BRILL | NIJHOFF

THE INTERNATIONAL JOURNAL OF
MARINE AND COASTAL LAW 38 (2023) 228–248

THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

brill.com/estu

# The LOSC *Renvois* as a Source of Untapped Jurisdiction

*Danae F. Georgoula*
Doctoral Candidate, Netherlands Institute for the Law of the Sea,
Utrecht Centre for Water, Oceans and Sustainability Law,
Utrecht University, Utrecht, The Netherlands
*d.f.georgoula@uu.nl*

## Abstract

This article aims to contribute to the discussion around the jurisdictional effects of the express *renvois* in the substantive rules of the United Nations Convention on the Law of the Sea (LOSC). Through the lens of pre-existing scholarship on the function of the *renvois*, it examines the function of this type of provision in the Convention and attempts to delineate the scope of jurisdiction granted through them. It is posited that this jurisdiction can be both broad and dynamic, but it has remained largely untapped by States and the judiciary. Prompted by this observation, the possible reasons behind this underutilisation are examined and finally, possible ways to use this mechanism to judicially address some of the contemporary challenges that the ocean is facing are outlined.

## Keywords

*renvois* – jurisdiction *ratione materiae* – United Nations Convention on the Law of the Sea (LOSC) external issues – modern challenges

## Introduction

A common drafting technique in legislation which serves the economy of the text and creates links between legal instruments is the use of provisions which refer to external legal material without reproducing it (*renvois*). This technique

Published with license by Koninklijke Brill NV | DOI:10.1163/15718085-BJA10131

can already be found in international instruments of the 1920s,[1] and, in the context of the law of the sea, in Article 10 of the 1958 Convention on the High Seas.[2] Regardless of the age-old origin of the *renvois*, their normative function is still not entirely clear and significant questions regarding their function remain.

The United Nations Convention on the Law of the Sea (LOSC)[3] contains different types of provisions that refer to external legal materials and can be broadly identified as *renvois*.[4] These include procedural provisions of Part XV,[5] provisions that have been interpreted as implicit references to external rules,[6] provisions that allow for the *inter se* modification of the rules of the Convention,[7] and substantive provisions which contain express references.[8] These provisions have been identified as a mechanism which allows the Convention to live, grow and adapt to new challenges.[9] The limited adjudication of disputes involving *renvois* under the Convention, as will be shown below, has hinted that the scope of judicial jurisdiction that is produced on their basis can be dynamic and can expand over an array of issues which are

1 M Forteau, 'Les renvois inter-conventionnels' (2003) 49 *Annuaire français de droit international* 71–104.

2 BH Oxman, 'The duty to respect generally accepted international standards' (1991) 24 (1) *New York University Journal of International Law and Politics* 109–160, at p. 122.

3 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3 [LOSC].

4 Other terms used include 'rule(s) of reference', GAIRS (generally accepted international rules and standards) or AIRS (accepted international rules and standards). See, e.g., W van Reenen, 'Rules of reference in the new Convention on the Law of the Sea, in particular in connection with the pollution of the sea by oil from tankers' (1981) 12 *Netherlands Yearbook of International Law* 3–44; LB Sohn, 'Generally accepted international rules' (1986) 61 *Washington Law Review*, 1073–1080; B Vukas, 'Generally accepted international rules and standards' in AHA Soons (ed), *Implementation of the Law of the Sea Convention through International Institutions. Proceedings* (Law of the Sea Institute, Honolulu, 1990); C Redgwell, 'Mind the gap in the GAIRS: The role of other instruments in LOSC regime implementation in the offshore energy sector' (2014) 29 *International Journal of Marine and Coastal Law* (*IJMCL*) 600–621; LN Nguyen, 'Expanding the environmental regulatory scope of UNCLOS through the rule of reference: Potentials and limits' (2021) 52(4) *Ocean Development & International Law* 419–444. These works often focus on a specific context or a specific category provisions. To avoid context-specific connotations, this article uses the term *renvois.*

5 For example, LOSC (n 3), Article 297(1)(c).

6 For example, *ibid*., Article 194(5).

7 For example, *ibid*., Article 311.

8 For example, *ibid*., Article 2(3).

9 C Whomersley, 'How to amend UNCLOS and why it has never been done' (2021) 9 *Korean Journal of International and Comparative Law* 72–83; J Barrett and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, London, 2016).

not explicitly regulated by the Convention. However, this jurisdictional potential has remained largely untapped.

This article aims to contribute to the discussion around the jurisdictional effects of the express *renvois* in the substantive rules of the LOSC. Building upon pre-existing scholarship,[10] it briefly discusses the correlation between the scope of the *renvois* and the scope of judicial jurisdiction, the reasons behind the underutilisation of this mechanism, and outlines in what way the *renvois* might be used to judicially address some of the contemporary challenges that the ocean is facing.

## The Scope of Jurisdiction Arising from the *Renvois*

Under Article 288(1) of the LOSC, tribunals have 'jurisdiction over any dispute concerning the interpretation or application of this Convention'. From this it follows that for a tribunal to enjoy jurisdiction over disputes which concern the interpretation or application of rules which are not explicit in the Convention on the basis of a *renvois* two conditions apply: first, the referenced external rules must have become part of the Convention; and second, the scope of jurisdiction over the external rules will be directly dependent on the relationship that the *renvoi* establishes between the Convention and the source which is being referenced. Thus, to delineate the jurisdiction conferred through a *renvoi*, it is necessary to identify the rules to which it refers to and determine the effects that it brings into the Convention.[11] In other words, it is necessary to understand how this provision functions in the Convention.

### *The General Distinction of the* Renvois

A general twofold distinction proposed by Sperduti can be used to assist in understanding the aspects of the function of the *renvois* through which jurisdiction can be subsequently delineated. First, based on the identity of the referenced rule, the *renvois* can be distinguished into material *renvois* (*rinvii materiali*) and formal *renvois* (*rinvii formali*). Material *renvois* refer to a specific provision(s) and function statically – corresponding to the content of the referenced provision(s) at the moment the reference is made.[12] Formal *renvois*

10 Forteau (n 1); G Sperduti, *Lezioni di Diritto Internazionale* (Giuffre, Milan, 1958) 99–104, examine the general function of *renvois*; see also generally van Reenen (n 4); Sohn (n 4); Vukas (n 4); Redgwell (n 4) who examine them in a specific regulatory context.

