States which ‘helps to guarantee that international judges remain responsive to State interests, thus ensuring that States continue to trust these judicial institutions’.⁷⁶⁴ As its functions mainly involve issues of procedural nature, the Meeting of State Parties does not actually have the power to develop substantive law of the sea. Thus, its impact on the work of UNCLOS tribunals has to date been quite minimal.

The UNGA, on the other hand, has the responsibility to ‘[encourage] the progressive development of international and its codification’.⁷⁶⁵ In the field of the law of the sea, in Resolution 49/28 in 1994, the UNGA decided to assume the responsibility to conduct annual consideration, review and evaluation of developments relating to the implementation of the Convention and developments relating to ocean affairs and the law of the sea in general.⁷⁶⁶ The seabed regime under UNCLOS, for example, originated from the concept of ‘common heritage of mankind’ first introduced by the UNGA Resolution 2749 in 1970. In the past few years, the UNGA has been the forum at which States discuss emerging issues in the law of the sea which are not currently regulated, either under UNCLOS or customary law. For example, in 2015 the UNGA adopted Resolution 6/292 which decided to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.⁷⁶⁷ These conferences lay the ground for the

⁷⁶² Rules of Procedure for Meetings of States Parties (24 January 2005), SPLOS/2/Rev.4.

⁷⁶³ There is an ongoing debate relating to whether the Meeting of State Parties should be given the mandate to review the developments in the law of the sea or to take decisions on substantive issues relating to the implementation of the Convention. See Irina Buga, ‘Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction’ in Rothwell et al (n 210) 54; Tullio Treves, ‘The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention’ in Alex G Oude Elferink, *Stability and Change* (n 759) 55.

⁷⁶⁴ Harrison, ‘The Law of the Sea Convention Institutions’ (n 757) 382.

⁷⁶⁵ Charter of the United Nations, 1 UNTS XVI, Article 13.

⁷⁶⁶ Hans Corell, ‘Oversight of the Implementation of the Global Ocean Regime: The Role of the United Nations’ in Davoe Vidas and Willy Onstreng (eds), *Orders for the Oceans at the Turn of the Century* (Kluwer Law International 1999) 340.

⁷⁶⁷ UNGA, Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction’ (19 June 2015) UN Doc A/RES/69/292.

adoption of new rules of law. While not binding, UNGA resolutions furnish the tribunals with evidence regarding where States stand on emerging issues and the path towards which the law regulating these issues is heading. These resolutions, therefore, have the potential to assist the tribunals in the interpretation of relevant UNCLOS provisions. However, the fact that States are still negotiating on these issues means that the legal regime regulating these issues is yet to be settled. This may restrain the discretion of the tribunals when requested to pronounce on these issues, as they should be mindful not to prematurely decide what the law should be before States, the law-makers under international law, could reach an agreement on the issue.

Besides the UNGA, States also convene at diplomatic conferences to conclude implementing treaties to bring changes to UNCLOS, as exemplified by the 1994 Implementation Agreement relating to Part XI and the UNFSA, or to adopt non-binding instruments such as the Rio Declaration on Environment and Development and Agenda 21. These instruments record developments in international law which took place after the entry into force of UNCLOS and provide for important principles that are not found under the Convention such as 'sustainable development' or the 'precautionary principle'. All these documents have 'the effect of legitimizing and encouraging legal developments based on these new perspectives'.⁷⁶⁸ Thus, in whichever form or nature they may be, they may have a bearing on the UNCLOS tribunals' approach to interpreting UNCLOS provisions which touch upon these issues. Indeed, as analysed in previous chapters, the Rio Declaration informed ITLOS' understanding of the status of the 'precautionary principle' in the *Advisory Opinion on Activities in the Area*, and the UNFSA provided guidance to ITLOS in interpreting the 'obligation to ensure' in the *Advisory Opinion on IUU Fishing*, even if ITLOS did not acknowledge this. It follows that subsequent multilateral instruments and UNGA Resolutions have assisted UNCLOS tribunals in interpreting the provisions of the Convention, in the sense that they provided UNCLOS tribunals with indication of what the law regulating certain issues was at the time of interpretation, and thus enabled the tribunals to read these developments into UNCLOS and interpreted the Convention in a way that reflected such developments.

In short, States have an extremely significant role to play in inducing changes to the law of the sea. Unilateral State practice and subsequent instruments adopted by States in multilateral conferences provide evidence of a common understanding on the part of States in implementing the Convention, and thus offer guidance to the tribunals on the meaning to be given to the terms or provisions of the Convention. In that sense, States practice supports the law development role of UNCLOS tribunals. However, when a legal issue is subject to diverse State practice, the

⁷⁶⁸ Birnie, Boyle and Redgwell (n 620) 384.

lack of agreement on the part of States regarding the rule of law to be put in place may restrain the ability or willingness of UNCLOS tribunals to develop the law in those areas. Although this scenario has yet to concretise in the practice of UNCLOS tribunals, it is most likely to be a factor that could impact the extent to which UNCLOS tribunals are willing to venture into uncharted waters for fear of being accused of assuming the role of legislators.

2. UNCLOS institutions

Apart from ITLOS and Annex VII arbitral tribunals, UNCLOS also provide for the establishment of two other institutions: the CLCS and ISA. The former is responsible for overseeing the delineation of the continental shelf beyond 200 nm, and the latter for the implementation of the deep seabed mining regime under Part XI of the Convention. While neither of these bodies are explicitly given the role of developing UNCLOS, each has its own institutional machinery and powers to generate procedural rules for its functioning.⁷⁶⁹ These rules have the potential to clarify and develop UNCLOS provisions in relation to these specific areas. Thus the question that arises is: what impact do the competence and operation of these institutions have on the work of UNCLOS tribunals? While UNCLOS may contain specific provisions purporting to regulate the relationship between these institutions, the practice of these institutions reveals that the interaction between UNCLOS tribunals and themselves is not at all straightforward.

With regard to the CLCS, Article 76(10) stipulates that the provisions of Article 76 'are without prejudice to the question of delimitation of the continental shelf'. As discussed in Chapter 3, in *Bangladesh/Myanmar*, ITLOS acknowledged the differences between the function of the CLCS as a scientific body and that of its own as a dispute settlement body. Thus it held that it could proceed with delimitation of the outer continental shelf, even in the absence of a recommendation on the outer limits of the shelf by the CLCS.⁷⁷⁰ By emphasising that the request brought before them was legal in nature, enabling them to exercise jurisdiction, the tribunals seemed to imply that they would refrain from clarifying technical and scientific terms of the Convention, because that would be in the realm of the CLCS' expertise. The UNCLOS tribunals' reasoning in this regard showed that they were cognisant of the limits of their powers in relation to the development of the regime of the outer continental shelf due to the existence of the CLCS.

⁷⁶⁹ Barrett (n 55) 19.

⁷⁷⁰ *Bangladesh/Myanmar* (n 338) [411]. The Annex VII arbitral tribunal in *Bangladesh/India* followed this line of reasoning to proceed with the delimitation of the outer continental shelf. See *Bangladesh/India* (n 339) [76].

Does the CLCS, however, have the power to provide legal interpretation of the Convention? This question is pertinent as it means that in dealing with issues relating to the continental shelf, UNCLOS tribunals would have to be aware of the role of the CLCS and decide the cases in such a way as to incorporate CLCS' interpretation, or at least, to not conflict with the latter's approach. The answer to the above question seems to be in the positive if one looks at the CLCS's Scientific and Technical Guidelines. These Guidelines state that one of their purposes is 'to clarify its interpretation of scientific, technical and *legal terms* contained in the Convention'.⁷⁷¹ The CLCS explained that such clarification was necessary for three reasons: (i) the Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology, (ii) the Convention does not 'determine the precise definition of various scientific and technical terms', and thus various terms in the Convention might be left open to several possible and equally acceptable interpretations, and (iii) several provisions are so complex that States might encounter potential scientific and technical difficulties in making a single and unequivocal interpretation of each of them.⁷⁷² Based on this, Judge Nelson argued that 'the Commission is not unaware of this role', ie the role to interpret and apply the provisions of the Convention relevant to its work.⁷⁷³

Moreover, the mandate of the CLCS is to consider State parties' submissions and to provide recommendation regarding the outer limits of the continental shelf 'in accordance with Article 76'.⁷⁷⁴ However, the 'continental shelf' concept under Article 76 is not purely scientific, it is also of a juridical nature. Law and science are thus deeply intertwined. It would not be difficult, therefore, to envision a situation in which '[w]hile one interpretation of a provision of Article 76 may lead to the conclusion that specific data proves that the requirements of the Article are met, under another interpretation the same data might not provide sufficient proof in this respect.'⁷⁷⁵ Therefore, in the course of assessing scientific information in the submissions, the CLCS may have to undertake the task of interpreting legal terms under Article 76 in order to decide whether the submissions have met the technical requirements of this article.⁷⁷⁶ As a result, the International Law Association noted that:

⁷⁷¹ CLCS, 'Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf' (13 May 1999) CLCS/11.

⁷⁷² *ibid.*, 7.

⁷⁷³ See LDM Nelson, 'The Commission on the Limits of the Continental Shelf and Coastal States' Submissions' in Holger P Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, vol 1 (Brill 2011) 980 .

⁷⁷⁴ Article 3(1)(a) of Annex II to UNCLOS.

⁷⁷⁵ First Report of the Committee, 'Legal Issues of the Outer Continental Shelf' in International Law Association Report of the Seventy-Second Conference (International Law Association, Berlin 2004) 3.

⁷⁷⁶ Bjorn Kunoy, 'The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate' (2012) 25 LJIL109, 110; Rüdiger Wolfrum, 'The Role of International Dispute Settlement

The Convention does not charge the Commission to consider and make recommendations on legal matters. However, the Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of Article 76 or other relevant Articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it.⁷⁷⁷

It follows that the line between what could be considered a scientific and what is a legal interpretation of Article 76 may not be as clear cut as UNCLOS tribunals made it out to be in the *Bay of Bengal* cases. In practice, in assessing the submissions of State parties regarding the outer limits of the continental shelf, the CLCS's interpretation of the terms contained under Article 76 also contributes to interpreting this article by introducing new requirements to Article 76 or new rules to Annex II.⁷⁷⁸

Does the fact that the CLCS has the ability and, in practice, has engaged in interpreting Article 76, have a bearing on the way UNCLOS tribunals interpret Article 76?⁷⁷⁹ The CLCS's recommendations are not always made public, and when they are, they are more often than not in the form of a mere summary. Thus, it is not always easy for UNCLOS tribunals—or for State parties for that matter—to fully grasp whether and to what extent the CLCS has engaged in treaty interpretation. In the spirit of comity, and in order to ensure the uniformity of the Convention, it is of course advisable for UNCLOS tribunals take into account the interpretation adopted by the CLCS, although no specific provisions under UNCLOS would seem to compel such adherence. In practice, ITLOS in *Bangladesh/Myanmar* referred to the 'test of appurtenance' contained in the CLCS' Scientific and Technical Guidelines, a concept which was not found under Article 76,⁷⁸⁰ to assist it in shedding light on the meaning and the role of 'natural prolongation', a concept which, in turn, the CLCS 'largely avoids using'.⁷⁸¹ Although this was just one instance, it suggests that ITLOS would most likely be willing to take into consideration the interpretation of Article 76 adopted by the CLCS in its recommendations.

Institutions in the Delimitation of the Outer Continental Shelf' in Lagoni and Vignes (n 702) 24; LDM Nelson, 'The Continental Shelf: Interplay of Law and Science' in Nisuke Ando et al (eds), *Liber Amicorum Judge Shigeru Oda*, vol 2 (Kluwer Law International 2002) 1238.

