Jurisdiction and Applicable Law in the Settlement of Marine Environmental Disputes under UNCLOS

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Abstract

Part XII of the United Nations Convention on the Law of the Sea (UNCLOS) on the protection and preservation of the marine environment contains provisions that are worded in a general manner. As “the problems of ocean space are closely interrelated and need to be considered as a whole”, these provisions need to be interpreted in harmony with the wider corpus of international law. However, when marine environmental disputes are brought before the UNCLOS dispute settlement bodies, their jurisdiction is limited to disputes arising under UNCLOS. The tribunals, therefore, have to navigate between deciding disputes in a holistic manner and remaining within their jurisdictional limits. This article discusses the techniques used by UNCLOS tribunals to resort to other sources of international law when settling marine environmental disputes. It will then assess whether, in doing so, the tribunals have remained within their jurisdictional parameters and the wider implications of this practice.

Keywords

United Nations Convention on the Law of the Sea – marine environmental protection – dispute settlement – jurisdiction – applicable law

1 Introduction

The protection of marine environment assumes a special place under of the United Nations Convention on the Law of the Sea (“UNCLOS” or “the Convention”).¹ Not only does the Convention prescribe States’ rights and obligations regarding the conservation of marine resources in the maritime zones falling under their jurisdiction, it also devotes the entire Part XII to the “Protection and Preservation of the Marine Environment”. However, as Part XII is intended to provide a general framework for the protection of the marine environment, it contains certain provisions that are worded in a general or vague manner. As a result, the the rights and obligations in various provisions of Part XII UNCLOS need further interpretation and clarification. Furthermore, the Preamble of UNCLOS makes clear that “the problems of ocean space are closely interrelated and need to be considered as a whole”. This would call for UNCLOS, including the provisions on the protection of the marine environment, to be interpreted in harmony with the wider corpus of international law. This, in turn, entails the need to refer to and/or apply rules of international law that are not provided for under UNCLOS in interpreting the various provisions of the Convention.

When a dispute concerning the marine environment is brought before a court or tribunal under UNCLOS, a holistic approach to interpreting provisions relating to the protection of the marine environment would similarly be required. At the same time, Article 288(1) UNCLOS provides that the courts and tribunals listed under Article 287 only have compulsory jurisdiction to settle disputes “concerning the interpretation and application of the Convention”. This means that UNCLOS tribunals were set up not as those of a general nature but as specialised dispute settlement bodies to deal with certain categories of disputes. Being specialised, however, does not necessarily mean being self-contained. The need to interpret the Convention in harmony with more general international law still remains. As a result, UNCLOS tribunals have to balance between, on the one hand, the need to ensure that disputes concerning the marine environment are dealt with in a holistic manner and, on the other hand, remaining within the jurisdictional limits provided for under the Convention.

Against this background, this article seeks to examine whether and how the courts and tribunals under UNCLOS have managed to ensure such a balance in dealing with marine environmental disputes through the prism of the relationship between jurisdiction and applicable law. For the purposes of this article,

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

I will only focus on the International Tribunal for the Law of the Sea and the ad hoc arbitral tribunals established under Annex VII of the Convention (collectively referred to as “UNCLOS tribunals”), as these are the only tribunals that have to date heard cases brought under the auspices of Part XV UNCLOS, thereby bound by the jurisdictional limitation found under Article 288(1). The article is structured as follows. Section 2 will examine the techniques used by UNCLOS tribunals to examine external sources of international law in the course of settling environmental disputes arising from UNCLOS. Section 3 will then assess the implications of the use of such techniques for determining UNCLOS tribunals’ jurisdictional parameters and for the settlement of marine environmental disputes under UNCLOS. Section 4 will offer some concluding remarks.

2 The Techniques used by UNCLOS Tribunals

As mentioned, UNCLOS tribunals’ jurisdiction is limited to disputes “concerning the interpretation and application of the Convention” as established under Article 288(1). However, once jurisdiction is founded, the applicable law which UNCLOS tribunals may apply is not necessarily confined to UNCLOS. In other words, in order settle a dispute that arises under the Convention, UNCLOS tribunals may resort to sources of law that can be found beyond the Convention. This is possible through the use of different techniques, which include: (i) Article 293(1) on Applicable Law, (ii) the rule of reference and (iii) Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).² In practice, UNCLOS tribunals have, explicitly or implicitly, made use of one or a combination of these techniques in settling disputes relating to marine environmental protection arising from UNCLOS. Each of these techniques will be examined in turn.

