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Reflections on the Governance Function of Compulsory Dispute Settlement in the Legal Order for the Ocean

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Abstract

This article takes the fortieth anniversary of the United Nations Convention on the Law of the Sea as an opportunity to reflect on the role that the compulsory dispute settlement system under Part XV of the Convention plays in maintaining the legal order for the ocean. It posits that, in addition to the more traditional understandings of the dispute settlement function and law-ascertainment function of international adjudication, a clear governance function can be discerned. By developing a three-fold typology of ways in which this governance function manifests itself in the use and exercise of compulsory jurisdiction under Part XV, the aim is to shed light on the multifaceted role of compulsory dispute settlement in maintaining the legal order for the ocean in a way that accounts for the changing expectations of States Parties over time.

Keywords

compulsory dispute settlement – courts and tribunals – United Nations Convention on the Law of the Sea (LOSC) – legal order – ocean governance

Introduction[1]

The drafters of the United Nations Convention on the Law of the Sea (LOSC),[2] according to its preamble, sought to establish 'a legal order for the seas and oceans'. While the LOSC's honorary title of 'constitution for the oceans' has become somewhat of a truism, its package deal nature and the resultant normative and institutional structure can indeed be characterised in 'constitutional'[3] or 'public law' terms.[4] The compulsory dispute settlement procedures contained in Part XV of the Convention are a key part of that package, and have been hailed as one of its most 'significant achievements'.[5] The drafters thus accorded an important role to compulsory dispute settlement in maintaining the legal order for the ocean. The term 'legal order' is maintained deliberately for the present purposes, because it captures and connects three important aspects: the object and purpose of the LOSC to provide the overarching legal framework for this legal order; the more general idea that one can only speak of a legal 'order' when the norms that make up this order relate to each other in some way;[6] and the understanding of a legal order as something that is inherently dynamic and adaptive (akin to a 'living constitution').[7] The purposes of compulsory dispute settlement under Part XV can be summarised as

1 The author thanks the editors, reviewers, and participants in the workshop 'The United Nations Convention on the Law of the Sea at Forty: The Contribution of the Judiciary and Judicial Jurisdiction' (Utrecht, 5–6 May 2022) for insightful comments.

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, in force 1 November 1994) 1833 *UNTS* 397 [LOSC].

3 SV Scott, 'The LOS Convention as a constitutional regime for the oceans' in A Oude Elferink (ed), *Stability and Change in the Law of the Sea: the Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden, 2005) 9–38; J Barrett, 'The UN Convention on the Law of the Sea: A "living" treaty?' in J Barrett and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL, London, 2016) 3–37; RJ Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Brill, Leiden, 2022).

4 E Hey, 'Reviewing implementation of the LOS Convention and emerging international public law' in Oude Elferink (ed) (n 3), 75–88; P Allott, 'Power sharing in the law of the sea' (1983) 77 *The American Journal of International Law* 1–30.

5 M Nordquist, S Nandan and S Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol V (Martinus Nijhoff Publishers, The Hague, 1989) 5–15; N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, Cambridge, 2005).

6 See also A Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15 *International Journal of Constitutional Law* 671–704, at p. 679.

7 See also D Guilfoyle, 'Governing the oceans and dispute resolution: An evolving legal order?' in D Ireland-Piper and L Wolff (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge, Abingdon, 2017) 173; and extensively, Roland Holst (n 3).

corresponding to each of these aspects: maintaining and protecting the balance of interests struck by the LOSC; providing authoritative interpretations on how norms relate to one another and to the broader normative context; and, when relevant, progressively developing the regime to adapt to changing interests and circumstances.[8] That does not mean that these different objectives are always easily reconciled. As courts and tribunals are faced with increasingly complex disputes and changing circumstances beyond what was foreseen by the drafters, finding a balance between protecting and progressively developing of the legal order can be perceived as a straddle.

This article takes the occasion of the Convention's fortieth anniversary as an opportunity to reflect on the role that compulsory dispute settlement has played in maintaining the legal order for the ocean. It will not venture onto the slippery slope of assessing whether after forty years Part XV can be said to have lived up to the expectations of its drafters. Not only would that require an empirical enquiry beyond the scope of this contribution, more importantly, as times and circumstances change, expectations change. A stock-taking exercise may thus more usefully be informed by broader normative considerations that span across time. The compulsory dispute settlement system under Part XV is after all expected – both by its drafters and the relevant community of States Parties at any given point in time – to fulfil certain functions. These functions will be the focal point of the present analysis. More specifically, it is posited that compulsory jurisdiction under Part XV enables and arguably requires LOSC courts and tribunals to exercise an important 'governance function',[9] in addition to the more traditional understandings of the interconnected 'dispute settlement', 'fact-finding' and 'law-ascertainment/law-making' functions of international courts and tribunals.[10]

The governance function broadly articulates the observation that adjudicators (intentionally or unintentionally) also influence States and other actors beyond those that are party to a particular dispute, and may need to be mindful of wider (community) interests and normative coherence within and beyond

8 See for a discussion of key objectives of Part XV DH Anderson, 'Peaceful settlement of disputes under UNCLOS' in Barrett and Barnes (eds) (n 3), 385–415, at pp. 394–411.

9 This term is used by Alvarez to describe one of the functions of international adjudicators more generally, see JE Alvarez, 'What are international judges for? The main functions of international adjudication' in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2014) 158–178.

