



# Compulsory Jurisdiction as the DNA of LOSC Dispute Settlement: An Evolutionary Path

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## Introduction

The contributions to this special issue have their origin in the workshop ‘The United Nations Convention on the Law of the Sea at Forty: The Contribution of the Judiciary and Judicial Jurisdiction’, which was organised in the framework

of the Judicial Jurisdiction project<sup>1</sup> at Utrecht University on 5 and 6 May 2022. As the title of the workshop indicates, contributors were asked to reflect on the performance of the judiciary under the United Nations Convention on the Law of the Sea (LOSC)<sup>2</sup> and, in particular, on how the judiciary has dealt with issues of jurisdiction of courts and tribunals as provided by the Convention, their roles and how States have responded to these developments. Before further introducing the individual contributions to the special issue, the following section sets the stage by providing some general reflections on judicial jurisdiction under the Convention and its implementation agreements, that is, the Part XI Implementation Agreement, Fish Stocks Agreement and BBNJ Agreement.<sup>3</sup> As will be further discussed below, all implementation agreements to the LOSC include Part XV as a framework for dispute settlement, with two of them including some additional nuances.

## A Brief Primer on Judicial Jurisdiction under the Convention and Its Implementation Agreements

### *The LOSC*

As has been pointed out on many occasions, Part XV of the LOSC is a carefully crafted compromise.<sup>4</sup> Part XV seeks to reconcile the different views of States

- 1 The full title of the project, which is funded by the Dutch Research Council (file number 406.18.RB.007), is Safeguarding the Effectiveness of the Judiciary's Role in Legal Regime for the Oceans: Charting a Course between Judicial Restraint and Judicial Activism.
- 2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 1 November 1994) 1833 *UNTS* 397 [LOSC].
- 3 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994, in force 28 July 1996) 1836 *UNTS* 42 [Part XI Implementation Agreement]; 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 (New York, 4 August 1995, in force 11 December 2001) 2167 *UNTS* 88 [Fish Stocks Agreement]; 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 (Advanced, unedited, pending paragraph renumbering, text of 4 March 2023) available at [https://www.un.org/bbnj/sites/www.un.org/bbnj/files/draft\\_agreement\\_advanced\\_unedited\\_for\\_posting\\_v1.pdf](https://www.un.org/bbnj/sites/www.un.org/bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf); all websites accessed 20 March 2023 [BBNJ Agreement].
- 4 Generally, see AO Adede, *The System of Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and Commentary* (Martinus Nijhoff Publishers, Dordrecht, 1987); MH Nordquist, S Nandan, S Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill and University of Virginia. Center for Oceans Law Policy, 1987) Part XV. It may be noted that Ambassador Tommy Koh in his memorandum on the informal negotiating text of 21 July 1975 on dispute settlement (UN Doc A/CONF.62/WP.9)

on the desirability of potentially subjecting their actions to compulsory dispute settlement. The first section of Part xv on general provisions starts with Article 279, which recalls the obligation of States to settle their disputes by peaceful means, referring to the means included in Article 33, paragraph 1, of the United Nations Charter.<sup>5</sup> Apart from listing these means, Article 33, paragraph 1, provides that parties to a dispute may make use of the ‘means of their own choice’. The right of parties to agree on the means of their own choice is confirmed by Article 280 of the Convention. This upfront recognition of the autonomy of the parties to agree on specific means is followed by Articles 281 and 282, which allow parties to contract out of the availability of unilateral recourse to compulsory dispute settlement procedures under section 2 of Part xv of the LOSC. Section 3 of Part xv furthermore contains limitations and exceptions to the applicability to section 2.

However, none of the above detracts from the fact that the LOSC makes unilateral recourse to compulsory dispute settlement available. And by accepting that option, the States parties to the Convention have accepted a significant limitation to their primary role in interpreting and applying the provisions of the Convention. Article 288 of section 2 of Part xv is the key provision in this respect. That Article’s paragraph 1 confers upon courts and tribunals jurisdiction ‘over any dispute concerning the interpretation of application of [the LOSC] which is submitted [in accordance with Part xv]’. Paragraph 4 confirms a fundamental notion underpinning an independent judiciary, providing that ‘[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal’. This *compétence de la compétence* implies that it is upon courts and tribunals to decide whether a dispute that is submitted to them is concerned with the interpretation and application of the Convention. However, due to the different approaches tabled by LOSC tribunals in different cases, the test to determine the scope of jurisdiction remains to date rather unclear.<sup>6</sup> Moreover, the need

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commented: ‘[T]he provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on convention. Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently.’ In connection with the exceptions he notes: ‘The final article is an attempt to compromise the extreme and conflicting views regarding the question of including or excluding certain disputes relating to the economic zone from binding dispute settlement procedures.’ UN Doc A/CONF.62/WP.9/Add.1 (31 March 1976).

5 Article 33 lists ‘negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice’.

6 For example, the ITLOS and the Annex VII arbitral tribunal in *M/V Saiga No. 2* and *Guyana/Suriname* respectively used Article 293 to expand jurisdiction to issues not strictly concerning

for LOSC courts and tribunals to determine the scope of jurisdiction as defined under Article 288(1) is even more important because the LOSC – being part of an intricate web of instruments governing the ocean – frequently makes references to or incorporates external instruments into the Convention. As the contribution of Danae Georgoula indicates, the Convention's frequent use of *renvois* to rules that are external to the Convention is recognition by its drafters that the Convention cannot be viewed in isolation and allows taking on board those external rules in settling disputes concerning the interpretation and application of the Convention.<sup>7</sup> As Georgoula's article also points out, the exact implications of the *renvois* remain to be further assessed, which again is a task that primarily is within the competence of courts and tribunals.<sup>8</sup>