⁷⁷⁷ International Law Association (n 775) 5.

⁷⁷⁸ See Kunoy, 'The Terms of Reference' (n 776) 118, 119; Andrew Serdy, 'The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate' (2011) 26 IJCLM 355; Oystein Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy* (Brill 2014) 47–92.

⁷⁷⁹ For a detailed discussion on whether the CLCS recommendations could be considered as a traditional source of international law for the purposes of treaty interpretation, see Jensen (n 778) 119–33.

⁷⁸⁰ Lindsay Parson, 'Observations on the Article 76 Process: Coastal States' Submissions and the Work Outstanding for the Commission on the Limits of the Continental Shelf' in Barrett and Barnes (n 55) 124.

⁷⁸¹ *ibid.*

In short, there exist two institutions under UNCLOS which are responsible for overseeing the regime of the continental shelf, the CLCS and the dispute settlement bodies. Although the two institutions' tasks are demarcated by a line drawn between science and law, this line is blurry in practice. The CLCS can and in fact has taken up the role of providing legal interpretation, thus there is an overlap in the functions of the two as far as Article 76 is concerned. The implication of this overlap is that UNCLOS tribunals would need to take into account the work of the CLCS in deciding the cases. ITLOS has in fact done so. But the Bay of Bengal case also suggests that UNCLOS, while still acknowledging the limits of their functions as imposed under UNCLOS, were not deterred from hear the case even when the question before them may implicate the function of the CLCS.

Turning to the ISA, this is an autonomous international organisation, 'through which States Parties shall [...] organize and control activities in the Area, particularly with a view to administering the resources in the Area'.⁷⁸² The core function of the ISA is to encourage the development of deep seabed mining, but it is also entrusted with other important tasks, including the transfer of technology to developing States, the protection of human life with respect to activities in the Area, and the protection of the environment from harmful effects that may arise from such activities. In fulfilling its duties, the ISA has to date adopted three Regulations, namely the Nodules Regulations in 2000, the Sulphides Regulations in 2010, and the Cobalt-rich Ferromanganese Crusts Regulations in 2012. The latter two Regulations are of particular interest because they 'opened the door for claims for exploration sites to be made in respect of resources other than polymetallic nodules, which had been the only deep seabed resources discussed during the Conference'.⁷⁸³ These Regulations are thus evidence that the ISA has already been engaged in developing the legal regime of the Area under the Convention in line with the advancement of technology. The ISA also has the power to adopt criteria for equitable sharing of financial and other economic benefits derived from activities in the Area, for equitable sharing of payments or contributions made under Article 82 concerning the exploitation of non-living resources of the continental shelf beyond 200 nm, as well as to adopt rules and regulations applicable to the conduct of third parties in the Area. These powers highlight the important role that the ISA plays under the Convention with regard to developing the regime of the Area.

⁷⁸² Article 157 UNCLOS.

⁷⁸³ Helmut Tuerk, 'UNCLOS Institutions and Their Roles', Maritime Issues (28 February 2017) <<http://www.maritimeissues.com/uploaded/HTBD8/UNLCOS%20institutions%20and%20their%20role.pdf>> accessed 25 September 2018.

Disputes relating to the Area fall under the jurisdiction of the SDC. Although the SDC is part of ITLOS and comprises judges from the tribunal itself, it has a specific jurisdiction, separate from that of the Tribunal, to deal with disputes with respect to activities in the Area falling within the categories listed under Article 187. One of the reasons for the existence of the SDC was the uncertainties regarding the manner in which the ISA might carry out its responsibilities. As a result, during the Third Conference, there was a strongly held view that a tribunal should be established to serve as a check on the Authority's actions.⁷⁸⁴ However, Article 189 makes clear that the SDC has 'no jurisdiction with regard to the exercise by the Authority of its discretionary powers' under Part XI of the Convention and 'in no case shall it substitute its discretion for that of the ISA'. This Article thus prevents the SDC from venturing into areas which are under the exclusive regulatory power of the ISA. Given the broad competence of the ISA as described above, this suggests that the room available for the SDC to contribute to the development of the UNCLOS provisions relating to the Area is restricted. The SDC acknowledged this limitation itself. When dealing with the question of the liability of a State party for a sponsored entity's failure to comply with the Convention, for example, the SDC held that the Authority has only dealt with prospecting and exploration, but not liability arising from exploitation.⁷⁸⁵ It then stated that 'it does not consider itself to be called upon to lay down such future rules on liability'.⁷⁸⁶ This statement clearly demonstrates the awareness on the part of the SDC regarding the scope of its power in dealing with the Area.

However, Article 189 only prohibits the SDC from pronouncing on the conformity of the ISA' rules, regulations and procedures with UNCLOS. It does not prevent the SDC from interpreting those rules and regulations in order to clarify their content, because it clearly has the jurisdiction to hear disputes concerning whether the ISA has violated the rules and regulations it has put in place pursuant to Article 187(b). Moreover, the SDC also has the explicit jurisdiction under Article 187(a) to decide on disputes concerning the interpretation and application of [Part XI] and the Annexes', as well as disputes between a State Party and the Authority and between parties to a contract. In hearing these disputes, there is still ample opportunity for the SDC to clarify UNCLOS provisions in Part XI and thereby contribute to the development of the legal regime regulating the Area.

Apart from contentious proceedings, the SDC also has the exclusive power to render advisory opinions on legal questions arising within the scope of the activities of the Assembly and Council of the ISA. Unlike the controversial power of the ITLOS as a full tribunal to give

⁷⁸⁴ Noyes (n 57) 677.

⁷⁸⁵ *Advisory Opinion on Activities in the Area* (n 235) [168].

⁷⁸⁶ *ibid.*

an advisory opinion, this power of the SDC is explicitly spelled out in the Convention as well as the Statute of the Tribunal. As shown in Chapter 4, the SDC made use of this jurisdiction in the *Advisory Opinion on Activities in the Area* to elucidate an important obligation relating deep seabed mining under UNCLOS—the obligations of sponsoring States in the Area—thereby contributing to strengthening the principles for marine environmental protection applicable not only to the Area but also the law of the sea in general. In the course of doing so, the two Regulations of the ISA played an important part in guiding the SDC in the interpretation of the ‘obligation to ensure’. In this instance, the discretionary power of the ISA, resulting in specific rules and regulations, facilitated the capacity of UNCLOS tribunals to develop the law.

In sum, UNCLOS clearly envisions separate roles for the different institutions that it establishes. What they all have in common, however, is the task to ensure the uniform and effective implementation of UNCLOS. This means that UNCLOS tribunals, when performing their functions, should be mindful of the work of the other two institutions. The tribunals’ decisions to date suggest that ITLOS has also shown restraint when a particular issue clearly falls within the power of the other institutions, as seen in the *Advisory Opinion on Activities in the Area*. However, the Bay of Bengal cases also show that UNCLOS tribunals have not refrained from examining an issue which could potentially fall within the competence of the other institutions, when it determined that such an issue requires the interpretation and application of UNCLOS. In other words, a mere overlap in function did not prevent ITLOS from examining the cases. Furthermore, the two cases in which the question of the relationship between UNCLOS tribunals and other institutions established under the Convention arose, ie the *Bay of Bengal* cases and the *Advisory Opinion on Activities in the Area*, demonstrated that the work of these two institutions could also have a facilitating, rather than restraining, effect on the ability of UNCLOS tribunals to develop the law. UNCLOS tribunals have harnessed the expertise that the Convention confers on these institutions to assist them in shedding light on the meaning of vague UNCLOS provisions.

3. Other international organisations referred to in UNCLOS

Apart from the UNGA as discussed above, a number of UN specialised bodies are involved in ocean issues. It would be impossible within the limited space of this chapter to examine the functions and impact of all of these organisations on the work of UNCLOS tribunals. Attention will thus be directed to the two bodies whose roles feature most prominently under UNCLOS, ie the FAO and IMO. These two bodies already existed before UNCLOS came into force. The Convention acknowledges their existence and defers to their expertise by making references to these bodies in various provisions, albeit rarely by name.

The IMO has competence in the regulation of international shipping and navigation for safety, vessel-source pollution, and maritime security.⁷⁸⁷ UNCLOS defers to the expertise of the IMO in two ways, either by assigning the task of developing the rules under UNCLOS to States acting through the IMO, or by making implicit reference to IMO's own competence.⁷⁸⁸ The former mode could be seen in respect of maritime safety and marine pollution, for which UNCLOS does not specify the content of the rules, and standards.⁷⁸⁹ For these issues, the IMO facilitates the convening of diplomatic conferences and exercise its quasi-legislative function by using its own governance structure.⁷⁹⁰ UNCLOS refers to the IMO as the developer of the rules and standards in several provisions, such as in Article 60(3) relating to the duty of the coastal State to remove abandoned or disused installations and structures, or Article 41(4) on designating or substituting sea lanes or prescribing or substituting traffic separation schemes. The IMO draws direct authority to adopt such standards from its constitutive instrument and particular maritime conventions, such as the International Convention for the Safety of Life at Sea. In the exercise of these powers, the IMO plays a particularly important role in developing UNCLOS as it provides 'substantive content to the jurisdictional schemes and prescriptions for cooperation on navigation and shipping matters in the [UNCLOS]'.⁷⁹¹

In *South China Sea*, the Annex VII arbitral tribunal was willing to recognise the Convention on the International Regulations for Preventing of Collisions at Sea (COLREGS)⁷⁹²—a Convention of the IMO—as 'generally accepted international regulations' referred to under Article 94(5) in order to determine the scope of flag States' duties.⁷⁹³ Even though this article did not specifically refer to the IMO as the 'competent organisation', the tribunal confirmed the relevance of COLREGS to the interpretation of UNCLOS provisions relating to flag States' obligations over their vessels.

With regard to FAO, this organisation has an important role in the field of fisheries and aquaculture, especially in promoting responsible and sustainable use of fisheries resources. As such, FAO 'provides, both at global and regional levels, an institutional framework within which, [...] rules and standards may be negotiated but also political commitments adopted as

⁷⁸⁷ IMO, 'IMO: What is it' <http://www.imo.org/en/About/Documents/What%20it%20is%20Oct%202013_Web.pdf> accessed 25 September 2018.

⁷⁸⁸ Aldo Chircop, 'The International Maritime Organization' in Rothwell et al (n 210) 431.

⁷⁸⁹ Rudiger Wolfrum, 'IMO Interface with the Law of the Sea Convention' in John Norton Moore and Myron H Nordquist (eds), *Current Maritime Issues and the International Maritime Organization* (Nijhoff 1999) 229.

⁷⁹⁰ Chircop (n 788) 430.

⁷⁹¹ *ibid* 418.

⁷⁹² Convention on the International Regulations for Preventing Collisions at Sea (20 October 1972) 1050 UNTS 16.

⁷⁹³ *South China Sea*, Merits (n 622) [1083].

well as concrete measures'.⁷⁹⁴ In particular, FAO adopted in 1995 the Code of Conduct for Responsible Fisheries and several other important international instruments in the form of plans of actions, strategies, guidelines and agreements, with varying degrees of bindingness, aimed at strengthening the mechanisms to combat harmful fishing practices.⁷⁹⁵ In addition, FAO has RFMOs present in all regions of the world, which are now a key component of the international institutional framework for ocean governance, and it also provides support to RFMOs established outside its framework.⁷⁹⁶ Given the emphasis under UNCLOS on the conservation and management of marine resources, as well as the need for cooperation between States in this regard, it is not difficult to see the important role that FAO plays and the impact that the instruments adopted under its auspices have on the development of the law relating to sustainable fisheries. In the *Advisory Opinion on IUU Fishing*, the fisheries agreements that FAO had adopted, in addition to the UNFSA, provided the basis for ITLOS to read into UNCLOS the flag State's obligations over fishing vessels and States' obligation for sustainable development of fisheries resources, albeit without any such acknowledgement. Many of the instruments adopted by these bodies are non-binding in nature, thus by themselves, they have little normative force to compel action by States. However, by incorporating them into UNCLOS, the tribunals endowed authority on them and strengthened their normative value. In that sense, UNCLOS tribunals and these specialised organisations enjoy a mutually reinforcing relationship.