2.1 *Article 293(1) UNCLOS*

The first and perhaps most obvious legal basis for resorting to external sources is Article 293(1) UNCLOS which reads “[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.” This article allows UNCLOS tribunals to, once jurisdiction has been established, resort to other treaties, or customary rules to resolve a dispute arising under UNCLOS. As law of the sea is but a branch of public international law, “it may frequently happen that a

² Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969).

matter not regulated by UNCLOS will arise before the courts and tribunals”;³ but UNCLOS “does not provide all of the law needed to resolve certain aspects of a dispute”.⁴ Article 293, while reaffirming the specialised nature of the UNCLOS dispute settlement system, paves the way for the UNCLOS tribunals to apply external sources to UNCLOS to deal with a dispute falling within its jurisdiction.

Article 293 was used in several important cases relating to the marine environment. In the *Advisory Opinion on Activities in the Area*, the Seabed Disputes Chamber explicitly mentioned Article 293.⁵ In examining the obligations of sponsoring States in the Area, the Chamber had resort to various instruments relating to environmental protection in order to shed light on the obligations of sponsoring States in the Area. For example, in examining the precautionary principle, the Chamber referred to Principle 15 of the Rio Declaration.⁶ It is noteworthy, however, that in this instance the Chamber did not explicitly state that Article 293 laid the foundation for resort to external sources, Article 293 was only mentioned in a general manner. In the case of the precautionary principle, the Sulphides Regulations and the Nodules Regulations already require the application of the precautionary approach ‘as reflected in Principle 15 of the Rio Declaration’, which was interpreted by the Chamber to “transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation” under UNCLOS.⁷ It would seem, therefore, that while Article 293 was mentioned, it was not strictly needed for the Chamber to resort to the Rio Declaration.

Article 293 was also explicitly mentioned in one of the first cases in which an international tribunal examined the general provisions of Part XII in a detailed and substantive manner, namely the *South China Sea* arbitration. When examining the Philippines’ submission that China had violated several provisions of UNCLOS concerning the protection of the environment in Part XII, the tribunals paid considerable attention to Article 192 which imposes a general obligation on States “to protect and preserve the marine environment”. Due to its general wording, the obligation imposed on States parties by virtue of Article 192 is not entirely clear, which calls for further specification with reference to other provisions of Part XII. In the Award on Merits, the tribunal held that “Article 192 does impose a duty on States Parties, the content

3 A. Proelss (Ed.), *United Nations Convention on the Law of the Sea: A Commentary* (C H Beck, Hart, Nomos, 2017), 1894.

4 *Ibid.*, 1895.

5 *Responsibilities and obligations of States with respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, p. 10, paras. 51–52.

6 *Ibid.*, para. 125.

7 *Ibid.*, para. 127.

of which is informed by the other provisions of Part XII and *other applicable rules of international law*⁸ including “[t]he corpus of international law relating to the environment”.⁹ On this basis, the tribunals then examined two external treaties, namely the Convention on Biological Diversity (CBD)¹⁰ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹¹ to interpret these two articles. The arbitral tribunal stated that although it did not have jurisdiction to decide on violations of the CBD, it could consider “the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.”¹² This statement clearly indicates that the tribunal was mindful of the limits of its jurisdictional scope, which does not extend to dealing with violations of other environmental agreements. However, that does not mean that these agreements could not be used as applicable law to shed light on the meaning of general or vague terms found in various provisions of the Convention. The tribunal explicitly made clear that it was the use of Article 293 UNCLOS combined with Article 31(3) VLCT that allowed it to do so.¹³

In particular, the tribunal relied on Article 2 of the CBD, which contain the definition of “ecosystem”,¹⁴ to find that “the marine environments where the allegedly harmful activities took place in the present dispute constitute ‘rare or fragile ecosystems’”.¹⁵ The tribunal also referred to the Appendices of CITES¹⁶ – which it considered to be “the subject of nearly universal adherence, including by the Philippines and China” and thus “forms part of the general corpus of

8 *South China Sea (Philippines v China)*, Arbitral Award on Merits (12 July 2026), para. 941 (emphasis added), available at <https://www.pcacases.com/web/sendAttach/2086>.