The *compétence de la compétence* of courts and tribunals, which is provided by Article 288 (4) of the LOSC, also includes determining the implications of Part xv's exclusions of and limitations to the compulsory jurisdiction as contained in its Articles 281, 282, 297 and 298. The case law of LOSC tribunals indicates that different approaches have been entertained in that connection, with significant implications for the availability of compulsory dispute settlement under the Convention. One high profile example in this respect is provided by the diametrically opposed interpretations of Article 281 by the Annex VII tribunals in respectively the *Southern Bluefin Tuna* and *South China Sea Arbitrations*.<sup>9</sup> In commenting on the former decision just after it was issued, Oxman identified several arguments to allow subsequent tribunals distinguishing a case before them from the factual pattern in *Southern Bluefin Tuna*

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the interpretation and application of the LOSC (see *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, *ITLOS Reports 1999*, p. 10, para 155; *Arbitration between Guyana and Suriname*, Award, 17 September 2007, PCA Case No. 2004-04 (2012) 30 *RIAA*, p. 1, para 406. In *Chagos Marine Protected Area and Coastal States' Rights*, the Annex VII arbitral tribunals used the 'ancillary test' to determine jurisdiction over issues not concerning the LOSC. See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015 (2018) 31 *RIAA*, p. 359, para 220; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Award, 21 February 2020, PCA Case No. 2017-06, para 194, available at <https://pcacases.com/web/sendAttach/9272>. Also in *Chagos Marine Protected Area* the tribunal interpreted Article 297(1)(c) as a *renvoi* which expands the jurisdiction of LOSC tribunals beyond the Convention (*Chagos Marine Protected Area* (n 6), para 316).

7 D Georgoula, 'The LOSC *renvois* as a source of untapped jurisdiction' (2023) 38(2) *International Journal of Marine and Coastal Law (IJMCL)*, this issue.

8 *Ibid.*

9 *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*) available at <https://www.itlos.org/en/main/cases/list-of-cases/case-no-3-4/>; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* available at <https://pca-cpa.org>

to avoid a decision that would not accord precedential effect to the award.<sup>10</sup> However, the tribunal in the *South China Sea Arbitration* decided to take the latter approach.<sup>11</sup> That is a choice with significant implications for the future development of judicial jurisdiction. As Oxman observed, remaining silent on the precedential effect of the decision in *Southern Bluefin Tuna* would risk ‘a broad interpretation of the precedential effect of the award, which could prejudice interests not only in the compulsory jurisdiction provisions of the [LOSC], but also in comparable provisions of other treaties’<sup>12</sup> Distinguishing a later case would similarly have confirmed the precedential effect of the earlier case. The rejection of such precedential effect by the tribunal in the *South China Sea Arbitration* presents future tribunals that have to rule on this issue with two clear alternatives that have different implications for judicial jurisdiction under the LOSC. As Ke Song indicates in his contribution, such diverging approaches are illustrative of not only the judicial process of the ‘battle of ideas’ amongst LOSC tribunals, but also of the institutional dynamics of this battle.<sup>13</sup>

Tribunals dealing with the interpretation and the application of the LOSC have not only dealt with the implications of Article 281 for their jurisdiction, but various cases have addressed the implications of Articles 282, 297 and 298. Just as is the case for Article 281, the development of the jurisprudence on these articles has not always been linear. Tribunals have not always confirmed the precedential effect of earlier cases, as illustrated by the interpretation of the ‘military activities’ exception under Article 298(1),<sup>14</sup> some interpretations have developed the law in ways that may not have been foreseen by those involved in the drafting of the Convention, most prominently exemplified by the

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/en/cases/7/. See further LN Nguyen, *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (CUP, Cambridge, 2023) 196–200.

10 BH Oxman ‘Complementary agreements and compulsory jurisdiction’ 2012 (95) *American Journal of International Law* 277–312, at p. 292.

11 *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award, 29 October 2015 (2020) 33 *RIAA*, p. 1, paras 223–225.

12 Oxman (n 10), at p. 309.

13 K Song ‘The battle of ideas under LOSC dispute settlement procedures’ (2023) 38(2) *IJMCL*, this issue.

14 *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)* Award, 12 July 2016, (2020) 33 *RIAA*, p. 153, paras 1158–1168; *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Award, 27 June 2022, paras 65–75, available at <https://pcacases.com/web/sendAttach/38096>; *Dispute Concerning Coastal State Rights* (n 6), paras 330–338.

interpretation of Article 297(1);<sup>15</sup> and the fragile basis upon which the International Tribunal for the Law of the Sea (ITLOS) affirmed its advisory jurisdiction as a full court.<sup>16</sup> However, this does not necessarily mean that in future cases tribunals should detract from these precedents, no matter how creative these might be. As Miron observes in her contribution, other systemic or teleological justifications might exist that could excuse such jurisdictional innovations and the upholding of these precedents.<sup>17</sup>

It is submitted that especially in respect of advisory jurisdiction there is an increased need to delineate it more clearly.<sup>18</sup> Such a jurisdictional innovation might have been well received by States – especially those that argued in favour of affirming the ITLOS's advisory jurisdiction also over the BBNJ Agreement – but, as Lando's contribution indicates, the authority of judicial bodies is very much impacted by the quality of their reasoning<sup>19</sup> and therefore, an unthorough engagement with issues of jurisdiction and admissibility<sup>20</sup> could have far-reaching implications for the future. It could, arguably, risk undermining the persuasive authority of LOSC courts and tribunals and consequently, the credibility of the judicial process.

