The General Duty of "Due Regard" under the United Nations Convention on the Law of the Sea

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master thesis

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The General Duty of “Due Regard” under

by

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Abstract

This thesis offers an interpretation and doctrinal analysis of the undefined, open-textured term “due regard” under the United Nations Convention on the Law of the Sea (LOSC). The focus is on LOSC Articles 87(2), 56(2) and 58(3) under which a state is to have “due regard” to—or, to balance—the rights, duties and freedoms of other states when it exercises its own rights, duties and freedoms. The study proceeds by first considering relevant rules of international treaty interpretation set out in the Vienna Convention on the Law of Treaties, with emphasis on doctrinal debates as to when and how preparatory work (travaux préparatoires, a treaty’s negotiation record, or legislative history) may be used as a treaty interpretive aid. An exhaustive examination of judicial interpretations of the LOSC on this point confirms that recourse to preparatory work is prevalent in the judicial interpretation of open-textured terms under the LOSC. Next, “due regard” is interpreted with reference to the term’s ordinary meaning and context and in light of the LOSC’s object and purpose—and, on the basis that “due regard” is an open-textured, ambiguous or obscure LOSC term, using legislative history to inform and confirm an understanding of its meaning. Finally, balancing methodology in international law and judicial interpretations and applications of “due regard” are examined. The interpretive conclusions are that the duty of “due regard” signifies (a) a relationship based on legal equality, and (b) the shift from traditional laissez-faire freedoms of the seas to a comprehensive, more heavily normative legal order under the LOSC. The practical consequence of the first is that no state enjoys priority in any ocean use conflict beyond the territorial sea simply on the basis of being a coastal or a flag state. The practical consequences of the second are that “due regard” is a more heavily normative and narrower standard than its predecessor “reasonable regard”, and, because it encompasses obligations to the interests of the international community, the specific application of “due regard” must always include ecological considerations, howsoever to be weighted.
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Chapter 1: Introduction

1.1 Background


Eleven UNCLOS III sessions took place over 585 days between 1973 and 1982. The Conference was attended by about 150 states and proceeded by way of consensus-based negotiations. The treaty is a “package deal”—Article 309 provides that no reservations or exceptions can be made unless expressly permitted under the LOSC. The LOSC is recognized as being, in large part, a “flexible” framework treaty that leaves elaboration or specification to other instruments or adjudicators. The scope, procedure and complexity of the negotiations are reflected in part in the general, open-textured language of many of the provisions of the LOSC.

3 Ibid.
6 LOSC supra note 1 at Article 309, 310; Budislav Vukas, “Possible Role of the International Tribunal for the Law of the Sea in Interpretation and Progressive Development of the Law of the Sea” in Selected Writings 39 at 43 (“There are many reasons why the provisions of [LOSC] necessitate more interpretation than an average treaty… [including] the unusual methods at work at UNCLOS III (mostly informal negotiations, very often restricted only to some delegations; drafts presented by the Chairmen of the Main Committees and the President of the Conference, which were almost untouchable in the subsequent negotiations; the ‘package deal’, which linked the solutions adopted for the territorial seas, straits and the [EEZ], and other compromises which also results in vague solutions and provisions;)…”).
8 HLA Hart, The Concept of Law (Oxford: Clarendon Press, 1961) at 127 (open-textured terms as a response to “the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.”); Alan E Boyle, “Dispute Settlement
The term “due regard” is a significant example of such language. Under the LOSC, a state is to have “due regard” to the rights, duties and freedoms of other states when it exercises its own rights, duties and freedoms. The term “due regard” is not defined in the LOSC. Its meaning is “elusive”. Its full determination is always necessarily deferred to its application, when the specific circumstances of a particular case and the relevant competing interests can be taken into account. It is characterized as an obligation “so


9 Martin H Belsky et al, “Due regard” in George K Walker, ed, Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention (Leiden: Martinus Nijhoff Publishers, 2011) 179 at 187; and see Churchill & Lowe, supra note 7 at 175 (Regarding conflicting activities in the EEZ, “the only guidance (if it can be called that) given by the [LOSC] is the mutual obligation of coastal States and other States to have ‘due regard’ to each other’s rights”); George V Galdorisi & Alan G Kaufman, “Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict” (2002) 32 Cal W Int’l J 253 at 273 (“[EEZ] provisions, while requiring ‘due regard,’ did not define just what regard is due, leaving that difficult and dangerous question on the table, with the answer very much dependent upon the eye of the beholder.”); Mark J Valencia & Kazumine Akimoto, “Guidelines for Navigation and Overflight in the Exclusive Economic Zone” (2006) 30 Marine Policy 704 et al at 705 (“[T]here are no specific criteria [for ‘due regard’] except, perhaps, that the activity should not interfere with the ‘rights and interests’ of the states concerned. There is no agreement on what constitutes such rights and interests, nor is there agreement as to whether the interference must be unreasonable or not, and whether it could be or must be actual or potential.”); Alexander Proelss, “The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited” (2012) 26 Ocean Yearbook 87 at 94 (“[T]he specific content of the ‘reciprocal due regard rule’ contained in Article 56(2) and Article 58(3) of UNCLOS is far from clear.”).

10 Hart, supra note 8 at 132 (“The open texture of the law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case”); Martii Koskenniemi, The Politics of International Law (Oxford: Hart Publishing, 2011) [Politics] at 339 (“[M]ost law with a universal scope refrains from rule-setting and instead calls for ‘balancing’ the interests with a view of attaining ‘optimal’ results to be calculated on a case-by-case basis. Take, for example, the law of territory… Looking for a just allocation of maritime resources, or drawing a terrestrial boundary, it is hard to generalise. Hence the law in instruments such as [LOSC] or the practice of the ICJ points to the need to attain an equitable result.”); Maria Gavouneli, Functional Jurisdiction in the Law of the Sea (Leiden: Martinus Nijhoff, 2007) [Functional Jurisdiction] at 69 (“[J]urisdiction and rights attributed to both the coastal and the ‘other’ States [in the EEZ] … [are] to be exercised… in view of the corresponding rights and duties of others on [sic] the same area. Although the existence of parallel and often contradictory obligations is nothing new in international law and, more specifically, in the law of the sea, the necessity to adjudicate each case on its merits and the specific circumstances surrounding it adds more than a sprinkle of uncertainty in the process.”); Buzan, supra note 5 at 345 (“[W]hile ambiguity may be politically useful in the negotiations, it may lead to ineffective law shot through with implementation problems… There is no escaping this problem,
indeterminate that its application by different decision makers will necessarily be unpredictable.”  

It is, in other words, open-textured or “relatively” indeterminate.  

1.2 Thesis, methodology, and sources

This thesis is both a consideration of the interpretation of open-textured terms in international law (and of the interpretation of “due regard” specifically) and a doctrinal analysis of “due regard” based on the interpretation herein and on the term’s application in specific adjudications.

The focus is on the general duty of “due regard” as it is set out in LOSC Articles 87(2) on the high seas and 56(2) and 58(3) on the exclusive economic zone (EEZ), and on the shared legislative history of these provisions. The EEZ, a newly-recognized regime under the LOSC, is a zone up to 200 NM from baselines, an area in part previously established as high seas. In general, the EEZ recognizes coastal state sovereign rights with respect to living and non-living resources and jurisdiction with respect to structures,

but a number of countervailing pressures are available. Skilled and well-informed work by the text drafter/chairman… [can] go a long way… Comprehensive dispute settlement procedures are another bulwark…”); and see Chagos Award, supra note 15 at para. 519 (“The Tribunal declines to find in this formulation [of the ‘ordinary’ meaning of ‘due regard’] any universal rule of conduct.”).


12 Hart, supra note 8 at 124 (“[Legal terms], however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question prove indeterminate; they will have what is termed an open texture.”), 128 (on “relative indeterminacy”); Brian Bix, “H.L.A. Hart and the ‘Open Texture’ of Language” (1991) 10:1 Law & Phil 51 generally and at 66 (on earlier references to open-textured language in general by Friedrich Waismann and Ludwig Wittgenstein); on related categories or descriptors of language, see Martii Koskenniemi, From Apology to Utopia (Cambridge: Cambridge University Press, 2005) [From Apology] at 39 (“[I]n valuative terminology… such as ‘undue delay’… [there is an] element of indeterminacy embedded”); Richard K Gardiner, Treaty Interpretation (New York: Oxford University Press, 2008) at 172-173 citing the ICJ in Aegean Sea Continental Shelf (Greece v Turkey) [1978] ICJ Reports 3 at 31-32 para 76 (on a “generic term”: “The point of broader significance… [being] that the concept of a ‘generic term’ includes ‘a known legal term, whose content the Parties expected would change through time’.”); Sean D Murphy, “The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties” in Georg Nolte, ed, Treaties and Subsequent Practice (Oxford: Oxford University Press, 2013) 82 at 87 (“[T]he phenomenon of ‘evolutive interpretation’ does exist in dispute settlement, usually in circumstances where states have crafted an open-textured treaty provision and, by subjecting it to interpretation by a dispute-settler, have invited the possibility of interpretation and reinterpretation in reaction to future developments. Sometimes this is referred to as the parties agreeing to let the dispute settler ‘complete the contract’…”); Susy Frankel, “WTO Application of ‘the Customary Rules of Interpretation of Public International Law’ to Intellectual Property” (2006) 46:2 Virginia J Int’l L 365 at 409 (distinguishing “open texture” from a more “extreme” “open-endedness”—through which, for example, “new subject matter can be brought under [an] agreement”).
research, and environmental protection—and, at the same time, the continued exercise by all states of high seas freedoms except for fishing.\textsuperscript{13}

The marine environment is increasingly subject to activity and pressures on space, resources, and preservation—and potentially to dispute. This is especially so in the EEZ, an interactive zone of concurrent, non-identical rights and duties that contains a high proportion of ocean resources.\textsuperscript{14} All three adjudications that have expressly interpreted and applied the duty of “due regard” have arisen from claims of violations of this obligation in the EEZ under Articles 56(2) and 58(3).\textsuperscript{15}

A study of state practice—as an indicator of interpretative consensus and of customary law—is beyond the scope of this thesis.\textsuperscript{16} Neither does the thesis examine those

\begin{itemize}
\item \textsuperscript{13} LOSC, \textit{supra} note 1 at Part 5.
\item \textsuperscript{14} Churchill \& Lowe, \textit{supra} note 7 at 162 (“[T]he area falling within 200-mile limits contains over ninety per cent of all presently commercially exploitable fish stocks, about eighty-seven per cent of the world’s known submarine oil deposits, and about ten per cent of the world’s known manganese nodules…”); Alf Håkon Hoel, Are K Sydnes \& Syma A Ebbin, “Ocean Governance and Institutional Change” in Syma A Ebbin, Alf Håkon Hoel \& Are K Sydnes eds, \textit{A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources} (Dordrecht: Springer, 2005) 3 at 3 (“The EEZs of the world now cover most continental shelf resources and the majority of the world’s fisheries (United Nations, 2004.”); Lawrence Juda, “Changing Perspectives on the Oceans: Implications for International Fisheries and Oceans Governance” in David D Caron \& Harry N Scheiber, eds, \textit{Bringing New Law to Ocean Waters} (Leiden: Martinus Nijhoff, 2004) 17 at 20 (“With the legitimization of EEZs, the high seas commons was reduced in geographic extent and importance in regard to fisheries as some 90 to 95 percent of the world’s marine fish catch was taken from ocean areas now under coastal state jurisdiction.”).
\item \textsuperscript{15} The Chagos Marine Protected Area Arbitration (Mauritius \textit{v} UK), \textit{Award} (2015), (Permanent Court of Arbitration) (Arbitrators: Professor Ivan Shearer, Judge Sir Christopher Greenwood, Judge Albert Hoffmann, Judge James Katka, Judge Rüdiger Wolfrum), online: Permanent Court of Arbitration <https://pcacases.com/web/view/11>, 162 ILR 59 [Chagos Award]; \textit{The Arctic Sunrise Arbitration (Netherlands \textit{v} Russia), Award on the Merits} (2015), (permanent Court of Arbitration) (Arbitrators: Judge Thomas A. Mensah (President) Mr. Henry Burmester Professor Alfred Soons Professor Janusz Symonides Dr. Alberto Székely), online: Permanent Court of Arbitration <https://pcacases.com/web/view/21> [Arctic Sunrise Award]; \textit{The South China Sea Arbitration (Philippines \textit{v} China), Award} (2016), (Permanent Court of Arbitration) (Arbitrators: Judge Thomas A Mensah, Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred HA Soons, Judge Rüdiger Wolfrum), online: Permanent Court of Arbitration <https://pcacases.com/web/view/7> [SCSA Award]. See also \textit{M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines \textit{v} Guinea), [1999] 3 ITLOS Rep 10, 120 ILR 156 [Saiga 2 Judgment]} at paras. 127, 136, 187: ITLOS did not refer to “due regard” in its determination that Guinea violated rights of St. Vincent and the Grenadines held under LOSC in Guinea’s EEZ. However, ITLOS recognized that a coastal state has customs jurisdiction in its EEZ only under Article 60(2) with respect to structures, and that otherwise the application of coastal state customs law in the EEZ is wrongful, and Guinea had thereby acted in a manner contrary to LOSC—implicitly, a violation of “due regard” under Article 56(2).
\item \textsuperscript{16} However, see Churchill \& Lowe, \textit{supra} note 7 at 161-2 (“It would seem that what is part of customary international law are the broad rights of coastal rights of coastal and other States enumerated under articles 56 and 58… It is much more doubtful whether the detailed obligations in the articles relating to the exercise of coastal State jurisdiction over fisheries, pollution and research have passed or are likely quickly to pass into customary international law, partly because of a lack of claims embodying the duties of the [LOSCH]… This reflects a tendency for rights to pass more quickly into custom than duties.”); William R Edeson, “A
LOSC provisions that provide for a duty of “due regard” in more specific circumstances.¹⁷ These provisions have their own legislative histories and may be considered lex specialis.¹⁸ Nor does it extend to the numerous other legal concepts similar to “due regard”, with the exception of the duty of “reasonable regard” as it figures in the legislative history of “due regard”.