11 Sperduti (n 10).

12 For example, LOSC (n 3), Article 74(1) referring to 'Article 38 of the Statute of the International Court of Justice'.

refer to a particular source of law[13] and follow the modifications of the content of the external source.[14] Second, based on the effects that they bring into the referring legal instrument, they can be distinguished into receptive *renvois* (*rinvii ricettizii*) and non-receptive *renvois* (*rinvii non-ricettizii*). Receptive *renvoi*s incorporate the referenced rule in the referring system, while non-receptive, by way of reference, only link the application of the rule of the referring legal instrument to situations depending on the referenced external rule without incorporating it.[15] Accordingly, receptive *renvois* will allow for the exercise of jurisdiction over the external rule, while non-receptive – as shown in the next section – will have variable jurisdictional effects depending on the type of relationship that they establish between the different instruments, without, however, allowing for the expansion of jurisdiction over the direct assessment of the application of the external rule.[16]

### *The Scope of the Referenced Rules*

Most of the *renvois* in the LOSC are formal. Instead of referring to specific external provisions,[17] they employ standardised and generic linguistic formulas through which they refer to external sources of law. The use of these formulas reveals that the *renvois* purport to establish a link with various external sources and allow the normative content of the LOSC provisions to follow the developments of the referenced source.[18] Admittedly, this is not a novel observation, and already before the entry into force of the Convention, scholars had consistently highlighted the flexibility and dynamism that the *renvois* would bring into it.[19]

---

13 For example, *ibid*., Article 2(3) referring to 'to other rules of international law'.

14 Sperduti (n 10); G Pinzauti, 'The European Court of Human Rights' incidental application of international criminal law and humanitarian law: A critical discussion of *Kononov v. Latvia*' (2008) 6 *Journal of International Criminal Justice* 1043–1060.

15 Sperduti (n 10); Pinzauti (n 14). Sperduti provides as an example of a receptive *renvoi* Article 38(1)(c) of the ICJ Statute and of a non-receptive *renvoi* Article 2 of the Legge Italiana di Guerra (Royal Decree of 8 July 1938: Law of War, n. 1415 [Italy]). In the LOSC, Article 2(3) can fall under the definition of receptive and Article 208(3) under the definition of non-receptive *renvois*.

16 See discussion below at 'The Establishment of Jurisdiction Based on the Relationship between the LOSC and the External Sources'.

17 Except for Articles 74, 83, 279 of the LOSC (n 3), the material *renvois* to specific provisions of the Convention itself, Forteau (n 1) generally characterises these kind of *renvois* as '*renvoi*s intra-conventionnel'.

18 Pinzauti (n 14).

19 See generally, (n 4).

Based on the formulas which the *renvois* utilise to refer to external rules, the referenced external rules can be identified and the material scope of the *renvois* can be delineated. These formulas can be broadly taxonomised into five categories: (i) 'other rules of international law',[20] (ii) the principles of international law embodied in the Charter of the United Nations,[21] (iii) rights and duties of States,[22] (iv) international rules and standards,[23] and (v) international agreements.[24] Because this contribution aims only to showcase the broad and dynamic potential of the *renvois* and not to delineate the scope of each provision, the discussion below will only examine the scope of the 'other rules of international law' and 'international rules and standards' formulas, which, so far, have received the attention of scholars and tribunals.

The practice of LOSC tribunals has shown that the reference to 'other rules of international law' is not only broad but can also be progressively enriched, without though really clarifying its exact scope.[25] The first tribunal to examine the scope of this formula was the tribunal in the *Chagos Arbitration* which held that the term encompasses general international law[26] and not any bilateral commitment that the addressee State has undertaken.[27] The dissenting arbitrators, however, submitted that it can also encompass obligations that arise from a 'special relationship, geographical or other',[28] including customary law obligations and binding decisions of an international organisation.[29] Shortly after, the tribunal in the *South China Sea Arbitration* (*SCS Arbitration*), while endorsing the reasoning of the majority in *Chagos*,[30] added that traditional

20 This category also includes 'other pertinent rules of international law' and 'international law'. See, e.g., LOSC (n 3), Articles 2(3), 19(1), 58(2), 87(1), 235(1).

21 For example, *ibid*., Articles 19(2), 39(1).

22 For example, *ibid*., Articles 56(2), 238.

23 This category also includes, *inter alia*, 'applicable international regulations', 'applicable international standards', and 'internationally agreed rules, standards and recommended practices and procedures'.

24 For example, *ibid*., Article 303(4).

25 N Klein, 'Informal agreements and UNCLOS' United Kingdom Parliament, Written evidence UNC0047 (received 10 December 2021) available at https://committees.parliament.uk/writtenevidence/41569/pdf/; all websites accessed 26 October 2022.

26 *Chagos Marine Protected Area Arbitration* (*Mauritius* v. *United Kingdom*), Award, 18 March 2015, Permanent Court of Arbitration (PCA) Case No. 2011-03, paras 503–516 [*Chagos Arbitration*].

27 *Ibid*., para 516.

28 *Ibid*., Dissenting and Concurring Opinion of Judges James Kateka and Rüdiger Wolfrum, para 94.

29 *Ibid*.

30 *South China Sea Arbitration* (*Republic of Philippines* v. *People's Republic of China*), Award, 12 July 2016, PCA Case No. 2013–19, para 808 [*SCS Arbitration*].

fishing rights, as vested rights of foreign individuals, also fall under the scope of this reference.[31] Meanwhile, against the background of this progressive enrichment, scholars have reasonably argued that the reference can already be considered to include rules of international human rights law.[32]

The broadness and dynamism of the *renvois* are endorsed further by the 'international rules and standards' formula. The wording of the formula highlights its strong technical component and reveals that it can encompass not only primary sources of international law but also other more technical instruments and non-binding rules.[33] It has been observed that this inexact formulation aims to leave the detailed articulation of these rules to the relevant – already existing and future – conventions,[34] which the *renvois* purport to make binding through incorporation and, consequently, secure their primacy over the domestic law of LOSC State Parties.[35] The coupling of this formula with qualifiers such as 'applicable',[36] 'generally accepted',[37] 'generally recommended',[38] and 'internationally agreed',[39] on the one hand specifies the referenced rule and on the other hand, shows that this formula can encompass rules to which a State has not itself consented to.[40] This was, in some ways, showcased in the *SCS Arbitration*. There the tribunal exercised jurisdiction through the *renvoi* in Article 94(5) of the LOSC over the application of the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS), because it found that they had become 'generally accepted'[41] although the Philippines acceded to COLREGS after the submission of the dispute.[42] However, it should be further noted that the LOSC in Article 39(2)(a)

31 *Ibid.*

32 N Klein 'Geneva Declaration on Human Rights at Sea: An endeavor to connect law of the sea and international human rights law' (2022) *Ocean Development & International Law* 1–37, at p. 23.