10 *Ibid.*; 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; Shany uses the broader concept of 'goals' to assess the effectiveness of international courts, Y Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, Oxford, 2014).

and the confines of a specific part of a regime. The governance function is thus polycentric and may manifest itself in a variety of ways, reflective of broader structural developments in the international legal order associated with procedural 'constitutionalisation', international public law, and global administrative law.[11] More specifically for the present purposes, it resonates with particular constitutional and administrative law features of the LOSC. This article uses the governance function as an analytical frame to identify and assess the different ways in which it is reflected in the use and exercise of compulsory jurisdiction under Part XV to date – be that in ways intended or unintended by the drafters. The aim is to shed light on the multifaceted role of compulsory dispute settlement in maintaining the legal order for the ocean in a way that accounts for the changing expectations of States Parties over time. The article does not purport to be exhaustive of forty years of LOSC jurisprudence, instead, it offers a three-fold typology of (non-exclusive) ways in which the governance function manifests itself in compulsory dispute settlement under the LOSC. The discussion follows these three lines of enquiry. First, a variety of ways in which the compulsory dispute settlement system contributes to normative coherence in the legal order for the ocean, both within the Convention itself and between the Convention and its broader normative context, will be identified. The second part turns to specific governance functions that flow directly from substantive provisions of the Convention and the limitations thereto. Drawing on the preceding analysis, the third part will consider the ways in which the governance function can be understood to reach beyond the parties to a dispute.

The Governance Function of the Compulsory Dispute Settlement System: Normative Coherence

Compulsory dispute settlement plays an important role in maintaining normative coherence and enhancing systemic integration within the legal order for the ocean. Indeed, a key rationale for adopting Part XV in its present form was to ensure the effectiveness of the substantive bargains struck under the Convention, and to provide a central mechanism for authoritative interpretation of the Convention.[12] That does not mean that the reach of compulsory procedures under Part XV is fully comprehensive, nor have all available procedures

11 See more generally also Alvarez (n 9), at p. 171; Peters (n 6).

12 See also Anderson (n 8), at pp. 387–392; A Boyle, 'Dispute settlement and the Law of the Sea Convention: Problems of fragmentation and jurisdiction' (1997) 46 *International and Comparative Law Quarterly* 37–54, at p. 38.

been used in practice.[13] As the drafters could not agree on a single adjudicatory forum, Part XV leaves States a choice between the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), *ad hoc* arbitration under Annex VII, or special arbitration under Annex VIII.[14] These LOSC courts and tribunals can, in principle, exercise compulsory jurisdiction over 'any dispute concerning the interpretation or application of the Convention',[15] with a number of limitations and optional exceptions.[16] It is noteworthy that the initial fears voiced by some commentators that the choice of different judicial fora under Part XV would lead to fragmentation of both substantive law and procedure was not a particular concern of the drafters,[17] nor has it materialised in practice. An overall trend towards coherence and cross-fertilisation between the jurisprudence of different LOSC courts and tribunals, rather than fragmentation thereof, is widely observed.[18] The term 'coherence' for present purposes denotes this overall discernible trend and aim, that is not to say that case law under the LOSC is free of ambiguities or inconsistencies. The following discussion identifies factors that contribute to this trend at the level of the LOSC 'internally', as well as 'externally' in its relationship with the broader normative order.

13 Special arbitration under Annex VIII has thus far not been used, and while the ICJ had adjudicated on numerous law of the sea disputes, its jurisdiction in these cases was based on agreements other than Part XV of the LOSC.

14 LOSC (n 2), Article 287. When States fail to reach agreement, Annex VII arbitration is the default option.

15 *Ibid.*, Article 288(1).

16 *Ibid.*, Article 297 lists limitations, notably including disputes concerning sovereign rights over living resources in the exclusive economic zone (EEZ). Optional exceptions are listed in Article 298 and include disputes concerning boundary delimitations or military activities. For these types of disputes, compulsory conciliation under Annex V Section 2 is available, but has not yet been used in practice.

17 See, e.g., for a discussion Boyle 'Dispute settlement and the Law of the Sea Convention' (n 12), at p. 40–41; Anderson (n 12), at p. 415; T Treves, 'Dispute-settlement in the law of the sea: Disorder or system?' in M Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch* (Brill | Nijhoff, Leiden, 2007) 927–949, at p. 927.

18 See, *inter alia*, A Miron, 'The *acquis judiciaire*, a tool for harmonization in a decentralized system of litigation?: A case study in the law of the sea' in C Giorgetti and M Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (Cambridge University Press, Cambridge, 2022) 128–161; J Paine, 'The judicial dimension of regime interaction beyond systemic integration' in S Trevisanut, N Giannopoulos and R Roland Holst (eds), *Regime Interaction in Ocean Governance: Problems, Theories and Methods* (Brill, Leiden, 2020) 184–221; A Boyle, 'The Tribunal and the rule of law', *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Brill, Leiden, 2018) 195–202.

Internal Coherence within the LOSC

The availability of compulsory dispute settlement has a function in guarding the internal normative coherence and uniform interpretation of the Convention. On a procedural level, it may be noted that the possibility of forum shopping among the different LOSC courts and tribunals under Part XV does not necessarily impede this function. Afterall, States may have different reasons for choosing one forum over the other, not in the least the significantly higher costs involved in arbitration for example. In certain types of cases, ITLOS, as a permanent specialist tribunal, may furthermore be considered a 'more predictable commodity',[19] or more authoritative than an Annex VII tribunal, to rule on questions that are of relevance to the functioning of the Convention on a more structural or institutional level.[20] In addition, ITLOS has a track record of hearing and deciding on cases relatively quickly. The flexibility provided in the choice of procedure under Part XV may actually cater for different and changing needs of States in a way that bolsters the broader public function of compulsory dispute settlement.