This study is based on both primary and secondary sources. Primary sources include (a) official conference records and published documents relating to UNCLOS I and UNCLOS III and the legislative history of the LOSC and “due regard”, available in both hardcopy and electronic form at the University of Calgary Bennett Jones Law Library and online from websites of the United Nations; and (b) international judicial decisions and awards, available online from the websites of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Permanent Court of Arbitration.¹⁹ Secondary sources were obtained in hardcopy and electronic form from the

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¹⁷ See especially LOSC, supra note 1 at Articles 27(4), 60(3), 142(1), 148 and 234.


generally, this thesis employs secondary sources on the subjects of public international law, international treaty interpretation, the law of the sea, the LOSC, the EEZ, and “due regard”. the thesis is situated with respect to these sources as follows.

with respect to the historical and doctrinal aspects of LOSC, this thesis relies heavily on leading textbooks in public international law and the law of the sea and literature on the origins and doctrine of the LOSC and the EEZ. the consideration of relevant international rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties (VCLT) focusses especially on doctrinal debates as to when and how preparatory work (a treaty’s negotiation record, or legislative history) may be used as an interpretive aid. an examination of judicial interpretations of the LOSC on this point confirms that


use of preparatory work is prevalent in the judicial interpretation of open-textured terms under the LOSC. The discussion on balancing in international law takes into account literature that identifies the potential difficulties with the application of a balancing test.\textsuperscript{22}

The concluding chapter relies on literature that identifies ecological crises as a problem not resolved by the LOSC, partly on the basis of which this thesis concludes that ecological factors may now be a consideration in any application of “due regard”.\textsuperscript{23}

With respect to the literature on the interpretation of “due regard”, writings that consider the term generally do so with reference to its indeterminacy,\textsuperscript{24} or interpret it as signifying in the EEZ a paramountcy in favour of either sovereign rights or continued freedoms of the high seas,\textsuperscript{25} or equate it with “reasonable regard”.\textsuperscript{26} In contrast, this thesis seeks to limit the indeterminacy of “due regard” through an interpretation with recourse to

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\textsuperscript{22} Wolfgang Friedmann, “The North Sea Continental Shelf Cases—A Critique” (1970) 64:2 AJIL 229; Anderson, supra note 20; Attard, supra note 20; Crawford, supra note 20; Koskenniemi, From Apology, supra note 12 and “Law, Teleology”, supra note 16.


\textsuperscript{24} Belsky, supra note 9; Churchill & Lowe, supra note 7, Galdorisi & Kaufman, supra note 9, Valencia & Akimoto, supra note 9; Sohn, Noyes & Franckx, supra note 11.


ordinary meaning, context, the object and purpose of the LOSC, and the term’s legislative history.  

Furthermore, the thesis concludes that “due regard” signifies legal equality between coastal and flag states in the EEZ, and distinguishes “due regard” from “reasonable regard”.

1.3 Thesis structure

Following from the identification of “due regard” as an open-textured term in this introductory chapter, Chapter Two sets out a historical and doctrinal introduction to the LOSC, reaching back to early modern Europe but with emphasis on the second half of the twentieth-century, and framed specifically as context for the interpretation of “due regard” herein. The chapter positions the LOSC as being rooted in the long-standing doctrinal dichotomy in the law of the seas between mare liberum (freedom of the seas) and mare clausum (national claims to maritime areas). It concludes that the LOSC expresses and answers to this dichotomy by departing from the traditional regime of laissez-faire freedoms of the seas and establishing a more heavily normative regime. The thesis as a whole concludes that this shift is recognized in the use of the term “due regard” both in the EEZ and the high seas regimes under the LOSC.

Chapter Three first considers the international interpretative rules set out under Articles 31(1) and 32 of the Vienna Convention on the Law of Treaties (VCLT), focusing on the question of when and how preparatory work may be used as an interpretative aid. An examination of judicial interpretations of the LOSC confirms that recourse to

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29 VCLT, supra note 21.
preparatory work is prevalent in the judicial interpretation of open-textured terms under the LOSC.

The second part of Chapter Three sets out an interpretation of “due regard” under Articles 56(2), 58(3) and 87(2) according to the interpretive rules in VCLT Articles 31(1) and (2). The interpretation proceeds with reference to the term’s ordinary meaning and context and in light of the LOSC’s object and purpose—and, on the basis that “due regard” is an open-textured, ambiguous or obscure LOSC term, using legislative history to inform and confirm an understanding of its meaning. In brief, this section concludes that the general duty of “due regard” in the EEZ under Articles 56(2) and 58(3) engenders a relationship between states based on legal equality, as it does in the high seas. It also concludes that “due regard” in the high seas regime under Article 87(2) signifies the shift under the LOSC to a comprehensive, more heavily normative legal order, as is expressly recognized within the EEZ.

Chapter Four discusses the application of the general duty of “due regard”. The chapter first briefly considers “balancing” methodology in international law with reference to judicial reasoning of the International Court of Justice (ICJ) and to secondary literature. It then analyses the three international arbitration awards that have expressly interpreted and applied the general duty of “due regard” under the LOSC.

In brief, the conclusions of this thesis are identified in Chapter Five as follows. First, based on the interpretation that the duty of “due regard” in the EEZ signifies a relationship based on legal equality, no state interest has priority in the EEZ simply on the basis of its sovereign nature (in the case of a coastal state interest) or its status as a freedom of the high seas (in the case of a flag state interest). Second, due regard” under Articles 56(2), 58(3) and 87(2) collectively signifies the shift under LOSC to a more heavily normative legal order. One practical consequence of this conclusion is that “due regard” is a stricter standard than its predecessor “reasonable regard” and narrows the scope for non-actionable injurious state conduct at sea. Another consequence is that, because “due regard” is herein interpreted as including an obligation of “due regard” to the interests of the international community, and because global ecology must now be considered to be such an interest, the circumstances relevant to the balancing test of “due regard” in any specific case may now always include ecological considerations, howsoever these are to be weighted.
Chapter 2: Object and Purpose of the LOSC

This chapter provides a brief historical and doctrinal introduction to the LOSC with a view to providing context for the subsequent chapters in which the interpretation and application of the duty of “due regard” is considered.

2.1 Historical and legal context of the LOSC

The existence and form of the LOSC are rooted in the long-standing dichotomy in the law of the seas between the doctrines of freedom of the seas (mare liberum) and of national sovereignty over maritime areas (mare clausum). The history of this dichotomy reaches back at least to early modern Europe. Both doctrines have continuously existed up to and including in the modern law of the sea, with the balance between their dominance shifting over time. From early European modernity to the mid or later twentieth-century, the traditional doctrine of freedom of the seas was the dominant regime.

In the fifteenth-century, there were numerous claims to areas of the oceans. In 1609, the Dutch jurist Hugo Grotius published the treatise *Mare Liberum* (1609). The text was written to support the position of the Dutch East India Company, in opposition to Portugal’s claims over maritime areas and to a monopoly on trade with southeast Asia. Grotius argued, on the basis of natural law, and for the interests of navigation and trade, that the

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30 Anand, *supra* note 20 at 3 (“[M]odern writers on international law have no doubt that the doctrine of the freedom of the seas… originated in Europe and is based on European beliefs and concepts, and derived from European state practices.”), 6 (“[T]he law as it developed since the late eighteenth century was geared to the furtherance of European interests and to the protection of European rights. Law of the sea… developed in response to the needs of the European industrial powers for wider markets in Asia and Africa.”); Rothwell & Stephens, *International Law of the Sea, supra* note 4 at 2 (“The history of the international law of the sea up until the mid-twentieth century is dominated by European practice.”).

31 Anderson, *supra* note 20 at 4 (“Neither the doctrine of Mare liberum nor that of Mare clausum could apply to the total exclusion of the other; a balance has to be struck between them”).

32 Crawford, *supra* note 20 at 297 (“The modern law governing the high seas has its foundation in the rule that the high seas .. was res extra commercium or res communis.”).

33 Churchill & Lowe, *supra* note 7 at 204 (“[F]or example, by Sweden and Denmark in the Baltic and Norwegian Seas; by Venice in the Adriatic and Genoa and Pisa in the Ligurian Sea; and by Britain in the ill-defined ‘British seas’ around its coasts.”).


35 Churchill & Lowe, *supra* note 7 at 4 (“… [Mare Liberum was] written in order to vindicate the claim of the Dutch East India Company, by whom [Grotius] was employed, to trade in the Far East despite the monopoly on trade in the area claimed by the Portuguese at that time.”).
seas were open to all and were not available for appropriation. Grotius identified the concept of the limitless seas as a condition or part of his reasoning for this doctrine; he qualified or distinguished that concept—elsewhere identified as *sic utere*, or conduct without injury to another—from circumstances in which use of a resource by one would affect common access or availability.

Freedom of the seas became the dominant international doctrine. In political economic terms, the traditional doctrine of freedom of the seas was related to or expressed as *laissez-faire* legal relations at sea. Modern legal theorists would modify the *sic utere* concept in such a way as to recognize that in a field of uncorroborated freedoms (that is, “liberties uncorroborated by either legal or moral duties on others”) there is scope in the lawful conduct of one actor for non-actionable injury (*amnum absque injuria*) to another. The “reasonableness” standard is related to this model of legal relations. In a field of uncorroborated freedoms, only “unreasonable” interference is actionable: “[n]either [user of a resource] has a duty not to use it in a way that interferes with the use of the other as long as the use is ‘reasonable’ and therefore within the scope of the legal liberty.”

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36 Feenstra, *supra* note 34 at preface, ch1 p2, ch5 p13; Anderson, *supra* note 20 at 5 (“This regime of governance [*freedom of the seas*] facilitates communication and trade between different parts of the world.”).
38 Joseph William Singer, “The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld” (1982) *Wis L Rev* 975 at 1050 (“The [classical] *sic utere* doctrine had the ideological purpose of reassuring people that the exercise of legal liberties did not threaten their security.”).
40 Anderson, *supra* note 20 at 5 (“The Grotian concept of freedom of the seas gradually attracted general support… and became a principle of customary international law.”); Churchill & Lowe, *supra* note 7 at 204 (“The battle was eventually won by advocates of the open seas, as the importance of free navigation in the service of overseas and colonial trade came to overshadow national interests in coastal fisheries, and as the development of real naval power displaced notional claims to sovereignty over the sea.”); Crawford, *supra* note 20 at 298 (“[I]n truth it is a general principle of international law”).
41 Churchill & Lowe, *supra* note 7 at 2 (“From the early eighteenth century up to the end of the nineteenth century, the seas were largely subject to a *laissez-faire* regime. Beyond the narrow belt of coastal seas, the high seas were open and unrestricted use by all.”).
42 Singer, *supra* note 38 at 1032.
43 Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913-1914) 23 *Yale LJ* 16 at 30 and generally, and “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1916-1917) 26 *Yale LJ* 710; Singer, *supra* note 38 at 1050 (“The major contribution of Hohfeld’s opposites was to make it plain that to the extent others have legal liberties, one has no legal rights. Liberties are not by definition limited to the extent necessary to prevent damage to others, as the *sic utere* doctrine misleadingly implied. … Hohfeld’s concept of opposites was ideologically designed to demonstrate that to the extent individuals have freedom of action, others have no security. The modern ideological message was completely the reverse of the classical message.”).
44 Singer, *supra* note 38 at 1030, on the work of Edward Weeks (“Weeks also recognized the existence of *uncorroborated* liberties in the legal system. One example is the case of riparian rights to the reasonable use of streams… In this case, each party has a legal liberty to use the stream. Neither has a duty not to use it in a
The traditional doctrine of freedom of the seas remained settled until at least the late nineteenth-century, when coastal states began to make claims to adjoining waters in the interest of security from naval powers.\textsuperscript{45} In the mid twentieth-century, the assertion of claims by coastal states became more marked.\textsuperscript{46} The demand for oil had escalated during WWII.\textsuperscript{47} The US, with its interest in controlling oil and gas in the seabed of the Gulf of Mexico and off California, issued the 1945 Truman Proclamation which claimed the natural resources of the subsoil and seabed of the continental shelf off the US.\textsuperscript{48} In the Fisheries Proclamation which followed the US declared its jurisdiction to establish conservation zones in certain areas of the high seas.\textsuperscript{49} Other coastal states followed suit.\textsuperscript{50}

The balance in this doctrinal tension continued to shift. Although UNCLOS I resulted in four treaties (the \textit{1958 Geneva Conventions}),\textsuperscript{51} neither these nor UNCLOS II in 1960 resolved the questions of the breadth of the territorial seas, exclusive fishing rights, or coastal rights in relation to environmental protection.\textsuperscript{52} After 1960, the regime became an “amalgam” of the \textit{1958 Geneva Conventions} and developing customary law with respect to coastal state claims to fishing zones.\textsuperscript{53} These claims included both unilateral claims, by Iceland, Norway, various African, Asian, and Latin American states, and claims that were
incorporated into bilateral and regional agreements.\textsuperscript{54} These claims by coastal states were a key part of the immediate historical conditions of the LOSC.\textsuperscript{55}

At the same time, the legal status of the deep seabed had become a significant issue.\textsuperscript{56} In 1967, Arvid Pardo, Ambassador for Malta, presented a proposal to the UN General Assembly that the seabed and ocean floor be reserved “exclusively for peaceful purposes… and the use of their resources in the interests of mankind”.\textsuperscript{57} The Ambassador emphasized that there was an urgent need for a “just” legal framework for the deep seabed.\textsuperscript{58} The dangers without such a framework, he emphasized, were the intensification of national appropriation already occurring with respect to the continental shelf, inequitable national exploitation by technologically advanced states, and militarization of the deep seabed.\textsuperscript{59}

The problem with an open access regime,\textsuperscript{60} Malta’s Ambassador insisted, was that:

… [national appropriation of the deep seabed] will entail not only immense prejudice to all land-locked countries but also to most of the coastal States that do not have the requisite technical competence to exploit the ocean floor. Under-developed States fronting on an ocean might believe that a division of the ocean floor of the world would be advantageous to them. This is a complete… and utter illusion. Is it credible that technologically advanced countries would be deterred from exploiting rich mineral resources on the ocean floor… for the sole reason that these deposits happened to be under the theoretical jurisdiction of a State unable to exploit them?\textsuperscript{61}

In the wake of Malta’s proposal, the UN General Assembly constituted the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (Sea-Bed Committee), whose mandate was subsequently

\textsuperscript{54} \textit{Ibid} at 10. And see Anderson, \textit{supra} note 20 at 12 on Canada’s 1970 Arctic jurisdiction claim with respect to marine pollution.

\textsuperscript{55} Rothwell & Stephens, \textit{International Law of the Sea, supra} note 4 at 83 (“The most important pre-UNCLOS III development was the assertion of [exclusive fishing zones].”); Crawford, \textit{supra} note 20 at 274 (“Although the EEZ is considered one of the central innovations of [the LOSC], it was foreshadowed by claims to fisheries jurisdiction beyond the territorial seas.”); Anand, \textit{supra} note 20 at 238 (“[After 1960] [t]he small, weak, poor and under-developed states… started claiming wider territorial seas… larger continental shelves… extensive fisheries zones and authority to control the dangers of pollution in vast areas of the sea.”); Hoel, Sydnes & Ebbin, \textit{supra} note 14 at 5; Shaw, \textit{supra} note 20 at 421.

\textsuperscript{56} Rothwell & Stephens, \textit{International Law of the Sea, supra} note 4 at 11; Anderson, \textit{supra} note 20 at 11.

\textsuperscript{57} UN Doc A/C.1/PV.1515 (1967), \textit{supra} note 19.

\textsuperscript{58} \textit{Ibid} at para 5.

\textsuperscript{59} \textit{Ibid} at paras 5, 39-40, 45-55, 59, 64, and 72.

\textsuperscript{60} Anderson, \textit{supra} note 20 at 5 (“The concept of freedom makes the seas and oceans a global of ‘common’ space available to all to use on a basis of equality.”).