33 See generally, (n 4).

34 *Ibid.*

35 International Law Association (ILA), *Committee on Coastal State Jurisdiction Relating to Marine Pollution Final Report* (International Law Association, London, 2000) 32; Oxman 1991 (n 2); Redgwell (n 4).

36 For example, LOSC (n 3), Articles 42, 60, 94, 211.

37 For example, *ibid.*, Articles 21, 39, 41, 211.

38 For example, *ibid.*, Articles 61, 119.

39 For example, *ibid.*, Article 212.

40 Nguyen (n 4).

41 *SCS Arbitration* (n 30), para 1081.

42 Maritime Industry Authority of the Philippines, 'List of IMO Conventions Ratified by the Philippines' available at https://marina.gov.ph/wp-content/uploads/2018/07/LIST-OF-IMO-CONVENTIONS-RATIFIED-BY-THE-PHILIPPINES.pdf; proceedings were initiated on 22 January 2013.

explicitly requires compliance with the COLREGS and recognises them 'as generally accepted international regulations' for safety at sea and that the respondent State had acceded to the COLREGS before the submission of the dispute.[43]

### *The Establishment of Jurisdiction Based on the Relationship between the LOSC and the External Sources*

Although the above formulas clearly show that the *renvois* encompass a broad spectrum of rules which can be enriched over time, this realisation does not clarify the scope of judicial jurisdiction that they can allow for. As already mentioned, jurisdiction will also depend on the legal relationship that the provision establishes between the referring system and the external rule. For an external rule to be incorporated in a way that the adjudicating tribunal will have jurisdiction to directly assess its application, this external rule must be rendered a source of rights or obligations with which compliance is required under the LOSC.[44] For this to happen, the *renvoi* must be contained in a provision that prescribes a behaviour that is necessarily supplemented by the external rule. In turn, this entails two consecutive examinations. An examination of whether the provision in question is prescriptive, and an examination of whether and how the behaviour that the provision prescribes, is supplemented by the external rule.

First, the function of a provision as prescriptive depends on the content of its active clause. Generally, what someone ought, is permitted, or is forbidden to do is expressed by the use of deontic modals in the active clause of provisions.[45] In the LOSC the use of 'shall', the present tense, and 'may' most of the time express obligation,[46] and therefore, their presence in the active clause

43 China acceded on 7 January 1980. Convention on the International Regulations for Preventing Collisions at Sea, 1972 (London, 20 October 1972, in force 15 July 1977) 1050 *UNTS* 16.

44 *Chagos Arbitration* (n 26), para 504; A Petrig and M Bo, 'The International Tribunal for the Law of the Sea and human rights' in M Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (CUP, Cambridge, 2019) 353–411, at p. 402.

45 These deontic modals include 'shall', 'should', 'may' and the present tense. See G Scotto di Carlo, 'Linguistic patterns of modality in UN resolutions: The role of shall, should, and may in Security Council resolutions relating to the Second Gulf War' (2017) 30 *International Journal for the Semiotics of Law* 223–244; GH von Wright, 'Deontic logic' (1951) 237(60) *Mind* 1–15.

46 As confirmed by the English Language Group of the LOSC Drafting Committee, '"shall" denotes an imperative and expresses an obligation'. See Anon, 'Note on the use of the word shall', in S Rosenne and A Yankov (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nijhoff Publishers, Dordrecht, 1991) xli–xlii, xliii–xliv, xlv–xlvi ('"shall" should not be used where the present tense adequately conveys the meaning'); *Chagos Arbitration* (n 26), paras 500–514; *SCS Arbitration* (n 30), para 808. 'May' is found

of LOSC provisions will most probably render the said provision prescriptive. Second, the relationship that the *renvois* establish between the LOSC and the external rule is usually expressed through another set of formulas.[47] These formulas can be broadly taxonomised into the following groups:[48] The first group contains the formulas 'in accordance with', 'under the conditions', 'subject to', 'in conformity with', 'giving effect to', comply 'with', 'refrain from' and 'conform to'; the second the formulas 'no less effective' and 'at least have the same effect'; the third the 'without prejudice' formula; and the fourth the 'due regard' and 'taking into account' formulas. From these, only the first group contains strong formulas which reflect the intention to make the external rule binding, as they directly require States to abide by it. Accordingly, the *renvois* containing the formulas of the first group can be considered to be receptive and allow for the exercise of jurisdiction over the external rule. The rest of the groups contain softer formulas which do not require direct compliance with the external rule (non-receptive), and consequently, they do not directly allow for the exercise of jurisdiction over its application. However, to a certain extent, their content depends on the external rule, and therefore, they can grant some sort of jurisdictional expansion.

More specifically, the *renvois* containing the 'no less effective' and 'at least have the same effect' formulas, do not require States to directly conform with the external rule, but require them to yield equivalent results to what it prescribes.[49] In this respect, the addressee State has an obligation of result, equivalent to the standard set by the external source, but the external rule is not incorporated in the LOSC and, the adjudicating tribunal will not have jurisdiction to make substantive determinations regarding its application. Still, as the external rule is set as a binding minimum standard of compliance,[50] the States' behaviour will be assessed in analogy to what the external rule prescribes. The *renvois* containing the 'without prejudice' formula express that the external rule still applies and do not expand the jurisdiction of the tribunal.[51]

in the active clause of Articles 21, 220 and 230 of the LOSC which, due to their performative function, can be considered prescriptive.

47 P Allot, 'Power sharing in the law of the sea' (1983) 77(1) *American Journal of International Law* 1–29.

48 As grouped in Drafting Committee, Informal Paper 2 (8 August 1978): A Preliminary list of Recurring Words and Expressions in the ICNT Which May be Harmonized, pp. 46–58.