In conclusion, UNCLOS tribunals are not the only institutions established by UNCLOS to ensure its effective implementation. The Convention incorporates the rules and standards set by other international organisations such as FAO or IMO into its provisions, thus giving these bodies the competence to develop the law in their respective field of expertise. Lowe and Tzanakopoulos contend that international bodies with specific technical expertise such as FAO or IMO have the role of 'the regulators' whose task is to set out guidelines and regulations in relation to the technical details, which eventually shape the content of the law.⁷⁹⁷ Given that UNCLOS clearly confers the power to develop rules in certain areas to these 'regulators', the room left for UNCLOS tribunals to develop technical details in the areas under the purview of these bodies would seem to be restricted. However, the *Advisory Opinion on IUU Fishing* and

⁷⁹⁴ Jean-François Pulvenis, 'FAO, Ocean Governance, and the Law of the Sea' in Harry N. Scheiber, Jin-Hyun Paik (eds) *Regions, Institutions and the Law of the Sea* (Brill 2013) 123.

⁷⁹⁵ See, eg, Compliance Agreement (n 248); (IPOA-IUU) (n 183); Agreement on Port State Measures (n 248).

⁷⁹⁶ For a list of regional fisheries bodies, see FAO website: <<http://www.fao.org/fishery/rfb/search/en>> accessed 25 September 2018.

⁷⁹⁷ See Vaughan Lowe and Antonios Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in Christian J Tams and James Sloan (eds), *The Development of International law by the International Court of Justice* (OUP 2013).

South China Sea show that UNCLOS tribunals have benefitted from the expertise of these organisations in clarifying the Convention. It seems safe to conclude that the mandate and expertise of the international organisations recognised as ‘competent’ under the Convention, such as the IMO and FAO, have had the effect of facilitating and enabling UNCLOS tribunals to develop the law under the Convention relating to issues in the former’s area of competence. UNCLOS tribunals frequently had resort to the work of these institutions to aid them in the interpretation of the Convention.

III. THE INTERPRETATIVE METHODS EMPLOYED BY UNCLOS TRIBUNALS

As the previous chapters have shown, the development of the law of sea by UNCLOS tribunals—as international dispute settlement bodies—is brought about through their decisions, in which they interpret and apply the legal rules relevant to the case. Thus, if we were to accept that interpretation is the principal way in which international courts and tribunals develop the law, then at first glance, the interpretative method that the court or tribunal uses is of limited significance. As long as the law is interpreted and thus clarified, it has been developed. In other words, any act of interpretation by an international judicial body would be an act of law-development, regardless of the method interpretation used. However, the act of interpretation is one that is inherently subjective in nature as the text of the treaty rarely carries one single meaning.⁷⁹⁸ The meaning of the terms or the scope of the rules contained in UNCLOS do not exist independently in a vacuum, waiting to be discovered by the tribunals. It is instead created through the tribunals’ interpretative act. The previous chapters have also shown that the tribunals have interpreted UNCLOS in such a way as to incorporate into the Convention the developments that have taken place in practice and to reflect current trends in the law of the sea. In that sense, UNCLOS tribunals have developed of the law in line with evolving circumstances, thereby maintaining the relevance and applicability of the Convention in the regulation of current activities at sea. Against such a background, this section seeks to understand how UNCLOS tribunals have approached the question of treaty interpretation, paying specific attention to the question of whether the tribunals deliberately employed a particular interpretative method to assist them, through interpretation, in developing UNCLOS in line with current practice.

The departure point for any treaty interpretation exercise would be the principles of treaty interpretation contained in Articles 31 to 33 of the VCLT, which reflect customary international

⁷⁹⁸ Harrison, ‘Judicial Law-Making’ (n 6) 286.

law.⁷⁹⁹ However, UNCLOS tribunals have only sparingly referred to the VCLT. ITLOS explicitly invoked the VCLT in the *Advisory Opinion on Activities in the Area*, in which it stated that the rules of treaty interpretation in the VCLT applied not only to the interpretation of UNCLOS and the 1994 Agreement, but also the Regulations adopted by the Authority even when they are not in principle treaties.⁸⁰⁰ In *Chagos MPA*, the Annex VII tribunal explicitly invoked Article 33, and, despite not referring to Article 31, applied all the elements of this article such as ‘ordinary meaning’, ‘context’, ‘object and purpose’ in the course of interpreting Article 2(3) UNCLOS.⁸⁰¹ In *South China Sea*, the arbitral tribunal explicitly stated that ‘the Tribunal must apply the provisions of the [VCLT]’,⁸⁰² particularly Articles 31 and 32 in interpreting the term ‘rock’ under Article 121(3). It then conducted a detailed examination of the meaning of the terms contained in this article, its context, the object and purpose of the Convention, and the *travaux préparatoires* of the Convention.⁸⁰³ Other than these three cases, UNCLOS tribunals have not generally engaged in a discussion regarding the approach to treaty interpretation that they were adopting, nor has the VCLT featured prominently in the case law of UNCLOS tribunals.

In practice, when international courts and tribunals interpret treaty provisions in a way that reflects developments at the time of interpretation, there is a tendency to resort to two interpretative techniques, namely: (i) evolutionary interpretation and (ii) reference to subsequent conduct. The remainder of this part seeks to explore whether UNCLOS tribunals have employed these two techniques to develop the law contained in the Convention.

1. Evolutionary interpretation

The evolutionary interpretative method is a tool used by international courts and tribunals to establish a contemporary meaning of a treaty provision, that is a meaning in the light of the circumstances at the time of its application.⁸⁰⁴ It has been argued that evolutionary interpretation could be an effective means for courts to develop law, as the determination of the meaning of a treaty provision at the time of application ‘allows tribunals to insert their grain of

⁷⁹⁹ *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045 [18]; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 [112].

⁸⁰⁰ *Advisory Opinion on Activities in the Area* (n 785) [58], [59].

⁸⁰¹ *Chagos MPA* (n 690) [499] – [504].

⁸⁰² *South China Sea*, Merits (n 622) [476].

⁸⁰³ *ibid* 477.

⁸⁰⁴ Georg Nolte, ‘First report on subsequent agreements and subsequent practice in relation to treaty interpretation’ International Law Commission, Sixty-fifth session A/CN.4/660, 23. See also Sean D Murphy, ‘The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties’ in Georg Nolte, *Treaties and Subsequent Practice* (OUP 2013) 86.

wisdom'.⁸⁰⁵ The ILC Study Group on Fragmentation of International Law suggested that a treaty has an evolutionary character where: (i) it implies taking into account subsequent technical, economic or legal developments; (ii) it sets up an obligation for further progressive development for the parties; or (iii) it has a very general nature or is expressed in such general terms that it must take into account changing circumstances.⁸⁰⁶ Commentators have also pointed to highly general or open-textured treaty provisions, to provisions in framework conventions, where parties agree that in the future they may further develop the obligations inherent in the treaty language,⁸⁰⁷ or to terms that have a 'generic character'⁸⁰⁸ as the likely subjects of evolutionary interpretation.

In practice, the method of evolutionary interpretation has been employed by several courts such as the ICJ,⁸⁰⁹ the Appellate Body of the WTO⁸¹⁰ and the European Court of Human Rights (ECtHR)⁸¹¹ in three main circumstances. First, as held by the ICJ, a treaty provision or term could be considered evolutionary if 'the parties intended, or presumed to have intended, to give the term a meaning or content capable of evolving, not fixed once and for all'.⁸¹² Second, adjudicators or arbitrators could give a treaty provision an evolutionary meaning if they deem that this is demanded to effectively realise the object and purpose of the treaty.⁸¹³ Finally, and particularly in the case of human rights treaties, when a convention is considered a 'living instrument', a dispute settlement body will adopt the evolutionary approach in order to interpret its provisions 'in the light of present-day conditions'.⁸¹⁴ International courts, particularly the ECtHR, have used the argument of 'a living treaty' to interpret the rights or obligations contained in the relevant conventions in a manner that departs, or appears to depart, from their original meaning as envisioned by the drafters of the convention, or to expand the scope of the convention' rights and obligations and read into the Convention rights and obligations that are

⁸⁰⁵ Eirik Bjorke, 'The Vienna Rules, Evolutionary Interpretation and the Intention of the Parties' in Andrea Bianchi, Daniel Peat, Matthew Windsor, *Interpretation of International Law* (OUP 2015) 191.

⁸⁰⁶ ILC, 'Fragmentation of International Law: Conclusions of the work of the Study Group' (18 July 2012) UN Doc A/CN.4/L.702, 22-23.

⁸⁰⁷ See Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 LPIC 443; Murphy (n 804).

⁸⁰⁸ Paolo Palchetti, 'Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning' in Boschiero et al (n 11) 91.

⁸⁰⁹ See, eg, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v US)* [1952] ICJ Rep 189; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, [1971] ICJ Rep 16; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 243 [63].

⁸¹⁰ *United States-Shrimps* (n 283) .

⁸¹¹ *Tyrer v the United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978; *Marckx v Belgium*, Application no. 6833/74, Judgment of 13 June 1979.

⁸¹² *Costa Rica v Nicaragua* (n 809) [64].

⁸¹³ *Iron Rhine Arbitration* (Belgium v Netherlands), Award, ICGJ 373 (PCA 2005) [80].

⁸¹⁴ *Tyrer v United Kingdom* (n 811) [31].

not expressly contained therein.⁸¹⁵ Moeckli and White argue that, apart from human rights treaties, treaties that are constitutive of international organisations, such as the UN Charter, or law-making treaties such as those in the field of humanitarian law or environmental law can also be considered to be ‘living’.⁸¹⁶ They further argue that ‘[t]reaties with courts or quasi-judicial bodies are likely to have more ‘life’ than treaties that rely on a review conference of the state parties’.⁸¹⁷ This statement suggests an implicit acknowledgment that international courts and tribunals are an important driving force in bringing ‘life’ to treaties.

As mentioned in Chapter 1, UNCLOS serves as a ‘Constitution for the oceans’ and a framework Convention for all uses of the sea. Moreover, it is also a law-making treaty as it sets up a new legal regime for ocean governance and has an integral dispute settlement system of its own. A recent study also concluded that UNCLOS has all the characteristics of a living treat due to the ‘structure and substance, and the complex legal networks it generates and is situated within’ which ‘enable it to adopt to changing realities’.⁸¹⁸ Despite all these characteristics, UNCLOS tribunals have never acknowledged that evolutionary interpretation had a role to play in deciding cases. There was some vague hint in the *Advisory Opinion on Activities in the Area*, in which the SDC stated that the concept of the ‘obligation to ensure’, as an obligation of due diligence, ‘may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge’.⁸¹⁹ However, the SDC did not take this matter further.

In contentious cases, some States parties appearing before UNCLOS tribunals have called on the tribunals to adopt an evolutionary interpretation of UNCLOS provisions. However, again UNCLOS tribunals have all rejected such an invitation. In *Virginia G*, Guinea-Bissau advocated for ‘an evolutionary interpretation of the Convention’ to recognise the regulation of bunkering of fishing vessels in the EEZ as falling under the sovereign rights and jurisdiction of the coastal State.⁸²⁰ It asked ITLOS to read into UNCLOS the coastal State’s right to regulate the bunkering of fishing activities, when the wording of the relevant Articles, ie Articles 56, 61, 62 and 73, do not explicitly provide for such an activity. ITLOS did not

⁸¹⁵ See Alastair Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5(1) Human Rights Law Review 57; George Letsas, ‘The ECHR as a Living Instrument in A Føllesdal, B Peters, G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2003) 106.