9 *Ibid.*

10 Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992).

11 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243 (3 March 1973).

12 *South China Sea (Philippines v China)*, Arbitral Award on Jurisdiction and Admissibility (29 October 2015), para. 176.

13 *Ibid.*

14 Article 2 of the CBD defines ‘ecosystem’ as ‘a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.’

15 *South China Sea*, Arbitral Award on Merits, *supra* note 8, para. 945.

16 Appendices I, II and III to the CITES are lists of species which are afforded different levels or types of protection from over-exploitation. Appendix I lists species that are the most endangered among CITES-listed animals and plants. Appendix II lists species that are not necessarily now threatened with extinction but that may become so unless trade is closely controlled. Appendix III is a list of species included at the request of a Party that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation. See: ‘The CITES Appendices’, available at <https://cites.org/eng/app/index.php>.

international law that informs the content of Article 192 and 194(5)¹⁷ – to find that the sea turtles and giant clams harvested by Chinese-flagged vessels to be endangered species. Combined with the finding that “the duty to prevent the harvest of endangered species follows from Article 192, read against the background of other applicable international law”, the tribunal found the “harvesting of sea turtles, species threatened with extinction, to constitute a harm to the marine environment”¹⁸ and that “a failure to take measures to prevent these practices would constitute a breach of Articles 192 and 194(5)”.¹⁹ On this basis, the tribunal concluded that China breached its obligations under the abovementioned articles.

It is clear that in this case Article 293 provided the arbitral tribunal with the legal basis for resort to sources beyond the Convention to interpret relevant provisions of the Convention. However, the tribunal could only do so if the content of the provisions concerned requires or at least leaves room for reference to external sources. As mentioned above, Article 192 only provides a general obligation to protect the marine environment, and as such, has generally been regarded being of a general hortatory nature.²⁰ The arbitral tribunal, however, adopted a different view and interpreted the general obligation contained therein to be one of due diligence.²¹ It is the open nature of the due diligence obligation under Article 192 that allowed the tribunal to, on the basis of Article 293, have recourse to rules beyond the Convention in order to shed light on States’ obligations under Articles 192 and 194(5). In other words, the tribunal in this case used international environmental obligations as applicable law to inform the standard of due diligence found under UNCLOS.²² This was not the first instance in which an UNCLOS tribunal had interpreted certain provisions of the Convention as containing a due diligence obligation.²³ However, it was the first case in which the obligation of due diligence played a key role in laying the ground for the tribunal to rely on external sources to elucidate UNCLOS

17 *South China Sea*, Arbitral Award on Merits, *supra* note 8, para. 956.

18 *Ibid.*, para. 960.

19 *Ibid.*

20 R. Churchill, *Dispute Settlement in the Law of the Sea: Survey for 2015 – Part I*, 31(4) *International Journal of Marine and Coastal Law* 555–582, 565 (2016).

21 *South China Sea*, Arbitral Award on Merits, *supra* note 8, paras. 956, 959, 964, 971.

22 See N. Matz-Lück and E. van Doorn, *Due Diligence Obligations and the Protection of the Marine Environment*, 42 *L’Observateur des Nations Unies* 177, 194 (2017).

23 Other cases in which the due diligence obligation is discussed include: *Responsibilities and obligations of States with respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, p. 10; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4. [Advisory Opinion on IUU Fishing].

provisions. It is worth noting that the reference to CBD and CITES in this instance was not controversial as both the Philippines and China are parties to the CBD and CITES, and thus the incorporation of rules found under these treaties into UNCLOS could not be seen as imposing additional obligations on the parties of the case to which they have consented.