This brief review of the Convention's definition of judicial jurisdiction and its development by tribunals highlights a number of critical points that all, to a larger or lesser extent, resonate with the title of this contribution.<sup>21</sup> First,

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- 15 The tribunal in *Chagos Marine Protected Area* interpreted Article 297(1) as 'a renvoi to sources of law beyond the Convention', thus effectively expanding the jurisdiction of LOSC courts and tribunals to 'certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself' (*Chagos Marine Protected Area Arbitration* (n 6), para 316).
- 16 Y Tanaka, 'Reflections on the advisory jurisdiction of ITLOS as a full court: The ITLOS advisory opinion of 2015' (2015) (14)(2) *The Law & Practice of International Courts and Tribunals* 318–339.
- 17 A Miron, 'COSIS request for an advisory opinion: A poisoned apple for the ITLOS?' (2023) 38(2) *IJMCL*, this issue.
- 18 T Ruys and A Soete, "'Creeping" advisory jurisdiction of international courts and tribunals? The case of the International Tribunal for the Law of the Sea' (2016) 29(1) *Leiden Journal of International Law* 155–176.
- 19 M Lando, 'An exploratory empirical outlook on the authority of Annex VII arbitral tribunals' (2023) 38(2) *IJMCL*, this issue.
- 20 Ruys and Soete (n 18).
- 21 To provide the reader with some context to this perhaps slightly enigmatic title, it may be observed that the characteristics of compulsory jurisdiction as a part of LOSC dispute settlement imply that it cannot evolve beyond a certain point without actually doing away with the idea of compulsory jurisdiction. These characteristics (the 'DNA') set bounds to the developmental path of provisions on compulsory dispute settlement. However, just as DNA changes to adapt to allow for the evolution of living organisms, some gradual change has also taken place in relation to compulsory dispute settlement under the Convention

allowing for third party dispute settlement implies that the States Parties have delegated the power to interpret the provisions setting the boundaries to judicial jurisdiction to the judiciary. Second, the provisions concerned are open-textured, leaving scope for different pathways to take in endowing them with specific meaning and determining their relationships. Third, the judiciary has shown itself to be open to considering different approaches and disregarding the precedential effect of earlier cases. Fourthly, the development and use of advisory jurisdiction by the ITLOS brings to the forefront the law-making effects that the feedback loop between States and the judiciary can have.<sup>22</sup>

Although the role of judiciary in developing its jurisdiction could be said to be part and parcel of compulsory dispute settlement, which requires entrusting courts and tribunals with the *compétence de la compétence*, this does not mean that the States Parties to the Convention have been passive bystanders. As a matter of fact, the opportunities for States to have an impact are many. States nominate and elect judges to the ITLOS (and the International Court of Justice (ICJ)) and the parties to an Annex VII arbitration in principle appoint the members of their tribunal.<sup>23</sup> Respondent States Parties routinely object to the jurisdiction and admissibility of the claims that have been introduced against them. This allows both the applicant and the respondent with the opportunity to argue their case and highlight the strengths and weaknesses of the existing case law and eventually canvass new approaches.

States may also voice their disagreement with the approach of the judiciary to defining its jurisdiction in other settings. The most vociferous opposition in this respect likely has come from China in the context of the *South China Sea Arbitration* that was unilaterally initiated by the Philippines in 2013.<sup>24</sup> By way

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(and its implementation agreements) as a result of developments in the world external to it.

22 This may be illustrated with reference to the impact the ICJ's *Chagos Advisory Opinion (Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965)*, Advisory Opinion, ICJ Reports 2019, p. 95) had on the judgment on preliminary objections of the ITLOS in *Mauritius/Maldives (Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives))*, Judgment, 28 January 2021, paras 140–215, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary\\_objections/C28\\_Judgment\\_prelimobj\\_28.01.2021\\_orig.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf).

23 See LOSC (n 2), Annex VII, Article 3.

24 Statement of Secretary Albert del Rosario: On the UNCLOS Arbitral Proceedings against China to achieve a peaceful and durable solution to the dispute in the West Philippine Sea (Released on 22 January 2013, accessed in <https://www.officialgazette.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/o>).



of example, it may be recalled that the Chinese Ministry of Foreign Affairs in a reaction to the 2015 award on jurisdiction and admissibility observed that

the Philippines and the Arbitral Tribunal have abused relevant procedures and obstinately forced ahead with the arbitration, and as a result, have severely violated the legitimate rights that China enjoys as a State Party to the [LOSC]. ... As a State Party to the [LOSC], China firmly opposes the acts of abusing the compulsory procedures for dispute settlement under the [LOSC].<sup>25</sup>

In a similar vein, China and the Russian Federation just days prior to the 2016 award dealing with merits of the case posited that

[i]t is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices.<sup>26</sup>

Although these statements do not explicitly reject the unilateral recourse to third party dispute settlement under the LOSC, impliedly the message is that third party dispute settlement should only be used with the consent of both parties in the individual case. That approach, where parties have control over the issues to be decided, would seriously curtail the possibilities of courts and tribunals to use their *compétence de la compétence* to define the scope of judicial jurisdiction under the Convention. It may be noted that the canvassed approach also contradicts Article 286 of the Convention, which squarely provides for the option of unilateral submission of LOSC disputes to compulsory dispute settlement. Moreover, the Convention has a general provision concerning the abuse of rights (Article 300) and a provision on the abuse of legal process (Article 294(1)). Even though those provisions do not set aside the general rule of Article 286, they may be invoked in the course of proceedings resulting from recourse to compulsory dispute settlement. It will be upon the

25 Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (30 October 2015) available at 2018 (17) *Chinese Journal of International Law* 679.

26 The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law of 26 June 2016, available at [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/201608/t20160801\\_679466.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201608/t20160801_679466.html).



court or tribunal concerned to decide on the implications of those provisions for the case at hand.

Doing away with the possibility of unilateral resort to third party settlement under the LOSC, a key element of its Part xv, will most probably not gain much support in the foreseeable future. However, the negotiations on the BBNJ Agreement did show some opposition to incorporating Part xv of the LOSC as it stands into the Agreement, as discussed in the contribution of Joanna Mossop to this special issue.<sup>27</sup> In that light, it is instructive to consider to what extent this opposition has resulted in adjustments to the dispute settlement procedures contained in the BBNJ Agreement<sup>28</sup> as compared to Part xv of the Convention. However, before doing so, some short comments on the Part xi Implementation Agreement and the Fish Stocks Agreement are warranted, as this may indicate whether, and if so, how the views on incorporating Part xv in implementation agreements to the LOSC may have changed over time.