In terms of substantive coherence in the interpretation and application of the Convention, the concept of '*acquis judiciaire*' has been used to describe the 'gradual building of a uniform law through the reiteration of and cross-referral to existing judicial decisions' among LOSC courts and tribunals.[21] While this requires nuance in that the *acquis* is better established for some parts of the Convention than others – inevitably those that have more frequently been subject to adjudication, such as maritime boundary delimitations,[22] obligations to protect the marine environment,[23] or prompt release,[24] – it articulates the mindfulness and active role of judges in guarding normative coherence within a legal system. Contrary to the concepts of 'precedent' or 'settled jurisprudence', which can be seen as static, *acquis judiciaire* is understood as an evolving process in which courts and tribunals may also be called upon to progressively develop the *acquis*.[25] This is important because, as noted above, a

19 See A Boyle, 'UNCLOS dispute settlement and the uses and abuses of Part XV' (2014) 1 *Revue Belge de Droit International* 182–204, at p. 191.

20 Boyle, 'The Tribunal and the rule of law' (n 18), at pp. 200–201. See for examples thereof further below.

21 Miron (n 18), at p. 132. See also Declaration of Judge Wolfrum, *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh* v. *Myanmar*), Merits, Judgement, 14 March 2012, *ITLOS Reports 2012*, p. 4, at p. 136; *Bay of Bengal Maritime Boundary Arbitration* (*Bangladesh* v. *India*), Award, 7 July 2014, Permanent Court of Arbitration (PCA), PCA Case No. 2010–16, para 339.

22 Miron draws on examples from this body of case law, (n 18), at p. 140 et seq.

23 See Roland Holst (n 3), at p. 218 et seq.

24 See in more detail below.

25 Declaration Judge Wolfrum (n 21), at p. 137; Miron (n 18), at p. 139.

'legal order' for the ocean not only implies a system of norms that coherently relate to one another, but also one that is adaptive in response to changing needs over time. Furthermore, in terms of the governance function of dispute settlement, a growing *acquis judiciaire* may have a self-perpetuating function in that it strengthens substantive normative coherence within the LOSC, while at the same time guiding judicial reasoning by appealing to the 'adjudicators' conscience of belonging to a unified system of law'.[26]

Finally, there are certain developments in the practice of adjudication under Part XV that may also contribute to the overall trend towards coherence, including adjudicators' 'conscience' in that respect. For example, the parties in Annex VII arbitration each nominate an arbitrator of their choice and appoint the remaining arbitrators on the panel by agreement. When no such agreement can be reached, as is often the case, the President of the ITLOS will appoint the other members of the panel.[27] As a result, panels often consist of present or former ITLOS judges, thereby closely resembling a special chamber of the ITLOS with one judge *ad hoc* appointed by each party. Boyle suggests that this interchange between the ITLOS and Annex VII arbitration may actually promote substantive coherence and consistency in the jurisprudence, and strengthen the role and legitimacy of both the Tribunal and arbitral panels.[28]

External Coherence: The LOSC and Beyond

The 'external' dimension of normative coherence in the legal order for the ocean, that is, of the Convention within its wider normative context, is facilitated by the drafters in various ways. On the level of substantive provisions, the Convention contains ample provisions that expressly refer to 'other rules of international law',[29] or even directly incorporates external rules and standards through so-called 'rules of reference'.[30] The role of dispute settlement in guarding external coherence is, however, not limited to instances where courts and tribunals are called upon to apply such provisions. Importantly, attention for normative coherence comes to the fore in the general method of judicial interpretation. Much attention has been paid in international legal scholarship to Article 31(3)(c) of the Vienna Convention on the Law of Treaties

26 Miron (n 18), at p. 161.

27 LOSC (n 2), Annex VII, Article 3.

28 Boyle 'The Tribunal and the rule of law' (n 18), at p. 201.

29 E.g., Article 2(3) requires coastal State sovereignty over the territorial sea to be exercised in accordance with the Convention and 'other rules of international law'.

30 Roland Holst (n 3), at p. 150 et seq; LN Nguyen, 'Expanding the environmental regulatory scope of UNCLOS through the rule of reference: Potentials and limits' (2021) 52 *Ocean Development & International Law* 419–444.

(VCLT) as a 'de-fragmentation' tool,[31] yet the LOSC's applicable law provision in Article 293(1) provides what could be seen as a *lex specialis* thereto: stating that courts and tribunals with jurisdiction under Part XV 'shall apply this Convention and other rules of international law' not incompatible with it. Article 293 is of course no panacea. Managing normative interactions through judicial interpretation takes place within the limits of the general rules on treaty interpretation.[32] Furthermore, Article 293 cannot be used as a 'back-door' to expand jurisdiction *ratione materiae*. A LOSC court or tribunal cannot directly apply external norms in cases where no jurisdiction to do so has first been established. This distinction, however, has not always been upheld so clearly by LOSC courts and tribunals in practice, and has triggered criticism on various occasions.[33]

The question of applicable law should be separated from the question of jurisdiction and the associated power to exercise 'incidental jurisdiction' over ancillary non-LOSC issues when this is necessary to resolve the dispute at hand.[34] It falls within the discretion of the court or tribunal to 'objectively' identify the 'real issue' at stake and the 'object of the claims' submitted to it,[35] but this is a question of jurisdiction and not of applicable law. While this issue initially mainly arose in so-called 'mixed disputes' (a law of the sea dispute involving a concurrent unsettled territorial sovereignty dispute),[36] it has since arisen in connection with claims concerning, *inter alia*, the use of force, immunities, human rights, environmental law, and may in principle arise in

31 Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980) 1155 *UNTS* 331. See, e.g., A van Aaken, 'Defragmentation of public international law through interpretation: A methodological proposal' (2009) 16 *Indiana Journal of Global Legal Studies* 483–512; 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (13 April 2006), paras 419–420.