\textsuperscript{61} \textit{Supra} note 57 at para 70.
broadened to other issues in the law of the sea and, eventually, to preparations for UNCLOS III.\textsuperscript{62}

There was a growing understanding of the exhaustibility of the ocean’s living resources and of ecological crisis,\textsuperscript{63} including specifically that:

… the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas failed to provide an effective means for avoiding the ‘tragedy of the commons,’ namely, a solution to the allocation problem and attendant conservation problem that arise when exploitation of a stock by multiple users approaches or exceeds its sustainable yield.\textsuperscript{64}

Pressures on living resources and the marine environment were recognized as including seabed mineral resource exploitation, highly efficient fishing technology, and the intensification of human activity at sea in general.\textsuperscript{65} The traditional freedom of the seas regime as a whole did not contemplate these circumstances—rather, that principle had “commended itself as representing a sensible concept of shared use in circumstances where the level of technology did not threaten the maritime global commons.”\textsuperscript{66}

Together, the informing issues leading up to and contemporaneous with UNCLOS III were (a) global security needs (of both coastal states and in respect of freedom of navigation), resource competition, and environmental degradation, (b) legal objectives related to international equity, resource sustainability, and environmental protection, and (c) the need to clarify of the limits of the continental shelf, the legal status of the deep

\textsuperscript{62} Attard, \textit{supra} note 20 at 15-17 (“The General Assembly set up the Sea-bed Committee to Study the Question of Control over Sea-bed Resource Extraction [1967]. This committee was replaced in December 1968 by the Permanent UN Committee on the Peaceful Uses of the Sea-bed and the Ocean-Floor beyond the Limits of National Jurisdiction… In December 1970, the General Assembly passed the Declaration of Principles Governing the Sea-bed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction, which provided the basis for the convocation of UNCLOS III.”); Commentary vol 1, \textit{supra} note 27 at 47 (“UN General Assembly resolution 2750C (XXV) of 17 December 1970, which decided on the convening of [UNCLOS III], effectively assigned the preparatory work to the [UNSBC]”).

\textsuperscript{63} Hoel, Sydnes & Ebbin, \textit{supra} note 14 at 4; Juda, \textit{supra} note 14 at 19; Anderson, \textit{supra} note 20 at 13. Churchill & Lowe, \textit{supra} note 7 at 205 (“… the \textit{laissez-faire} principles upon which the regime of the high seas is built gave rise to increasing criticism that the regime was incapable of dealing with the problems of controlling pollution and over-fishing.”).

\textsuperscript{64} Oxman, “The Territorial Temptation”, \textit{supra} note 20 at 833. For discussion of the concept of the tragedy of the commons, see Garrett Hardin, “The Tragedy of the Commons” (2009) 1:3 J Nat Resources Policy Research 243 generally and at 246 (“Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.”); and with respect to the global commons, Eduardo Araral, “Ostrom, Hardin and the Commons: A Critical Appreciation and a Revisionist View” (2014) 36 Envtl Science & Pol’y 11 at 15-17.

\textsuperscript{65} Anderson, \textit{supra} note 20 at 20-21.

\textsuperscript{66} Crawford, \textit{supra} note 20 at 298.
seabed, and fishing rights.\textsuperscript{67} The scope of these issues and objectives drove the replacement of the doctrine of traditional \textit{laissez-faire} freedoms of the seas (and the \textit{1958 Conventions}) with the significantly more comprehensive and normative LOSC regime.\textsuperscript{68}

\subsection*{2.2 General structure and scope of the LOSC}

As a whole, the adopted text of the LOSC both “finalized” and developed the maritime legal zones.\textsuperscript{69}

In brief, the subject areas of the \textit{1958 Conventions} were elaborated on as follows.\textsuperscript{70} In LOSC Part II on the territorial seas and contiguous zone, the breadth of the former was established at 12 NM,\textsuperscript{71} and of the latter (in which a coastal state may exercise control in specific circumstances) at 24 NM.\textsuperscript{72} The right of innocent passage in the territorial sea was further defined in Section 3 of the same part. In Part VI on the continental shelf, the continental shelf was defined.\textsuperscript{73} In Part VII on the high seas, Article 87 recognized the construction of artificial islands and other installations and the conduct of scientific research as “freedoms”.\textsuperscript{74}

LOSC Part IV is a new part on archipelagic states. Part V sets out the newly-recognized EEZ regime, said to be the “most progressive” component of the LOSC.\textsuperscript{75} The new deep seabed regime is described in Part XI on the “Area”. New parts are included

\textsuperscript{67} Anderson, \textit{supra} note 20 at 19-22; de Mestral, \textit{supra} note 18 at 114.
\textsuperscript{68} Hoe, Sydnes & Ebbin, \textit{supra} note 14 at 4 (“As it became evident that the oceans and their natural resources were in limited supply, the system of rules implying that the natural resources of the high seas belonged to no one (\textit{res nullius}) came under pressure.”); Anderson, \textit{supra} note 20 at 19 (“[T]he doctrine of the freedom of the seas did not provide an adequate regulatory regime for the modern world”); Scheiber & Caron, \textit{supra} note 23 at 5 (“[T]he traditional Grotian ideal of unlimited access and use… [conflicts with] the competing idea that collective interests of humankind must be given priority over such freedom lest ocean resources be plundered. Such unregulated plunder would lead to a loss of those resources to future generations, but more immediately would permit unjust and inequitable distribution of the income from ocean uses.”); Louis Henkin, “Arctic Anti-Pollution: Does Canada Make—or Break—International Law?” (1971) 65 AJIL 131 at 136, cited in Oxman, “The Territorial Temptation”, \textit{supra} note 20 at 851 (“[T]he issue is not in fact between \textit{laissez-faire} for shippers and \textit{laissez-faire} for coastal states. The seas—all the seas—cry for regulation as a veritable \textit{res communis omnium}.”).
\textsuperscript{69} Gavouneli, \textit{Functional Jurisdiction}, \textit{supra} note 10 at 61 (“The [EEZ] was one of the two novelties brought by the [LOSC] to the traditional law of the sea, the other being the deep seabed Area.”); Rothwell, “Oceans Management”, \textit{supra} note 20 at 331; Stephens & Rothwell, \textit{supra} note 22 at 29.
\textsuperscript{70} See Rothwell & Stephens, \textit{International Law of the Sea, supra} note 4 at 15.
\textsuperscript{71} LOSC, \textit{supra} note 1 at Article 3.
\textsuperscript{72} \textit{Ibid} at Article 33.
\textsuperscript{73} \textit{Ibid} at Article 76.
\textsuperscript{74} Rothwell & Stephens, \textit{International Law of the Sea, supra} note 4 at 15.
\textsuperscript{75} Rothwell, “Oceans Management”, \textit{supra} note 20 at 331.
regarding transit through straits used for international navigation (Part III), marine scientific research (Part XIII), islands (Part VIII), enclosed or semi-enclosed seas (Part IX), and landlocked and geographically disadvantaged states (Part X).

LOSC Part XII sets out provisions on the protection and preservation of the marine environment and is said to have “sought to build on developing principles of international law”. 76 Notably, LOSC Article 192 sets out that “States have the obligation to protect and preserve the marine environment.”77 This obligation—an “unparalleled and unequivocal obligation”78—is now recognized as customary law and therefore as an obligation of all states, whether LOSC state parties or not.79

Part XV sets out provisions on dispute settlement, including compulsory binding procedures.80 State parties may settle disputes by peaceful means of their choice,81 and are obliged to exchange views regarding settlement.82 In the case of compulsory, binding procedures, under Article 287 state parties may choose a procedure before the ITLOS, the ICJ, an arbitral tribunal constituted under Annex VII, or a special arbitral tribunal constituted under Annex VIII (regarding disputes concerning fisheries, protection of the environment, marine scientific research, or navigation, including pollution).

General provisions are set out in Parts I (definitions), XVI, and XVII.

2.3 The EEZ and high seas under the LOSC

The LOSC took shape in the form of a comprehensive order of integrated zones and regimes,83 a “package deal” that structurally refigured the balance in the long-standing dichotomy in the law of the seas between the doctrines of mare liberum and mare clausum.84 The EEZ, characterized as “a compromise between the creeping jurisdictional

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76 Rothwell & Stephens, International Law of the Sea, supra note 4 at 16.
77 LOSC, supra note 1.
78 Freestone, supra note 5 at 3.
79 Gavounelli, Functional Jurisdiction, supra note 8 at 81.
80 See Boyle, supra note 8.
81 LOSC, supra note 1 at Article 280.
82 Ibid at Article 283.
83 Oxman, “The Territorial Temptation”, supra note 20 at 835 (“The response [at UNCLOS III] to the territorial temptation was to define and circumscribe both its geographic and its substantive reach.”).
84 Long, supra note 7 at 166 (on “the importance of the conceptual underpinnings of the LOSC as a ‘package deal’ that balances conflicting interests in an equitable manner”).
aspirations of the coastal State and the high seas purists of the flag States,” most obviously engenders or answers to this doctrinal tension.\(^85\)

The EEZ is a newly-recognized zone under the LOSC. It includes within it significant bodies of water that were previously considered to be high seas. Within the EEZ coastal states now have sovereign rights that are to be substantively balanced with “freedoms” of the high seas. The rights of the coastal state are sovereign in character, and are in part based on the objective or doctrine of coastal state environmental resource and environmental stewardship.\(^86\) Flag states have the unique, specific duty to comply with coastal state law in the EEZ.\(^87\) However, LOSC Part 5 on the EEZ expressly recognizes the continuation of high seas freedoms and international law in the EEZ in Articles 58(2) and (3). Article 58(2) states: “Articles 88 to 115 [in LOSC”s high seas regime] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.” (“Freedoms” is formally a misnomer for flag state entitlements in the EEZ, as the zone is structured upon relations of rights and correlative duties.)\(^88\) Furthermore, under Article 59, any conflict between the interests of a coastal and other state in the EEZ in the context of rights or jurisdiction not attributed under the LOSC is to be resolved in a broad balancing of interests:

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\(^{85}\) Gavouneli, *Functional Jurisdiction*, supra note 10 at 62; Churchill & Lowe, *supra* note 7 at 160 (“While [the EEZ’s] historical roots lie in the trend since 1945 to extend the limits of coastal State jurisdiction ever seawards…, its more direct and immediate origins lie in the preparations for UNCLOS III.”); Rothwell & Stephens, *International Law of the Sea*, *supra* note 4 at 82 (“[The EEZ reflects] the ambition of southern states for a new international economic order in which they would obtain a fair share of coastal marine resources…”); Kwiatkowska, *supra* note 20 at 2 (“[EEZs] have the underlying purpose of accelerating the socio-economic development of states and reducing the inequalities existing between the industrialized and developing countries. This is already reflected…. by the basically resource-oriented scope of the coastal state’s rights and jurisdiction in the zone.”).

\(^{86}\) Rothwell & Stephens, *International Law of the Sea*, *supra* note 4 at 82 (“[T]he expectation [was] that [the EEZ] would address the tragedy of the ocean commons…”); Hoel, Sydnes & Ebbin, *supra* note 14 at 3 (“A principal justification for [the creation of the EEZ regime]… was the growing sense [at UNCLOS III] that international efforts to manage human uses of marine resources had failed.”); Eric A Posner & Alan O Sykes, “Economic Foundations of the Law of the Sea” (2010) 104 AJIL 569 at 570 (“Regulatory jurisdiction is predominantly allocated to the nations that value it the most or can exercise it most cheaply. Constraints on jurisdiction respond to externalities that arise when regulators tend to ignore the welfare of other nations. International cooperation on regulatory matters is encouraged and facilitated where national regulation alone is inadequate.”), 595 (“[S]tates are better regulators than international agencies.”).

\(^{87}\) LOSC, *supra* note 1 at Article 58.

\(^{88}\) *Supra* note 43; Kwiatkowska, *supra* note 20 at 5 (“The multifunctional character of the EEZ and the applicability of modified *mare clausum* and *mare liberum* approaches to different problems in the same area of the zone necessitated a detailed a detailed articulation not only of coastal and other states’ rights, but also of obligations corresponding to these rights.”).
… on the basis of equity and all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.\textsuperscript{89}

In other words, the EEZ is a zone of compromise between coastal and other states and the international community as a whole—or, doctrinally, between \textit{mare clausum} and \textit{mare liberum}. The subsequent interpretation of “due regard” in this thesis relies in part on this context in concluding that “due regard” signifies a relationship based on legal equality.

The high seas regime in the LOSC is said “largely” to replicate that in the \textit{1958 Convention on the High Seas} (the \textit{1958 Convention}), but with the additional express recognition of several freedoms in Article 87.\textsuperscript{90} Another change from the \textit{1958 Convention} however is the use of the term “due regard” in LOSC 87(2), which is a shift from the term “reasonable regard” in Article 2 of the \textit{1958 Convention}. A third difference between these two provisions is that, under LOSC Article 87(2), states must exercise their freedoms with “due regard” not only to the “interests” of others in the exercise of their freedoms but also to “rights” in respect of activities in the deep seabed, a shift from Article 2 of the \textit{1958 Convention}. The subsequent interpretation of “due regard” in this thesis relies in part on this context in concluding that “due regard” signifies the shift in LOSC as a whole from the traditional \textit{laissez-faire} freedom of the seas to a comprehensive, more normative order.

\footnotesize{\textsuperscript{89} LOSC, \textit{supra} note 1. }

\footnotesize{\textsuperscript{90} Rothwell & Stephens, \textit{International Law of the Sea}, \textit{supra} note 4 at 15.}
Chapter 3: An Interpretation of the General Duty of “Due Regard”

This chapter begins with an examination of the rules of international treaty interpretation relevant to the interpretation of “due regard” that follows.

3.1 Relevant rules of interpretation

The international rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) apply to the interpretation of LOSC.91

VCLT Article 31(1) sets out the general rule, which states:

Article 31. General rule of interpretation

1. A treaty shall 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.92

“Ordinary” meaning means dictionary meaning,93 and is itself a product of interpretation (as opposed to being self-evident),94 and is to be combined with other interpretative means.95 “Context” for the purpose of the general rule includes the whole of

91 VCLT, supra note 21; International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission / Finalized by Martii Koskenniemi”, UN Doc A/CN.4/L.682, 13 April 2006 at 94 (“[M]ost of the VLCT—at least its customary law parts—including above all articles 31 and 32—automatically, and without incorporation, is part of [a special] regime”), 92 (“[A]rticles 31 and 32 of the VCLT are always applicable unless specifically set aside by other principles of interpretation. This has been affirmed by practically all existing international law-applying bodies.”); Shaw, supra at note 20 at 676 (“[VCLT] Article 31 lays down the fundamental rules of interpretation and can be taken as reflecting customary law.”); and Klabbers, “Virtuous Interpretation”, supra note 21 at 24 (the VCLT rules of interpretation “come close to being of quasi-constitutional character”).
92 VCLT, supra note 21 at Article 31(1).
93 See for example M/V “Virginia G” (Panama v Guinea-Bissau), Separate Opinion of Judge Paik [2014] ITLOS Rep 194 at para. 22.
94 Klabbers, “International Legal Histories”, supra note 21 at 272 (“ordinary or natural meaning can only be established upon interpretation”); Koskenniemi, From Apology, supra note 12 at 333-4 (“Doctrinal expositions and case-law on treaty interpretation usually start out by emphasizing that a text must first be so construed as to give effect to its ‘normal’, ‘natural’, ‘ordinary’, or ‘usual’ meaning… ‘Natural’ meaning seems relevant as the most reliable guide to what the parties had consented to as well as what justice requires. But this position is not really a rule of interpretation at all. It assumes what was to be proved: that the expression has a certain meaning instead of another one.”); contra, for example, M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v Guinea), Separate Opinion of Judge Zhao, [1999] 3 ITLOS Rep 10, 120 ILR 237 at para. 2 (“the word ‘navigation’ [in Article 58] means nothing but ‘the act of navigating’ or ‘the making of a voyage at sea’”).
95 Gardiner, supra note 12 at 161 (“[T]he first impression as to what is the ordinary meaning of a term [is not] anything other than a very fleeting starting point. For the ordinary meaning of treaty terms is immediately and intimately linked with context, and then to be taken in conjunction with all other relevant elements of the
the treaty’s text, and “text” includes syntax, structure, and surrounding, related, and contrasting provisions. In the determination of a treaty’s object and purpose, object and purpose may be treated as a “combined concept”.