⁸¹⁶ Daniel Moeckli and Nigel D White, ‘Treaties as ‘Living Instruments’ in Dino Kritsiotis and Michael Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP, forthcoming)

⁸¹⁷ *ibid.*

⁸¹⁸ Richard Barnes, ‘The Continuing Vitality of UNCLOS’ in Barrett and Barnes (n 55) 487.

⁸¹⁹ *Advisory Opinion on Activities in the Area* (n 235) [117].

⁸²⁰ *Virginia G* (n 91) [187].

respond to this argument in its judgment, and as will be shown below, adopted a different interpretative technique to address this issue.

In *Chagos MPA*, Mauritius, in arguing for the tribunal's jurisdiction over territorial sovereignty, called for 'an evolutionary process in the application of compulsory dispute settlement under the Convention'. In particular, Mauritius contended that:

[A]s the [ITLOS] and Annex VII Tribunals have been confronted with a range of issues and questions that may not have been at the forefront of the minds of the drafters of the Convention, or indeed in their minds at all, sensible solutions have been found, and the law has evolved. Those solutions have been practical and they have been effective. It is true that they may have taken the interpretation of the Convention to a place where some of the early writings that the United Kingdom likes to rely upon may not have foreseen and may not like it. But it cannot be said that disaster has followed.⁸²¹

Mauritius thus recognised that by inviting the arbitral tribunal to establish jurisdiction over territorial disputes, it was essentially calling on the tribunal to deviate from the intention of the drafters and adopt an evolutionary interpretation of the scope of its jurisdiction. The Annex VII tribunal, however, rejected this evolutionary approach for several reasons, one of which being that an expansion of jurisdiction to cover matters of land sovereignty 'would do violence to the intent of the drafters of the Convention'.⁸²² It is worth recalling that, one of the grounds for the adoption of evolutionary interpretation is the intention of the drafters to allow the treaty term or provision to be evolutionary. Thus reference to the drafters' intention does not necessarily restrict or prohibit an evolutionary interpretation of the treaty. In this case, the arbitral tribunal indeed referred to the drafters' intention to determine whether a broadened scope of jurisdiction was envisioned. The tribunal's refusal to adopt evolutionary interpretation in this case was, however, not difficult to understand as the matter under consideration was a procedural issue, ie the tribunal's jurisdictional scope. The room for evolutionary interpretation resulting in an expansion of jurisdiction is limited due to the importance of State's consent in international dispute settlement.

In the same vein, UNCLOS tribunals have not expressly acknowledged that the Convention is a 'living treaty'. An examination of the case law of both ITLOS and Annex VII arbitral tribunals shows that the notion of 'living treaty' never appeared in the decisions of these bodies. This term only appeared once in the decision of ITLOS in its *Advisory Opinion on IUU*

⁸²¹ *Chagos MPA* (n 106) [200].

⁸²² *ibid* [219].

Fishing. But even then, ITLOS was only recalling the argument made by some States that ‘the purpose of Article 21 of the Statute is to shape the Tribunal as a living institution’ while deciding whether it could exercise advisory jurisdiction.⁸²³ It did not address this argument in its examination of Article 21 of the Statute. In fact, the only instance in which this term was used was in the Separate Opinion of Judge Lucky in the *Advisory Opinion on IUU Fishing*. Regarding ITLOS’ advisory jurisdiction, Judge Lucky argued that UNCLOS, as well as the Statute of ITLOS, were ‘living instruments’.⁸²⁴ Judge Lucky stated that these instruments “‘grow” and adapt to changing circumstances’.⁸²⁵ As ‘the law of the sea is not static’ and it is ‘dynamic’, Judge Lucky argued that ‘through the interpretation and construction of the relevant Articles a court or tribunal can adhere and give positive effect to this dynamism’.⁸²⁶ As a result, in his view ‘judges must take a robust approach and apply the law in a legal but pragmatic way’. It is clear, therefore, that Judge Lucky viewed the ‘living treaty’ argument as an independent basis on which the tribunal could interpret UNCLOS provisions to reflect current developments.

2. Resort to subsequent conduct

Resort to subsequent conduct differs from evolutionary interpretation in that while the latter has been argued to be based on the *original* intention of the parties, interpretation based on ‘subsequent practice’ revolves around *later* intentions of the parties. It allows judges and arbitrators to interpret treaty on the basis of the practice of the parties subsequent to its entry into force. Moreover, while evolutionary interpretation is not explicitly provided for under the VCLT—although several scholars have argued that evolutionary interpretation is in fact grounded on the VCLT⁸²⁷—treaty interpretation based on subsequent conduct finds basis in Article 31(3)(a) and (b) of the VCLT.

In contrast to the lack of reliance on evolutionary interpretation, UNCLOS tribunals have frequently resorted to subsequent practice and agreements to interpret UNCLOS, although they never actually acknowledged that this was the interpretative method they were adopting. As analysed in Chapter 2, UNCLOS tribunals referred to subsequent practice or subsequent developments that had taken place as recorded in domestic legislation or international

⁸²³ *Advisory Opinion on IUU Fishing* (n 216) [49].

⁸²⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, Sep. Op. Lucky) ITLOS Reports 2015, 4 [18].

⁸²⁵ *ibid* [18].

⁸²⁶ *ibid*.

⁸²⁷ Arato argues that the VCLT implicitly endorses evolutionary interpretation, as it can be grounded in Articles 31(1) and 31(3)(c). Arato (n 811) 446. BJORKE argues that evolutionary principle is based on the drafters’ intention, but the drafters’ intention could only be determined based on the application of Articles 31 and 32 of the VCLT. Eirik BJORGE, *The Evolutionary Interpretation of Treaties* (OUP 2014).

instruments to assist them in giving meaning to certain terms used under UNCLOS or determining whether certain activities or principles are compatible with UNCLOS. For instance, in one of the first cases before ITLOS, *M/V Saiga*, ITLOS referred to the 1986 Convention on the Conditions for the Registration of Ships, the 1993 FAO Compliance Agreement and the UNFSA to interpret the requirement of ‘genuine link’ between a ship and a flag state in establishing the nationality of ship under Article 94.⁸²⁸ In *Virginia G*, while ITLOS agreed with Guinea-Bissau that coastal States were allowed to regulate the bunkering of fishing vessels despite the lack of reference to this activity in UNCLOS, it did not adhere to the call from Guinea-Bissau to adopt the ‘evolutionary interpretation’ approach to interpreting UNCLOS provisions. What it did instead was take into account the definitions of ‘fishing’ and ‘fishing-related’ activities in several international agreements, most of which came into force after UNCLOS, which establish the close connection between fishing and bunkering activities.⁸²⁹ It also referred to national legislation which recognises the right of the coastal State to regulate bunkering activities.⁸³⁰ ITLOS did not make clear what the legal basis for relying on subsequent practice was, and more specifically, whether it was invoking Article 31(3) to interpret relevant UNCLOS provisions. Recourse to subsequent agreements was also had in the *Advisory Opinion on IUU Fishing*. Although ITLOS insisted that the flag State’s obligation to ensure that vessels flying their flags do not conduct IUU fishing activities within the EEZ was based on the wording of the relevant provisions under UNCLOS, they were in fact read into the Convention based on binding agreements and other soft law instruments relating to international fisheries that were concluded subsequent to UNCLOS. As a result, it would appear that ITLOS in this case was adopting an interpretative method based on subsequent agreements, while refusing to acknowledge it as such.⁸³¹

Apart from subsequent conduct, new trends in the law of the sea have also had an impact on ITLOS’ interpretation of the Convention. The first example is the interpretation of ‘reasonable bond’ in prompt release proceedings. As elaborated in Chapter 2, while in earlier prompt release cases, ITLOS gave exclusive weight to quantifiable factors in determining what constitutes a ‘reasonable bond’, beginning from *Volga* and more prominently in *Hoshinmaru*, ITLOS began to take into account coastal States’ obligations to conserve its marine resources

⁸²⁸ *Saiga* (No. 2) (n 89) [85].

⁸²⁹ *Virginia G* (n 91) [216].

⁸³⁰ *ibid* [218].

⁸³¹ The Appellate Body of the WTO also has the tendency to rely on the ordinary meaning of the terms of the treaty. It has been argued this reliance has ‘protected the Appellate Body from criticism that its reports have added to or diminished the rights and obligations provided in the covered agreements’. It is not clear whether this was also the reason behind the insistence on the part of ITLOS that flag States’ obligations to ensure was implicit in the wording of UNCLOS. See Claus-Dieter Ehlermann, ‘Experiences from the WTO Appellate Body’ (2005) 38(3) *TJIL* 469, 481.

in determining the reasonable bond. As all the prompt release requests were made in the context of alleged illegal fishing activities, the fact that conservation concerns started to make their way into the consideration of the judges reflected a recognition of the importance of conservation concerns which have increasingly taken centre stage of the law of the sea. Also in the context of marine environment, the SDC in the *Advisory Opinion on Activities in the Area* endorsed the customary status of the precautionary principle by holding that ‘there was a trend towards making the precautionary approach part of customary international law’.⁸³² The SDC reached this decision based on the observation that ‘the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration’.⁸³³

In conclusion, both ITLOS and Annex VII arbitral tribunals have developed UNCLOS by interpreting the Convention progressively to include new practice that are not expressly provided for its provisions. However, UNCLOS tribunals generally refrain from explaining what interpretative method they are adopting. There is scarce mention of the VCLT. The tribunals have never acknowledged the use of evolutionary interpretation, even though it is arguable that their treaty interpretation exercises in many cases produced results that were evolutionary in nature. Neither have they considered UNCLOS a ‘living treaty’. The only approach that could be said to have been relatively prominent in cases of UNCLOS tribunals was the reference to subsequent conduct. Nevertheless, UNCLOS tribunals have not done this in a systematic fashion with a clear indication that they were consciously applying this interpretative method. Where subsequent instruments or practice were relied upon, there was no mentioning of the legal ground that warranted such resort, except for the *South China Sea* arbitration. Therefore, while it cannot be concluded that UNCLOS tribunals deliberately adopted a particular method of treaty interpretation with the specific aim to develop the law of the sea, implicit in the approach of the tribunals in several cases was the acknowledgement that the Convention should be interpreted in light of current developments, and that the meaning and scope of the rights and obligations contained under the Convention should be interpreted in an evolving manner.

IV. THE PERCEPTION BY UNCLOS TRIBUNALS OF THEIR ROLES

Chapter 1 touches upon the question of whether UNCLOS tribunals, as international courts and tribunals, have the authority to develop the law. However, this question has been tackled purely from a doctrinal perspective and from an outsider's point of view. This part seeks to take a look

⁸³² *Advisory Opinion on Activities in the Area* (n 235) [135].

⁸³³ *ibid.*

at this question from a different angle, that is from UNCLOS tribunals' point of view. It aims to determine the perception of ITLOS and Annex VII arbitral tribunals of their own roles as evident in their decisions. In particular, it asks whether they see themselves as having the task of contributing to the development of the law of the sea and if so, what impact, if any, does it have on the way in which the tribunals decided the cases?

1. ITLOS's perception

A perusal of the judgments rendered by ITLOS shows that it has not once explicitly acknowledged that it does or should undertake a role of developing the law of the sea. In the two advisory proceedings, the type of proceedings which, as argued above,⁸³⁴ is considered to give international courts and tribunals more leeway to develop the law, ITLOS was still careful to reiterate it should not undertake a regulatory or legislative role.