### *The Part xi Implementation Agreement and the Fish Stocks Agreement*

As Article 1 of the Part xi Implementation Agreement euphemistically observes its States Parties ‘undertake to implement Part xi [of the LOSC] in accordance with this Agreement’. This undertaking is further cemented by Article 2 of the Agreement, which provides that ‘the provisions of this Agreement and Part xi shall be interpreted and applied together as a single instrument’. Finally, Article 4 seeks to ensure that States become bound by both the Convention and the Part xi Implementation Agreement. In light of this approach, there was no need to further address the application of Part xv of the Convention to the Agreement. The Agreement does make a number of references to dispute settlement, but in these cases simply provides that the settlement of the disputes concerned ‘shall be subject to the dispute settlement provisions set out in the Convention’.<sup>29</sup>

The Fish Stocks Agreement is of a different nature as compared to the Part xi Implementation Agreement. First, it creates additional law that is not an integral part of the Convention; second, the Agreement has linkages to

27 J Mossop, ‘Reimagining the procedural aspects of Part xv of the United Nations Convention on the Law of the Sea’ (2023) 38(2) *IJML*, this issue.

28 It is recognised that there may be different reasons for the opposition to including Part xv without change into the BBNJ Agreement, some of which may be unrelated to concerns about how the judiciary has defined the extent of its jurisdiction. However, the final text of the BBNJ Agreement, as further discussed below, indicates that such concerns did play a role.

29 Part xi Implementation Agreement (n 3), sections 3.12, 6.1.f.ii and 6.4 and 8(1)(f).

other agreements relating to straddling fish stocks and highly migratory fish stocks; and finally, it does not require that its States Parties also are or become parties to the Convention. Consequently, the negotiators of the Fish Stocks Agreement had to consider what dispute settlement provisions to include in the Agreement.

The settlement of disputes is regulated by Part VIII of the Fish Stocks Agreement. Its Article 27 restates the general obligation to settle disputes by peaceful means, which is also contained in Article 279 of the Convention. Article 28 requires States to 'cooperate in order to prevent disputes'. This obligation is precisely and narrowly defined by adding that '[t]o this end, States shall agree on efficient and expeditious decision-making procedures within subregional and regional fisheries management organizations and arrangements and shall strengthen existing decision-making procedures as necessary'. Article 29 provides for a procedure that allows for dealing with disputes of a technical nature without recourse to the compulsory dispute settlement. Article 29 does not imply an obligation to (first seek to) resolve technical dispute through the procedure it sets out.

The applicability of Part xv of the Convention is regulated by Article 30 of the Fish Stocks Agreement, which makes Part xv applicable '*mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention'.<sup>30</sup> Article 30(2) contains an identical provision in relation to any dispute between States Parties to the Agreement concerning the interpretation or application of a relevant fisheries agreement to which they are parties.<sup>31</sup> Article 30(5) contains an applicable law provision, which ensures that a court or tribunal in dealing with disputes

shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention.

The dispute settlement provisions of the Fish Stocks Agreement differ in many respects from those of the BBNJ Agreement, as discussed below. At this juncture, two points may be noted. Contrary to the BBNJ Agreement, the Fish

<sup>30</sup> Fish Stocks Agreement (n 3), Article 30(1).

<sup>31</sup> Article 30(3) and (4) contain further detail concerning the application of Article 287 of the LOSC by States Parties to the Agreement.

Stocks Agreement does not seek to put any glosses on the jurisdictional framework for compulsory dispute settlement of Part xv. A couple of considerations may be part of an explanation of this difference. First, in 1995, when the Fish Stocks Agreement was adopted, there was no experience with the interpretation and application of the relevant provisions by the judiciary that might have given States reason to tinker with Part xv. Second, between 1995 and 2023 the balance of power in the international community has significantly changed, which also is bound to find an expression in the law.

A second point on which the Fish Stocks Agreement and the BBNJ Agreement differ is that while the former seeks to integrate dispute settlement across the instruments concerned, the latter seeks to insulate the procedures under other frameworks, instruments and bodies from those provided by the BBNJ Agreement (i.e., the procedures of Part xv of the Convention). Part of a possible explanation may be the difference in nature of the Fish Stocks Agreement and the BBNJ Agreement. While the Fish Stocks Agreement and the other agreements with which it has linkages have a focus on fisheries, the BBNJ Agreement has a broader focus and involves different interests than many of the other frameworks, instruments and bodies concerned. In addition to the fact that certain States wanted to avoid too large a role of the BBNJ Agreement in ocean governance in general, it seems likely that a similar consideration also played a role in framing the relationship clauses under its dispute settlement provisions.

### *The BBNJ Agreement*

The settlement of disputes is addressed by Part IX of the BBNJ Agreement. The first article of Part IX, currently numbered 54 ante, provides that 'Parties shall cooperate to prevent disputes'. As was observed above, the same obligation is contained in Article 28 of the Fish Stocks Agreement. However, whereas Article 28 narrowly and precisely circumscribes the content of this duty, Article 54 ante is completely silent on this point. Consequently, the exact implications of the article remain unclear. Does it entail an additional obligation to cooperate once it emerges that a situation may evolve into a dispute? When will that obligation to cooperate terminate? When a dispute has actually arisen? And what will be the implications of a breach of this duty to cooperate? In light of the fact that Part IX of the BBNJ Agreement makes Part xv of the LOSC available to settle disputes concerning the interpretation or application of the Agreement, it is certainly a possibility that the implications of Article 54 ante will be considered by the judiciary. Article 54 ante may result in slowing down the process that eventually will lead to compulsory proceedings as States seemingly may be obliged to engage in additional cooperation, but not block

it definitively.<sup>32</sup> At the same time, such a slowing down of the process may change the dynamics of a developing dispute and its eventual outcome. It is submitted that as regards the impact of Article 54 ante, much will depend on how States and courts and tribunals will interpret and apply this provision, particularly whether it will be interpreted as a pre-condition for the exercise of jurisdiction, or whether it constitutes a stand-alone obligation.