32 Primarily contained in VCLT (n 31), Articles 31–33.

33 See, e.g., P Tzeng, 'Jurisdiction and applicable law under UNCLOS' (2016) 126 *Yale Law Journal* 242–260; L Marotti, 'Between consent and effectiveness: Incidental determinations and the expansion of the jurisdiction of UNCLOS tribunals' in A Del Vecchio and R Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer International Publishing, Berlin, 2019) 383–406; K Parlett, 'Beyond the four corners of the Convention: Expanding the scope of jurisdiction of law of the sea tribunals' (2017) 48 *Ocean Development & International Law* 248–299.

34 See *Chagos Marine Protected Area Arbitration* (*Mauritius* v. *United Kingdom*), Award, 18 March 2015, PCA Case No. 2011–03, paras 220–221.

35 *Ibid.,* para 208; *South China Sea Arbitration* (*Philippines* v. *China*), Jurisdiction and Admissibility Award, 29 October 2015, PCA Case No. 2013–19, para 150.

36 See, e.g., I Buga, 'Territorial sovereignty issues in maritime disputes: A jurisdictional dilemma for law of the sea tribunals' (2012) 27 *International Journal of Marine and Coastal Law* 59–95.

any case that touches on non-LOSC issues. This underlines the breadth and (growing) complexity of the broader legal order for the ocean, and thereby also of the governance function of LOSC courts and tribunals in this respect. Indeed, several examples can be found in recent cases of States invoking violations of external instruments in addition to or in support of alleged violations of the LOSC.[37] In the *South China Sea Arbitration*, the Philippines submitted that China's toleration of destructive fishing methods violated obligations under both the LOSC and the Convention on Biological Diversity (CBD).[38] The tribunal considered that the Philippines had not 'presented a claim arising under the CBD as such'[39] and was accordingly satisfied that Article 293(1) of the LOSC, together with Article 31(3)(c) of the VCLT enabled it to 'consider the relevant provisions of the CBD *for the purposes of interpreting* the content and standard of Articles 192 and 194 of the Convention'.[40] In the *Arctic Sunrise Arbitration*, the Netherlands claimed that Russia had violated various human rights obligations under customary international law and the International Covenant on Civil and Political Rights in arresting the Greenpeace vessel *Arctic Sunrise* and its crew.[41] The arbitral tribunal made it very clear that regard may be had to human rights law in assessing the reasonableness and proportionality of coastal State enforcement actions, but that this would be 'to *interpret* the relevant Convention provisions by reference to relevant context' pursuant to Article 293.[42] The tribunal expressly stated that it did not have jurisdiction to apply these human rights provisions directly or to establish breaches thereof.[43] Article 293 thus 'ensures that a tribunal can give full effect to the provisions of the Convention'[44] within their broader normative context. It should be

37 E.g., in the now withdrawn *San Padre Pio* case, Switzerland submitted that Nigeria failed to have due regard to the rights and duties of Switzerland as the flag State in the EEZ of Nigeria by preventing it from fulfilling its duties under, *inter alia*, the International Covenant on Civil and Political Rights and the 2006 Maritime Labour Convention in respect of its crew. See *M/T 'San Padre Pio'* (*Switzerland* v. *Nigeria*), Provisional Measures, Order of 6 July 2019, *ITLOS Reports 2019*, p. 375, paras 109–110.

38 Convention on Biological Diversity (adopted 5 June 1992, in force 29 December 1993) 1760 *UNTS* 79; *South China Sea Arbitration* (n 35), para 174.

39 According to the tribunal, 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'. *Ibid.*, para 168.

40 *Ibid.*, para 176, emphasis added.

41 *Arctic Sunrise Arbitration* (*Netherlands* v. *Russia*), Merits, Award, 14 August 2015, PCA Case No. 2014–02, paras 193–196.

42 *Ibid.,* para 197, emphasis added.

43 *Ibid.*, para 198; confirmed also in *Duzgit Integrity Arbitration* (*Malta* v. *São Tomé and Príncipe*), Award, 5 September 2016, PCA Case No. 2014–07, para 207.

44 *Duzgit Integrity* (n 43), para 208.

noted that Article 293 does create a normative hierarchy to the extent that the Convention prevails in case of a conflict between the LOSC and other rules of international law.[45] Or in other words, recourse to external norms for the purposes of interpretation cannot lead to a result that goes against the object and purpose of (provisions of) the Convention.

The compulsory dispute settlement system enables LOSC courts and tribunals to fulfil a governance function by guarding and enhancing the 'internal' and the 'external' normative coherence of the Convention. This is effectuated both on the procedural level and through interpretative methods and the development of a growing *acquis judiciaire*, which in turn arguably strengthens the position and legitimacy of dispute settlement bodies themselves.[46] It has been suggested that (interpretative) arguments based on coherence tend to carry particular authoritative weight.[47] Courts and tribunals that are aware of their own position in shaping the broader legal order of the ocean thereby arguably also help to enhance the legitimacy of that legal order.[48]

Specific Governance Functions Flowing from Substantive Provisions

There are a number of specific governance functions of compulsory dispute settlement that could be seen as purposefully created by the drafters in the sense that they flow directly from substantive provisions of the Convention and the design of Part XV. First of all, these can be identified on the procedural level in Part XV where it assigns an 'administrative role' to the ITLOS for types of disputes over which it has exclusive jurisdiction, in the case of the Seabed Disputes Chamber,[49] or default jurisdiction in cases of provisional measures[50] and applications for prompt release of vessels and crews.[51] The bulk of the early caseload of the ITLOS consisted of applications for prompt release, making it a good example of an area where the Tribunal has developed an *acquis*

45 See also Klein (n 5), at p. 58.

46 See also Peters (n 6), at p. 695 who refers to the concept of 'judicial dialogue' in this connection.

47 D Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press, Oxford, 2014) 284.

48 See also, e.g., L Boisson de Chazournes, 'Plurality in the fabric of international courts and tribunals: The threads of a managerial approach' (2017) 28 *European Journal of International Law* 13–72, at p. 71; Peters (n 6).