49 Redgwell (n 4).

50 Nguyen (n 4); ILA (n 35).

51 Drafting Committee (n 48), pp. 39–40.

The most elusive *renvois* are, arguably, those containing the 'take into account' and 'due regard' formulas.[52] The first obliges States, when fulfilling their LOSC obligations, to take into consideration the external rule, but not necessarily having to give effect to it.[53] In this respect, when a State has not already individually consented to the external rule it has the discretion to decide if and how it will implement it without becoming directly bound by it.[54] Therefore, the States' conduct is not determined in accordance with its conformity to the external rule, and the adjudicating tribunal will enjoy jurisdiction only over good faith obligations that arise in respect of this rule.[55] However, when the State has individually consented to be bound by the relevant external rule, then this rule becomes a minimum standard of conduct under the LOSC.[56] The State, in this case, is required to show that it has attempted to abide by this standard and the adjudicating tribunal will be allowed to also assess due diligence obligations that may arise in this connection.

The *renvois* that contain the 'due regard' formula are even more complex.[57] The content of 'due regard' is context-depended,[58] and it can take the form of a duty of self-restraint,[59] comprised by a negative obligation to not unjustifiably interfere with the rights of others,[60] but also by a positive obligation that requires due diligence.[61] Accordingly, the jurisdiction granted through a 'due regard' *renvoi* will be equally context-depended and multidimensional, spanning from good faith to due diligence obligations that arise out of the external

52 *Inter alia*, see ILA (n 35); M Forteau, 'The legal nature and content of "due regard" obligations in recent international case law' (2019) 34 *IJMCL* 25–42.

53 Oxman 1991 (n 2); van Reenen (n 4) characterises this as a mild obligation, in, for example, Article 207 of the LOSC.

54 AE Boyle, 'Marine pollution under the Law of the Sea Convention' (1985) 79(2) *American Journal of International Law* 347–372; Nguyen (n 4).

55 *Chagos Arbitration* (n 26), para 534.

56 J Harrison, 'Litigation under the United Nations Convention on the Law of the Sea: Opportunities to support and supplement the climate change regime' in I Alogna, C Bakker and JP Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill | Nijhoff, Leiden, 2021) 415–432; AE Boyle, 'Litigating climate change under Part XII of the LOSC' (2019) 34 *IJMCL* 458–481.

57 For example, LOSC (n 3), Articles 56(2), 58(3).

58 *Chagos Arbitration* (n 26), para. 519.

59 BH Oxman, 'The principle of due regard' in International Tribunal for the Law of the Sea, *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Brill | Nijhoff, Leiden, 2018) 108–117, at p. 113.

60 *Chagos Arbitration* (n 26), para. 540; J Gaunce, 'On the interpretation of the general duty of "due regard"' (2018) 32 *Ocean Yearbook* 27–59.

61 Oxman 2018 (n 59).

rule and, arguably, expanding even over the application of more substantive external matters.[62]

Interestingly, applicant States have on several occasions attempted to supplement their claims with allegations of violation of rules external to the LOSC arguing that the 'due regard' formula allows for an extension of jurisdiction.[63] The LOSC tribunals, however, have not yet determined that by virtue of the 'due regard' formula they would be allowed to directly assess the application of the external rule. The tribunal in *Chagos* explained that 'due regard' should be understood as equivalent to the 'subject to' formula, submitting that the provisions containing it should be regarded as *renvois* that incorporate external rules in the LOSC.[64] However, it only proceeded to assess the respondent's compliance with good faith obligations that arose in connection with the external rule and not the latter's application.[65]

## An Underutilised Jurisdictional Basis

To date States have made little use of both the compulsory mechanism of Part XV and the jurisdictional dynamic of the *renvois*.[66] Admittedly, any attempt to explain why States have underutilised the *renvois* flirts with the risk of speculation, as various factors may have played a role. The decision of a State to initiate judicial proceedings is often not so much dependent on the legal merit of the dispute but rather on its determination that such a procedure will in itself create the conditions which will assist the satisfactory conclusion of its problems.[67] In this respect, the initiation of adjudication is, predominantly, a political decision dependent on various legal, extra-legal, and meta-legal factors which complement and influence one another.[68] The following

62 CE Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* (OUP, Oxford, 2021) 99.

63 *The M/T "San Padre Pio" Case* (*Switzerland* v. *Nigeria*)*, Provisional Measures*, Order, 6 July 2019, *ITLOS Reports 2018–2019*, p. 375, para 26.

64 *Chagos Arbitration* (n 26), paras 503, 520.

65 *Ibid*., para 534.

66 LN Nguyen, 'Jurisdiction and applicable law in the settlement of marine environmental disputes under UNCLOS' (2021) 9 *Korean Journal of International and Comparative Law* 337–353.

67 J Gladstone, 'The legal adviser and international disputes: Preparing to commence or defend litigation or arbitration' in A Zidar and JP Gauci (eds), *The Role of Legal Advisers in International Law* (Brill, Leiden, 2016) 34–55, at pp. 35–36.

68 J Collier and V Lowe, *The Settlement of Disputes in International Law* (OUP, Oxford, 2000) 1–16; SV Scott, 'Litigation versus dispute resolution through political processes' in

two sections will attempt to outline some of the factors that could have made the *renvois* a less appealing jurisdictional basis.

### *Legal Factors: Jurisdictional Inconsistencies and Uncertainties*

The LOSC may have been hailed as an instrument that provides for compulsory adjudication, but both its institutional and procedural structure show that the judicial settlement of disputes is neither fully compulsory nor completely comprehensive.[69] More significantly, when a dispute implicates external instruments, it is possible that, under Articles 281 or 282, another dispute settlement mechanism would be given priority instead of Part XV procedures. In addition to this potentially unappealing jurisdictional background, LOSC tribunals have advanced conflicting interpretations of Articles 281 and 282 making it difficult for States to fully grasp when and how these two bars to jurisdiction would become applicable. Thus, the uncertainties regarding the scope of these articles seem to have rendered the *renvois* a rather unattractive jurisdictional option for States.