Articles 54 and 54 ter ante basically restate the obligations contained in Articles 279 and 280 of the Convention, while Article 54 ter provides for a procedure that allows for dealing with disputes of a technical nature without recourse to the dispute settlement listed in Part xv of the Convention. However, Article 54 ter does not imply an obligation to (first seek to) resolve technical disputes through the procedure it sets out.<sup>33</sup> It is worth noting that Part xv of the LOSC also contains a procedure to settle disputes involving technical issues under Annex VIII of the LOSC, although the technical issues are clearly defined under Annex VIII, as opposed to being more open-ended under Article 54 ter. In light of Article 55(1) bis, which replicates Annex VIII of the LOSC, the question may arise as to the relationship between the procedure under Article 54 ter and arbitration under Annex VIII. Does the invocation of one exclude resort to the other? In any case, the fact that arbitration under Annex VIII has never been invoked may indicate the difficulties of separating technical issues from the broader context of the dispute.

Article 55, paragraph 1, of the Agreement provides that 'disputes concerning the interpretation or application of this Agreement shall be settled in accordance with the provisions for the settlement of disputes provided for in Part xv of the Convention'. The subsequent paragraphs of Article 55 ensure that the relevant choices under Article 287 and declarations under Article 298 of Part xv of States Parties to the Convention are equally applicable in the context of the Agreement, unless a State Party wants to vary that application.<sup>34</sup> Paragraphs 4 to 6 of Article 55 allow non-parties to the LOSC to avail themselves of these mechanisms in the context of the Agreement.

In terms of the assessment as to how the Agreement may have varied the availability of compulsory dispute settlement as compared to the LOSC,

32 Article 54 ante entails an obligation to cooperate to prevent disputes, which does not exclude disputes from eventually arising. Such disputes may be settled in accordance with Part xv of the Convention.

33 It may be noted that an identical provision is contained in Article 29 of the Fish Stocks Agreement (n 3).

34 BBNJ Agreement (n 3), Article 55(1 bis)-(3).

paragraphs 7 and 8 of Article 55 are pertinent.<sup>35</sup> Paragraph 7 provides that the provisions of Article 55

shall be without prejudice to the procedures on the settlement of disputes that Parties have agreed to as participants in a relevant legal instrument or framework, or as member of a relevant global, regional, subregional or sectoral body concerning the interpretation and application of such instruments and frameworks.

In considering the implications of this provision, it is relevant to take into account its relationship to Articles 281 and 282 of the Convention that carve out exceptions to the applicability of Part xv of the Convention. These articles are in any case applicable to the settlement of disputes concerning the interpretation or application of the BBNJ Agreement, due to the replication of Part xv of the Convention into the Agreement by its Article 55(1 bis). This raises the question what Article 55 (7) accomplishes as compared to these articles. In that respect a couple of points may be noted. First, paragraph 7 does not refer to disputes concerning the interpretation or application of the Agreement, but only to disputes concerning the interpretation and application of other instruments and frameworks. As such, paragraph 7 concerns the impact of Part xv under the Agreement on external dispute settlement mechanisms. Articles 281 and 282, on the other hand, envisage when Part xv of the LOSC may be invoked should there exist an external dispute settlement mechanism, thus focusing more on the impact of external agreements on Part xv. Second, the without prejudice provision of paragraph 7 seemingly may have broader implications than Articles 281 and 282, as it may be read as implying that dispute settlement procedures under other instruments and frameworks are insulated from the effect of the outcome of a related dispute settlement procedure under the BBNJ Agreement.<sup>36</sup> However, as judicial practice indicates, these other procedures,

35 Article 55(8 bis) contains a safeguarding clause that is not of direct relevance to determining the scope of the jurisdiction of courts and tribunals in relation to disputes concerning the interpretation or application of the Agreement.

36 The interaction (or lack thereof) between outcomes of parallel procedures has already been discussed in the framework of LOSC courts and tribunals concerning the *MOX Plant* case (*Ireland v. United Kingdom*). The same factual situation gave rise to three international judicial procedures: an OSPAR Arbitral Tribunal (*Dispute Concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom*, Decision, 3 July 2003, 23 (2006) *RIAA*, p. 59; an Annex VII Arbitral Tribunal (PCA, Order No. 3, 24 June 2003, *suspension of the proceedings*) with a request for provisional measures submitted to the ITLOS (*The MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures*, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95); and a case in front of the

in interpreting and applying the law, at the same time would tend to assess the precedential effect of earlier jurisprudence under the Agreement, or, for that matter, the Convention.

Paragraph 8 of Article 55 excludes the consideration of disputes concerning the legal status of areas within national jurisdiction and sovereignty claims or other rights over continental or insular land territory or a claim thereto from the jurisdiction of courts and tribunals under the Agreement. The reference to ‘any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto’ is similar to the clause ‘any unsettled dispute concerning sovereignty or other rights over continental or insular land territory’ contained in Article 298 of the Convention. Article 298 makes this reference in connection with the exclusion of disputes concerning the delimitation of maritime boundaries from compulsory dispute settlement and their eventual submission to conciliation under Annex v, section 2, of the Convention. Article 55(8) applies this exclusion generally to compulsory dispute settlement. However, this does not imply a different approach from the Convention. Article 298 excludes these matters from conciliation, but should not be read as allowing for their concurrent consideration in adjudging disputes concerning the interpretation or application of the Convention.<sup>37</sup> The explicit exclusion of sovereignty disputes in paragraph 8 can be seen as a reaction to the ways in which LOSC tribunals have determined the scope of their jurisdiction over sovereignty disputes. More specifically, the *Chagos Marine Protected Area Arbitration*, while rejecting jurisdiction in that particular case over submissions deemed related to territorial sovereignty, still left open the possibility of entertaining such an issue with the ‘ancillary’ and ‘weight of the dispute’ tests.<sup>38</sup> Article 55(8) has now simply shut that door of possibility.