VCLT Article 32 sets out the rule on “supplementary means” of interpretation. “Supplementary” materials expressly include preparatory work, or travaux préparatoires, a treaty’s negotiation record. Preparatory work can encompass the preparatory work of prior related treaties. Preparatory work is sometimes referred to by the International Tribunal for the Law of the Sea (ITLOS) in the context of what it more broadly describes as “legislative history.”

When and how “supplementary” means may be used as an interpretive aid under the VCLT has been a matter of some debate. VCLT Articles 31 and 32 are characterized as

Vienna rules.”); and Aust, supra note 21 at 209 (“The determination of the ordinary meaning cannot be done in the abstract, only in the context of the treaty and in the light of its object and purpose.”); Crawford, supra note 20 at 381 (“A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole”).

Gardiner, supra note 12 at 177-187; further, see VCLT, supra note 21 Articles 31 (3) and (4) (“3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. // 4. A special meaning shall be given to a term if it is established that the parties so intended.”).

Gardiner, supra note 12 at 192-194.

VCLT, supra note 21 at Article 32 (Supplementary means of interpretation // Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”).

Ris, supra note 21 at 112.

Aust, supra note 21 at 220 (“Article 32 gives only examples of the principal supplementary means of interpretation. One may also look at other treaties on the same subject matter adopted either before or after the one in question that use the same or similar terms.”); for example see Maritime Delineation in the Black Sea (Romania v Ukraine) [2009] ICJ Rep 61 at para 134.


Hart, supra note 8 at 123 (“Canons of ‘interpretation’ cannot eliminate, though they can diminish, these uncertainties [of communication]; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation.”); Koskenniemi, From Apology, supra note 12 at 41 (“To safeguard the overall determinacy of legal argument in hard cases [those in which reasonable lawyers are left to disagree] lawyers have developed specific ‘second order’ methods for ensuring that their effect on the controlling force of legal argument remains marginal. Recourse is had to rules of interpretation...But there is much disagreement on the role and application of these methods.”); and Klabbers, “International Legal Histories”, supra note 21 at 274 (“[I]t is the method of interpretation which dictates which results a rule will have... interpretation is not a mere technical device, but a political matter of the utmost importance.”).
textualist, a perspective in which a treaty’s text is the pre- eminent source of its meaning and literal interpretation is the predominant interpretative mode.\textsuperscript{104} From a strict textualist perspective, preparatory work is not “context” for the purpose of the general rule but is “supplementary” only\textsuperscript{105}—that is, only to be relied on in the event that interpretation under the general rule is not fully determinative, and then only for certain purposes.\textsuperscript{106} However, applications of the VCLT range, from textualist or literal approaches\textsuperscript{107} to others that are less restrictive with respect to the use of preparatory work.\textsuperscript{108} The latter approaches are based on the application of VCLT Articles 31 and 32\textsuperscript{109} and the “realities and practicalities” of interpretative practice, in which preparatory work is very often used and interpretive approaches tend to combine.\textsuperscript{110}

\textsuperscript{104} Ris, supra note 21 at 117 (VCLT Articles 31 and 32 manifest “a clear, though not extreme, textualist approach...”); and Crawford, supra note 20 at 379 (“[O]nly the textual approach is recognized in the VCLT...”).

\textsuperscript{105} Yet see Klabbers, “International Legal Histories”, supra note 21 at 285 (“[D]rafting histories would be part of the context of a treaty on any “natural” reading of the term “context”. Yet, as if to demonstrate its own fallibility, the term “context” has found a rather narrow definition in the [VCLT]—a definition which excludes most of the travaux préparatoires.”); and Gardiner, “The Role of Preparatory Work”, supra note 21 at 116 (on preparatory work precisely as context, being “more likely to help by colouring in the background and by casting light on the main focus of interpretative attention than providing a sole and conclusive determinant.”).

\textsuperscript{106} VCLT, supra note 21 at Article 32.

\textsuperscript{107} Crawford, supra note 20 at 383 (“Preparatory work is an aid to be employed with care, since its use may detract from the textual approach”); and see Linderfalk, supra note 21.

\textsuperscript{108} Ris, supra note 21 at 113, 116 (“The intent school considers travaux préparatoires more freely and possibly even before consulting the text of a treaty. The teleological [on the object and purpose of the treaty] and New Haven [on the genuine shared expectations of the parties] schools leave the use of travaux préparatoires to the discretion of the interpreter.”); and Koskenniemi, From Apology, supra note 12 at 339n101 (“If original intent is held as the goal, then, clearly, there is no justification to exclude any item which might evidence it.”).

\textsuperscript{109} Schwebel, supra note 21 at 543 (“May [the Court] bring to bear the travaux to correct—or indeed from the outset to inform and influence—what otherwise would be its understanding of the meaning of the treaty provision at issue?... [T]he terms of a treaty which come before the Court for interpretation, if not usually obscure, are often ‘ambiguous.’ If this were not so, that is, if they did not lend themselves to argument attaching different meaning to their terms, they would not likely be legally contested at all. Moreover, it is not infrequent that the ‘ordinary meaning’ of the terms of a treaty, even if found to be unambiguously such, leads to a result which, if not ‘manifestly absurd’ is ‘unreasonable’—at any rate, in the view of one of the parties to the dispute.”); and Mortenson, supra note 21 at 786 (“The VCLT creates four distinct doctrinal pathways toward [ recourse to travaux]: ambiguity, absurdity, special meaning, and confirmation. Cumulatively, these pathways permit reliance on travaux every time a treaty is interpreted.”).

\textsuperscript{110} Gardiner, supra note 12 at 302 (“Attaching the labels ‘textual’ and ‘intention seeking’ to the different approaches serves mainly to hide the realities and practicalities of treaty interpretation... the differences between the two approaches are not so great as they may appear to be... these clear lines of approach (particularly confirmation) were not intended to be applied too rigidly, nor are they in practice. ‘Frequent and quite normal recourse to travaux préparatoires’ was the thought underlying the ILC’s approach”); Aust, supra note 21 at 218 (“the parties to a dispute will always refer the tribunal to the travaux, and the tribunal will inevitably consider them along with all the other material put before it.”); Shaw, supra note 20 at 676 (“[A]n true interpretation of a treaty in international law will have to take into account all aspects of the
Caution must be exercised when weighing the value of treaty preparatory work as evidence of its parties’ intentions, both generally and specifically with respect to LOSC preparatory work. Nevertheless, preparatory work is often used in the interpretation of LOSC provisions—most often by ITLOS, sometimes with explicit or implicit reference to the VCLT, and sometimes from the outset of the interpretation. Preparatory work is used agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any of these components.”); Schwebel, supra note 21 at 547 (“[P]reparatory work is often brought to bear in the interpretation of treaties, by the parties to those treaties and by their interpreters, and this whether the travaux préparatoires confirm or correct an interpretation otherwise arrived at.”); and Koskenniemi, From Apology, supra note 12 at 338 (“In practice, interpretation tends to refer to several such considerations [ie teleological, grammatical, logical, systematic, historical, functional and authoritative interpretative methods] in a ‘controlled confusion’.”). 111 Aust, supra note 21 at 217 (“[T]ravaux are by their nature less authentic than the other elements [relied on in interpretation], often being incomplete and misleading…”); and Koskenniemi, From Apology, supra note 12 at 342 (“[O]riginal intent cannot be opposed to a State denying such intent unless one accepts a non-consensual (descending) position: intent binds in the form it is declared in the travaux préparatoires.”). 112 Gardiner, supra note 12 at 218 (“The most important parts of a negotiation, and of drafting, often take place informally with no agreed record being kept. The negotiations at [UNCLOS III]... are a good example.”); M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v Guinea), Separate Opinion of Judge Laing, [1999] 3 ITLOS Rep 10, 120 ILR 269 [Saiga 2, Separate Opinion of Judge Laing] at 2n (“[T]here are substantial limitations as far as concerns preparatory work which, in the case of [LOSC], is very limited due to the amorphous nature of and absence of concrete chains of causation between materials and [LOSC], its frequent ‘random and disorderly character,’ the deliberate informality of much of the negotiating process, and the limited utility of formal unilateral statements made at or after the final session of [UNCLOS III]...”). See on balancing in the territorial sea, contiguous zone, EEZ, high seas zones and in enclosed / semi-enclosed seas: M/V “SAIGA” (Saint Vincent and the Grenadines v Guinea), Prompt Release, [1997] 1 ITLOS Rep 16, 110 ILR 741 (at para. 80 on “genuine link” under Article 91), Separate Opinion of Judge Zhao, Separate Opinion of Judge Nelson (at para. 21), Separate Opinion of Judge Vukas (at para. 16-17 on Articles 56 and 58), Separate Opinion of Judge Laing (at para. 9 on “control” under Article 33); ITLOS, MOX Plant (Ireland v United Kingdom), Provisional Measures, Separate Opinion of Judge Anderson [2001] 5 ITLOS Rep 124, 126 ILR 287 (at para. 17 on Article 123); ITLOS, “Volga” (Russian Federation v Australia), Prompt Release, Judgment of 23 December 2002, [2002] 6 ITLOS Rep 10, 126 ILR 439, Declaration of Vice-President Vukas, Separate Opinion of Judge Cot (at para. 23), Dissenting Opinion of Judge Anderson (at para. 7), (on “reasonable” and “bond” under Article 73), Vukas at para. 2 (on Part V); The Chagos Marine Protected Area Arbitration (Mauritius v UK), Award (2015), 162 ILR 59 (at para. 500), Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, (at para. 92 on Article 2). See on maritime delimitation: Maritime Delimitation in the Black Sea (Romania v Ukraine) [2009] ICJ Rep 61 at para. 134 (on Article 11); ITLOS, Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh v Myanmar), Judgment of 14 March 2012, [2012] ITLOS Reports 4, 166 ILR 472 at para. 428 (on Article 76). See on provisions under Part XV on settlement of disputes: M/V “SAIGA” (Saint Vincent and the Grenadines v Guinea), Prompt Release, [1997] 1 ITLOS Rep 16, 110 ILR 741, Dissenting Opinion of Vice-President Wolfrum and Judge Yamanoto (at para. 16, on Article 292), Dissenting Opinion of Judges Park (at para. 23), Nelson, Chandrasekhara Rao, Vukas and Ndaiye; MOX Plant (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p95, Separate Opinion of Vice-President Nelson (at para. 2 on Article 282); M/V “Virginia G” (Panama v Guinea-Bissau), Joint Separate Opinion of Judges Cot and Kelly [2014] ITLOS Rep 164 (at para. 9 on Article 295); The Chagos Marine Protected Area Arbitration (Mauritius v UK), Award (2015), 162 ILR 59 (paras. 215, 307, 378 on Articles 288, 297, 283), Dissenting and Concurring Opinion of Judges Kateka and Wolfrum (paras. 26, 32, 73 on Articles 288, 297, 293). See on jurisdiction: Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, Declaration of Judge Cot, [2015] ITLOS Rep 4 (at para. 3 on Annex VI, Article 21).
to interpret LOSC provisions in the context of open-textured “semantically wide” terms, the balancing of competing interests on a case-by-case basis, or areas left to be more specifically developed. The interpretation of open-textured terms and the use of preparatory work may overlap because the former are relatively indeterminate and the latter helps illuminate meaning. They may also overlap because the adjudication of such terms involves “relative” discretion. Preparatory work can “demonstrate[e] that the drafting history does not stand in the way of a particular (often more teleological) interpretation which would be difficult to accommodate on the basis of the mere text of a treaty provision.” This practice may be particularly relevant in the context of international disputes, which are “seen as idiosyncratic and fact-intensive” and thus require the interpretation of open-textured norms.

With reliance on the foregoing, preparatory work or legislative history is used in this thesis to confirm and inform the interpretation of “due regard”, on the basis of the term’s ambiguity or obscurity, its open-textured nature and the realities and practicalities of treaty interpretation. There are no official LOSC travaux préparatoires, however, LOSC commentary, official conference records, and some collected documents are available in published form.

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114 Koskenniemi, From Apology, supra note 12 at 40n76.
115 Hart, supra note 10.
116 Koskenniemi, From Apology, supra note 12 at 40n76 (“[I]n cases where semantically wide expressions leave a margin of discretion… [d]iscretion is ‘relative’ because its limits are assumed to be set by law…”).
117 Klabbers, “International Legal Histories”, supra note 21 at 283, 285 (“When the use of travaux préparatoires is abundant, any stigmas of unclarity will be avoided, giving interpreters the leeway they desire and need without automatically provoking the critique that an interpretation is not in conformity with the general rule on interpretation and without automatically suggesting that states did not know what they were doing when they concluded a treaty.”); see for example Chagos Dissent, supra note 102 at para. 26 (“[T]he Tribunal emphasizes that the negotiation records of [LOSC] provide no firm answer regarding jurisdiction over territorial sovereignty. With this we would agree. But… we draw a different conclusion therefrom.”).
118 Koskenniemi, Politics, supra note 10 at 340.
119 Commentary vol 3, supra note 27 at 1
120 Commentary vols 1, 2, 3; and UN Legislative History Articles 56, 58 and 87, all supra note 27.
121 1956 ILC Yearbook vol 2; 1958 Official Records vol 4; and UNCLOS III Official Records, all supra note 19.
122 UN Doc A/C.1/PV.1515 (1967); UN Doc A/AC.138/53, 23 August 1971; and Platzöder, supra note 19.
3.2 An interpretation of the general duty of “due regard”

The ordinary or dictionary meaning of the duty of “due regard” can be phrased as: one party’s obligation of proper conduct toward another.\textsuperscript{123} The arbitral Tribunal constituted under LOSC Annex VII in its Award on the Merits (18 March 2015) in the Chagos Marine Protected Area Arbitration (Mauritius v UK) (2015) (Chagos) framed the term’s ordinary meaning as follows:

In the Tribunal’s view, the ordinary meaning of “due regard” calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [UK], and the availability of alternative approaches.\textsuperscript{124} (emphasis added)

The Annex VII Tribunal in the South China Sea Arbitration (Philippines v China) agreed with this interpretation.\textsuperscript{125}

The Chagos Tribunal did not expressly resort to any other interpretive means set out in the VCLT. However, its characterization of the obligation as a “balancing exercise” accords with the term’s context in LOSC’s EEZ and high seas regimes. In the EEZ, reciprocal duties of “due regard” in Articles 58(3) and 56(2) form the balancing mechanism of a legal zone structured precisely to balance the concurrent respective rights and duties of coastal and other states.\textsuperscript{126} In the high seas, “due regard” is the point of

\textsuperscript{123} “due, adj. and adv.” and “regard, n.” in OED Online (Oxford University Press, September 2016), accessed online 16 November 2016: (“owed… as an enforceable obligation”), (“attention or heed paid… as having an effect or influence on action or conduct; respect or deference due to an authority, principle, etc.”); “due” and “regard” in Black’s Law Dictionary 10th ed., Bryan A. Garner, ed. (Thomson Reuters, 2014), accessed online 16 November 2016: (“just, proper, regular and reasonable… immediately enforceable”), (“attention, care, or consideration”).