Already, in the first LOSC arbitration, the *Southern Bluefin Tuna Arbitration* (*SBT Arbitration*), the tribunal found that it lacked jurisdiction through a surprisingly expansive interpretation[70] of Article 281 of the LOSC and Article 16 of the Convention for the Conservation of Southern Bluefin Tuna.[71] This interpretation was heavily criticised[72] and later dismissed by the tribunal in the *SCS Arbitration*.[73] However, the fact that this was the first award issued under the LOSC had far-reaching implications.[74] It created considerable uncertainty around the scope of Article 281 and, arguably, had a chilling effect[75] on the

N Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP, Cambridge, 2014) 29.

69 The application of compulsory procedures is subject to the limitations of Article 297 of the LOSC and the optional exceptions under Article 298 of the LOSC.

70 DA Colson and P 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(1) *Ocean Development & International Law* 59–82, at p. 63.

71 *Southern Bluefin Tuna Case* (*Australia & New Zealand* v. *Japan*), Award on Jurisdiction and Admissibility, (2000) 23 *RIAA* 1–57, paras 53–59.

72 Colson and Hoyle (n 70).

73 *SCS Arbitration* (n 30), Award on Jurisdiction and Admissibility (29 October 2015), paras 194, 195, 223–225, 284, 318–320.

74 B Kwiatkowska, 'The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) award of the first Law of the Sea Convention Annex VII arbitral tribunal' (2001) 16(2) *IJMCL* 239–293.

75 MA Orellana, 'The law on highly migratory fish stocks: ITLOS jurisprudence in context' (2004) 34 *Golden Gate University Law Review* 459–495, at pp. 476–477; HS Schiffman,

use of compulsory procedures, especially for disputes that implicated issues under external instruments and could motivate respondent States to invoke objections under Articles 281 and 282 of the LOSC. Consecutively, the *MOX Plant Arbitration*, which was the first case in which a State attempted to jurisdictionally utilise a *renvoi*,[76] did not provide much clarity either. Although it sidestepped the *SBT Arbitration* findings, it did not explain why Articles 281 and 282 were not applicable,[77] and, regardless of whether the tribunals got it right,[78] it is probable that the consecutive dismissal of disputes that implicated external instruments had a negative impact on the use of *renvois*.

Today, the practice of the tribunals seems to have established that if the dispute falls only under the LOSC then Articles 281 and 282 will not be applicable and a mere overlap of instruments will not suffice to substantially bring the dispute under both.[79] Meanwhile, if the dispute is found to fall under both instruments, Article 281 will apply if the external instrument provides for an alternative dispute settlement procedure that has not been utilised and clearly excludes further procedures.[80] Further, Article 282 will apply if the external instrument provides for a compulsory and binding dispute settlement mechanism over a dispute which concerns the interpretation or application of the LOSC.[81] Thus, the threshold for their application has been set relatively high,

---

'UNCLOS and marine wildlife disputes: Big splash or barely a ripple?' (2001) 4(3) *Journal of International Wildlife Law and Policy* 257–278, at p. 276; see generally, V Lowe, 'The function of litigation in international society' (2012) 61(1) *International & Comparative Law Quarterly* 209–222.

76 Ireland was seeking to uphold its rights under LOSC Articles 123, 192, 193, 194, 197, 206, 207, 211, 212, 213, 217, 222 invoking, *inter alia*, MARPOL 73/78, the OSPAR Convention and international customary law. See *The MOX Plant Case* (*Ireland* v. *United Kingdom*), Memorial of Ireland, Segment 2 (26 July 2002), paras 5.1–6.36; *The MOX Plant Case* (*Ireland* v. *United Kingdom*), Reply of Ireland, Volume I (7 March 2003), paras 5.1.–5.37; *The MOX–Plant Case* (*Ireland* v. *United Kingdom*), Day 2 – June 11, 2003, Professor Lowe transcript pp. 40–41, 44–45.

77 *The MOX Plant Case* (*Ireland* v. *United Kingdom*), Order no. 3, 24 June 2003, PCA Case No. 2002-01, para 18; V Roben, 'The order of the UNCLOS Annex VII arbitral tribunal to suspend proceedings in the case of the MOX Plant at Sellafield: How much jurisdictional subsidiarity?' (2004) 73(2) *Nordic Journal of International Law* 223–246.

78 *MOX Plant* was hailed as sensible by, e.g., J Finke, 'Competing jurisdiction of international courts and tribunals in light of the MOX Plant dispute' (2006) 49 *German Yearbook of International Law* 307–326, and negatively criticised by, e.g., Roben (n 77).

79 *SCS Arbitration* 2015 Award (n 73), paras 194, 284; N Klein, 'Adapting UNCLOS dispute settlement to address climate change' in J McDonald, J McGee and R Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing, Cheltenham, 2020) 94–113.

80 *SCS Arbitration* 2015 Award (n 73), paras 195, 223–225.

81 *Ibid*., paras 318–320.

and although some questions regarding their scope remain unresolved,[82] to a large extent their interpretation has been streamlined and the chilling effect of the earlier jurisprudence seems to be fading out.

However, even if it were not for the procedural uncertainty that the jurisprudence has created, the lack of precedence in connection with the substantive assessment of the *renvois* also affects the predictability of the merits of the dispute. In this respect, it is only rational that the *renvois* mechanism, which to a very large extent has remained unclarified, does not, so far, motivate States to engage in the costly, time-consuming and inherently risky endeavour of adjudication.[83] In turn, this can potentially create a vicious cycle of non-use, as the less this mechanism is used the more the uncertainty around it increases and the more the phenomenon is amplified.

### *Extra and Meta-legal Factors: Interests, Timing and Systemic Repercussions*

The broader interests of a State play a significant role in its decision to pursue adjudication. Often States will pursue adjudication as a means of last resort[84] when they consider that the resolution of a specific dispute is of significant importance and cannot be resolved in any other way. Even though the *renvois* can allow for a rather broad jurisdictional spectrum, to a large extent the external rules which they incorporate relate to issues that States either consider to be of a lower order, such as environmental protection,[85] or issues that they prefer to resolve through other channels, such as shipping. Therefore, it is possible that the *renvois* have been a less popular jurisdictional option because of the issues that they regulate.

This is illustrated by the exceptional cases in which States have utilised the *renvois*, seemingly as a means of last resort, to adjudicate issues that are not explicitly regulated by the LOSC. On the one hand, these concerned disputes which implicated claims concerning rights owed to individuals[86] and territorial

82 H Roberts, 'Identifying "exclusionary agreements": Agreement type as a procedural limitation in UNCLOS dispute settlement' (2021) 52(2) *Ocean Development & International Law* 113–142.