In the *Advisory Opinion on Activities in the Area*, while acknowledging that 'the Regulations issued to date by the Authority deal only with prospecting and exploration'⁸³⁵ but not exploitation in relation to sponsoring States' liability, the SDC stated that 'it does not consider itself to be called upon to lay down such future rules on liability' as 'it is to be expected that member States of the Authority will further deal with the issue of liability in future regulations on exploitation.'⁸³⁶ In the *Advisory Opinion on IUU Fishing*, ITLOS was again adamant that it was not undertaking a legislative role in response to the argument put forward by some States that 'while the four questions may be couched as legal questions, what the SRFC actually seeks is not answers *lex lata*, but *lex ferenda* and that is outside the functions of the Tribunal as a judicial body'.⁸³⁷ ITLOS held that it did not consider that the SRFC was seeking a legislative role for the tribunal and, more importantly, that '[t]he Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions'.⁸³⁸

In both Advisory Opinions, ITLOS was careful to avoid portraying its role as that of a law-maker, emphasising that this task belonged to the States, or the Authority in the case the Area. Instead, ITLOS stated that its role in advisory proceedings was two-fold. First, it would assist the requesting body—the Council of the ISA and the SRFC respectively—in the performance of its function. Second, the Advisory Opinions would 'contribute to the

⁸³⁴ See Chapter 2, Part I.2.

⁸³⁵ *Advisory Opinion on Activities in the Area* (n 785) [227].

⁸³⁶ *ibid* [168].

⁸³⁷ *Advisory Opinion on IUU Fishing* (n 732) [73].

⁸³⁸ *ibid* [74].

implementation of the Convention’ through the interpretation of the rules pertinent to the issue in question. To be more specific, the SDC in the *Advisory Opinion on Activities in the Area* clearly stated that ‘the Chamber is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities *and* contribute to the implementation of the Convention’s regime’.⁸³⁹ Despite admitting that it was the members of the ISA that had the power to specify the rules on exploitation, the SDC went on to suggest that ‘the member States of the Authority may, however, take some guidance from the interpretation in this Advisory Opinion of the pertinent rules on the liability of the sponsoring States in the Convention’.⁸⁴⁰ Apart from its guidance role, the SDC also acknowledged that ‘[t]he functions of the Chamber [...] are relevant for the good governance of the Area’.⁸⁴¹ In the *Advisory Opinion on IUU Fishing*, ITLOS took the same approach by affirming that ‘by answering the questions it will assist the SRFC in the performance of its activities *and* contribute to the implementation of the Convention’.⁸⁴² When faced with a request to provide advice regarding flag States’ responsibility for IUU fishing activities in the EEZ of another State, ITLOS acknowledged that this was an issue which was not directly addressed in the Convention, and hence that there existed a gap in the Convention.⁸⁴³ However, ITLOS was careful not to be seen as adding new obligations to the Convention. Instead it claimed that it was merely filling in the gaps found in Convention, through the interpretation and application of obligations which already existed under the Convention.

The first role identified above, that of assisting the requesting body in the performance of its function, is nothing out of the ordinary for an international tribunal when rendering an advisory opinion.⁸⁴⁴ However, the second role of ‘contribut[ing] to the implementation of the Convention’ is particularly noteworthy. From ITLOS’ statements above, this second function was clearly separate to and independent of the the first one. These statements show that ITLOS saw itself as having a role that extended beyond the function normally performed by a judicial body in advisory proceedings, ie assisting the requesting institutions. Rather, ITLOS acknowledged a role pertaining to UNCLOS itself—protecting and ensuring the effective implementation of the Convention’s legal regimes.

⁸³⁹ *Advisory Opinion on Activities in the Area* (n 785) [30]. (emphasis added)

⁸⁴⁰ *ibid* [168].

⁸⁴¹ *ibid* [29]

⁸⁴² *Advisory Opinion on IUU Fishing* (n 732) [77]. (emphasis added)

⁸⁴³ *ibid* [110].

⁸⁴⁴ Oellers-Frahm, after surveying the advisory function of several international courts such as the ICJ, the Inter-American Court of Human Rights, the ECHR, the Court of Justice of the EU, concluded that ‘the advisory function is conceived, or at least presented, by the courts themselves as a means of merely giving guidance to the requesting organ in the particular circumstance on the basis of the existing law’. Oellers-Frahm (n 746) 90.

Beside advisory proceedings, the only contentious case in which ITLOS acknowledged that it had role broader than dispute settlement was *Bangladesh/Myanmar*. As analysed in Chapter 3, ITLOS in this case for the first time dealt with the highly controversial question regarding the relationship between itself and the CLCS in cases involving delimitation of the outer continental shelf in the absence of a recommendation regarding the outer limits of the shelf by the CLCS. ITLOS held that ‘[a] decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention.’⁸⁴⁵ It further said that if it did not resolve the case, the parties ‘would be left in a position where they may be unable to benefit fully from their rights over the continental shelf.’⁸⁴⁶ These statements indicate that in the view of ITLOS, its task was not only to resolve disputes, but also to safeguard the system of rights and obligations that UNCLOS conferred on the State parties.

In addition to express statements, one could arguably seek to determine whether ITLOS views itself as having a role to develop the law by asking whether the Tribunal has been willing to pronounce on issues which were not strictly necessary to resolve the dispute before it. It has been argued that ‘courts and tribunals tend to decide on the narrowest available bases and if possible to avoid fundamental questions about the legal order [...]. They focus on the narrower function of deciding particular disputes [...] rather than seeing themselves overtly responsible for developing the legal regime.’⁸⁴⁷ It follows that, as an *a contrario* argument, an endeavour on the part of ITLOS to discuss or decide on questions beyond what was needed to provide an answer to the questions posed to it would signal that, notwithstanding the lack of an explicit acknowledgement of a law-development role in its decisions, ITLOS has in fact embraced such a role.

A survey of ITLOS’ decisions in contentious proceedings, however, provides no evidence of such practice. In advisory proceedings, as mentioned above, ITLOS has explicitly stated that its role was to contribute to the implementation of the Convention. In the *Advisory Opinion on Activities in the Area*, ITLOS’ approach to handling some of the issues that arose gives a mixed picture. On the one hand, as discussed in Chapter 4, the SDC proceeded to comment on the status of the precautionary principle under customary international law, even though the precautionary principle was already provided for in the two Regulations, and hence

⁸⁴⁵ *Bangladesh/Myanmar* (n 770) [391].

⁸⁴⁶ *ibid* [392].

⁸⁴⁷ The exceptions are tribunals such as the CJEU and ECtHR, and increasingly the WTO AB, which see themselves as responsible for the development of their ‘sectoral’ legal regime. See Lowe and Tzanakopoulos (n 797) 186.

there was no need to determine whether the precautionary principle existed as a rule of customary rule in order for it to be applicable to the case. Given that the precautionary principle at the time, and perhaps even up to date, was subjected to a great level of uncertainty, one could reasonably construe the SDC's attempt to endorse the precautionary principle under customary international law as an endeavour to contribute to the development of this rule under international law. On the other hand, in the same case, the SDC was faced with an argument that, based on Article 191 of UNCLOS which states that the Chamber 'shall' give an advisory opinion, the SDC, unlike the ICJ, did not have the discretionary power to decline a request for advisory opinion.⁸⁴⁸ In response to this question, the SDC simply said that 'the Chamber does not consider it necessary to pronounce on the consequences of that difference with respect to admissibility in the present case'.⁸⁴⁹ The SDC thus forewent an opportunity to expound on the contour of its advisory jurisdiction under the Convention.

What is clear from the preceding discussion is that ITLOS has not openly acknowledged that it has a role to play in developing the law of the sea. ITLOS has only explicitly recognised its role in contributing to the implementation of the Convention by providing answers to advisory requests, and hinted at a similar role of ensuring the enjoyment of the rights and obligations under the Convention in one contentious case. While not going so far as acknowledging that it has a role to play in the development of the law of the sea, at least such a recognition indicates that ITLOS sees itself as having a role that is not merely confined to responding to the questions put to it, either by international organisations in advisory proceedings or by States in contentious proceedings. Instead, there seems to be an understanding on the part of ITLOS that its answers have a broader significance, in that they contribute to protecting the legal regime created by the Convention and further enabling the latter's effective implementation. These functions are arguably the essence of that of an institutional guardian.

Unlike the decisions which shed little light on its perception of the role that the tribunal should play, ITLOS judges in their individual opinions have been much more willing to advocate or acknowledge a creative role for the tribunal. In their separate and dissenting opinions, one can find strong and explicit endorsement for ITLOS to undertake a broader function than mere dispute settlement. For example, in *Bangladesh/Myanmar*, Judge Treves contended that:

⁸⁴⁸ *Advisory Opinion on Activities in the Area* (n 785) [48].

⁸⁴⁹ *ibid* [48].

All courts and tribunals called to decide on the interpretation and application of the Convention, including its provisions on delimitation, should consider themselves as parts of a collective interpretative endeavour, in which, while keeping in mind the need to ensure consistency and coherence, each contributes its grain of wisdom and particular outlook.⁸⁵⁰

By calling on all courts and tribunals, including ITLOS in this particular case, to be part of ‘a collective interpretative endeavour’, Judge Treves seemed to have envisioned a broader and more systemic role for the tribunal than settling concrete disputes. It should also contribute to the interpretation and development of the law, in this case the law on maritime delimitation.

Several judges have even called for an outright recognition of the role of the tribunal in developing the law. Judge Wolfrum explicitly stating that ITLOS is expected to have a ‘law-making function’ in the context of maritime delimitation. He argued that ‘Article 287 of the Convention entrusts three institutions with the tasks and responsibility of interpreting the Convention, and within its framework, to progressively develop it.’⁸⁵¹ The case law on maritime delimitation ‘constitutes an *acquis judiciaire*, a source of international law to be read into Articles 74, 83 of the Convention’⁸⁵², and in perhaps the strongest endorsement of the role of ITLOS to develop the law, he stated that:

It is the responsibility of these courts and tribunals not only to decide delimitation cases while remaining within the framework of such *acquis judiciaire* but also to provide for the progressive development of the latter. They are called upon in further developing this *acquis judiciaire* to take into account new scientific findings.⁸⁵³

In the *Advisory Opinion on IUU Fishing*, several judges took the opportunity to voice their opinion regarding the role of the Tribunal. In Judge Ndiyaie’s view, the judges must lay down ‘the positive law, the law in force when the decision is rendered’.⁸⁵⁴ However, where there is no law, he argued that ‘the judge, acting in keeping with the principle of the “court’s duty to decide”, interprets so as to avoid a non liquet’,⁸⁵⁵ that is to avoid uncertainty or gaps in the law. In essence, the role of the judge is to develop the law by filling the gaps in the law

⁸⁵⁰ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Decl. Treves) ITLOS Reports 2012, 141, [2].

⁸⁵¹ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, Decl. Wolfrum) ITLOS Reports 2012, 137.

⁸⁵² *ibid.*

⁸⁵³ *ibid.*

⁸⁵⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, Sep. Op. Ndiyaie) ITLOS Reports 2015, 4 [5].