\textsuperscript{124} Chagos Award, supra note 15 at para. 519.

\textsuperscript{125} SCSA Award, supra note 15 at para. 742.

\textsuperscript{126} Commentary vol 2, supra note 27 at 543 (Article 56(2) “balances the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the [EEZ].”); 556 (“Article 58 complements article 56, paragraph 2… There is mutuality in the relationship of the coastal state and other States, and articles 56 and 58 taken together constitute the essence of the regime of the [EEZ].”); Vicuña, supra note 20 at 33 (“The regime of the [EEZ] forms a unit integrated in its most fundamental aspects by Articles 56 and 58… [T]he regime… has had to establish the necessary mechanics to harmonize the various interests. The first provision
balance between concurrent freedoms of the high seas and between those freedoms and rights in respect of the deep seabed.\textsuperscript{127}

### 3.2.1 Legal equality in the EEZ

As to the context of the “due regard” provisions, Articles 58(3) and 56(2) elaborate differently on the respective duties of coastal and flag states in the EEZ. Under Article 58(3), in addition to the duty of “due regard” to the rights and duties of the coastal state, the flag state is uniquely subject to the specific duty to:

… comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.\textsuperscript{128}

Under Article 56(2), in addition to the duty of “due regard” to the rights and duties of other states, the coastal state is subject to the general duty to “act in a manner compatible with the provisions of [LOSC]”.\textsuperscript{129}

Notwithstanding the asymmetry between Articles 58(3) and 56(2) as a whole, the mutual duties of “due regard” in these provisions are themselves identically expressed, and the general duty of the coastal state to act in a manner compatible with the provisions of LOSC applies to all state parties.\textsuperscript{130} In other words, there is asymmetry between coastal and other states in the EEZ in the non-identical specific rights, jurisdiction and duties of coastal and other states.\textsuperscript{131} However, this thesis agrees with the interpretation that there is no “prima facie paramountcy or pre-eminence” between entitlements in the EEZ strictly by virtue of those entitlements being either sovereign in nature or extensions of freedoms of the high seas.\textsuperscript{132} In other words, the general legal relationship between all states in the

\textsuperscript{127} Commentary vol 3, supra note 27 at 73 (“P]aragraph 2 [of Article 87] balances the exercise of high seas freedoms with the rights and interests of all States.”); see LOSC, supra note 1 at Article 87(2).

\textsuperscript{128} LOSC, supra note 1 at Article 58(3).

\textsuperscript{129} Ibid Article 56(2).

\textsuperscript{130} Ibid at Article 1(2)(1) (“States Parties’ means States which have consented to be bound by this Convention and for which this Convention is in force.”).

\textsuperscript{131} Crawford, supra note 20 at 278 (“The allocation of the respective rights and duties of the coastal state and those of other states in the [EEZ] involves a delicate balancing process which is articulated in fairly general terms in the provisions of [LOSC].”).

\textsuperscript{132} Saiga 2, Separate Opinion of Judge Laing, supra note 112 at para. 52 (“[T]he internal consistency of the [LOSC] has led to my finding that the rights and jurisdiction of coastal and flag States are concurrent and that
EEZ is based on legal equality, as it is in the high seas, and this relationship is represented by the mutual duties of “due regard”.\textsuperscript{133} This interpretation has been expressed,\textsuperscript{134} but not with universal agreement.\textsuperscript{135}

\begin{flushleft} neither has\textit{ prima facie} paramouncty or preeminence” in the EEZ); Valencia & Akimoto, supra note 9 at 706 (“[LOSC] seeks to ensure this balance [in the EEZ] by including detailed rights and obligations for both coastal and maritime states, but, most importantly, by codifying the ‘due regard’ standard.”).\textsuperscript{133} Shaw, \textit{supra} note 20 at 155 (“The doctrine of the legal equality of states is an umbrella category for it includes within its scope the recognised rights and obligations which fall upon all states. This was recognised in the 1970 Declaration on Principles of International Law. This provides that: ‘All states enjoy sovereign equality… In particular, sovereign equality includes the following elements: (a) States are juridically equal; (b) Each state enjoys the rights inherent in full sovereignty; (c) Each state has the duty to respect the personality of other states;… (f) Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.’”); Crawford, \textit{supra} note 20 at 448-9 (“[Equality] refers to the juridical conceptualization of the division of power between states. Obviously, the allocation of power and the capacity to project it in reality are different things, which suggests that while all states are equal, some are more equal than others. But nonetheless formal equality remains and has meaning.”). See also Belsky, \textit{supra} note 9 at 187 (comity means “a species of accommodation… a synonym for international law… Comity and due regard may be considered related.”); however, see “comity” in \textit{Black’s Law Dictionary} 10\textsuperscript{th} ed, \textit{supra} note 123, accessed online 31 August 2017: (“International Law. This sense [of comity being synonymous for international law] is considered a misusage…”).\textsuperscript{134} Supra note 132; Treves, “Coastal States’ rights”, \textit{supra} note 28 at 42 (“[The] reciprocal ‘due regard’ rule does not grant priority to the rights of the coastal State or to the freedoms of other States. It is an obligation for both States to exercise their rights respecting those of the other States and to endeavor in good faith to find accommodations permitting the exercise of the rights of both.”); Oxman, “The Territorial Temptation”, \textit{supra} note 20 at 839 (“[Substantive balance in the EEZ] is particularly vulnerable to the territorial temptation because the EEZ is already perceived in quasi-territorial terms. In this regard, we need to consider that, after all is said and done, what really separates the EEZ from the territorial sea is that the former embraces [the freedoms of the high seas] and is not in principle subject to comprehensive coastal state jurisdiction”); Vicuña, \textit{supra} note 20 at 24 (“[LOSC Article 56(1)(a)] provides that the coastal State has ‘sovereign rights’ in the [EEZ]. This right has been conceived not in a general manner but with a functional scope…”) Tuerk, \textit{supra} note 20 at 161; Hoel, Sydnes & Ebben, \textit{supra} note 14 at 11 (“The rights of coastal states in the EEZs are far-reaching, but not identical to the bundle of rights generally associated with sovereignty over territory.”).\textsuperscript{135} For example, see Proelss, \textit{supra} note 9 at 93 (“If one accepts that the sovereign rights of the coastal state are a functionally limited variation of its sovereignty, and taking into account that the rights mentioned in Article 58(1) of UNCLOS cannot be regarded as equally constituting sovereign rights of the states concerned, it is difficult to oppose a shift of emphasis in favor of the coastal state.”); M/V \textit{“Virginia G”} (\textit{Panama v Guinea-Bissau}), \textit{Dissenting Opinion of Judge ad hoc Sérvulo Correia} [2014] ITLOS Rep 359 at para. 16 (“The circumstance that the sovereign rights of a coastal State in its [EEZ] involve a concept not reducible to territorial sovereignty does not exclude these rights from the broad notion of sovereignty in international law…[They] are therefore exercised in an environment of non-subordination to other subjects of international law.”); Stephen C Nemeth et al, “Ruling the Sea: Managing Maritime Conflicts through UNCLOS and Exclusive Economic Zones” (2014) 40 International Interactions 711 at 715 (EEZ as “privatization”); Gunnar Kullenberg, “The Exclusive Economic Zone: Some Perspectives” (1999) 42 Ocean & Coastal Management 849 at 849 (“The EEZ adds a new province to the country.”); Kraska, \textit{supra} note 25 at 84 (“Since ‘freedom’ is a broader genus than ‘right’, freedom of navigation may logically be said to trump some coastal-state rights.”); Attard, \textit{supra} note 20 at 64 (“The question whether there exists a presumption (in case of dispute) in favour of the coastal State’s rights or the freedoms of others is extremely important here and related to the onus of proof. Under the EEZ regime the burden may shift according to each use.”); and Xiaofeng & Xizhong, \textit{supra} note 25.\end{flushleft}
This conclusion is compatible with if not essential to the concept of “substantive balance” that characterizes the EEZ regime. It is assisted by the object and purpose of LOSC discussed in Chapter Two insofar as the EEZ most obviously expresses and answers to the long-standing tension in the balance between coastal and other states’ interests, or between the doctrines mare liberum and mare clausum. It is also assisted by reference to LOSC’s Preamble, which brings into relief the confluence of the duty of “due regard” with the general relationship between states in international law based on legal equality:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans... (emphasis added)

The use of “due regard” as a reconciling principle in international contexts outside of the strict application of any LOSC “due regard” provision further supports this conclusion.

Furthermore, this interpretation can be confirmed by reference to the legislative history of Articles 56(2) and 58(3). At UNCLOS III, proposals that would have structured a general paramountcy in the EEZ in favour of coastal states were not adopted. Instead,

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136 Oxman, “The Territorial Temptation”, supra note 20 at 839 (“The essence of the EEZ is its substantive balance.”); and Tuerk, supra note 20 at 161 (“[The EEZ’s] essence is the substantive balance between the rights of the coastal State on the one hand, and those of the international community on the other.”).

137 Attard, supra note 20 at 238 (“[T]he [LOSC] preamble is the guiding light used in interpreting the text’s spirit.”).

138 LOSC, supra note 1 at Preamble.

139 Rainer Lagoni, “Interim Measures Pending Maritime Delimitation Agreements” (1984) 78:2 AJIL 345 at 365 (use of the duty of “due regard” both to interpret the obligation of “mutual restraint” and as a pragmatic guide to conduct pending delimitation); Youri Van Logchem, “Submarine Telecommunication Cables in Disputed Maritime Areas” (2014) 45 Ocean Dev & Int’l L 107 at 118 (“due regard” as a “solution” to submarine cable activity in disputed EEZs or continental shelf areas); Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh v Myanmar), [2012] ITLOS Reports 4, 166 ILR 472, and Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award (2014), (Permanent Court of Arbitration) (Arbitrators: Judge Rüdiger Wolfrum (President), Jean-Pierre Cot, Judge Thomas A. Mensah, Dr. Pemmaraju Sreenivasa Rao, Professor Ivan Shearer), online: Permanent Court of Arbitration <https://pcacases.com/web/view/18> (on the reconciliation, by recourse to “due regard”, of concurrent interests within the “grey areas” resulting from the marine delimitation between Bangladesh and, respectively, Myanmar and India); ICJ, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment of 31 March 2014, ICJ Reports 2014, at para. 83 (“… the States Parties to the [International Convention for the Regulation of Whaling] have a duty to co-operate with the [International Whaling Commission] and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives [to lethal scientific research on whales].”); PCA, Arbitration Between the Republic of Croatia and the Republic of Slovenia, Final Award of 29 June 2017, (Arbitrators: Judge Gilbert Guillaume, Ambassador Rolf Einar Fife, Professor Vaughan Lowe, Professor Nicholas Michel, Judge Bruna Simma), available online: <https://www.pcadisputes.com/web/allcases/> at para 1134) (use of principles of good faith and “due regard” as part of a special regime set out by the LOSC ad-hoc Tribunal pursuant to the Arbitration Agreement).
Articles 56 and 58 (and Article 59) together codify substantive balance by recognizing at once both (a) the non-identical specific rights, jurisdiction and duties of coastal and other states in the EEZ, and (b) in the mutual general duties of “due regard”, the zone’s continued accord with principles in international law on the general relationship between sovereign states based on legal equality.

The broad historical and doctrinal context underlying this legislative history is rooted in the long-standing dichotomy in the law of the seas between the doctrines of freedom of the seas (mare liberum) and national sovereignty over maritime areas (mare clausum) discussed in Chapter Two. The part of that context most contemporaneous with UNCLOS III included developments in customary law with respect to coastal state claims to fishing zones, which were part of the circumstances of the meetings of the UN Sea-Bed Committee in 1971 in preparation for UNCLOS III. In those meetings, it is reported:

…[t]he point was often made that nothing should be done to impede the freedom of navigation. That freedom, it was noted, was of great importance for international economic relations, for industrial growth and international solidarity. On the other hand, it was also contended that it should not be abused as a concept.

These entitlements were recognized by the ICJ in Fisheries Jurisdiction (UK v Iceland) (1974).