83 S Karim, 'Litigating law of the sea disputes using the UNCLOS dispute settlement system' in Klein (ed) (n 68), at p. 270.

84 A Serdy, 'The paradoxical success of UNCLOS Part XV: A half-hearted reply to Rosemary Rayfuse' (2005) 36(4) *Victoria University of Wellington Law Review* 713–722.

85 T Stephens, 'International environmental disputes: To sue or not to sue?' in Klein (ed) (n 68), at p. 288.

86 *The Arctic Sunrise Arbitration* (*Netherlands* v. *Russia*), PCA Case No. 2014-02; *The M/T "San Padre Pio" (No. 2) Case* (*Switzerland* v. *Nigeria*), ITLOS Case No. 29; *SCS Arbitration* (n 30), para 808.

sovereignty.[87] These types of disputes clearly touch upon issues with a subject matter of high saliency, which are not always easily handled at the inter-State level. International fora willing to address issues of territorial sovereignty are often not available, whereas the adjudication of rights owed to the individuals of the crew of a vessel either might not be available[88] or might be preconditioned on the exhaustion of local remedies, causing considerable delays for the well-being of the concerned individuals.[89] On the other hand, these cases concerned disputes which would otherwise be considered lower order, but due to extraordinary circumstances became disputes of high priority for applicant States. In that connection, the *MOX Plant* dispute is characteristic. This was an environmental dispute which, under normal circumstances, would have been considered a dispute of secondary importance. However, because the dispute concerned an activity with extraordinary risks – the discharge of radioactive matter – it became an urgent matter for the affected State. Apart from that, it is also noteworthy that the applicant tried to resolve the dispute first through other channels and initiated the arbitration only after it had exhausted almost all other means; this arbitration had become its last card in a threefold strategic litigation scheme.[90]

Another set of factors that may have made the *renvois* a less appealing jurisdictional option is their effects as provisions that can make binding rules to which States have not individually consented to, alongside with their nature as agents of regime interaction, and therefore, bearers of systemic questions.[91] First, considering how reciprocal State relations often are, States might have been hesitant to utilise against each other a mechanism that would allow a tribunal to exercise some sort of jurisdiction over rules to which a State has not individually consented to. Second, from a more systemic perspective, the *renvois*, by creating links between different legal regimes, can give rise to questions regarding the interaction of those regimes and the institutions for which they provide. Answering these questions often calls for broader policy considerations which can impact the system as a whole and States might seek to avoid

87 See generally, *Chagos Arbitration* (n 26).

88 *The Duzgit Integrity Arbitration* (*Malta* v. *São Tomé and Príncipe*), Award, 5 September 2016, PCA Case No. 2014-07, paras 147–157.

89 For direct inter-State claims under the LOSC local remedies would be inapposite. See *The Arctic Sunrise Arbitration* (*Netherlands* v. *Russia*), Award on Merits, 14 August 2015, PCA Case No. 2014-02, para 173; *The Duzgit Integrity Arbitration* (n 88), para 160; *The M/T "San Padre Pio" Case* (n 63), paras 128–129.

90 R Churchill and J Scott, 'The MOX Plant litigation: The first half-life' (2004) 53(3) *International and Comparative Law Quarterly* 643–676, at p. 673.

91 Lowe (n 75).

the interference of an impartial third party in such matters.[92] This was illustrated again in the *MOX Plant Arbitration*, where the disputing States were, at the same time, both a party to the LOSC and a Member State of the European Community. Almost immediately complex questions on the competencies and interaction of the European Court of Justice and the LOSC tribunals arose. For reasons of judicial comity[93] the proceedings were put on hold for approximately seven years, and the case was finally put on record after the withdrawal of the applicant, clearly demonstrating the preference – as reflected in Article 292 of the European Community Treaty – to deal with the matters on a European rather than an international level.

A final factor that could have impacted the use of the *renvois* is the timing of the dispute in relation to the effect that the subsequent decision and its precedent are expected to have on the substantive development of the law. To be more specific, as discussed above, the majority of the LOSC *renvois* are formal; they do not refer to a specific provision(s) but to external sources, and their content follows the evolution of the external source. This feature can have a double-edged effect: it can provide for a dynamic scope of jurisdiction, but it can also result in uncertainties and the risk of premature litigation.[94] Precedent in international adjudication may not be binding, but the findings of courts and tribunals significantly impact the development of the law – either by assisting its further evolution or by stabilising its normative expectations.[95] Thus, if a *renvois* is utilised when the external invoked law is still in flux, it might produce the exact opposite of the intended results, and instead of propelling a further development of the law, lead to an indefinite standstill. Thus, one of the elements that can make the *renvois* such an appealing jurisdictional basis can also become an element that discourages States from utilising it. This sensitive balance is visible in the outcome of several arbitrations. The *SBT* and *MOX Plant Arbitrations* were initiated, *inter alia*, with the view of authoritatively establishing that the precautionary principle binds States under the LOSC. However, at that moment in time, the tribunals showed that they were not ready to explicitly validate the status of the principle, and today, approximately twenty years later, the issue still awaits

92 *Ibid.*

93 *The MOX Plant Case*, Order no. 3 (n 77).

94 Lowe (n 75).

95 A von Bogdandy and I Venzke, 'On the functions of international courts: An appraisal in light of their burgeoning public authority' (2013) 26 *Leiden Journal of International Law* 49–72.

explicit adjudicative confirmation in a contentious setting under the LOSC.[96] Exactly the opposite occurred with the claim of the Philippines against China in respect of a violation of the COLREGS under the *renvois* of Article 94(5) of the LOSC. When the dispute was submitted, the COLREGS had become one of the most widely adopted conventions.[97] Thus, the tribunal was ready to accept their incorporation, in effect, opening the way for the submission of disputes which implicate international rules and standards developed by external instruments under Article 94.[98]

## Can the *Renvois* Serve to Address Modern Challenges?

It is almost self-explanatory that a legal instrument adopted in 1982 will not directly speak to the issues that came into being long after that date. However, the flexibility and dynamism that the *renvois* bring into the LOSC can provide for a semi-open door to judicially address certain aspects of them. Issues such as climate change, ocean acidification, sea level rise, seaborne migration, human rights protection and biodiversity protection are certainly more complex than the LOSC or the bilateral structure of international adjudication can tackle. However, adjudication can at least make a start in addressing those challenges and, arguably, the LOSC tribunals can in certain respects prove to be suitable fora. That said, the aim of this part is not to comprehensively examine how these issues would be adjudicated, but only to showcase that – by virtue of the *renvois* – they can become subject to LOSC adjudication although they are, often, more directly regulated by other instruments. The following section is divided into two parts which examine how two broad categories of challenges might be accommodated under the LOSC.