⁸⁵⁵ *ibid.*

through the act of interpretation. Similarly, Judge Lucky strongly endorsed the power of judges to develop the law by stating that:

It is accepted that judges do not make law, but they can point out deficiencies or ambiguities in the law or give a wide interpretation to an Article or section of a treaty or convention to assist in the development of the jurisprudence of international law.⁸⁵⁶

In *Arctic Sunrise*, in which Russia declined to appear before ITLOS, the Tribunal was faced for the first time with a case of non-appearance. Article 28 of the ITLOS Statute provides for such a situation. However, when examining the consequences of non-appearance on the proceedings within the framework of UNCLOS, ITLOS did not once refer to this Article 28, but instead extensively relied on the jurisprudence of the ICJ on the issue of non-appearance. Several judges were critical of the Tribunal's omission, for they felt that ITLOS had missed an important opportunity to clarify and develop the legal regime provided for under UNCLOS. Judge Paik, for example, contended that:

[T]he legal regime based on a statute and the jurisprudence of the tribunal entrusted to safeguard that regime cannot be expected to develop unless serious efforts are made to clarify some inevitable uncertainties or ambiguities lurking in many statutory provisions. Bypassing a provision of its own statute and simply relying on the jurisprudence that has been developed on the basis of the provision, though similar, of another statute would hardly be conducive to such development.⁸⁵⁷

The first sentence of this statement clearly indicates that Judge Paik sees a role of developing the law through interpretation for the tribunal, albeit in this case for a procedural issue. Had ITLOS invoked Article 28 of the ITLOS Statute, it would most likely have reached the same conclusion regarding the legal consequences of non-appearance on the proceedings of the case. This means that either way, ITLOS would still have fulfilled its dispute settlement role. Judge Paik's emphasis on reference to Article 28 stemmed not from concerns regarding the ability of the tribunal to resolve the case but from those relating to the role that the Tribunal should have undertaken, namely of developing the legal regime under UNCLOS. Likewise, Judges Wolfrum and Kelly also argued that 'the Tribunal could have shed some further light on how non-appearance is to be seen under a mandatory dispute settlement system such as the one established under Part XV of the Convention'.⁸⁵⁸ Again, this went beyond what was needed to

⁸⁵⁶ *Advisory Opinion on IUU Fishing*, Separate Opinion of Judge Lucky (n 824) [10].

⁸⁵⁷ '*Arctic Sunrise*' (*Kingdom of the Netherlands v Russian Federation*) (Provisional Measures, Order of 22 November 2013, Sep. Op. Paik) ITLOS Reports 2013, 230 [6].

⁸⁵⁸ *ibid* [5].

dispose of the dispute, and emphasised an understanding of a broader role that ITLOS should play. Beyond the confines of their individual opinions, various judges have also expressed their view, rather firmly, that ITLOS has a role to play in developing the law of the sea in various fora,⁸⁵⁹ as well as in their extra-judicial writings.⁸⁶⁰

In short, several ITLOS judges have expressed the view that its role should include developing the law by clarifying the content of the rules pertinent to the case, filling in the gaps and stating what the law is when there are no relevant rules to regulate the issue, and by interpreting the law in a way that ensures consistency with wider system of international law. The opinions of these individual judges echo the view which has gained ground in the academic community that international courts and tribunals should have a role to play in developing international law as discussed earlier in the thesis.

What value do individual opinions of the judges of international courts carry? ITLOS judges, similar to their ICJ counterparts,⁸⁶¹ are given the opportunity to append a separate or dissenting opinion, or a declaration to the judgment.⁸⁶² Several scholars and judges attach great significance to individual opinions rendered by international judges. Judge Franck saw the dissenting opinion as ‘present[ing] to the law’s universal market place of ideas certain principles of law and nuances of analysis which, even if not adopted in the instant case, may be of use in another, as yet unforeseen, context.’⁸⁶³ Other judges, writing extra-judicially, argued that separate opinions, while not changing the result of the case, ‘influence the shaping and

⁸⁵⁹ See Vladimir Golitsyn, ‘The Report Of The Tribunal’, (20 June 2016) at the Twenty-Sixth Meeting of States Parties to the United Nations Convention on the Law of the Sea, 3 <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/Golitsyn/MSP_Statement_English_June_20_2016.pdf> accessed 25 September 2018; Vladimir Golitsyn, ‘Agenda Item 74(a) “Oceans And The Law Of The Sea”’ (9 December 2014) at the Plenary of the Sixty-Ninth Session of the United Nations General Assembly, para 16 <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/Golitsyn/Statement_GA_09122014_FINAL_EN.pdf> accessed 25 September 2018; Rüdiger Wolfrum, ‘Agenda Item 71(a)’ (8 December 2014) at the Plenary of the Sixty-First Session of the United Nations General Assembly <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ga_081206_eng.pdf> accessed 25 September 2018; Helmut Tuerk, ‘Presentation to the Seminar on Exploration and Exploitation of Deep Seabed Mineral Resources in the Area: Challenges for Africa, and Opportunities for Collaborative Research in the South Atlantic Ocean’ (24 March 2009), Abuja, Nigeria <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/tuerk_nigeria_240309_eng.pdf> accessed 25 September 2018.

⁸⁶⁰ Tullio Treves ‘Judicial Lawmaking in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?’ in Rudiger Wolfrum and V Röben (eds), *Developments of International Law in Treaty Making* (Springer Berlin 2005) 587; David H Anderson, ‘Some Aspects of the Use of Force in Maritime Law Enforcement’ in Boschiero et al (n 11) 241.

⁸⁶¹ Article 57 ICJ Statute.

⁸⁶² Article 30(3) ITLOS Statute.

⁸⁶³ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Dissenting Opinion of Judge Franck) [2002] ICJ Rep 625, 693.

sometimes the altering of the course of law’,⁸⁶⁴ or that ‘they are said to demonstrate the range from which the Court has chosen its stance’.⁸⁶⁵ Providing a more specific explanation, another scholar argued that ‘individual opinions can offer a sort of “first airing” of possible new legal rules that the majority might not yet be prepared to recognize; these can contribute to the progressive development of international law’.⁸⁶⁶ As such, individual opinions are believed to ‘blaze trails along which future development of the law should proceed, either at the hands of the Court or at the hands of independent jurists.’⁸⁶⁷

However, it is worth noting that the discussion relating to the value of individual opinions of judges to date mostly concerns their potential impact on substantive issues of law. In contrast, the opinions of ITLOS judges examined above relate to the role that the tribunal should assume when hearing the cases. Thus, it is unclear as to whether the significance of judges’ individual opinions as discussed above also bears out when they relate not to substantive legal issues, but to the perception of the role that the tribunal should undertake. In other words, when ITLOS in its decisions does not set out its perception of its own role, can the views of individual judges tell us anything about the tribunal’s perception? These individual opinions are not, of course, representative of the view of the whole tribunal. But the fact that such views repeatedly surfaced in the opinions of different judges, in more than just one case, arguably signals that an understanding of the law development role was present in the mind of the judges. While such a view has yet to make its way into the majority’s reasoning, the individual opinions help shed light on the understanding which underlay the judgment of the majority, but which the latter was reluctant to spell out. It arguably indicates that the lack of pronouncement on law development does not necessarily mean that the tribunal was not aware of this role, merely that it was being cautious about acknowledging a creative role.

2. Annex VII arbitral tribunals’ perception

Similar to ITLOS, no Annex VII arbitral tribunals have acknowledged that they should or do have a role to play in the development of the law of the sea. In fact, a perusal of more than ten awards rendered by Annex VII arbitral tribunals shows that a discussion regarding their role is largely missing. The only instance in which an Annex VII arbitral tribunal seemed to have mentioned the purpose of its work was in *Bangladesh/India*. The tribunal stated that:

⁸⁶⁴ R P Anand, ‘The Role of Individual and Dissenting Opinions in International Adjudication’ (1965) 13(3) ICLQ 788.

⁸⁶⁵ Robert Y Jennings, ‘The Internal Judicial Practice of the ICJ’ (1988) LIX BYBIL 31.

⁸⁶⁶ Hernandez (n 36) 119.

⁸⁶⁷ Manley O Hudson, ‘The Twenty-Eighth Year of the World Court’ (1950) 44 AJIL 20.

[I]naction by this Tribunal would in practice leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf. The Tribunal does not consider that such an outcome would be consistent with the object and purpose of the Convention.⁸⁶⁸

This pronouncement is reminiscent of ITLOS's statement in *Bangladesh/Myanmar*, signifying, albeit implicitly, an appreciation by the tribunal of its treaty guardian role to ensure that States are able to enjoy the rights and obligations that UNCLOS confers on them.

Further, in relation to maritime delimitation, the tribunal added that 'transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process'.⁸⁶⁹ This statement suggests that the tribunal was conscious that it had a broader role than just drawing a boundary line as requested by the parties. Instead, it should clarify the law that regulates the delimitation process so as to provide guidance for future cases. More interestingly, the tribunal held that:

[T]he ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under Article 38(1)(d) of the Statute of the International Court of Justice, and should be read into Articles 74 and 83 of the Convention.⁸⁷⁰

Here, the tribunal, while seemingly just accepting that under Article 38(1)(d) judicial decisions are merely a supplementary source of law, actually gives judicial decisions a much more significant role. By saying that the case law should be read into Articles 74 and 83, the tribunal was acknowledging that it is the judicial decisions that provides the normative content and scope of the rules on maritime delimitation. This statement thus implicitly admits that judicial decisions have an important role in developing the law, at least in the context of maritime delimitation.

Other than this one example, the idea that their decisions should have a larger role to play, even if held by the arbitrators, was not expressed in any of the arbitral awards that have been rendered by Annex VII tribunals. One could argue that such a lack of discussion regarding a systemic role on the part of the arbitral tribunals, at least when compared with ITLOS, reflects the commonly held belief that ad hoc arbitral tribunals are only concerned about resolving disputes. But as the previous chapters show, the awards of the Annex VII arbitral tribunals have

⁸⁶⁸ *Bangladesh/India* (n 339) [82].

⁸⁶⁹ *ibid* [339].

⁸⁷⁰ *ibid*.

made important contributions to the development of the law, regardless of whether they themselves recognised or deliberately aimed at achieving such an impact.

In conclusion, neither ITLOS nor Annex VII arbitral tribunals has explicitly adopted the view that they do or can assume the task of developing the law. Unlike Annex VII arbitral tribunals, however, ITLOS at least indicated an understanding of an institutional guardian role, protecting the regime set up by the Convention and providing guidance to them in exercising the rights that UNCLOS confers on them. The lack of an acknowledgement of a law-development role on the part of the tribunal should perhaps not come as a surprise as international courts are generally still reluctant to do so. It does not, however, mean that such an awareness was absent from the minds of individual judges. More importantly, it also did not prevent UNCLOS tribunals from engaging in the development of the law of sea. It seems safe to conclude, therefore, that even though UNCLOS tribunals were reluctant to embrace their law-development role, this had little impact on the outcome of their decisions or the significance of their decisions on the development of the law of the sea.

V. CONCLUSION

This Chapter assesses whether and to what extent the following factors, namely the jurisdictional scope of UNCLOS tribunals, the institutional design of UNCLOS, the interpretative method that UNCLOS tribunals used and the perception of the tribunals of their own roles impact the ability and willingness of the tribunals to develop the law. It finds that the jurisdictional conditions that UNCLOS imposes on the tribunals have rarely impeded them from actually asserting jurisdiction to hear the cases because of the low threshold that the tribunals have set for the satisfaction of these conditions. In fact, UNCLOS tribunals have been able to assert jurisdiction to hear the majority of cases brought before them. ITLOS has only declined jurisdiction in one contentious case, namely *M/V Louisa*, and one prompt release proceeding, namely *Grand Prince*; while an Annex VII arbitral tribunal has only declined jurisdiction in one case, *Southern Bluefin Tuna*—a decision that did not subsequently go down well with most critics—and has suspended proceedings in *MOX Plant* due to consideration of comity towards the European Court of Justice. Among the limitations and exceptions to jurisdiction under UNCLOS, only the limitation regarding the coastal State's sovereign rights in the EEZ under Article 297(3) has made its impact felt in several cases. But even when UNCLOS tribunals gave this limitation a broader scope than the wording of Article 297(3) might suggest, this did not completely hamper the tribunals from contributing to the development of the law on fisheries.