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European Court of Justice (Grand Chamber, Judgement of 30 May 2006, Case C-459/03). While the Annex VII tribunal suspended its proceedings while waiting for the decision of the then Court of Justice of the European Communities (CJCE) because of the possible ‘exclusive jurisdiction and competence of the European Communities’ on certain matters of the case (PCA, Order No. 3 note 30, paras 25–26), the OSPAR Tribunal and the CJCE did not seem particularly concerned by the ongoing parallel procedures. For a comment see, e.g., B Kwiatkowska, ‘The Ireland v United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism’ (2003) (18)(1) *IJMC* 1–58; N Lavranos, ‘The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?’ (2006) (19) *Leiden Journal of International Law* 223–246.

37 *Chagos Marine Protected Area Arbitration* (n 6), para 219.

38 *Ibid.*, paras 220–221; see also *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Award, 21 February 2020, 2021 (191) *International Law Reports* 1, para 194.

The exclusion of disputes concerning the legal status of areas within national jurisdiction is not contained in the Convention. An expansive reading of the term 'legal status' might exclude the consideration of any matter related to how a coastal State defines its jurisdiction, as that definition informs the legal status of the coastal State's maritime areas. However, such an expansive interpretation would seem to be contradicted by the fact that paragraph 8 also provides that 'nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Section 2 Part xv of the Convention'. That jurisdiction is also defined by the scope of the limitations contained in Article 297 of the Convention, which only exclude disputes with regard to the specific exercise by a coastal State of its sovereign rights or jurisdiction. Reading paragraph 8 in the light of Article 297 would mean that an expansive interpretation of the term 'legal status' to justify blocking the jurisdiction of LOSC courts and tribunals is untenable.<sup>39</sup> However, it seemingly may be challenging for courts and tribunals to reconcile these different aspects of Article 55(8).

Some of the language contained in the BBNJ Agreement may facilitate arguing in an extra-legal setting that a court or tribunal has overstepped its competence. For instance, a State that is dissatisfied with the outcome of a case could refer to the fact that, in considering its actions, the concerned court or tribunal has not respected the requirement in Article 55(8) to exclude any dispute 'that concerns or necessarily involves the concurrent consideration of the legal status of an area within national jurisdiction' and thus has infringed the right of a sovereign State, while ignoring the complexities of paragraph 8 as discussed above.

Another challenge to the effective use of compulsory dispute settlement may be the requirement in Article 54 *ter* for States Parties to the Agreement to 'cooperate in order to prevent disputes'. As was argued above, the implications of this requirement are not clear and implementing this obligation may delay or complicate unilateral access to the judiciary. However, also in this case, the judiciary likely will have the opportunity to elaborate on the more specific contours of this provision.

An important innovation of the BBNJ Agreement over the Convention is that it explicitly allows the Conference of the Parties to seek 'an advisory opinion on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence'

39 In addition, in dealing with this issue a court or tribunal would have to consider the precedential effect of the jurisprudence concerning Article 297 of the Convention, which is relevant to this interpretational issue.



from the ITLOS.<sup>40</sup> This should avoid the criticism that the Tribunal received in relation to the SFRC Advisory Opinion and the current debates concerning the pending Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, which Alina Miron refers to as ‘a poisoned apple’ in her contribution.<sup>41</sup>

This brief review of the dispute settlement clauses to the BBNJ Agreement reveals some attempt at pushback against the availability of compulsory dispute settlement as provided by the LOSC. The additional provisions of the BBNJ Agreement both can be seen as an attempt to tinker with the compromise on the availability of compulsory dispute settlement contained in the Convention and the judiciary’s practice that has operationalised this compromise. At the same time, the dispute settlement clauses of the BBNJ Agreement itself also indicate that it seeks to reconcile opposing views on the scope of compulsory dispute settlement. However, compulsory dispute settlement will be available under the BBNJ Agreement and the Agreement does not question the fundamental notions underpinning an independent judiciary. Thus, it will remain the responsibility of courts and tribunals to exercise their *compétence de la compétence* in determining the extent of their jurisdiction under the BBNJ Agreement.

With the adoption of the BBNJ Agreement, the basic framework for ocean governance provided by the LOSC and its implementing agreements seems to be set for the coming decades. No other major negotiation of the law of the sea is on the horizon and such a negotiation in any event would take time to materialise into a treaty text. It thus seems unlikely that there will be further opportunities for adjustment of the scheme for compulsory dispute settlement and its definition of judicial jurisdiction as contained in the LOSC through multi-lateral negotiations. Although, as was also argued above, individual States may affect the development of that scheme, it will remain mostly up to the judiciary to elaborate it in further detail. And it will be up to academics to critically engage with the resulting case law, thus taking part in the discussion of how the rule of law and an equitable and sustainable order for the ocean may be

40 BBNJ Agreement (n 3), Article 48(6). Article 48(6) includes the same limitation on the matters to be considered as Article 55(8) of the Agreement and in addition provides that ‘[a] request for an advisory opinion shall not be sought on a matter within the competence of other global, regional, subregional or sectoral bodies’. No such competence to seek advisory opinions is accorded to the Meeting of States Parties to the Convention, which has a very limited mandate as compared to the Conference of the Parties to the Agreement.

41 Miron (n 17).

facilitated by recourse to Part xv of the Convention. The current special issue intends to contribute to that discussion.