2.2 *The Rule of Reference*

UNCLOS includes what is often referred to as the “rule of reference” – a term that is not found under UNCLOS itself. This is but an umbrella term referring to instances in which certain UNCLOS incorporates “generally recognized international rules and standards” or “global rules and standards” which exist in other sources of law into provisions relating to shipping, navigation and, most abundantly, those relating to marine pollution under Part XII.²⁴ The “rule of reference” takes cognisance of various instruments that were already in existence at the time that UNCLOS was concluded, and allows for their incorporation into UNCLOS.²⁵ The difference between the rule of reference and the use of Article 293 on Applicable Law as analysed above is that by virtue of the latter, external sources are only used to interpret UNCLOS provisions, they do not in themselves create additional binding obligations on UNCLOS State parties. In contrast, external rules and standards, once they are incorporated into UNCLOS through the rule of reference, become binding on UNCLOS State parties, regardless of whether the latter have consented to these external rules independently of UNCLOS. In order for external sources to be incorporated into UNCLOS and thereby binding, they need to meet the threshold of “generally accepted” or “global” rules and standards. However, the terms “generally accepted” or “global” are extremely ambiguous. UNCLOS provides no guidance on how to interpret these terms and there have exist differing scholarly views on this matter.²⁶

To date, there has only been one case in which an international dispute settlement body used the rule of reference to incorporate external rules and standards into UNCLOS. The Annex VII arbitral tribunal the *South China Sea* arbitral tribunal, when examining Article 94(5) concerning flag States’ duties over their vessels, had to consider what constituted “generally

24 See e.g., Articles 208, 210, 211 UNCLOS.

25 E.g., the 1972 London Convention on the Prevention of Marine Pollution by of Wastes and Other Matter.

26 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*, 12 Netherlands Yearbook of International Law, 3–44 (1981); E. J. Molennar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International, 1998) 152.

accepted international regulations, procedures and practices” contained therein. In this case, the Philippines in its submission pointed out that the International Maritime Organization (IMO) had recognized the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) “on account of their world wide acceptance” to fulfil the requirement of general acceptance for the purposes of Article 94(3).²⁷ The tribunal agreed that COLREGS had met the threshold of “generally accepted” rules and standards as set out under this article. The tribunal held that “with 156 contracting parties representing more than 98 percent of world tonnage, the COLREGS comprise one of the most widely adopted multilateral conventions in force.”²⁸ This statement provides some guidance as to how the threshold of “generally accepted” could be met. As a result, even though the rule of reference in this case did not pertain to issues relating to marine environmental protection, it could be an important precedent for understanding the application of the rule of reference found in various provisions of Part XII.

Due to the hitherto limited use of the rule of reference, there remain open questions about its scope of application, particularly with regard to the question of which external rules and standards could be brought into the ambit of UNCLOS. Consequently, the potential of the rule of reference is still under-explored. One question that has arisen with regard to the rule of reference, for example, is whether it could incorporate measures dealing with climate change found in external sources into provisions in Part XII UNCLOS. For instance, can the rule of reference contained in Article 211 on vessel-source pollution make binding on UNCLOS State parties rules relating to the prevention of air pollution from ships found in Annex VI of the International Convention for the Prevention of Pollution from Ships? Or can Article 210 concerning dumping serve as the legal basis to require State parties to adopt climate change mitigation measures, such as ocean fertilization and sub-seabed CO₂ sequestration, through the rule of reference contained in this article? The answers for these questions are beyond the scope of this article. However, the point is that the rule of reference creates a link between UNCLOS and external sources and enables UNCLOS, by incorporating these external sources, to develop in tandem with new developments of the law of the sea. From the perspective of dispute settlement, it is perhaps not controversial that the use of the rule of reference to read into UNCLOS other rules and standards of international law is within the jurisdiction of UNCLOS tribunals, as it requires the interpretation of various UNCLOS provisions containing such rules. However, what remains uncertain is

²⁷ *South China Sea*, Arbitral Award on Merits, *supra* note 8, para. 1063.

²⁸ *Ibid.*, para. 1081.

how far the reach of the rule of reference is. Thus, the extent to which UNCLOS tribunals can use the rule of reference to apply other sources of international law in a dispute arising under the Convention awaits future cases for further clarification.