49 See LOSC (n 2), Part XI, Section 5. No disputes have been submitted to the Chamber yet, but this may happen in the future when commercial deep seabed mining commences.

50 Pending the establishment of an arbitral tribunal, see LOSC (n 2), Article 290 (1) and (5).

51 *Ibid.*, Article 292.

judiciaire.[52] The fact that the stream of applications for prompt release has effectively dried up since 2007 might even suggest that the Tribunals' job is pretty much done in this respect.[53] Prompt release jurisprudence is discussed in more detail below as it also provides an illustration of the second way in which governance functions flow from the text of the Convention, namely through substantive provisions that include open-ended balancing principles.[54]

Provisions that qualify the exercise of certain rights by reference to principles such as 'reasonableness', or the obligation to have 'due regard' to the rights of other States, impose an administrative law-like review function on courts and tribunals having to interpret and apply them. While this function as such was foreseen by the drafters, it was not determined exactly what 'standard of judicial review' courts or tribunals ought to apply in concrete cases. This is where things can get contentious as States' expectations as to the degree of deference shown to particular interests differ and evolve. In addition to the more 'bilateral' and retrospective function of these provisions that requires a balance of interests to be struck between the parties to a particular dispute, there is arguably also a 'public' and more prospective function inherent in the exercise of judicial jurisdiction in these types of cases, as courts and tribunals anticipate future situations in which the same open-ended principles will have to be applied again.[55] Some examples will be discussed to illustrate how this open-ended balancing exercise enables or even requires dispute settlement bodies to exercise a governance function, while at the same time imposing limitations thereon.

Governance Function via Open-ended Balancing Principles

A key balancing principle that is found recurrently throughout the Convention is the obligation to have 'due regard' to the rights and duties of other States. The term 'due regard' is found explicitly in the regimes of the exclusive economic zone (EEZ) and the high seas, yet an obligation to be 'other regarding' in the exercise of rights under the Convention extends throughout the various maritime zones.[56]

52 See in more detail below.

53 Interestingly, a new prompt release case was submitted in November 2022, only to be discontinued a few days later. *M/T 'Heroic Idun' Case* (*Marshall Islands* v. *Equatorial Guinea*), *Prompt Release*, ITLOS Order 2022/3.

54 See more extensively Roland Holst (n 3), at p. 208 et seq.

55 See also AV Lowe, 'The function of litigation in international society' (2012) 61 *International and Comparative Law Quarterly* 209–222, at pp. 212–213.

56 *Chagos* (n 34), para 503.

The duty of due regard entails a positive obligation for States to engage in a 'balancing exercise',[57] but it is 'open-ended' in the sense that it depends on the circumstances of a specific case which duties exactly are 'due'.[58] As a balancing mechanism, its function is not limited to mediating conflicting interests between two States on a strictly bilateral basis, but may include (by implication or directly) the consideration of other actors' interests or wider community interests.[59] For example, in interpreting the coastal State's duty of due regard under Article 56(2), the tribunal in *Arctic Sunrise* had to balance the right of the coastal State to take measures necessary to protect its sovereign rights in the EEZ with the right of Greenpeace activists on board the Dutch-flagged *Arctic Sunrise* to protest at sea. The tribunal considered protest at sea to be an 'internationally lawful use of the sea related to the freedom of navigation', derived from the freedom of expression and the freedom of assembly as protected under human rights instruments to which both States were parties.[60] The tribunal then read into the obligation of due regard under Article 56(2) the requirement that coastal State measures aimed at protecting its sovereign rights must 'fulfil the tests of reasonableness, necessity, and proportionality'.[61] Where the exercise of sovereign rights, jurisdiction, and freedoms across the Convention is qualified by open-ended balancing principles like due regard, subjecting these obligations to compulsory dispute settlement is not only a tool to bilaterally (and retrospectively) protect the rights of one State Party against the alleged excessive exercise of jurisdiction by another, it also serves a broader public governance function in (prospectively) guarding the balance of competing interests in ocean space.

Another, more narrowly circumscribed, balancing principle is applied in prompt release cases. The ITLOS has to assess the 'reasonableness' of the bond set by the coastal State for the release of a vessel and crew that have been detained on suspicion of illegal fishing, pollution or dumping offences in the coastal State's EEZ.[62] Over time, ITLOS' prompt release jurisprudence

57 *Ibid*., para 535.

58 *Ibid*., para 519; *South China Sea Arbitration* (*Philippines* v. *China*), Merits Award, 12 July 2016, PCA Case No. 2013–19, para 742; *'Enrica Lexie' Incident* (*Italy* v. *India*), Award, 21 May 2020, PCA Case No. 2015–28, paras 976–977.

59 See also, e.g., J Gaunce, 'On the interpretation of the general duty of "due regard"' (2018) 32 *Ocean Yearbook Online* 27–59, at p. 59; BH Oxman, 'The principle of due regard', *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Brill, Leiden, 2018) 108–117.

60 *Arctic Sunrise* (Merits) (n 41), para 227.

61 *Ibid*., para 326.