Yet—or, precisely as an illustration of this tension—the UN Sea-Bed Committee’s final report to the UN General Assembly in 1973 for the purpose of UNCLOS III catalogued various proposed terms for coastal and other states respectively in the EEZ that on the whole favoured the former. Proposals for a general coastal state duty to other

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140 Supra note 143.
141 “Analytical summary of proposals and suggestions embodied in the views expressed by delegations in the debates in the First Committee of the General Assembly at the twenty-fifth session and in the Sea-Bed Committee in March 1971”, A/AC.138/41, sect. III.B. 224, cited in UN Legislative History Article 87, supra note 27 at 40.
142 ICJ Fisheries Jurisdiction (1974), supra note 208 at para. 52 (“Two concepts have crystallized as customary law in recent years arising out of the general consensus, revealed at [UNCLOS II in 1960]. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial seas; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential fishing rights in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries…”).
143 Commentary vol 2, supra note 27 at 556 (“In the Sea-Bed Committee, as discussion concerning the concept of an [EEZ] developed, the rights and duties of other States in that zone initially were addressed in the context of restrictions imposed on those rights by coastal States in the exercise of their rights and
states in the EEZ were in the form of open-textured, evaluative terms such as “no unjustifiable interference”\textsuperscript{144} with, or “due consideration,”\textsuperscript{145} “due regard”\textsuperscript{146} or “reasonable regard”\textsuperscript{147} to, the interests of other states. These relatively open-textured terms were distinct from proposals for a corresponding general duty of other states to coastal states in the EEZ. The latter were less open-textured, more specific, more clearly protective of coastal state interests and limiting of those of other states.\textsuperscript{148}

This drafting pattern continued into the first two sessions of UNCLOS III.\textsuperscript{149} For example, submissions by Canada (with others, as a group proposal),\textsuperscript{150} Nigeria,\textsuperscript{151}
Madagascar,152 and other African states153 emphasized the general paramountcy of coastal states in the EEZ. However, the 1974 conference records also document submissions countering the concept of coastal state paramountcy in the EEZ.154 States with interests in long-range fisheries favoured mutuality in the EEZ (for example, the German Democratic Republic)155 or emphasized the imperative of protecting freedoms of the high seas in the EEZ (for example, the USSR).156 The US proposed a model of mutually identical general duties, with identical terminology.157

At the end of the 1974 sessions, the emerging “main trends” identified by the Second Committee with respect to the EEZ included two formulae for a general legal relationship between coastal and other states in the EEZ.158 One set out that the coastal state would act

152 Delegate of Madagascar, UNCLOS III, 2nd Session, 22nd meeting of the Second Committee, 31 July 1974, in UNCLOS III Official Records vol 2, supra note 19 at 175 para. 56 (stating: “…rules should be formulated which would define the requirements of the international community, as well as those of … freedom of navigation… However, such activities involved an obligation on the part of the user, since they must not in any way harm the coastal State, which would be fully justified in taking measures to protect itself.”).
153 “Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania, Zaire: draft articles on the exclusive economic zone” dated 26 August 1974, A/CONF.62/C.2/L.82, Article 5, in UNCLOS III Official Records vol 3, supra note 19 at 240 (Article 5 “…States shall ensure that their activities in the [EEZ] are carried out in such a manner as not to interfere with the rights and interests of the coastal State”, and without any provision setting out a corresponding general coastal State duty as toward other states).
154 Commentary vol 1, supra note 27 at 51.
155 Delegate of the German Democratic Republic, UNCLOS III, 2nd Session, 22nd meeting of the Second Committee, 31 July 1974, in UNCLOS III Official Records vol 2, supra note 19 at 173 para. 30 (stating: “his country was fully sympathetic to the proposals of the developing countries favouring the establishment of an [EEZ]…On the other hand, [GDR] depended essentially on its long range fishing fleet… It therefore supported the idea of a régime for the [EEZ] which would give due regard to the interests of both coastal and other States”).
156 Delegate of USSR, UNCLOS III, 2nd Session, 28th meeting of the Second Committee, 6 August 1974, in UNCLOS III Official Records vol 2, supra note 19 at 221 para. 54 (stating: “… the granting of sovereign rights in the economic zone to the coastal State was not equivalent to the granting of territorial sovereignty and must in no way interfere with the other lawful activities of States on the high seas... The convention must state clearly that the rights of the coastal State in the [EEZ] must be exercised without prejudice to the rights of any other State recognized in international law”).
157 Delegate of the US, UNCLOS III, 2nd Session, 41st meeting of the Second Committee, 16 August 1974, in UNCLOS III Official Records vol 2, supra note 19 at 291 para. 14 (stating: “In view of the need for balance in harmonizing different interests in an area of ocean space used for various purposes at the same time, the same language of ‘without unjustifiable interference’ had been used [in the US proposal] to indicate that the exercise of the rights of coastal States should not interfere with those of other States and vice versa.”)
158 Churchill & Lowe, supra note 7 at 16 (“The conference was divided into three main committees… Committee Two dealt with the regimes of the territorial sea and contiguous zone, the continental shelf, the [EEZ], the high seas, and fishing and conservation of the living resources of the high seas…”); Commentary vol 1, supra note 27 at 113 (“The Bureau of the Second Committee produced a document entitled ‘main trends’ ‘in order to reflect in generally acceptable formulations the trends which had emerged.’ This document also set out alternative texts on various issues before the Second Committee.”); and “Working paper of the Second Committee: main trends”, Appendix I of “Statement of activities of the Second
in accordance with the LOSC and “with due regard to other legitimate uses of the high seas”. The other was in the form of a mutual duty of coastal and other states not to “unjustifiably interfere” with the other.

Subsequently, in the first “informal single negotiating text” (ISNT) dated 7 May 1975, the terms that would structure the general legal relationship between coastal and other states in the EEZ settled as the reciprocal duties of “due regard to the rights and duties” of coastal and other states. The ISNT was prepared by the Chairmen of the three Committees. However, two group proposals introduced prior to the production of the ISNT set out mutual duties of “due regard” in the EEZ and had been influential.

3.2.2 “Reasonable regard” and “due regard”

As for the relation between the mutual duty of “due regard” in the EEZ and that in the high seas, each provides context for interpretation of the other. Because an interpretation of the duty of “due regard” in each respective regime draws on related Committee”, Annex II of “Statement of activities of the Conference during its first and second sessions”, in UNCLOS III Official Records vol 3, supra note 19 at 107.

159 UNCLOS III Official Records vol 3, supra note 19 at 121 (Provision 92 Formula A).

160 Ibid (Provision 92 Formula B).


162 “Text presented by the Chairman of the Second Committee”, A/CONF.62/WP.8/PART II, in UNCLOS III Official Records vol 4, supra note 19 at 152 (Article 45(2)), 159 (47(4)) (Article 45(2) “In exercising its rights and performing its duties under the present Convention in the [EEZ], the coastal State shall have due regard to the rights and duties of other States.” and Article 47(4) “In exercising their rights and performing their duties under the present Convention in the [EEZ], States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations enacted by the coastal State…”); Churchill & Lowe, supra note 7 at 17 (“The early [‘negotiating’] texts represented in part an emerging consensus among delegates, and in part the aspirations of their drafters. They were modified only if it was thought that an amendment would have greater support than the existing text.”); Commentary vol 1, supra note 27 at 116 (“[D]espite the caveat that the [ISNT] would be informal and and that it would be a negotiating and not a negotiated text, most delegations anticipated that the text would have a special significance.”); Attard, supra note 20 at 36 (“In cases where the evidential value of a provision is being considered, an examination of its origins and subsequent development will be carried out. This may be useful, for example, in demonstrating that a particular [LOSC] provision, which first appeared in the 1975 ISNT and has remained unchanged throughout the subsequent texts, enjoys a widespread and general acceptance.”).

163 Commentary vol 1, supra note 27 at 114-115.

164 “Evensen Group: The Economic Zone – Sixth Revision, 16 April 1975”, Articles 1(2) and 3(3), in Platzöder, supra note 19 at 275; “Group of 77: Working paper on the Exclusive Economic Zone” dated 1 May 1975, Articles 4 and 7(2), in ibid at 264 and 265; Commentary vol 1, supra note 27 at 116 (“In the case of the Second Committee… [those preparing the ISNT] took careful account of the texts on the EEZ prepared by the [private negotiating group] Evensen Group and the [interest group of developing countries] Group of 77…”), 106 (“… there is no doubt that the [private negotiating group] Evensen Group played an important part in the negotiating process, especially during the period when the [I]SNT was being drafted.”).
interpretative aids (context, treaty object and purpose, and preparatory work), the term’s meaning in each regime is related if not identical, whereas conversely:

… the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires… (emphasis added)

The use of the same terminology in each regime reinforces an interpretation of mutual “due regard” in the EEZ as being based on legal equality, as it is in the high seas. It also reinforces the interpretation of “due regard” in the high seas as being part of the recognition in LOSC of a shift from the traditional laissez-faire freedoms the high seas. This shift is expressly recognized in LOSC’s EEZ regime.

This interpretation of “due regard” under Article 87(2) is assisted by reference to LOSC’s object and purpose, discussed in Chapter Two, and with further reference to the following three statements.

First, on convening UNCLOS III in 1970 the UN General Assembly resolved as follows:

166 Commentary vol 3, supra note 27 at 86 (“No State has the preeminent right to exercise any of the freedoms of the high seas, those freedoms being exercised on the basis of the equality of States…”); and Oxman, “The Territorial Temptation”, supra note 20 at 842 (“The accommodation [of flag state mobility] in the territorial seas, while real, is much different. The right of innocent passage is a limited one… and even [in the case of] transit passage applies only to ships and aircraft in continuous and expeditious transit, and does not embrace the range of the high seas freedoms preserved in the EEZ.”); Crawford, supra note 20 at 319 (“The conditions of passage with respect to the EEZ… have less in common with passage through the territorial seas or international straits, and more in common with the more liberal high seas regime.”).
167 Delegate of the UK, UNCLOS III, 2nd Session, 31st meeting of the Second Committee, 7 August 1974, in UNCLOS III Official Records vol 2, supra note 19 at 237 para 68 (stating: “The existing régime, set out in the Convention on the High Seas and based on the freedom of the seas, had served the international community well, though certain criticisms of that régime had been voiced at the Conference. It was necessary to consider the impact on that régime of the changes in national jurisdiction which might emerge as a result of the Conference; Koskenniemi, From Apology, supra note 12 at 44 (“While… the meaning of the “High Seas” used to be a relatively clear one, the introduction of the [EEZ] as well as other zones of special jurisdiction has made it increasingly uncertain.”); Rothwell & Stephens, International Law of the Sea, supra note 4 at 145 (“[Since the nineteenth century] the high seas have … become more regulated, not only as a result of … [LOSC], but also as a result of the narrowing of the breadth of the high seas and an increase in global concerns over oceans management.”).
168 Churchill & Lowe, supra note 7 at 176 (“The extension of coastal State jurisdiction… to encompass areas which had formerly been high seas—areas containing the major proportion of the ocean’s resources and being the site of most ocean activities—has represented a major change in the regulation of and access to ocean activities.”).
Conscious that the problems of ocean space are closely related and need to be considered as a whole,

Noting that the political and economic realities, scientific development and rapid technological advances of the last decade have accentuated the need for early and progressive development of the law of the sea, in a framework of close international co-operation,

... Decides to convene in 1973... a conference on the law of the sea which would deal with the establishment of an equitable international régime... ¹⁶⁹

Second, the ICJ in *Fisheries Jurisdiction (UK v Iceland)* (1974) identified precisely how historical conditions drove the shift from a system of uncorroborated freedoms to a more deeply normative structure of rights and correlative duties, including duties to the international community: ¹⁷⁰

[Preferential rights] come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation.

... It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. ¹⁷¹ (emphasis added)

Third, the LOSC’s Preamble states:

Conscious that the problems of ocean space are closely related and need to be considered as a whole,

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote

¹⁷⁰ See *supra* note 43.
¹⁷¹ ICJ Fisheries Jurisdiction (1974), *supra* note 208 at paras. 60, 72. See also UN Legislative History Article 87, *supra* note 27 at 41 (“The first proposal containing issues of freedom of navigation on the high seas presented in a comprehensive manner in the Sea-Bed Committee was a draft ocean peace treaty submitted by Malta. Although it was principally intended to serve as a framework or platform for debate and discussion purposes, the document influenced the later drafts of the provisions of [LOSC]”); and UN Doc A/AC.138/53, 23 August 1971, *supra* note 19 (“[T]wo concepts have been rejected: (a) *laissez-faire* freedom beyond national jurisdiction; [and] (b) the unfettered sovereignty of the State within national jurisdiction...”).
the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order…\(^{172}\)

In other words, as discussed in Chapter Two, the LOSC’s object and purpose is rooted in the recognition of security, resource, equitable and environmental imperatives in the global oceanic commons, and in the shift from the traditional *laissez-faire* freedoms of the high seas to a comprehensive, more heavily normative regulation of the whole.

The object and purpose of the LOSC overlaps with the object and purpose of the duty of “due regard”—“due regard” has been said to be “a fundamental principle on which [LOSC] is built”.\(^{173}\) The LOSC is intended to establish the “legal order for the seas”;\(^{174}\) and the duty of “due regard” operates as the general limit on sovereign conduct within that order. The specific character of that limit, and the extent to which it signifies the “new” law of the sea,\(^{175}\) lies in the term’s inflection from its predecessor, “reasonable regard” in Article 2 of the 1958 Convention.\(^{176}\)

There is much to suggest that “reasonable regard” and “due regard” are equivalent.\(^{177}\) The dictionary meaning of “reasonable regard” suggests that it is a less emphatically

\(^{172}\) LOSC, *supra* note 1 at Preamble.

\(^{173}\) *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Joint Declaration of Judges ad hoc* Hossain and Oxman, [2003] ITLOS Rep 34, 126 ILR 509.

\(^{174}\) LOSC, *supra* note 1 at Preamble.

\(^{175}\) Proelss, *supra* note 9 at 91n22 (“The term ‘new law of the sea’ is usually used with regard to the public order of the oceans established by the UNCLOS”).

\(^{176}\) 1958 *Convention on the High Seas, supra* note 180.

\(^{177}\) See Anderson, *supra* note 20 at 202 (“The test was slightly reworded as one of paying “due regard” in Article 87(2) of [LOSC] (the term used in the Court’s decision [in the Icelandic Fisheries Case]), but without altering the sense.”), 234 (“So far as I am aware, there was no intention at [UNCLOS III] to change the content of the ‘reasonable regard’ test. The change from the well-known term ‘reasonable’ to the rather less familiar word ‘due’ is no more than semantic.”); Churchill & Lowe, *supra* note 7 at 206 (“All exercises of the freedom of the high seas remain subject to the ‘due regard’ obligation, as the ‘reasonable regard’ obligation is now termed… The requirement of ‘due regard’ seems to require that where there is a potential conflict between two uses of the high seas, there should be a case-by-case weighting of the actual interests involved in the circumstances in question, in order to determine which use is the more reasonable in that particular case…”); Zhang, *supra* note 26 at 75 (“These two different expressions… convey the same meaning.”); Kwiatkowska, *supra* note 20 at 6 (“[The mutual duty of “due regard”] reflects a principle of equivalence and reasonableness of competing uses of the seas within the EEZ.”); and A.R. Thomas & James C. Duncan, eds. Annotated Supplement to the Commanders Hbk on the Law of Naval Operations. (Nav. War C. Intl L Stud v 73 1999), cited in Belsky, *supra* note 9 at 184 (The terms are “one and the same,” at 1-14M); Vicuña, *supra* note 20 at 33 (“… [re] Article 2 of the 1958 Geneva Convention on the High Seas, the last
normative term than is “due regard”—however, the dictionary meanings of these terms also overlap. At the very least, the terms are related insofar as “reasonable regard” is both a predecessor term for “due regard” (legislative history) and a rejected LOSC draft term for LOSC Articles 56, 58 and 87 (preparatory work). As such, “reasonable regard” is certainly an aid for the interpretation of “due regard”.

However, the legislative history of Article 87 supports the conclusion that “due regard” and “reasonable regard” are not seamlessly identical and that, on the contrary:

[...]his standard of “due regard” [in Article 87(2)] is less ambulatory and open-textured than is the standard of “reasonable regard” in the counterpart article 2 of the High Seas Convention.

Three aspects of the legislative history of Article 87 reinforce this interpretation of “due regard”.

First, the general legal relationship between sovereign states in the high seas was codified in the second paragraph of Article 2 of the 1958 Convention as follows:

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. (emphasis added)

The preparatory text for UNCLOS I, at which the 1958 Convention was negotiated, was a report prepared by the International Law Commission (ILC). In that report, the ILC’s paragraph… provided that the freedoms of the high seas will be exercised by all States with due regard [sic] for the interests of other states…); and Oxman, “Warships”, supra note 22 at FN 52.

See “reasonable, adj., n., and adv.” in OED Online (Oxford University Press, September 2016), accessed online 16 November 2016: (“reasonable” – “within the limits of what it would be rational or sensible to expect” and “proportionate” and “of something abstract: … just, legitimate; due, fitting”), and “reasonable” in Black’s Law Dictionary 10th ed, supra note 123, accessed online 16 November 2016: (“fair, proper, or moderate under the circumstances; sensible”); and see supra note 123 on the dictionary meanings of “due regard”.