2.3 *Article 31(3)(c) VCLT*

Article 31(3)(c) VCLT provides that in order to interpret a treaty, there shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties. Article 31(3)(c) essentially provides for what is known as the principle of systemic integration in treaty interpretation, in order to avoid treaties from being interpreted and applied in a vacuum, detached from the rest of the corpus of international law.²⁹

As mentioned above, the Annex VII arbitral tribunal in *South China Sea* explicitly relied on this article to refer to the CBD in interpreting Articles 192 and 194. In a more implicit manner, this article was used in the *Advisory Opinion on IUU Fishing*. In this Advisory Opinion, in response to a request from the Sub-Regional Fisheries Commission (SRFC) – a regional fisheries management organisation, ITLOS found that flag States had the obligation to ensure that vessels flying their flags do not conduct illegal, unreported and unregulated (IUU) fishing activities within the exclusive economic zone (EEZ) of another coastal State.³⁰ This obligation, in turn, imposes on flag States a series of measures such as taking the necessary measures to ensure that vessels flying their flag comply with the protection and preservation measures adopted by the SRFC Member States;³¹ to exercise effectively their jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked.³² ITLOS acknowledged that the issue of flag State responsibility for IUU fishing activities was not directly addressed in UNCLOS. However, it stated that the framework within which this question was to be examined was provided by the Convention. This framework consisted of two layers of obligations: first, general obligations concerning the conservation and management of marine living resources in Articles 91, 92, 94 as well as Articles 192 and 193; and second, specific obligations of the flag State in the EEZ of the coastal State.

29 O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018) 560.

30 *Advisory Opinion on IUU Fishing*, *supra* note 23, para. 120.

31 *Ibid.*, para. 136.

32 *Ibid.*, para. 137.

Nevertheless, the wording of the articles mentioned above, placed in their context and in light of the object and purposed of the Convention,³³ does not clearly provide a basis to identify the series of flag States' measures as held by ITLOS. ITLOS did not elaborate further what interpretative tool was used in order to reach such an interpretation. Flag States' measures mentioned by ITLOS are instead found in various binding agreements and soft law instruments relating to international fisheries that were concluded subsequent to UNCLOS, such as the 1995 United Nations Fish Stocks Agreement (UNFSA),³⁴ the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement),³⁵ and a series of soft law instruments developed under the auspices of the Food and Agricultural Organization (FAO), most importantly the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

In this light, ITLOS could have examined whether Article 31(3)(c) could be used to read into UNCLOS flag States obligations found under these fisheries agreement. Article 31(3)(c) has been used by various courts and tribunals as a tool to resort to external rules in order to interpret certain terms or provisions in a particular convention.³⁶ The application of this subparagraph (c) would turn on the question as to what could be considered "relevant rules" for the purposes of shedding light on a particular Convention? International courts and tribunals, when invoking Article 31(3)(c), did not seem to have adopted a stringent threshold in regard of the parties requirement, as in some cases, they even referred to treaties to which only one of the disputing parties was party.³⁷ Following the same logic, it can be argued that flag States obligations over fishing vessels under UNCLOS cannot and should not be interpreted in isolation, without regard to relevant rules on the matter. Article III, the core of

33 Article 31(1) VCLT requires that a treaty be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

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

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

36 See e.g., *Proceedings Pursuant to the OSPAR Convention (Ireland/United Kingdom)* (2 July 2003) RIAA Volume XXIII 59–151, paras. 93–105, 1137–38; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para158.

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

the Compliance Agreement, specifies that flag States are responsible for vessels flying their flags, no high sea fishing should be take place without prior authorisation of the flag State, and no authorisation shall be given unless the flag State is able to exercise effective responsibilities. The UNFSA is, as its name makes clear, an “Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea” which specifies on the fundamental obligation specified under UNCLOS to conserve and manage straddling stocks and highly migratory species. It elaborates at great length the duties of the flag State and makes more stringent the obligation of flag States to exercise control over vessels flying their flags in the high seas. ITLOS had already recognised that, by virtue of Article 58(2), flag State duties in the high seas are applicable to the EEZ insofar as they are not incompatible with coastal State obligations. The flag States’ obligations contained under the Compliance Agreement and the UNFSA, therefore, can provide guidance for the interpretation of flag States’ obligations over fishing vessels in the EEZ.