62 LOSC (n 2), Articles 73, 220, 226, 292. In cases of arrest and detention for other types of offences, applications for release have been requested as provisional measures instead, see Article 290.

has developed a relatively predictable set of relevant factors to assess the reasonableness of bonds, while emphasising the contextual and case-dependent nature of this balancing principle.[63] Given the limited scope and specific purpose of prompt release proceedings, the ITLOS has taken a restrictive approach to the balancing act involved.[64] Nevertheless, considerations based on norms external to the Convention have been taken into account, as is reflected for example in the Tribunal's statement that the obligation of prompt release includes 'elementary considerations of humanity and due process of law' and 'a concern for fairness'.[65] In stressing that a decision to confiscate a vessel should not be taken through proceedings 'inconsistent with international standards of due process of law', the Tribunal has furthermore (indirectly) taken the rights and interests of crews and shipowners into account.[66]

At the same time, examples can be found where the Tribunal was criticised for not giving enough effect to its governance function. In the *Volga* case, the balance of interests struck by the Tribunal proved particularly contentious, exactly because the Tribunal, according to many observers, had given insufficient consideration to the wider implications flowing from this case. Australia had arrested and detained the Russian-flagged *Volga* for illegal fishing in its EEZ, and argued that its obligations to combat illegal, unreported and unregulated (IUU) fishing under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)[67] were relevant in determining the gravity of the alleged offence, and thus the reasonableness of the bond. This argument was rejected by the majority of the Tribunal.[68] Australia had made the financial bond subject to two conditions: that the vessel carries a vessel monitoring system and that information regarding the vessel's beneficial owners, directors of the holding company and underwriters be provided to the Australian authorities,

63 See more extensively, e.g., J Harrison, 'Patrolling the boundaries of coastal State enforcement powers: The interpretation and application of UNCLOS safeguards relating to the arrest of foreign-flagged ships' (2017) 42 *L'Observateur des Nations Unies* 115–143, at pp. 129–131; S Trevisanut, 'Twenty years of prompt release of vessels: Admissibility, jurisdiction, and recent trends' (2017) *48 Ocean Development & International Law* 300–312.

64 See, e.g., *M/V 'Saiga' No. 1* (*St Vincent and the Grenadines* v. *Guinea*), *Prompt Release*, Judgement, 4 December 1997, *ITLOS Reports 1997*, p. 16, para 62.

65 *Juno Trader* (*Saint Vincent and the Grenadines* v. *Guinea-Bissau*), *Prompt Release*, Judgment, 18 December 2005, *ITLOS Reports 2004*, p. 17, para 77.

66 *'Tomimaru'* (*Japan* v. *Russia*), *Prompt Release*, Judgment, 6 August 2007, *ITLOS Reports 2005–2007*, p. 74, paras 75–76.

67 Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, in force 7 April 1982) 1329 *UNTS* 47.

68 *Volga* (*Russian Federation* v. *Australia*), *Prompt Release*, Judgement, 23 December 2002, ITLOS Reports 2002, p. 10, paras 68–69. See however, Dissenting Opinion Judge Anderson, para 103; Dissenting Opinion Judge *ad hoc* Shearer, paras 9–13; and Separate Opinion Judge Cot, paras 2–12.

which Australia justified by reference to the persistent serious problems with IUU fishing in the Southern Ocean, and the implications thereof for fisheries management more broadly.[69] The Tribunal took a restrictive approach to interpreting the term 'bond or other security' in Article 73(2) as limited to those of a 'financial nature' only.[70] It did not consider Australia's 'good behaviour bond' (the purpose of which was to prevent future violations) to fall within the meaning of this term.[71] Dissenting opinions condemned this interpretation as too narrow,[72] and commentators widely criticised the *Volga* decision for shifting the balance too far in favour of the flag State, to the detriment of coastal State rights and obligations to protect living resources in the EEZ and to cooperate in their conservation, including under important regional regimes such as CCAMLR.[73] While the Tribunal's textual approach to interpretation in this case may not be indefensible *per se*,[74] the essence of the critique speaks to the fact that 'a new balance' ought to have been found between, on the one hand, vessel owners, operators and fishing companies, and the coastal State on the other hand.[75] In other words, in the light of contemporary challenges related to IUU fishing, expectations as to how the balance of interests ought to be struck – even in the limited context of prompt release – had apparently evolved.[76] That said, the limited scope of prompt release jurisdiction should be borne in mind, and exactly because of this limited scope the Tribunal may have considered itself more restricted in its interpretative discretion. In interpreting and applying open-ended balancing principles, the degree of deference shown to the coastal State also determines the scope of the governance function of the Tribunal.

69 *Ibid*., paras 67, 75.

70 *Ibid*., para 77.

71 *Ibid*., paras 79–80.

72 See, e.g., Dissenting Opinion Judge *ad hoc* Shearer (n 68); Dissenting Opinion Judge Anderson (n 68).

73 See, e.g., Trevisanut (n 63), at p. 302; R Rayfuse, 'Standard of review in the International Tribunal for the Law of the Sea' in L Gruszczynski and W Werner (eds), *Deference in International Courts and Tribunals* (Oxford University Press, Oxford, 2014) 337–354, at p. 350; C Goodman, 'Rights, obligations, prohibitions: A practical guide to understanding judicial decisions on coastal State jurisdiction over living resources in the exclusive economic zone' (2018) 33 *International Journal of Marine and Coastal Law* 558–584, at p. 582.

74 See, e.g., Separate Opinion of Judge Cot in *Volga* case (n 68).

75 Dissenting Opinion Judge *ad hoc* Shearer in *Volga* case (n 68), para 19.

76 It may be noted that in the subsequent *Juno Trader* case the tribunal did 'take note' of Guinea-Bissau's concerns in respect of IUU fishing in its EEZ, and acknowledged that this is one of the considerations to be taken into account in determining the reasonableness of the bond. *Juno Trader* (n 65), paras 87, 94.