Saiga 2, Separate Opinion of Judge Laing, supra note 112 at para 32.


Churchill & Lowe, supra note 7 at 15 (“By 1956 the ILC had, at the request of the UN General Assembly, produced a report covering most aspects of the law of the sea of contemporary importance. This report… for the basis of the work of [UNCLOS I], held at Geneva in 1958.”); “Report of the International Law Commission covering the work of its eighth session, 23 April—4 July 1956” (A/3159) in 1956 ILC Yearbook vol 2, supra note 19 at 255 para 22 (“In pursuance of General Assembly resolution 899(IX) of 14 December 1954, the Commission has grouped together systematically all the rules it has adopted concerning the high seas…”); Anderson, supra note 20 at 9 (“The draft articles represented codification and progressive development of the law.”).
draft Article 27 on the freedom of the high seas was accompanied by the following commentary:

The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject. No State may subject any part of the high seas to its sovereignty; hence no State may exercise jurisdiction over any such stretch of water. States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States. \(^{182}\) (emphasis added)

The sentence emphasized in this passage was a matter of debate at UNCLOS I—it was ultimately rejected for inclusion in Article 2 in favour of the term “reasonable regard”. \(^{183}\)

Some agreed with the ILC’s characterization of the general legal relation between states in the high seas. \(^{184}\) The US did not, the US delegate stating that:

… his delegation would oppose any proposals that sought to incorporate in article 27 the sentence in paragraph 1 of the commentary on the article reading “States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states.” That wording was, in his opinion, an unacceptable version of the phrase submitted for consideration to the [ILC], since it rejected the test of reasonableness that had since time immemorial been used to determine whether the high seas were being used legally or illegally. It must be borne in mind that any use of the high seas by [one state] affected their use by [other states] and that action taken by one state to protect its legitimate interest on the high seas might interfere with the interests of another… [I]f the Conference rejected the principle of reasonableness it would simply hamper the optimum use of the high seas by all states. \(^{185}\) (emphasis added)


\(^{183}\) Anderson, supra note 20 at 202 (“The Geneva Convention considered the issue [of freedom of the high seas] in the context of weapon tests and scientific research work on the high seas, rather than fisheries.”).

\(^{184}\) For example, “Poland: proposal” dated 21 March 1958, A/CONF.13/C.2/L.29, in 1958 Official Records vol 4, supra note 19 at 123; Delegate of Bulgaria, UNCLOS I, 16th meeting of the Second Committee, 26 March 1958, ibid at 41 para. 8; Delegate of Romania, ibid at 42 para. 19 (stating: “… In his opinion, [the ILC sentence at issue] was a correct statement of the law…”).

\(^{185}\) Delegate of US, ibid at 41 para. 10.
The UK delegate supported the US position and proposed the inclusion of the phrase “reasonable regard”. Some agreed with the US and UK, and some did not.

The 1958 debate on “reasonable regard” in 1958 is salient to the proposed interpretation of “due regard” in this thesis because that debate underscores that “reasonable regard” under the 1958 Convention was conceived as an open-textured, relatively subjective duty associated with the traditional laissez-faire freedoms of the high seas. In these respects, the character of “reasonable regard” is distinct from that of “due regard” under the LOSC.

Second, the ICJ interpreted and applied the obligation of “reasonable regard” in Article 2 of the 1958 Convention in the Fisheries Jurisdiction (UK v. Iceland) (1974), as follows:

… the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland and the United Kingdom to have due regard to each other’s interests, and to the interests of other States, in those resources [at issue].

186 Anderson, supra note 20 at 234 (“The [UK] proposal did not recapitulate the ILC’s element of ‘adverse’ effects upon others’ uses, possibly widening its scope as a result.”); Delegate of UK, 1958 Official Records vol 4, supra note 19 at 41 para. 12-13 (“[T]he sentence which the [US] had quoted was too sweeping and should not be incorporated in article 27, since it could unjustly limit the exercise by governments of certain legitimate rights. [The UK] also agreed that the test of reasonableness should be applied, and therefore would propose an addition to article 27…”); “United Kingdom of Great Britain and Northern Ireland: proposal” dated 26 March 1958, A/CON F.13/C.2/L.68, in ibid at 134; Delegate of UK, UNCLOS I, 21st meeting of the Second Committee, 31 March 1958, in ibid at 54 para 8 (stating: “… his delegation had submitted its proposal… because it considered that it contained a more accurate statement of the position than the third sentence of paragraph 1 of the [ILC’s] commentary of article 27.”); ibid at 55 (“… adopted by 30 votes to 18, with 9 abstentions.”).

187 For example, Delegate of Australia, UNCLOS I, 16th meeting of the Second Committee, 26 March 1958, in ibid at 42 para. 23.

188 For example, Delegate of India, ibid at 42 para. 25 (“… his delegation took the view that the ‘reasonableness’ referred to by the [UK] representative introduced an undesirably subjective criterion.”).

189 Supra note 188; Oxman, “The Territorial Temptation”, supra note 20 at 832 (“The 1958 Convention on the High Seas, the only one of the four adopted at Geneva to declare itself a codification, elaborated the Grotian regime and its application with admirable attention to principle and important detail…”); Juda, supra note 14 at 19 (“Coming into the middle of the twentieth century, the prevailing customary international law of the sea emphasized freedom of the seas, providing coastal states with narrow territorial seas bordering directly on the high seas, a vast area of ocean commons available for use by all.”); ICJ, Fisheries Case (UK v. Norway), “Rejoinder of Norway” (30 April 1951), in “Pleadings, Oral Argument, Documents Vol III”, available online: <http://www.icj-cij.org/docket/files/5/11029.pdf> at 11 (“Comme il l’a soutenu à plusieurs reprises, le Gouvernement n’ergien defend le point de vue suivant lequel l’Etat riverain a le droit de prendre des dispositions concernant l’étendue de son territoire maritime dans la limite du raisonnable.”), cited in Koskenniemi, From Apology, supra note 12 at 259n120 (“Norway had originally argued that the coastal State does have an extensive right to delimit its territorial seas according to its will—the sole restrictions to such right being provided by ‘reasonableness’.”).

190 ICJ Fisheries Jurisdiction (1974), supra note 208 at para 68.
The dispute was in relation to the parties’ activities on the then-high seas, to which the *1958 Convention* applied.\(^{191}\) This was in the context however of coastal state entitlements not addressed in the *1958 Convention* and recently crystalized in customary law.\(^{192}\) In other words, “reasonable regard”, which was generally intended to accord with traditional *laissez-faire* freedoms of the high seas, was interpreted in circumstances that had already outstripped *laissez-faire* practices as meaning “due regard”, a term textually less subjective and open-textured and, in the circumstances underscored by the Court, incrementally more normative—even before its adoption in the LOSC.\(^{193}\)

Third, on the heels of this decision by the ICJ,\(^{194}\) during the first sessions of UNCLOS III, the terms for the general legal relation between sovereign states were settled in the ISNT as (a) in the EEZ, the reciprocal duties of “due regard”, not “reasonable regard”,\(^{195}\) and (b) in the high seas, as the reciprocal duties of “due consideration”, not “reasonable regard”.\(^{196}\) Mutual “due consideration” in the high seas shifted the evaluative register of that legal relationship from “reasonable” to the less open-textured “due”, matching the register of that relationship in the EEZ. (The term for the reciprocal duty in the high seas subsequently would be changed from “due consideration” to “due regard” when terms for duties in the EEZ and high seas were “harmonized”.)\(^{197}\)

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191 Anderson, *supra* note 20 at 203 (“In the Icelandic Cases, the Court went on to describe the fishery zone as ‘a tertium genus between the territorial seas and the high seas,’ even though the waters of such a zone retained the status of high seas for purposes other than fishing.”).
192 *Supra* note 142.
193 See *supra* note 171; also see Anderson, *supra* note 20 at 204 (quoting the ICJ as follows: “‘due (sic) regard’”).
194 Anderson, *supra* note 20 at 198 (“The Court’s decision in the two [Icelandic Fisheries Cases] were read in the Hague by the President of the Court on 25 July 1974… In the four weeks preceding the judgment… over 100 delegations [had declared], on the record, their support for the concept of the [EEZ]… These delegations included some which could not hope to benefit from this extension of limits for clear geographical reasons. In other words, on the eve of the judgment a dynamic process had begun in [UNCLOS III] which led quickly, over the space of three and a half years, to the general acceptance of a new fishery limit and a new legal regime.”).
195 See *supra* note 162.
197 “Report of the Chairman of the Drafting Committee” dated 1 August 1980, A/CONF.62/L.57/Rev.1., in UNCLOS III Official Records vol 14, *supra* note 19 at 114 (“An informal intersessional meeting of the Drafting Committee was held in New York from 9 to 27 June 1980 for the purpose of continuing the process of harmonization of words and expressions recurring in the second revision of the informal composite negotiating text”), 118 (under Part V: “The main question relates to harmonization of the terms ‘reasonable regard’, ‘due regard’ and ‘due consideration’. …”); and UN Legislative History Article 87, *supra* note 27 at
85 (“The change [in draft article 87 on the high seas, para 2] is an outcome of the recommendation of the Drafting Committee to replace the words ‘due consideration’ with the words ‘due regard’.”).
Chapter 4: Application of the General Duty of “Due Regard”

This chapter first briefly considers “balancing” methodology in international law with reference to jurisprudence of the ICJ. It then analyses the three international arbitration awards in which the general duty of “due regard” under the LOSC has been expressly interpreted and applied.

4.1 Balancing in international law

Balancing is an important mechanism in the LOSC generally, in the EEZ regime, and in the duty of “due regard”. Balancing in the context of international law is not without precedent or methodology—this methodology is, broadly, goal-oriented. The reasoning of the ICJ in the Anglo-Norwegian Fisheries Case (UK v Norway) (1951), the North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands) (1969), and the Fisheries Jurisdiction Case (UK v Iceland) (1974) illustrate the methodology of the Court with respect to balancing in the context of the Court’s application of equitable

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198 Chagos Award, supra note 15 at para. 534 (the duty of “due regard” consists of “a balancing exercise”), para. 535 (the Respondent UK “failed properly to balance its own rights and interests with Mauritius’ rights”); see also LOSC, supra 1 at Article 59.
199 Hart, supra note 8 at 126 (“[W]e confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us.”); Koskenniemi, From Apology, supra note 12 at 48 (“To make an enlightened choice [the decision-maker] must balance the relevant interests at issue in light of overriding community goals.”), 258-9 (“If two liberties, for example, two jurisdictions seem to conflict... [o]ne must... look behind abstract presumptions for the general system of goals and values in international law and attempt to construct a solution which is best in harmony with them.”), 50 (“... I have assumed that the Court’s equity is in fact a purposive strategy which aims at giving effect to the concrete wills and interests of all parties concerned in the form of a cost-benefit analysis aiming at the most efficient (and in this sense the most acceptable) solution...”); Ris, supra note 20 at 115 (“The teleological school [of interpretation] strives to give effect to the object and purpose of a treaty.”); and see Virginia G, Separate Opinion of Judge Paik, supra note 93 at para. 9 (in the context of applying the term “necessity”: “if there is a choice between several appropriate measures, the least onerous (to other protected interests) and equally effective (in achieving the intended objective) needs to be chosen. In so doing, the notion of necessity attempts to balance two conflicting interests at play: namely, preserving the freedom of a State to achieve the objective it seeks through means of its choosing, and restraining the State from choosing means that would unduly infringe the protected rights or interests of another entity... The notion of necessity understood this way can be characterized essentially as a ‘balancing test’.”).
200 Fisheries Case (UK v Norway) [1951] ICJ Rep 116 [ICJ Anglo-Norwegian Fisheries (1951)].
201 North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands) [1969] ICJ Rep 3 [ICJ North Sea Continental Shelf (1969)].
principles in international law.\textsuperscript{203} This methodology has been critiqued.\textsuperscript{204} It has also been noted that, while the caution that equitable balancing may encourage states to adopt a subjective understanding of their rights is “justified”, nevertheless, “the law is inevitably bound up with the accommodation of different interests, and the application of rules usually requires an element of appreciation.”\textsuperscript{205}

In the \textit{Anglo-Norwegian Fisheries Case (UK v Norway)} (1951), the ICJ determined that Norway’s delimitation of a fisheries zone in response to British fishing vessels off the coasts of Eastern Finnmark was not contrary to international law.\textsuperscript{206} The ICJ reasoned, first, that the validity of maritime delimitation is subject to principles of international law.\textsuperscript{207} Second, the Court confirmed that the factors available for the determination of such validity

\textsuperscript{203} See Koskenniemi, \textit{From Apology}, supra note 12 at 49.

\textsuperscript{204} Friedmann, \textit{supra} note 22 at 234-236 (Regarding ICJ North Sea Continental Shelf (1969): “The apportionment of an as yet undelimited area considered as a whole would mean a decision \textit{ex aequo et bono}, which the Court would be authorized to give only under the conditions prescribed by Article 38, paragraph 2, of the Statute, i.e., by consent of the parties. What the Court was entitled, and indeed obligated, to do was to apply equitable principles as part of the relevant rule of law... But what can scarcely be doubted is that, by rejecting the criteria laid down in the [1958] convention and other documents, the Court, in effect, was giving a decision \textit{ex aequo et bono}, under the guise of interpretation. The Court applied a kind of distributive justice while denying that it was doing so.”); Haritini Dipla, “The Role of the International Court of Justice and the International Tribunal for the Law of the Sea in the Progressive Development of the Law of the Sea” in Anastasia Strati, Maria Gavouneli & Nikolaos Skourtos eds, \textit{Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After} (Leiden: Martinus Nijhoff, 2006) 235 at 237-8 (“In [North Sea Continental Shelf Cases (1969)], the first to be submitted to [the Court] in this area, the Court pronounced in favour of the discrepancy between customary and conventional law and introduced in the legal scene of general international law the equitable principles as being something different from the rules expressed in the conventional law of 1958, that mentioned the line of equidistance / special circumstance... [T]his discrepancy inevitably led to a theoretical and practical controversy... It also led to legal uncertainty, since the casuistic application by the judge of the equitable principles has proven to be highly approximate and unpredictable.”). On the factors to be considered relevant in any specific balancing application, see Koskenniemi, “Law, Teleology”, \textit{supra} note 16 at 21 (“Even when there is no disagreement about the content of a rule, the world in which it is to be applied is usually hard to interpret—what aspect is significant in the world, and what is not?”); Attard, \textit{supra} note 20 at 65 (“[S]uch phrases as ‘on the basis of equity’ and ‘relevant circumstances’ [as in LOSC Article 59 on allocation of rights in the EEZ] can lead to serious problems of application, The identification of the relevant circumstances and the weight to be accorded to each may also present difficulties.”);

\textsuperscript{205} Crawford, \textit{supra} note 20 at 47.