One explanation for ITLOS’ reluctance to expressly refer to the abovementioned fishing agreements is that they are either non-binding or if they are binding, such as the Compliance Agreement or the UNFSA, not all Member States of the SRFC were parties to these instruments.³⁸ The imposition of obligations found under these agreements on States parties to UNCLOS might lead to criticism that ITLOS was straying beyond its jurisdictional limits, and further violating the cardinal rule of state consent under international law. In advisory proceedings, Article 288(1) would not apply as this article is only applicable to contentious cases. Even if the jurisdictional limits under Article 288(1) were to extend to advisory proceedings, in the *Advisory Opinion on IUU Fishing*, the reference to external fisheries agreements did not necessarily mean that ITLOS was seeking to impose additional obligations on UNCLOS Member States. ITLOS’ finding that flag States have an obligation to ensure based on existing obligations under UNCLOS was not unreasonable. The resort to other fisheries agreements came into play only to shed light on the contours of that obligation. Thus resort to those instruments should be more properly viewed as the interpretation of the flag State obligations under UNCLOS in light of the development of the rules on flag States’ obligations which has taken place since the

38 The member States of the SRFC are Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra Leone. Among these States, only Guinea and Senegal are parties to the 1995 UNFSA. See http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

adoption of UNCLOS, and which embodies the common understanding of flag States obligations by a large number of States.

In sum, it follows from the foregoing discussion, there seems to exist two groups of mechanisms to allow for the tribunals to look into rules and norms beyond the Convention. These mechanisms could be classified into internal and the external mechanisms. The internal mechanism includes the use of Article 293(1) and the rule of reference. Article 293(1) used together with the concept of “due diligence” allowed Article 192 to become a gateway for rules contained in the wider corpus of international environmental law to be read into UNCLOS. The external mechanism includes Article 31(3) VCLT, although this has been mostly used in an implicit manner. In the interest of legal transparency, it would be advisable for UNCLOS tribunals to be clear in their legal reasoning by, *inter alia*, identifying the basis for resorting to external resources.

3 Implications

What are the implications of UNCLOS tribunals’ practice of applying rules of international law beyond UNCLOS in settling marine environmental disputes arising under UNCLOS? The implications are arguably two-fold, each of which will be addressed below: (i) the positive implication and (ii) the risks.

3.1 *The Positive Implications*

On the one hand, by resorting to rules of international law beyond the Convention, the tribunals ensure that the law of the sea is not a self-contained regime and is interpreted in harmony the rest of the corpus of international law. It is worth reminding that the creation of specialised dispute settlement bodies for the law of the sea was met with mixed reception during its early days. For example, in 1995, Judge Oda of the International Court of Justice argued that the establishment of ITLOS may result in the development of the law of the sea being “separated from the general rules of international law and placed under the jurisdiction of a separate judicial authority” and as such, “could lead to the destruction of the very foundation of international law.”³⁹ In contrast, Charney, in responding to Oda, questioned as to why the establishment of ITLOS would change the nature of law of the sea being entwined in international law. He doubted that ITLOS or the other dispute settlement forums under the Convention would fail to take appropriate account of public international law

39 S. Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 *International and Comparative Law Quarterly* 863 (1995).

to such an extent that they become a self-contained regime unrelated to general public international law.⁴⁰ UNCLOS dispute settlement bodies' reference to and application of a wider body of law seem to favour Charney's prediction and helps dispel any lingering skepticism regarding the position of the law of the sea within public international law. The relevant case law suggests that UNCLOS tribunals, while mindful of the limits of their jurisdictional scope, do not view the law of the sea as being separate from the wider corpus of international law. The use of different techniques to refer to rules emanating from international environmental law, for example, shows that the law of the sea is placed in a close relationship with other areas of international law and, more specifically, that the protection of the marine environment is viewed in light of the developments in these areas.

In particular, the fact that Article 192 is interpreted as including a due diligence obligation, which is "a variable concept" and "may change over time",⁴¹ enables UNCLOS to be a living treaty and as such deal with new challenges concerning the protection of the marine environment. The rule of reference, as mentioned, also contributes to ensuring the continued relevance of UNCLOS in the face of developments in international law. This means that the rule of reference envisages a certain level of dynamism to be built into UNCLOS. Article 31(3)(c) VCLT, as mentioned, has been considered an interpretative tool for harmonization of international law, so as to prevent specialised dispute settlement systems from applying the specific fields of law in a fragmented manner. The use of this article enables the Convention to be interpreted in harmony with the wider body of international law.