### The Contributions to This Special Issue

Before introducing the individual contributions, some brief remarks about their order are in place. The first set of articles sets the stage. The first contribution by Ke Song provides a broad picture as to how LOSC tribunals have interacted,<sup>42</sup> while also discussing some of the issues that are developed in other contributions, such as the scope of jurisdiction, interpretative method and authority. The articles that follow, by Danae Georgoula and Alina Miron,<sup>43</sup> address specific issues related to the jurisdiction of courts and tribunals under Part xv of the Convention. The contributions of Rüdiger Wolfrum and Rozemarijn Roland Holst discuss how courts and tribunals in exercising jurisdiction may also perform other functions, namely that of protecting community interests and governance respectively.<sup>44</sup>

The second set of articles takes an empirical turn. Massimo Lando presents the outcomes of an exploratory study on the perceived authority of Annex VII arbitral tribunals using empirical methods.<sup>45</sup> Sarah McLaughlin Mitchell and Andrew Owsiak use empirical data to argue that the judicialisation that has been accomplished by Part xv of the Convention has impacted on the bargaining behaviour of States.<sup>46</sup> Eduardo Malaya and Rolf Einar Fife both reflect on the interactions between the case law and State practice from a practitioner's perspective.<sup>47</sup> The special issue concludes with the contribution of Joanna Mossop, who reflects upon the question of what aspects of Part xv might be adjusted to make it more effective and what could be learned from the

42 Song (n 13).

43 Georgoula (n 7); Miron (n 17)

44 R Wolfrum, 'Implementation and enforcement of community interest-related treaties by judicial means: Procedural limitations, chances and prospects' (2023) 38(2) *IJMCL*, this issue; R Roland Holst, 'Reflections on the governance function of compulsory dispute settlement in the legal order for the ocean' (2023) 38(2) *IJMCL*, this issue.

45 Lando (n 19).

46 S McLaughlin Mitchell and A Owsiak, 'Judicialisation of the sea: An elaboration of our argument and its merits' (2023) 38(2) *IJMCL*, this issue.

47 JE Malaya, 'Maritime dispute settlement in Southeast Asia: Bargaining under the shadow of the LOSC' (2023) 38(2) *IJMCL*, this issue; RE Fife 'Contributions of LOSC jurisprudence to reaching and justifying a negotiated outcome – and contributions of negotiated settlements to the law of the sea' (2023) 38(2) *IJMCL*, this issue.

experience of dispute settlement and compliance and disputes avoidance mechanism in other branches of public international law.<sup>48</sup>

Ke Song's contribution considers the patterns that may be discerned in the jurisprudence of the ITLOS and Annex VII tribunals.<sup>49</sup> As he observes '[m]aintaining the consistency of jurisprudence is highly desirable in the international legal system'. At the same time, there has to be room for considering and testing different approaches to determining the more specific content of the generally-worded provisions of the Convention. In that connection, he observes that the approaches of the ITLOS and Annex VII tribunals may be juxtaposed, with the latter providing more detailed reasoning, while explicitly diverging from earlier case law. On the other hand, the ITLOS is less prone to provide detailed justifications and while at times taking new directions, will not say so openly. Ke Song argues that the approach of Annex VII tribunals is more conducive to having a 'free and fair battle of ideas' in arriving at a consistent jurisprudence. While arguing for certain changes to the approach of the ITLOS, he also indicates these may be difficult to implement in practice.

Danae Georgoula's contribution, as mentioned above, explores *renvois* as a source of untapped jurisdiction for LOSC courts and tribunals.<sup>50</sup> Although *renvois* are usually found in the substantive rules of the Convention, they have wide-ranging effects on the exercise of jurisdiction by LOSC tribunals. Georgoula begins by distinguishing different types of *renvois* and determining the scope of jurisdiction arising from *renvois*, in order to identify how the jurisdiction of LOSC courts and tribunals can be established based on the relationship between the Convention and the external sources. She further observes that while *renvois* have the potential to expand the scope of jurisdiction of LOSC courts and tribunals, little use has been made of this potential to date. This prompted her to conduct an inquiry into the reasons behind the under-utilisation of *renvois* as a jurisdictional basis. Finally, she argues that the multiple *renvois* of the LOSC could provide a ground for LOSC courts and tribunals to address challenges that are not necessarily regulated under but are nonetheless strongly connected to the LOSC. On this basis, she proposes some ways in which *renvois* might be used to judicially address some of the contemporary challenges that the ocean is facing.

Alina Miron then moves to the potential contribution of the ITLOS to the ongoing judicial debate about the climate crisis and how the request

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48 Mossop (n 27).

49 Song (n 13).

50 Georgoula (n 7).

for an advisory opinion submitted on 12 December 2022<sup>51</sup> might actually put the ITLOS in a difficult position concerning its own advisory function.<sup>52</sup> Highlighting first the autonomy of the ITLOS as judicial body, Miron flags how a reading of the ITLOS Statute in light of the principle of *effet utile*, combined with the systemic role that the LOSC gives to the Tribunal, supports the existence of a general advisory function for the ITLOS. The contribution moves on to analyse the conditions *ratione personae* and *ratione materiae* contained in Article 138 of the Rules of the Tribunal<sup>53</sup> and systematically interprets them through Article 311 of the LOSC. She concludes that there are some solid arguments for the Tribunal to recognise its own competence to answer the request for an advisory opinion, but that the ITLOS has a hard task ahead when it comes to ‘establish[ing] its legitimacy to give that opinion and therefore the authority of its conclusions on the merits’.

The article by Rüdiger Wolfrum considers how community interests may be implemented and enforced by judicial means.<sup>54</sup> In the context of ocean governance, which, to be effective, largely hinges on the advancement and protection of community interests, this is a question of critical importance. As Wolfrum points out, the bi-focalism of third party dispute settlement (i.e., the focus on the interests of the States rather than on community interests) makes taking into account community interests challenging. In his conclusion, Wolfrum advances a number of approaches to overcome the traditional limitations to factoring in community interests in judicial means for settling legal claims.