As for the existence of other institutions and organisations involved in the development of the law of the sea, their expertise and competence seem to have facilitated UNCLOS tribunals in the interpretation and development of the law. Although there are still uncertainties regarding the relationship between, for example UNCLOS tribunals and the CLCS, there is no evidence in the decisions rendered to date to show that UNCLOS tribunals have been hesitant to embark on developing the law due to the existence of other actors which may also be involved in regulating the same issue. Rather, UNCLOS tribunals sought to rely on the work of relevant institutions and use them as the basis, explicitly or otherwise, to interpret and give meaning to UNCLOS provisions. There is also no evidence to suggest that States have exercised constraints on UNCLOS tribunals to prevent them from engaging in developing the law, even though the mechanisms to do so exist under UNCLOS.

In interpreting the law under the Convention, UNCLOS tribunals have not expressly embraced the method of ‘evolutionary interpretation’ which has increasingly been used by several international courts in order to give treaty terms a more contemporary meaning at the time of application, as opposed to the meaning which might have been envisioned at the time of conclusion. The argument of ‘living treaty’ has also not played a prominent role in the consideration of the tribunals, although it has appeared in individual opinions of certain judges. In cases in which the rights and obligations under the Convention were interpreted to have a meaning or scope that reflect current developments, however, one can see the prevalence of resort of subsequent practice and agreements, albeit unsystematically and without any explanation as to why and how such a method was appropriate.

Finally, UNCLOS tribunals have not, in the course of deciding individual cases, actively pursued a role of developing the law. They have not publicly admitted that they were consciously taking on the role of developing the law, despite the fact that the drafters of the Convention arguably gave the tribunals a broader role than dispute settlement under the Convention and that individual judges have called on ITLOS to decide the cases in a way that contributes to the development of the law of sea. Nevertheless, for ITLOS, there are certain signs indicating that it sees itself as having a role that extends beyond just settling the disputes brought before it, to that of an institutional guardian. The general lack of pronouncement on a law development role, however, should perhaps not come as a surprise, given that ITLOS and Annex VII tribunals are still relatively early in the functioning of the UNCLOS system and the prevalence of the conventional view that law-making under international law lies in the hands of States. UNCLOS tribunal’s reluctance in this regard, however, did not mean that the tribunal in practice refrained from interpreting the rules and principles under the Convention in a manner

that contributed to the development of the law. In other words, the lack of explicit acknowledgment of a law-development role in the decisions themselves did not significantly hamper the ability of UNCLOS tribunals to develop the law in practice.

The creation of a new dispute settlement system which constitutes an integral part of UNCLOS has widely been seen as a radical and progressive move. The innovative nature of this new dispute settlement system is manifested most prominently in the establishment of specialised dispute settlement bodies under Part XV, ie ITLOS, Annex VII and Annex VIII arbitral tribunals, as well as the compulsory jurisdiction conferred upon these bodies to interpret and apply the Convention. Even though the express task given to the dispute settlement bodies is to settle disputes arising from the Convention, it is important not to lose sight of the fact that, as Chapter 1 argued, UNCLOS tribunals were also expected to assume roles that transcend the confines of settling concrete disputes. Given the nature of UNCLOS as a framework convention and the outcome of a negotiation process heavily based on compromise, resulting in many general and vaguely-worded UNCLOS provisions, Chapter 1 contended that UNCLOS tribunals were expected to clarify legal ambiguities and provide normative guidance to States in implementing the Convention in order to safeguard the uniformity and integrity of the Convention. In other words, the role of UNCLOS tribunals was to be that of an institutional guardian and as such, they were expected to clarify and develop the law under the Convention.

On the basis of the working definition of judicial development of the law as the clarification of the law—encompassing specifically determining the status of certain principles of law, defining the scope of general principles and clarifying the normative content of vague terms—the contributions of UNCLOS tribunals were assessed in three main substantive areas of the law of the sea, namely the law on fisheries, the law on the outer continental shelf and the law on the protection of the marine environment in Chapters 2, 3 and 4 respectively. This last chapter seeks to provide, based on the preceding chapters, the answers to the research questions set out in Chapter 1, in particular, the kind of contribution that UNCLOS tribunals have made to the development of the law of the sea and the factors that impact the performance of UNCLOS tribunals in this process.

I. TAKING STOCK OF THE CONTRIBUTION

The types of contributions made by international courts or tribunals to the development of the law, as mentioned in Chapter 1, can be in three main forms, namely (i) confirming a rule of customary international law (ii) defining the scope of rights and obligations under UNCLOS

and (iii) giving meaning to vague terms under the Convention. The following summarises the contribution of UNCLOS tribunals in each of these forms.

(i) Confirmation of customary international law

In the course of hearing cases arising from UNCLOS, questions relating to whether certain rules or principles have attained the status of customary law have arisen. UNCLOS tribunals have taken the opportunity to deal with these questions, thereby contributing to confirming the existence of customary rules.

ITLOS held in *MOX Plant, Land Reclamation* and the *Advisory Opinion on IUU Fishing* that the duty to cooperate had become part of general international law, and in the *Advisory Opinion on Activities in the Area* that the obligation to conduct EIA was an obligation under customary international law. It is noteworthy that UNCLOS already provides for both of these obligations. Thus it was not strictly necessary for the tribunal to have taken the extra step to confirm the customary nature of these principles in order to apply them to the cases before them. The willingness of ITLOS to do so nonetheless was a welcome contribution to reinforcing the importance of these principles beyond the confines of the Convention.

With regard to the precautionary principle, ITLOS did not acknowledge the customary nature of this principle in clear and explicit terms as was the case with the two abovementioned principles. However, despite the fact that UNCLOS itself does not provide for the precautionary principle, and its status under customary law has been subject to much debate,⁸⁷¹ ITLOS still relied on the precautionary principle to prescribe provisional measures in one of its first cases, the *Southern Bluefin Tuna* Provisional Measure Order, albeit without referring to the principle by name. Further, in the *Advisory Opinion on Activities in the Area*, it stated that ‘there is now a trend towards making this approach part of customary law’, which could be seen as one of the first endorsements of the customary nature of the precautionary principle at a time when other international courts or tribunals, such as the ICJ, WTO Appellate Body had the tendency to avoid addressing the issue. ITLOS’ decisions, therefore, added authoritative weight to affirming the customary status of this principle, or at least, gave it a much-needed push towards attaining this status.

As is clear, UNCLOS tribunals’ confirmation of the existence of customary rules has been in the area of marine environment protection. The willingness of UNCLOS tribunals to read into the Convention principles which are not expressly provided for therein, such as the precautionary principle and the principle of due diligence, reinforces the significance of these

⁸⁷¹ Dupuy and Viñuales (n 619) 61.

principles in the protection of the marine environment. This is particularly important as UNCLOS was negotiated at a time when international environmental law was still in its infancy. Thus despite its efforts to embrace a more environment-friendly approach to managing the oceans than that in previous law of the sea instruments, the drafters of the Convention could not have foreseen the significant efforts that have been made in the protection of the environment in more recent times.⁸⁷² By confirming the status of these important environmental principles and reading them into the Convention, the tribunals have helped ensure that UNCLOS develops in keeping with important progress that been made in international environmental law since 1982.

(ii) Defining the scope of States' rights and obligations under UNCLOS

UNCLOS is built upon the 1958 Geneva Conventions but has remarkable novelties, among which the most important includes the introduction of two new maritime zones, the EEZ and the Area, and the concept of the outer continental shelf. UNCLOS stipulates the nature of these new regimes, in particular the EEZ is 'a specific legal regime',⁸⁷³ the Area and its resources are 'common heritage of mankind' under Article 136 UNCLOS. What these phrases entail and the scope of States' rights and obligations in these new maritime zones nonetheless remain undefined. UNCLOS tribunals have had a significant role to play in this regard.

First, UNCLOS tribunals have helped to define the extent of coastal States' and flag States' rights in relation to the resources in the EEZ. It is worth bearing in mind that the novelty of the EEZ regime lies in the fact it is a resource-oriented regime: coastal States have exclusive sovereign rights over living resources, while other States retain their high sea freedoms, except for the freedom of fishing. In *Virginia G*, as a matter of treaty interpretation, ITLOS gave a positive answer to the question of whether, as part of its sovereign rights in the EEZ, coastal States can regulate the bunkering of fishing vessels in its fisheries law. The implication of such a decision is that coastal States' regulatory power in the EEZ extends not only to fisheries activities listed under Article 62(4) but any activity which has a direct connection with fishing. The scope of regulatory power of the coastal State is now broader than what might appear in the Convention, but this in fact reflects more accurately the practice that is taking place at sea, hence a new balance to be struck in the EEZ.

⁸⁷² See, eg, Peter H Sand, 'The Evolution of International Environmental Law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (OUP 2008) 29; Edith Brown Weiss, 'The Evolution of International Environmental Law' (2011) 54 JYBIL 1.

⁸⁷³ On the concept of the EEZ as a *sui generis* zone, see Rothwell and Stephens (n 187) 184; Gemma Andreone and Giuseppe Caltadi, 'Sui Generis Zones' in Attard, Fitzmaurice and Martinez (n 77) 217.

Furthermore, coastal States' enforcement power in the EEZ has also been elucidated, albeit not to the same degree of clarity as with the regulatory power. By answering the question regarding the permissibility of the confiscation of vessels as an enforcement measure that coastal States can take against vessels fishing illegally in its EEZ, ITLOS made clear in *Virginia G* that these enforcement measures could go beyond those explicitly provided for under 73(1), but only insofar as it is 'necessary' to enforce their rules and regulations. Regrettably, ITLOS failed to provide guidance on how to determine 'necessity', leaving the term which is perhaps the most important in Article 73(1) entirely open-ended.⁸⁷⁴ What has emerged from *Virginia G* is that coastal States are not confined to taking the measures listed under Article 73(1), but that their discretion is also not unlimited. Coastal States bear the burden of proving that whatever measure it is that they wish to take to enforce their rules and regulations must be 'necessary'.

Finally, with respect to flag States' obligations, even though UNCLOS places the primary obligation to conserve marine resources in the EEZ on coastal States, UNCLOS tribunals made clear that flag States also have to share this obligation. Notwithstanding the absence of such an obligation under UNCLOS, ITLOS in the *Advisory Opinion on IUU Fishing* confirmed that flag States have an 'obligation to ensure' that vessels flying their flags do not conduct IUU fishing activities in the EEZ of another State. It did so by deduction from the general obligations of State parties under UNCLOS with regard to conserving and managing marine living resources and from the specific obligations imposed on flag States whose vessels operate in the EEZ of another State. ITLOS' further elaboration of the measures to be taken in order to fulfil this obligation on the part of the flag State was highly significant because these measures redefine the balance to be struck between the rights and obligations of coastal States and those of flag States in the EEZ, thus clarifying what the *sui generis* character of the EEZ means in today's world. From a practical perspective, the imposition of obligations on the flag State with regard to IUU fishing is an important legal development in the face of prevalent and destructive fishing practices.⁸⁷⁵ Even though UNCLOS does not provide for flag States' obligations in this regard, by reading an 'obligation to ensure' into the Convention, ITLOS adds UNCLOS to the list of legal tools available to combat IUU fishing.

Turning to the Area, one of the unique features of this regime is that non-State actors have the right under UNCLOS to participate in the exploration and exploitation activities in the

⁸⁷⁴ However, the individual opinions of some judges focusing on this oversight of the tribunals may provide some guidance on the different approaches to assessing whether the requirement of necessity has been met. See Chapter 2, p 35–36.