3.2 *The Risks*

On the other hand, when using external sources to interpret UNCLOS, international courts and tribunals would have to be mindful of three potential problems.

The first problem is the line between jurisdiction and applicable law. Reference to other rules of international law in deciding disputes is of course not a practice that is peculiar to UNCLOS tribunals, nor is it problematic for international courts and tribunals to refer to a more general body of law in deciding disputes. Issues only arise when courts and tribunals blur the line between jurisdiction and applicable law. It is noteworthy that UNCLOS tribunals had in some of their earlier cases used Article 293 as the gateway to establish

40 J. Charney, *Is International Law Threatened by Multiple International Tribunals?* Recueil des Cours 271 (1998).

41 *Advisory to Activities in the Area*, *supra* note 5, para. 117.

jurisdiction to hear disputes that did not squarely fall under UNCLOS. For example, In *M/V Saiga*, ITLOS acknowledged that UNCLOS did not contain “express provisions on the use of force in the arrest of ships”, but nevertheless asserted that it had jurisdiction to consider whether Guinea had used excessive and unreasonable force in stopping and arresting the *Saiga* because “international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances”.⁴² ITLOS thus used Article 293 on the applicable law as the basis to bring issues which were not provided for under UNCLOS into its jurisdictional ambit. Similarly, in *Guyana/Suriname*, the Annex VII tribunal, recalling ITLOS’ above statement, held that it had the competence, under Article 293, to decide on matters that concerned the UN Charter and general international law on the use of force.⁴³ In contrast, the arbitral tribunal in *MOX Plant* adopted an opposite understanding of the relationship between Articles 288(1) and 293. It held that “there is a cardinal distinction between the scope of its jurisdiction under Article 288, paragraph 1 of the Convention, on the one hand, and the law to be applied by the Tribunal under Article 293 of the Convention on the other hand”.⁴⁴ It would appear that the *MOX Plant* tribunal’s approach is more tenable. Although Article 293 allows judges or arbitrators to resort to legal rules and principles contained under general international law to settle a dispute, such use should be strictly limited to assisting them to decide a dispute that arises under the Convention, not as the basis for jurisdiction to hear that dispute.⁴⁵ UNCLOS tribunals in the cases concerning the protection of the marine environment as analysed in Section 2 did not conflate between jurisdiction and applicable law. External sources were used to help interpret relevant articles of UNCLOS in order to decide marine environmental disputes falling within UNCLOS. The way in which UNCLOS tribunals dealt with cases concerning the protection of the marine environment seems to have followed the recent trend and remained within the limits of jurisdiction.

42 *M/V ‘SAIGA’ (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) ITLOS Reports 1999, p. 10, para. 155.

43 *Arbitration between Guyana and Suriname (Guyana/Suriname)* (2007) RIAA XXX 1, para. 406.

44 *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95, para. 19. The Annex VII arbitral tribunal in *Arctic Sunrise* endorsed this approach when it was invited to consider human rights law in deciding the case. See *Arctic Sunrise (Netherlands v Russia)*, Award on Jurisdiction [188], [191], available at <http://www.pcacases.com/web/sendAttach/1325>.

45 M. Wood, *The International Tribunal for the Law of the Sea and General International Law*, 22 (3) *International Journal of Marine and Coastal Law* 351, 353 (2007).

The second issue to which UNCLOS tribunals should pay careful attention is that of State consent, with regards to both the scope of jurisdiction and the substantive law of the sea matters. In particular, UNCLOS tribunals should always bear in mind their jurisdictional scope and their nature as specialised bodies in law of the sea so as not to expand themselves into general international environmental courts without the consent of the parties. This may be prone to happen in cases which turn on the determination the scope the due diligence obligation under Article 192 and the use of Article 31(3) VCLT. As indicated above, case law to date shows little cause for concern that UNCLOS tribunals have fallen into these pitfalls. It is worth noting, however, that the jurisdictional limits imposed on UNCLOS tribunals under Article 288(1) of the Convention would come to play when the dispute mechanism under Part xv is unilaterally invoked. In case the parties conclude an agreement to bring a dispute to a court or tribunal under Article 287 in which there is no such limitation, the risk of conflating jurisdiction and applicable law would be less of a problem. One example would be where the parties reach an agreement to submit a case to ITLOS under Article 21 of the Statute of ITLOS.