Limitations: Standard of Review

When called upon to apply any of the open-ended balancing principles discussed above, the role of courts and tribunals is arguably somewhat different in character from other instances of treaty interpretation in that it closely resembles administrative review.[77] Essentially, the role of a court or tribunal is to 'review' the exercise of State powers and determine whether it meets the minimum standard of care required vis-à-vis other actors, or whether it goes beyond what is permissible under the Convention. As pointed out above, this raises the question of what 'standard of review' courts and tribunals ought to apply.[78] Also known as the 'margin of appreciation' in other contexts,[79] it concerns the degree of deference shown by a court or tribunal to the discretion of State authorities in the exercise of their powers. In determining the standard of review, the governance function of dispute settlement manifests itself in the need to consider how the wider range of interests involved may be affected, as illustrated by the examples discussed above. The 'prospective' dimension of the exercise of judicial jurisdiction is particularly pertinent here, as the criteria that courts and tribunals develop for how these balancing principles are to be applied will have implications for future applications of those principles. Open-ended balancing principles grant adjudicators leeway to take account of evolving norms and interests on a case-by-case basis. At the same time, this 'open-ended-ness' also comes with the risk that too much opacity in judicial reasoning, or too much divergence between judges and arbitrators in the standard of review applied, may raise questions of legitimacy when adjudicators are perceived to replace coastal States' discretion with their own.[80]

In particular in the case law dealing with the exercise of coastal State powers in the EEZ, a lack of sufficiently clear reasoning as to the criteria that inform the standard of review has triggered some critique.[81] Across the board, it has been observed that LOSC case law tends to reflect a more permissive approach

77 See also, e.g., Harrison (n 63), at pp. 118, 125; S Trevisanut, 'The exercise of administrative functions by ITLOS: A comment on prompt release cases' in N Boschiero *et al.* (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press, Assen, 2013) 311–323.

78 Harrison notes that the interpretation of a rule and determining the standard of review are 'theoretically distinct processes', however, in practice they are often intertwined. Harrison (n 63), at pp. 127–128.

79 E.g., in human rights law, World Trade Organization law or European law. See more extensively Rayfuse (n 73), at pp. 337–338.

80 See also Harrison (n 63), at p. 143.

81 See *ibid.*, at p. 138; Paine (n 18), at p. 212; Z Scanlon, 'Upsetting the balance? The legality of vessel confiscation under the LOSC after the M/V Virginia G case' (2018) 33 *International Journal of Marine and Coastal Law* 166–198, at pp. 197–198; Goodman (n 73), at pp. 573–575, 581.

to assessing the exercise of prescriptive jurisdiction by coastal States, and a more restrictive and textual approach in respect of enforcement jurisdiction – which mirrors the balance between coastal State and flag State powers reflected in the EEZ regime more broadly.[82] Yet, LOSC courts and tribunals have occasionally also read balancing principles into provisions that do not explicitly contain them. In *M/V Virginia G*, the ITLOS considered that the principle of 'reasonableness', which is only found explicitly in Article 73(2) in connection to prompt release, applies generally to enforcement measures in the EEZ under Article 73 of the Convention.[83] The arbitral tribunal in *Duzgit Integrity* stated that any exercise of enforcement power on the basis of the Convention 'is also governed by certain rules and principles of general international law, in particular the principle of reasonableness', which 'encompasses the principles of necessity and proportionality'.[84] In the latter case, the result was that the arbitral tribunal effectively read these principles into Article 49(3) concerning the sovereign rights of archipelagic States without much clarification as to their normative content, thereby arguably widening the scope of review, and potentially even the types of cases that might be brought under this article.[85]

These various applications of open-ended balancing principles in practice illustrate that the standard of review often proves contentious. A balance needs to be struck between the bilateral, retrospective dimension of dispute settlement, and the prospective, more 'public' dimension. As part of the latter, governance considerations not only come into play in relation to wider implications and (community) interests that may need to be taken into account, but also in the need for adjudicators to carefully consider and motivate the criteria on which the eventual balance is struck – thereby enhancing the legitimacy of the judicial balancing exercise for present and future cases.

Governance beyond the Parties to a Dispute

The cases referred to in the preceding discussion illustrate that disputes under the LOSC often involve the interests of a wider range of actors beyond the States that are party to the dispute.[86] These may include non-State actors, such

82 See, e.g., Goodman (n 73), at p. 583; Roland Holst (n 3), at p. 52 et seq.

83 *M/V 'Virginia G'* (*Panama* v. *Guinea-Bissau*), Judgement, 14 April 2014, *ITLOS Reports 2014*, p. 4, para 270.

84 *Duzgit Integrity* (n 43), para 209.

85 See for a critical discussion Harrison (n 63), at pp. 136–137.

86 See also N Klein, 'Stakeholders in dispute settlement under the UN Convention on the Law of the Sea' in MC Ribeiro, F Loureiro Bastos and T Henriksen (eds), *Global Challenges and the Law of the Sea* (Springer International Publishing, Berlin, 2020) 239–261.

as ship owners, fishing companies, maritime service providers, multinational corporations involved in continental shelf exploitation, or, as seen in *Arctic Sunrise*, NGOs and crew members, whose rights and interests may be directly or indirectly implied. Disputes under the LOSC may furthermore touch on the mandates of different international organisations. The ITLOS in particular arguably has a governance function in relation to other institutions established by the LOSC: the Commission on the Limits of the Continental Shelf (CLCS) and the International Seabed Authority (ISA). Indeed, ITLOS has clarified its relation vis-à-vis the mandate of the CLCS in *Bangladesh/Myanmar*,[87] which was subsequently relied on by an Annex VII tribunal and the ICJ.[88] The ITLOS Seabed Disputes Chamber clarified the position of the Council of the ISA in the *Seabed Advisory Opinion*, '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'.[89]

A governance function can furthermore be observed in the wider influence that judicial pronouncements have on other States Parties to the Convention that are not party to the dispute. Any authoritative judicial interpretation of a State's rights or obligations under a treaty may of course have implications for the rights and obligations of other States Parties under that agreement, which is true in general. What is relatively unique about the LOSC's compulsory dispute settlement mechanism is that it is also available for disputes relating to shared interests and obligations *erga omnes*, for example those relating to high seas fisheries management or obligations to protect the marine environment.[90] For the establishment of jurisdiction under Article 288 it is not explicitly required that the applicant State acts exclusively in defence of its own rights or interests. It merely requires a disagreement 'concerning the interpretation and application' of the Convention. Wolfrum argues that 'allowing a case to be filed without the necessity to prove that individual interests of the applicant State are at stake would be in line with a literal interpretation as well as with the

87 *Bangladesh* v. *Myanmar* (n 21), paras 391–392.