⁸⁷⁵ It has been estimated that about 95% of the capture fisheries take place within 200 nm of the coast, although the EEZs only account for 8% of the Earth's surface and 36% of the world's marine areas. Proelss (n 78) 410.

deep seabed, but they could only do so if they are sponsored by a State party to UNCLOS.⁸⁷⁶ Article 139, while providing for the obligation of State parties in this regard, does not specify the nature of the 'responsibility to ensure' or what it requires on the part of the sponsoring State. ITLOS provided answers to both these questions in the *Advisory Opinion on Activities in the Area* and clarified that this 'obligation to ensure' meant that the sponsoring State had an obligation to ensure that the sponsored contractor complied with the obligations contained in Part XI. In terms of the nature of the obligation to ensure, it is an obligation of due diligence and an obligation of conduct. ITLOS also spelled out the kinds of measure required of the sponsoring State to comply with this obligation. These obligations were imposed on sponsoring States, but they can be extended to all States engaged in deep seabed mining in the Area

In short, UNCLOS tribunals, by adopting a creative approach to treaty interpretation, have defined the scope of the coastal States' power in the EEZ, flag States' obligation in the EEZ and the sponsoring States' obligation in the Area when they are not spelled out in any detail in UNCLOS.

(iii) Giving substance to vague concepts

The preceding discussion shows that in defining the scope of application of various general rules, UNCLOS tribunals also clarified the meaning of important terms, such as 'obligation to ensure'. Defining the scope of the State's rights and obligations and giving substance to vague concepts are, therefore, not always distinct types of judicial contributions and they may be symbiotic. At the same time, UNCLOS is replete with general terms and vague concepts, some of which hold the key to the enjoyment of rights or performance of duties by the States. It is thus argued that giving substance to vague terms employed under the Convention should also be considered a separate contribution worthy of scrutiny in its own right. The most important contributions of UNCLOS tribunals in this category relate to elucidating the terms 'reasonable bond' in prompt release proceedings, 'genuine link' in establishing the nationality of vessels, and 'natural prolongation' in establishing entitlement to the outer continental shelf.

'Reasonable bond' is without a doubt the most important term in Article 73(2) which provides for the prompt release procedure under UNCLOS. The purpose of the prompt release procedure is to balance the right of the coastal State to enforce its rules and regulations in the EEZ and the rights of the flag State not to have its vessel and crew detained for an unnecessarily prolonged length of time. If one envisages the prompt release procedure as a scale to balance the rights of these two groups of States, 'reasonable bond' is the fulcrum on which this scale

⁸⁷⁶ Article 153 UNCLOS.

operates. The clarification of what would be considered 'reasonable' and what constitutes a 'bond' is therefore crucial in the operation of prompt release proceedings. ITLOS has developed a list of relevant factors to assess the reasonableness of the bond imposed by the coastal State so as to provide guidance in implementing this article. This list has seen little change since the first cases and contains mostly quantifiable factors. Indeed, ITLOS made clear in *Volga* that the bond within the meaning of Article 73(2) should only be of a monetary nature. However, what is interesting is that the assessment of one of these factors, namely the gravity of the offence, has witnessed an important evolution over time. From taking into account only the penalty imposed under the domestic law of the coastal State in earlier cases, ITLOS progressed to very gradually taking into account coastal States' international commitments in the conservation of marine resources. *Hoshinmaru*—the last prompt release case heard by ITLOS to date—clearly demonstrated the increased awareness on the part of the Tribunal of the significance of sustainable fishing. Coupled with ITLOS' acknowledgment of the flag State's obligation of due diligence over its fishing vessels in the EEZ as analysed above, it is expected that ITLOS' consideration of 'reasonable bond' under Article 73(1) will continue to factor in international obligations to conserve marine resources, both on the part of coastal and flag States, in the determination of the gravity of the offence.

The issue of the nationality of a ship is important as it provides the basis for the implementation of one of the most fundamental principles of the law of the sea, ie the principle of the flag State's exclusive jurisdiction over vessels flying its flag. In *M/V Saiga*, ITLOS made clear that the requirement of a 'genuine link between the State and the ship' contained under Article 91 did not constitute a condition for a vessel to fly the flag of a State as has commonly been argued. What is crucial in the determination of the nationality of the ship is whether the ship has been registered in accordance with domestic law providing for ship registration. In this matter, the State has exclusive power. This, together with the principle of flag State's exclusive jurisdiction, highlights the broad scope of power and wide margin of appreciation granted to flag States with regard to their vessels.

Turning finally to 'natural prolongation', this term has long held a special position in the establishment of the outer continental shelf as the basis of a coastal State's entitlement to a continental shelf beyond 200 nm. However, this term had never been properly defined either under UNCLOS or by international courts. ITLOS in *Bangladesh/Myanmar*, followed by the Annex VII tribunal in *Bangladesh/India*, clarified that the term 'natural prolongation' contained in Article 76(1) referred to the seabed that extends from the coastal State's land territory to the outer edge of its continental margin. This means that 'natural prolongation' has been subsumed

and is to be determined by the formulae that UNCLOS provides under Article 76(4) to identify entitlement. This pronouncement was the first time that an international tribunal spelled out the meaning of 'natural prolongation' under UNCLOS and more importantly, the legal basis for entitlement to an outer continental shelf.

Taking stock of the UNCLOS tribunals' contribution to the development of the law of the sea, it seems clear that their contributions have not involved legal issues of a wide-ranging nature, but concentrated on new regimes and concepts which UNCLOS introduced into the corpus of the law of sea, including the EEZ regime, the outer continental shelf regime, the Area and marine environment protection. It should also be acknowledged that the significance of UNCLOS decisions seems to be at a micro rather than macro level: they have mostly been in the form of fine-tuning the provisions of UNCLOS by fleshing out the details of the vague provisions and defining the scope of the relevant principles. Even when some of the UNCLOS tribunals' decisions were the first instances in which an international dispute settlement body addressed a particular legal issue, for example, flag State's 'obligation to ensure' over vessels in the EEZ of another States in the *Advisory Opinion on IUU Fishing* and the relationship between delimitation and delineation of the outer continental shelf in the *Bay of Bengal* cases, the impact could hardly be considered to be ground-breaking, in the sense of introducing or bringing major changes to the substance of the law of the sea. The impact of UNCLOS tribunals' conclusion is that of enabling States to grasp the extent of their rights and obligations and ensuring that UNCLOS is interpreted and implemented in a uniform manner.

However, the level of clarification provided by UNCLOS tribunals to the law is not the same across these fields, nor within each field. The most significant contribution would appear to be in relation to the law on fisheries, but only to the extent of fisheries in the EEZ. By clarifying the scope of the coastal States' and flag States' rights and obligations in such a way as to reflect contemporary fishing practice and to take into account conservation demands and sustainable fishing practices, UNCLOS tribunals shed light on the balance to be struck in States' exercise of rights and obligations in relations to fisheries resources in the EEZ. In contrast, UNCLOS tribunals missed important opportunities to put their stamp on the development of the law on transboundary fisheries. With regard to the law on the protection of the marine environment, UNCLOS tribunals' decisions were significant in strengthening the status of important environmental law principles and confirming their applicability to both aspects of marine environment protection, ie the conservation of marine resources and prevention of marine pollution; but not in terms clarifying the content of these principles. Additionally, while UNCLOS tribunals were the first to delimit the outer continental shelf, many of the tribunals'

conclusions were restricted to the particular circumstances of the cases. Thus, apart from the clarification on the meaning of ‘natural prolongation’ and its role in the establishment of the outer continental shelf, it is uncertain whether the tribunals’ findings will have a broader impact.

Finally, UNCLOS tribunals’ creative interpretations have contributed to maintaining the relevance of the UNCLOS legal framework to the regulation of activities at sea. This is especially important given that UNCLOS was concluded more than three decades ago and a plethora of offshore activities are now taking place which the drafters did not and could not have envisioned.

II. FACTORS OF IMPACT

In an attempt to understand the performance of UNCLOS tribunals, Chapter 5 analyses four groups of factors which may have an impact on their law-development role, namely: (i) the jurisdictional scope of UNCLOS tribunals, (ii) the institutional design of UNCLOS, (iii) the interpretative methods that UNCLOS tribunals used in deciding the cases and (iv) the tribunals’ perception of their role. The first two factors may be considered objective factors, as they determine the space available for UNCLOS tribunals to engage in, and thus impact the ability of UNCLOS tribunals to develop the law. The remaining two factors are those that are at the disposal of the tribunals, and so are more subjective in nature; they seek to ascertain some indication of the tribunals’ willingness to develop the law of the sea. As the analysis in Chapter 5 clearly shows, the line between ‘objective’ and ‘subjective’ is not one that is easy to maintain. For example, while the jurisdictional scope of UNCLOS tribunals is laid down by the Convention, determining how wide or narrow this scope stretches is a task that is, to a large extent, at the discretion of UNCLOS tribunals. However, taken together, these four factors help to shed light on the performance of UNCLOS tribunals in developing the law.

The analysis in Chapter 5 shows that the compulsory nature of the tribunals’ jurisdiction facilitates their law-development role. This is even more so when the UNCLOS tribunals have had the tendency to reinforce their compulsory jurisdiction by restricting the applicability of the hurdles to jurisdiction. The only exception seems to have been that relating to States’ sovereign rights in the EEZ under Article 297(3), so the jurisdictional scope of UNCLOS tribunals did restrict the ability of the tribunals to deal with certain categories disputes of this, but not all dispute relating to coastal States’ sovereign rights. In respect of the institutional design of UNCLOS, it is clear that there are various actors in the field which have the power to develop the law of the sea. An analysis of the way in which UNCLOS tribunals interpret their relationship with these institutions shows that UNCLOS tribunals have not been reluctant to engage in the development of the law, even when the legal issues in question might fall into the

former's area of expertise. There has, however, been some recognition of the boundaries of their role, which signifies possible restraint in the future cases. So far, UNCLOS tribunals have referred to the instruments produced by the abovementioned institutions in order to shed light on legal terms which also had a scientific meaning, or as evidence of the current practice in determining the scope of certain rules and principles under the Convention. The work of these bodies, therefore, has been used in a way as to facilitated the law-development role of the tribunals.

Turning to the factors that impact willingness to undertake the law-development role, it is clear that while they have developed UNCLOS by interpreting the Convention progressively to include new practices that are not provided in its provisions, the tribunals did not consistently employ any particular method of interpretation to assist them in doing so. Even though the tribunals took into account subsequent agreements and practice in several cases, they did not acknowledge this interpretative technique nor the legal basis on which this technique was warranted. Finally, neither ITLOS nor Annex VII arbitral tribunals have expressly put forward the view that they have or should assume the task of developing the law, although in the case of ITLOS, individual judges have advocated that ITLOS should embrace its role in developing of the law of sea. UNCLOS tribunals are still keen to embrace their role merely as interpreting the Convention in order to provide guidance to States and other institutions in the implementation of the Convention. However, even when UNCLOS tribunals remain in denial of any law-development role that they might play, this did not impede them from deciding cases in such a way as to contribute to the development of different areas of the law of the sea.

In conclusion, twenty years after the first case was brought to the UNCLOS dispute settlement system, UNCLOS tribunals have only dealt with around thirty cases, which have touched upon a limited number of legal issues.⁸⁷⁷ Notwithstanding this fact, this thesis has shown that ITLOS and Annex VII arbitral tribunals have made some important contributions to the development of several areas of the law of the sea. As a result, the role that UNCLOS tribunals can play in the development of the law of the sea should not be underestimated.

⁸⁷⁷ For a breakdown of the number and subject-matter of the cases before UNCLOS tribunals, see Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48(3-4) ODIL 216, 224, 229.

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