### *Part XII* Renvois*: Environmental Challenges*

Contemporary environmental challenges are perhaps the issues that can be more easily accommodated under Part XV of the LOSC. The *renvoi* of Article 297(1)(c) provides for jurisdiction over disputes that concern the violation of international rules and standards for the protection and preservation

96 ITLOS under its advisory function observed that its *SBT Arbitration* order had implicitly identified the precautionary approach. See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, para 132.

97 *SCS Arbitration* (n 30), paras 1081–1082.

98 *The M/T "San Padre Pio" (No. 2) Case* (*Switzerland* v. *Nigeria*), Memorial of Switzerland, Volume 1 (23 June 2020), paras 6.44–6.58.

of the marine environment. The tribunal in *Chagos* has confirmed that this provision serves to expand judicial jurisdiction well beyond the four corners of the Convention.[99] Thus, already on that basis, certain environmental disputes can become subject to adjudication under Part XV. Aside from this provision, which exceeds the scope of this contribution, several Part XII *renvois* could also allow tribunals to address some contemporary environmental issues not directly regulated by the Convention.

Part XII contains a set of general provisions and a dense *renvois* network, which allow it to interact with a broad spectrum of external rules that substantially address contemporary environmental problems, such as climate change or ocean acidification.[100] The drivers of these environmental problems include substances which can qualify as marine pollutants under the LOSC,[101] and already without relying on a *renvoi* the failure of States to mitigate the effects of climate change and ocean acidification could be addressed through the general obligations of Article 192, which provides that States have an obligation to protect the marine environment, and Article 194(1), which provides that States 'shall take … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source'.[102] Moreover, the tribunal in the *SCS Arbitration* found that the content of these obligations can be informed and detailed by external sources of environmental law.[103] Therefore, although these provisions do not contain express *renvois*, they have been utilised in practice as implicit interpretative *renvois* that could allow the obligations of the LOSC to be read in accordance with the rules and standards developed in connection with climate change and ocean acidification.

Subsequently, more specific claims could be submitted through context-specific *renvois*. Article 207 on pollution from land-based sources and Article 212 on pollution from or through the atmosphere prescribe that States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment, from each source respectively, taking into account internationally agreed rules and standards. Both climate change and ocean

99 *Chagos Arbitration* (n 26), para 316.

100 ER Harrould-Kolieb, 'The UN Convention on the Law of the Sea: A governing framework for ocean acidification?' (2020) 29 *Review of European, Comparative & International Environmental Law* 257–270.

101 A Boyle, 'Law of the sea perspectives on climate change' (2012) 27(4) *IJMCL* 831–838.

102 Klein (n 79); M Doelle, 'Climate change and the use of the dispute settlement regime of the Law of the Sea Convention' (2006) 37(3–4) *Ocean Development & International Law* 319–337.

103 *SCS Arbitration* (n 30), paras 941–942.

acidification can be understood as forms of marine pollution against which States are obliged to take action under either Article 207 or Article 212. The LOSC here, utilising the rather weak[104] 'take into account' formula, does not incorporate with a binding effect the external rule[105] and leaves at the discretion of the State to decide the form and content of this action.[106] However, through Articles 192 and 194(1) the LOSC imposes an obligation of due diligence which is informed by the 'internationally agreed rules, standards' that the State is required to take into account through these *renvois*.[107] Thus, when the State is not individually bound by these rules it is at least obliged to act in good faith towards them,[108] and when it is individually bound by them it should show due diligence towards these external rules.[109] Therefore, although the adjudicating tribunal will not have jurisdiction to directly determine whether specific obligations under external regimes were violated, it will have jurisdiction to assess the due diligence and good faith obligations that arise under climate change and ocean acidification rules and standards.[110]

A question that might arise is whether the external instruments brought into the LOSC through the *renvois* would give rise to the application of Articles 281 and 282. As outlined above, this question will be determined by the assessment of under which instrument the dispute falls.[111] Still, even if the dispute is found to fall at the same time under any of the United Nations Framework Convention on Climate Change (UNFCCC) instruments and the LOSC, Article 281 would not apply as the relevant UNFCCC instruments do not explicitly exclude the application of Part XV. However, Article 282 of the LOSC

104 Harrison (n 56).

105 Nguyen (n 4).

106 E Kirk, 'Science and the international regulation of marine pollution' in DR Rothwell, AG Oude Elferink, KN Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP, Oxford, 2015) 516–535, at p. 526.

107 Oxman 1991 (n 2).

108 F Wacht 'Article 207' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, Munich, 2017) 1385.

109 Harrison (n 56); Boyle (n 56).

110 United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994) 1771 *UNTS* 107 [UNFCCC]; Kyoto Protocol to the UNFCCC (Kyoto, 11 December 1997, in force 16 February 2005, 2303 *UNTS* 162); Paris Agreement (Paris, 12 December 2015, in force 4 November 2016, 3156 *UNTS*; and other climate-related instruments. Identification of the relevant framework for ocean acidification would be more complicated as it is currently governed by a complex of functionally overlapping parallel regimes and institutions. See KN Scott, 'Ocean acidification: A due diligence obligation under the LOSC' (2020) 35(2) *IJMCL* 382–408.

111 *SCS Arbitration* (n 65), paras 194, 284; Klein (n 79).

might be found applicable in connection with Article 18 of the Kyoto Protocol, which according to some commentators, provides for a binding decision.[112]

This set of environmental issues exemplifies that even environmental *renvois* that employ weaker formulas than the *renvois* which require direct conformity with the external rule can still be utilised to address certain aspects of the contemporary environmental issues facing the ocean. The jurisdiction of the tribunals, on most occasions, will not allow for the assessment of the application of external instruments, but it will allow for the assessment of due diligence and good faith obligations that arise thereunder.