Finally, when referring to external sources to interpret UNCLOS provision, courts and tribunals need to be careful not to impose on UNCLOS State parties obligations to which they have otherwise not consented. In the cases surveyed, the parties to the cases were also parties to treaties to which the tribunals referred, thus references to these treaties were uncontroversial. In instances where this is not the case, the tribunals would need to tread more cautiously to avoid circumventing States' consent. For example, in *South China Sea*, the endorsement of the IMO, coupled with the fact that both the Philippines and China are parties to COLREGS enabled the application of the rule of reference with little difficulty. Should a case involve the applicability of an instrument that does not enjoy the same level of acceptance by States worldwide or is not already binding on the parties to the case, the use of the rule of reference to bring in external rules and standards may be met with objection. It is argued, therefore, that UNCLOS tribunals need to carefully determine the extent to which external rules could be brought into the ambit of UNCLOS in each case in order to not only respect state consent but also to not compromise the balance of rights and obligations under the Convention and its nature as a package deal.

4 Conclusion

This article deals with the question of the relationship between jurisdiction and applicable law in the settlement of marine environmental disputes under

UNCLOS. As such, it has examined the techniques used by the dispute settlement bodies under UNCLOS to resort to sources beyond the Convention in order to settle disputes relating to marine environmental protection arising under the Convention. It has shown that while the jurisdiction of UNCLOS dispute settlement bodies is limited to disputes concerning the Convention, this does not mean that the tribunals are prevented from using other sources of law to shed light on the rights and obligations found under the Convention. UNCLOS tribunals have in practice used, explicitly or implicitly, several different legal tools in order to do so, namely Article 293 on Applicable Law, the rule of reference and Article 31(3) VCLT. In some cases, the tribunals in question clearly explained the basis for resort to external sources, while in others, they were simply silent. A perusal of the way in which these legal tools were used shows that UNCLOS tribunals were able to maintain the distinction between jurisdiction and applicable law when examining sources beyond the Convention. In particular, external sources were used to give flesh to the general obligations provided for under UNCLOS, and not to expand the jurisdiction of UNCLOS tribunals to issues that are beyond the scope of the Convention. UNCLOS has been called “a living treaty”,⁴⁶ which means that it is expected to grow and adapt to new developments. The use of applicable law by international courts and tribunals to interpret important but general obligations relating to the protection of the marine environment under UNCLOS is one of the ways to ensure this spirit. The reference to external sources to date has raised little controversy primarily due to the fact that the parties to the cases were already also parties to the external conventions. However, when reading into UNCLOS external obligations, international courts and tribunals should be mindful of the risks of circumventing state consent or upsetting the balance of rights and obligations that was carefully struck under UNCLOS.

Finally, it is also worth noting that Article 55 of the first and second draft texts of the new international legally binding instrument (ILBI) for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ) envisions the application of Part XV UNCLOS *mutatis mutandis* to disputes about the interpretation or application of the ILBI.⁴⁷ As this instrument relates to the conservation and sustainable use of marine

46 R. Barnes, ‘The Continuing Vitality of UNCLOS’ in J. Barrett and R. Barnes (Eds.) *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, 2017).

47 Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, available at https://www.un.org/bbnj/sites/www.un.org/bbnj/files/revised_draft_text_a.conf_232.2020.11_advance_unedited_version.pdf.

biodiversity, and considering that the arbitral tribunal in *South China Sea* held that Article 192 UNCLOS was “broadly enough worded to include the obligation to protect and preserve marine biodiversity”,⁴⁸ it will be interesting to see how the ILBI will impact the interpretation of UNCLOS provisions relating to the marine environment, and vice versa, how UNCLOS case law may be used as applicable law to deal with disputes under ILBI should dispute settlement therein be invoked.

48 *South China Sea*, Arbitral Award on Jurisdiction and Admissibility, *supra* note 12, para. 284.