Rozemarijn Roland Holst’s contribution takes the 40th anniversary of the LOSC as an opportunity to reflect on the multifaceted role of compulsory dispute settlement system under Part XV of the LOSC.<sup>55</sup> She argues that LOSC tribunals alongside their dispute settlement and law-ascertainment functions have acquired a governance function which manifests itself through the

51 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, available at <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

52 Miron (n 17).

53 Article 138 of the Rules: ‘1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.’

54 Wolfrum (n 44).

55 Roland Holst (n 44).

exercise of compulsory jurisdiction. Next, she ventures mapping the different ways through which compulsory jurisdiction has enabled this function. She first explains that compulsory jurisdiction has enabled LOSC tribunals guarding, through the interpretative method, the normative, external and internal coherence of the Convention. She then identifies specific governance functions that have flown from substantive provisions of the Convention. Thirdly, she shows that the availability of compulsory jurisdiction for the adjudication of disputes that involve the interests of a wide range of actors beyond the States that are party to a specific dispute enables governance beyond the parties to a specific dispute. Finally, through this overview she shows that the governance function is part of the object and purpose of Part xv and concludes that thus far LOSC tribunals have succeeded in fulfilling this function in practice.

Massimo Lando conducted an exploratory study on the perceived authority of Annex VII tribunals using empirical methods.<sup>56</sup> Through anonymous surveys, respondents were asked to identify the best indices for authority and to use these indices to assess the authority of Annex VII tribunals. The results show that the three best indices of authority are the quality of reasoning in judicial decisions, the competence of individual members on the bench and the degree of compliance with final decisions. Applied to Annex VII tribunals, the respondents indicated the decisions of Annex VII tribunals have lower authority than those of the ICJ, but higher than those of the ITLOS. The competence of individual judges, in turn, was not perceived to be a factor in choosing a forum under Article 287 of the LOSC. Finally, the identity of the decision-maker has little impact on a State's decision as to whether to comply with judicial or arbitral decisions. Lando acknowledges that due to the low number of participants and the academic-heavy pool of respondents, the findings of this empirical study are merely of an exploratory nature. However, the contribution provides a useful first-instance inquiry into the authority of *ad hoc* arbitral tribunals, an issue currently underexplored in existing literature.

The contribution of Sarah McLaughlin Mitchell and Andrew Owsiak argues that the legalisation and judicialisation of the ocean under the Convention has significantly changed the bargaining power of States Parties involved in maritime disputes.<sup>57</sup> Article 287 of the LOSC is in particular framed as an 'incentive' to bargain out-of-court, as it makes any threat to go to court very concrete. Through the empirical analysis of State practice, the authors point to the continuous importance of bilateral negotiations in maritime disputes and highlight the deterrence effect of Part xv of the LOSC. States which have adopted

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56 Lando (n 19).

57 McLaughlin Mitchell and Owsiak (n 46).

a declaration pursuant to Article 287 of the LOSC are, for instance, less likely to be a party to a maritime dispute than States which have not expressed any choice of procedure.

Eduardo Malaya discusses how the Convention has affected the way in which States in Southeast Asia perceive the role of the law of the sea and the option of having recourse to compulsory dispute settlement. He in particular focusses on the *South China Sea Arbitration* and how its outcome has impacted the regional framework for dealing with law of the sea issues. This also concerns the ongoing negotiations on the Code of Conduct for the South China Sea. As Malaya indicates, the negotiators of the Code are confronted with the sensitive issues how the Code will relate to the Convention in general terms and in terms of compulsory dispute settlement. As he concludes '[f]or any resolution [of the South China Sea disputes] to be fair and lasting, it is best if such is anchored on the LOSC'.<sup>58</sup>

Rolf Einar Fife focusses on the case of Norway in considering the various pathways through which the case law and State practice interact.<sup>59</sup> As he observes, '[l]egal reasoning in negotiations is not divorced from judicial reasoning. Justification by drawing upon the latter may be required in the fundamental process of overcoming disagreement'. In this connection he discusses how the case law on maritime delimitation has facilitated the negotiation of the maritime boundary between Norway and the Russian Federation. At the same time, the agreements resulting from negotiations may contribute to the further development and concretisation of specific provisions of the Convention. This argument is illustrated with reference to Norway's extensive practice in relation to submarine pipelines and how it relates to Article 79 of the Convention. In view of the multiple interactions between State practice and the case law, and the role negotiations may have in promoting or countering the coherence of the law of the sea, Fife also makes a plea for 'States developing and refining their "international legal policy"'.<sup>60</sup>

Joanna Mossop offers some final and forward looking insights by answering the question the editors had asked her to consider: 'what would/should Part xv look like if it were to be negotiated today?'<sup>60</sup> As she points out, the 'would' question probably would lead to the answer that under current geopolitical circumstances a much weakened Part xv would be a likely outcome. For that reason, she focusses on the question of what Part xv should look like if we want to use it for contributing to an effective governance regime for the ocean.

58 Malaya (n 47).

59 Fife (n 47).

60 Mossop (n 27).

Her main focus in this respect is on compulsory jurisdiction, looking both at the pertinent provisions of the Convention and judicial practice in relation to their interpretation. The arguments she develops among others concern making the ITLOS the default mechanism under Article 287 of the Convention. It may be noted that Ke Song's article suggests that such a choice would raise interesting questions concerning how the jurisprudence might have developed. Mossop also argues for adjusting a number of provisions that set the bounds for the availability of compulsory jurisdiction under Part xv. In this connection, she discusses various aspects of Articles 281, 297 and 298. Mossop further considers what could be learned from the experience of dispute settlement and compliance and disputes avoidance mechanisms in other branches of public international law. The conclusion of the article highlights the delicate balance that tribunals have to strike in defining their jurisdiction between on the one hand States that are seeking a judicial resolution of their disputes and on the other hand States that are unwilling to submit their actions to a review by an independent party. Different considerations come into play in striking a broadly accepted balance, while that point of balance may shift one way or the other in light of broader geopolitical developments that provide the framework for assessing the performance of the Convention and its Part xv.