### *Zonal* Renvois*: Challenges Concerning the Treatment of Individuals*

Contrary to Part XII, which directly addresses the protection and preservation of the marine environment through a dense network of soft *renvois*, the LOSC is almost silent when it comes to the treatment of individuals. However, in its scattered zonal *renvois* it employs strong formulas, which can be utilised to address issues of that kind, no matter how exorbitant they may sound.

So far, States have submitted disputes that implicate variable rights owed to individuals through the 'subject to' and 'due regard' formulas. In the *SCS Arbitration* the Philippines claimed that China had interfered with the traditional fishing rights owed to its fishermen.[113] The Netherlands, in the *Arctic Sunrise Arbitration*, claimed that the Russian Federation had breached several human rights obligations[114] to which it was required to pay 'due regard'.[115] More recently, Switzerland in the *San Padre Pio* dispute claimed that Nigeria obstructed it from exercising its duty to uphold the rights of the crew under the International Covenant on Civil and Political Rights (ICCPR) and Maritime Labour Convention, 2006 (MLC), which are incorporated as 'generally accepted international regulations, procedures and practices' in Articles 94(3) and 94(4) of the LOSC.[116] Further, Switzerland argued that Nigeria directly violated several provisions of the ICCPR and, therefore, failed to have due regard to the rights of Switzerland under Article 56(2) of the LOSC.[117]

LOSC tribunals have showed that the door to adjudicating rights owed to individuals has not been shut. The *SCS* arbitral tribunal found that traditional

112 Klein (n 79).
113 *SCS Arbitration* (n 30), Transcript Day 2, p. 164.
114 *The Arctic Sunrise Arbitration* (*Netherlands* v. *Russia*), Memorial of the Kingdom of the Netherlands (31 August 2014), PCA Case No. 2014-02, pp. 109–111.
115 *Ibid.*, Second Supplemental Written Pleadings, at p. 7, para. 4
116 *The M/T "San Padre Pio" (No. 2) Case*, Memorial of Switzerland (n 98), para 6.44.
117 *Ibid.*, para 6.58.

fishing rights,[118] as customary rights, fall squarely under the LOSC Article 2(3) *renvoi*[119] and assessed their application. The *Arctic Sunrise* arbitral tribunal submitted that, although it could not directly assess whether human rights had been violated, it would be able to deduce the standards developed thereunder to assess the legality of enforcement actions under the LOSC.[120] And although the *San Padre Pio* dispute never reached the merits stage[121] and the International Tribunal for the Law of the Sea in its provisional measures order did not address the issue, only Judge Lucky explicitly refuted the inclusion of the ICCPR and the MLC under the *renvoi*.[122] This limited jurisprudence reveals that through strong *renvoi* formulas external customary rights of individuals can be directly assessed, while softer *renvoi* formulas can be utilised as a source of legal standards leaving room for future evolution. It is, therefore, anticipated that through provisions where the engagement of the LOSC with external rules is stronger – *renvois* which call for direct conformity with the external rule[123] – claims related to refugee law and human rights can to a certain extent be addressed under Part XV.

To illustrate this, the LOSC in Part II employs two strong *renvois* through which it subjects the sovereignty of the coastal State[124] and the regulation of innocent passage to other rules of international law.[125] As discussed above, although the material scope of these references has not been clarified, it has been broadly and dynamically applied. What is more, the findings of the *SCS Arbitration* indicate that the tribunals would be able to examine rights owed to individuals of a customary or *jus cogens* nature through this formula.[126] Consequently, a dispute over pushback/pullback operations that implicates claims in connection with the right to not be subjected to torture or inhuman and degrading treatment or the prohibition of refoulement could be adjudicated. In the same context, the conformity of measures taken by coastal States to regulate innocent passage under Article 21 of the LOSC could also be assessed under such external rules. Moreover, in other maritime zones, external rules concerning rights owed to individuals could be brought under Part XV

118 *SCS Arbitration* (n 30), para 814.

119 *Ibid.*, para 808.

120 *The Arctic Sunrise Arbitration*, Award on Merits (n 89), para 197.

121 *The M/T "San Padre Pio" (No. 2) Case* (*Switzerland* v. *Nigeria*), Order 2021/6, 29 December 2021, ITLOS Case No. 29.

122 *The M/T "San Padre Pio" Case* (n 63), Dissenting Opinion Judge Lucky, paras 26–27.

123 For example, use of the terms 'in accordance with', 'under the conditions', 'subject to', 'in conformity with', 'giving effect to' and 'conform to'.

124 LOSC (n 3), Article 2(3).

125 *Ibid.*, LOSC.

126 Petrig and Bo (n 44).

even when the Convention employs softer *renvois* formulas. For example, similarly to Switzerland's claims outlined above, the flag State of vessels rescuing asylum seekers that are being ordered by coastal States to stop before entering the territorial sea can initiate adjudication for the unlawful interference with the freedom of navigation[127] and bring claims implicating rights owed to the individuals on board under the *renvois* of LOSC Article 94.[128]

## Conclusion

The *renvois* mechanism is at the heart of the LOSC allowing for the dynamic incorporation of a broad spectrum of external rules. This dynamism is, in turn, also part of the jurisdiction of the tribunals. However, due to a variety of factors, States have made limited use of this mechanism in adjudication. What would have happened if States had taken advantage of the *renvois* will remain unknown. Nonetheless, today, that the LOSC is entering its fifth decade, it is the right moment to discuss what can be done for the challenges that lie ahead. The multiple *renvois* of the LOSC can provide a footing to judicially address challenges with a strong connection to the Convention, like the effects of climate change and ocean acidification, but also more peripheral issues such as seaborne migration and the rights owed to individuals at sea. Of course, judicial fora, such as the LOSC tribunals, are not a panacea and considerable obstacles and limitations will always exist. Even so, the *renvois* constitute a source of untapped jurisdictional potential which remains to be explored and can possibly mark a beginning in addressing such pressing challenges.

127 E Papastavridis, 'The Aquarius incident and the law of the sea: Is Italy in violation of the relevant rules?' (*EIJL:Talk!*, 27 June 2018) available at https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/.

128 Objections under Articles 281 and 282 of the LOSC can be avoided if the submitted claims are based on rules which have acquired a customary or *jus cogens* status. In that case, only declarations under Article 36(2) of the ICJ Statute or other dispute settlement arrangements specifically providing for the adjudication of such disputes might give room to relevant objections.