88 *Bangladesh* v. *India* (n 21), paras 75–80; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles* (*Nicaragua* v. *Colombia*), Preliminary Objections, Judgement, 17 March 2016, *ICJ Rep* 2016, p. 100, paras 105–115.

89 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2001*, p. 10, paras 29–30.

90 LOSC (n 2), Part XII. See also RJ Roland Holst, 'Community interests and sovereignty: On consonance and dissonance in the law of the sea' in G Zyberi (ed), *Protecting Community Interests under International Law: Challenges and Prospects for the 21st Century* (Intersentia, Antwerp, 2022) 99–125.

general community orientation of the Convention'.[91] There are no examples yet of a State bringing a case under Part XV purely in the public interest. In practice, there will inevitably be a combination of individual and community interest at play, regardless of how the submissions are framed. In the *Chagos Arbitration*, the United Kingdom argued it was acting in the common interest of biodiversity preservation by establishing a no-take marine protected area (MPA) around the Chagos archipelago, despite Mauritius' objection thereto.[92] It was not the goal of the MPA measure as such that led the tribunal to conclude that the United Kingdom had breached its obligations under the LOSC, but the failure to consult Mauritius in the process meant that the United Kingdom failed to properly 'balance its own rights and interests with Mauritius' rights'.[93] This points back to the administrative nature of the balancing exercise that is involved in the application of many obligations under the Convention.

Conclusion

The preceding discussion has sought to map the different ways in which the governance function of compulsory dispute settlement under the LOSC manifests itself in guarding the internal and external normative coherence of the legal order for the ocean and in giving effect to a wider range of (community) interests beyond the parties to a single dispute. In addition to these various manifestations of the governance function in the actual *exercise* of judicial jurisdiction, the mere *existence* of compulsory procedures under Part XV arguably also fulfils a governance function through its 'contraceptive effect'.[94] In other words, the 'threat' of litigation may discourage the exercise of creeping jurisdiction by States, or provide an incentive for disputes to be settled through negotiation instead. This aspect of the governance function aligns with the strong emphasis on (regional) cooperation in the implementation and further development of the legal order for the ocean that can be found throughout the Convention.[95]

91 R Wolfrum, 'Enforcing community interests through international dispute settlement: Reality or utopia?' in U Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, Oxford, 2011) 1132–1146, at p. 1145.

92 *Chagos* (n 34), paras 128, 189–190. Mauritius claimed sovereignty over the archipelago, but had not been consulted in the MPA designation process.

93 *Ibid.*, para 535.

94 See also Boyle, 'The Tribunal and the Rule of Law' (n 18), at p. 196.

95 E.g., in the conservation and management of living resources on the high seas, Article 118; in the protection of the marine environment, Article 197.

From the 'constitutional' character of the Convention, including its numerous features that are of a 'public law' nature, it can be deducted that the governance function is part of the object and purpose of Part XV, and it has indeed fulfilled this function in practice – in ways both foreseen and unforeseen by the drafters. How 'effectively' LOSC courts and tribunals can be said to have exercised this function, whether its reach has stretched too far or not far enough, is ultimately in the eye of the beholder. Yet, any exercise of judicial discretion is limited by functional and jurisdictional constraints, imposed by the text of the Convention and by how States Parties and adjudicators themselves view their function at any given time. The need to strike a balance between the at times conflicting demands of protecting and progressively developing the legal order for the ocean in light of changing circumstances and normative expectations over time also underlines the need for adjudicators to be mindful of those constraints and to motivate the scope and conditions for the exercise of judicial jurisdiction in any particular case. Ultimately, both the legal order for the ocean and the compulsory dispute settlement system depend on the continued willingness of States to participate in it, uphold it, and comply with it. Or as Miron puts it, 'their trust in the system is as essential as is the establishment of a judicial guardianship'.[96]

Thus far, at the milestone of forty, the evidence of this continued willingness looks quite promising,[97] despite some notable exceptions.[98] That said, the compulsory dispute settlement system, framed here in terms of its broader 'governance' function, may have yet to face its litmus test when disputes involving complex contemporary issues such as climate change, human rights at sea, or novel types of extractive activities start to make their way through the channels of Part XV. As one ought to look forward to a next major anniversary, it will be interesting to see how the governance function evolves and what the legal order for the ocean will look like for the LOSC at fifty.

96 Miron (n 18), at p. 132.

97 See also HD Phan, 'International courts and State compliance: An investigation of the law of the sea cases' (2019) 50 *Ocean Development & International Law* 70–90.

98 In the *Arctic Sunrise* case Russia refused to appear, and China did not participate in the *South China Sea Arbitration*, nor does it comply with the award. See for a discussion, e.g., E Franckx and M Benatar, 'Non-participation in compulsory procedures of dispute settlement: The People's Republic of China's position paper in the South China Sea arbitration and beyond' in A Follesdal and G Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, Oxford, 2018) 183–206.