\textsuperscript{206} ICJ Anglo-Norwegian Fisheries (1951), \textit{supra} note 200 at 118 (“by Royal Decree of July 12\textsuperscript{th}, 1935, as amended by a Decree of December 10\textsuperscript{th}, 1937”), 124, 143.

\textsuperscript{207} \textit{Ibid} at 132 (“The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other State depends upon international law.”).
at international law include not only coastal physical characteristics but also state interests—in this case, Norway’s coastal dependence on the fishery at issue.\(^{208}\)

In the *North Sea Continental Shelf* Cases (*Germany/Denmark; Germany/Netherlands*) (1969), the parties requested that the ICJ identify the principles and rules of international law applicable to delimitation of the continental shelf in the North Sea.\(^{209}\) The Court decided that the equidistance principle recognized in Article 6 of the *1958 Convention on the Continental Shelf* was not the sole applicable rule.\(^{210}\) Because “no one single method was likely to prove satisfactory in all circumstances,” the Court reasoned, “delimitation should, therefore, be carried out by agreement… and be effected by equitable principles”.\(^{211}\) The Court confirmed that states are limited in maritime delimitation by international law.\(^{212}\) States have an obligation to negotiate such that, “in the particular case, and taking all the circumstances into account, equitable principles are applied,” and equity (or, in the case of delimitation, “a reasonable degree of proportionality”) is aimed for.\(^{213}\) The Court described its methodology as follows:

… there is no legal limit to the considerations which States may take into account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result… The problem of the relative

\(^{208}\) *Ibid* at 133 (on the importance of considering “certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage”) and 128 (that inhabitants of the coastal zone derived their livelihood from fishing was a “[reality] which must be borne in mind”).


\(^{211}\) ICJ North Sea Continental Shelf (1969), *supra* note 201 at 36, and 50 (“[I]t is necessary to seek not one method of delimitation but one goal.”).

\(^{212}\) *Ibid* at 46 (“[T]he situation is [not] for the unfettered appreciation” of the parties…), and 47 (“[I]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles…”).

\(^{213}\) *Ibid* at 47 (The obligation to negotiate “merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the [UN Charter] as one of the methods for peaceful settlement of international disputes…[Parties] are under an obligation so as to conduct themselves that the negotiations are meaningful…”), 48 citing the Permanent Court of International Justice in *Railway Traffic Between Lithuania and Poland, Advisory Opinion* (on the obligation is “to pursue [negotiations] as far as possible with a view to concluding agreements”), 49 (“[T]he international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods… provided that, by the application of equitable principles, a reasonable result is arrived at…”), and 52 (on proportionality, “… in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions… eliminating or diminishing the distortions that might result from the use of [the equidistance] method”).
weight to be accorded to different considerations natural varies with the circumstances of the case.\(^{214}\)

The Court confirmed that the considerations in such balancing could include both geological and “geographical” factors.\(^{215}\)

In the *Fisheries Jurisdiction Case (UK v Iceland)* (1974), the ICJ was requested by the Applicant UK to declare that Iceland’s establishment of an exclusive fisheries jurisdiction zone extending 50 NM from baselines was invalid at international law.\(^{216}\) The Court identified the applicable law as, first, the *1958 Convention* (Article 1, defining the high seas, and 2, providing that the freedoms of the high seas “shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”) and second, coastal state entitlements that had recently crystalized in customary law.\(^{217}\) The Court also identified the state practice of implementing preferential rights by agreement or by settlement under UN Charter Article 33.\(^{218}\)

The Court determined that preferential fishing could not result in the “extinction” of any concurrent established rights of other states in the same resources—these interests were to “co-exist”.\(^{219}\) The coastal state had the obligation to “take account and pay regard to” other states’ interests, particularly if those other states had an economic dependence on the same fishing grounds.\(^{220}\) The goal was “to balance and regulate equitably”;\(^{221}\) an equitable result was:

> …a matter of appraising the dependence of the coastal State on the fisheries in question in relation to that of the other State concerned and of reconciling them in as equitable a manner as is possible.\(^{222}\)

In this case, the Court determined that Iceland’s regulations and their implementation disregarded UK’s historic fishing rights and violated Iceland’s obligation to exercise

\(^{214}\) *Ibid* at 50.

\(^{215}\) *Ibid*.


\(^{217}\) *Ibid* at 22; and *supra* note 142.

\(^{218}\) *Ibid* at 26.

\(^{219}\) *Ibid* 27, 30; whereas, see Gavouneli, *Functional Jurisdiction, supra* note 10 at 69 (Under the LOSC, “[t]he ultimate question [in the EEZ] remains not the type of balance required in that process but whether, in the pursuit of the final goal, the exercise of one of the parallel and contradictory rights may well be wholly obliterated.”).


\(^{221}\) *Ibid* at 31.

\(^{222}\) *Ibid* at 30.
“reasonable regard”, because the regulations contemplated “phasing out” of the Applicant UK’s fishing in the 12 NM zone and in adjacent waters.\textsuperscript{223}

In brief summary, in these decisions the ICJ identified its methodology as goal-oriented.\textsuperscript{224} The Court sought “proportionality” or “reconciliation” of the interests at issue.\textsuperscript{225} Relevant circumstances to be considered in any specific application would vary.\textsuperscript{226} Circumstances could include state economic interests or “dependence”.\textsuperscript{227} For state parties, the obligation took the form of an obligation to negotiate, and to do so “meaningfully” and “as far as possible”.\textsuperscript{228}

4.2 Judicial applications of the general duty of “due regard”

The specific content of the duty of “due regard” is fully determinable only on its application to specific circumstances and interests.\textsuperscript{229} The obligation has been expressly interpreted and applied in the following three arbitrations.\textsuperscript{230}

4.2.1 Chagos Marine Protected Area Arbitration

The Annex VII Tribunal in the Chagos Marine Protected Area Arbitration (\textit{Mauritius v UK}) issued its Award on the Merits 18 March 2015. The dispute involved the UK’s decision of 1 April 2010 establishing a Marine Protected Area (MPA) extending 200 NM from baselines around the Chagos Archipelago (Chagos).\textsuperscript{231} The Tribunal ruled in favour of Mauritius on the basis that in establishing the MPA, the UK breached its obligations to Mauritius under LOSC Articles 2(3), 56(2), and 194(4) of LOSC.\textsuperscript{232}

\textsuperscript{223} \textit{Ibid} at 29, 30.
\textsuperscript{224} ICJ North Sea Continental Shelf (1969), \textit{supra} note 201 at 36, 50.
\textsuperscript{225} \textit{Ibid} at 52; ICJ Fisheries Jurisdiction (1974), \textit{supra} note 202 at 30.
\textsuperscript{226} ICJ North Sea Continental Shelf (1969), \textit{supra} note 201 at 36, and 50 (In the Court’s identified methodology: “… there is no legal limit to the considerations which States may take into account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result… The problem of the relative weight to be accorded to different considerations natural varies with the circumstances of the case.”).
\textsuperscript{227} ICJ Anglo-Norwegian Fisheries (1951), \textit{supra} note 200 at 133; ICJ Fisheries Jurisdiction (1974), \textit{supra} note 202 at 28.
\textsuperscript{228} ICJ North Sea Continental Shelf (1969), \textit{supra} note 201 at 47, ICJ Fisheries Jurisdiction (1974), \textit{supra} note 202 at 26.
\textsuperscript{229} \textit{Supra} note 10.
\textsuperscript{230} See also \textit{supra} note 15 on Saiga 2, Judgment.
\textsuperscript{231} Chagos Award, \textit{supra} note 15 at para 5.
\textsuperscript{232} \textit{Ibid} at para 547.
The Tribunal interpreted and applied the duty of “due regard” under LOSC Article 56(2) in consideration of Submission 4 by Mauritius. Submission 4 requested that the Tribunal declare the MPA incompatible with the UK’s obligations under LOSC Article 56 on the basis that “the manner in which the [UK] conducted itself prior to the declaration of the MPA” violated the UK’s duty of “due regard”. The Tribunal characterized the issue in respect of Article 56 as follows: “[t]he difference between the Parties… concerns what is meant by “due regard” and the extent to which this implies an obligation to consult, or even of non-impairment.”

The relevant facts were as follows. Mauritius, a group of islands in the south-western Indian Ocean, claims the Chagos Archipelago, a group of coral atolls in the middle of the Indian Ocean, on the basis that the Archipelago was a dependency of colonial Mauritius. Mauritius (then Ile de France) was captured in 1810 by the UK from the French, and until 8 November 1965, Chagos was administered by the UK as a Dependency of Mauritius. From 1964 to 1965 the UK and the US negotiated a US defence facility on Chagos. Mauritius became independent 12 March 1968, around which time Chagos was severed from Mauritius, remaining under UK control. Meetings in 1965 between representatives of Mauritius and the UK culminated in an agreement, the Lancaster House Meeting undertakings, in which the UK undertook that “if the need for the facilities on the islands disappeared the islands should be returned to Mauritius”, an obligation which the Tribunal found to be legally binding. On the same basis, the Tribunal found that Mauritius also holds fishing rights in the Chagos territorial sea—subject to licensing, the defence needs of the US, and the UK’s discretion with respect to the fishery, such discretion to be exercised in accordance with the obligation to “ensure” that fishing rights “would remain available”. The Tribunal found this undertaking to be legally binding insofar as it relates to the Chagos territorial sea. Also on the basis of the Lancaster House undertakings, the

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233 Ibid at para 158.
234 Ibid at para 457.
235 Ibid at para 54, 55, 2.
236 Ibid at para 59, 61.
237 Ibid at paras 70-71.
238 Ibid at para 68-74.
239 Ibid at para 74-77, 547.
240 Ibid at para 74-77, 455.
241 Ibid at para 547.
Tribunal found the UK’s undertaking to preserve the benefit of any minerals or oil discovered in or near Chagos to be legally binding.\textsuperscript{242}

The Award set out the parties’ positions as follows. Mauritius interpreted the duty of “due regard” under Article 56(2) as relatively specific, or as a rule:

Mauritius argues that the formulation of the duty of “due regard” in Article 56(2) obliges the [UK] “to respect the rights of Mauritius”. Relying on the Virginia Commentary to the Convention, Mauritius considers that such due regard and respect requires the [UK] “to refrain from acts that interfere with [Mauritius’ rights]”. Mauritius also relies on the ILC’s commentary on the comparable provisions of the 1958 Convention on the High seas, which “interpreted the obligation to have ‘reasonable regard’ for the interests of other States as meaning that, ‘[s]tates are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other States.’”

… [Mauritius’ interpretation of the term is that] “its ordinary meaning [is] as elucidated by the Virginia Commentary and the ILC, both of which requires States to refrain from acting in ways that interfere with the rights of other states regardless of the strength of the reasons for doing so.”

In any event, Mauritius argues, Article 56(2) “necessarily implies an obligation to consult with other States when their rights or duties can be affected”…\textsuperscript{243}

Mauritius relied on the “Virginia Commentary” which sets out the 1958 ILC formulation also relied on by Mauritius.\textsuperscript{244} As discussed in Chapter Three, the 1958 ILC formulation of the legal relationship between states in the high seas was drafted by the ILC for negotiating purposes at UNCLOS I, and was rejected for inclusion in the 1958 Convention in favour of the term “reasonable regard”.\textsuperscript{245}

The UK interpreted the duty of “due regard” under Article 56(2) as a merely subjective obligation, as follows:

With respect to Article 56, the [UK] submits that the “straightforward point” is that “the formulation shall have due regard to’ does not somehow mean ‘shall give effect to’”.

According to the [UK], “‘due regard’ means what it says: It means take account of, give consideration to, do not ignore.” The [UK] also adopts the

\textsuperscript{242} \textit{Ibid} at para 74-77, 547.
\textsuperscript{243} \textit{Ibid} at paras 471-472.
\textsuperscript{244} Commentary vol 2, \textit{supra} note 27.
\textsuperscript{245} \textit{Supra} notes 181-188.
observation of the *Virginia Commentary* that “[t]he significance of [Article 56(2)] is that it balances the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the [EEZ].” At the same time, the [UK] argues, “[i]f there are good reasons for overriding the rights of other States in the EEZ, then article 56(2) allows that.”

… In the [UK]'s view, if “having ‘due regard’ for the rights of other states means consulting them, we would suggest the text would have said so…”[I]t is quite possible,” the [UK] argues, “to have regard for the rights of other states without consulting them: states do so on a daily basis.”

The UK’s interpretation of “due regard” in the EEZ in this case accords with a *laissez-faire* legal relationship between states. However, *laissez-faire* principles were recognized by the ICJ as no longer applicable in the context of concurrent rights in the *Fisheries Jurisdiction Case (UK v Iceland) (1974)*.247

The Tribunal interpreted the duty of “due regard” under Article 56(2) as neither a specific limiting rule nor a merely subjective duty, but rather as a balancing duty.248 The Tribunal elaborated as follows:

… The Convention does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [UK], and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation.249

…

There is no question that Mauritius’ rights have been affected by the declaration of the MPA. In the territorial sea, Mauritius’ fishing rights have effectively been extinguished. And… the Tribunal considers that… Mauritius [has] an interest in significant decisions that bear upon [the Archipelago’s] possible future uses. The declaration of the MPA was such a decision and will invariably affect the state of the Archipelago when it is eventually returned to Mauritius. The Tribunal considers Mauritius’ rights to be significant and entitled, as a matter of good faith and the Convention, to a corresponding degree of regard.250

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246 Chagos Award, *supra* note 15 at paras 476-477.
247 *Supra* note 171.
248 *Supra* note 124.
249 Chagos Award, *supra* note 15 at para 519.
The Tribunal’s interpretation accords with the general nature of an open-textured term, that of being an obligation fully determinable only on a balancing of interests in specific circumstances.

The Tribunal did not expressly state the normative goal of balancing in this instance, however, it applied Article 56(2) together with 2(3), reasoning that:

Article 2(3) requires the [UK] to exercise good faith with respect to Mauritius’ rights in the territorial seas, Article 56(2) requires the [UK] to have due regard for Mauritius’ rights in the [EEZ]. The Tribunal considers these requirements to be, for all intents and purposes, equivalent.\(^\text{251}\)

As to the content of the obligation of “due regard”, the Tribunal recognized that the obligation of “due regard” in the EEZ is equivalent to the requirement of “good faith” in the territorial seas.\(^\text{252}\) In most cases, it noted, this duty “will necessarily involve at least some consultation”\(^\text{253}\) — adding, however, that consultation “need not continue indefinitely or ‘until the other party is happy’.”\(^\text{254}\)

The Tribunal held out, as a concrete example of “due regard”, the interaction between the UK and the US in respect of the UK’s decision to establish the MPA:

In the Tribunal’s view, the [UK’s] approach to consultation with the [US] provides a practical example of due regard and a yardstick against which the communications with Mauritius can be measured. The record shows that the [US] was consulted [about the establishment of the MPA] in a timely manner and provided with information, and that the [UK] was internally concerned with balancing the MPA with U.S. rights and interests.\(^\text{255}\)

The evidence of the UK’s “due regard” for the US consisted of:

(a) a meeting between the Commissioner of the British Indian Ocean Territory (administrator of the Chagos Archipelago) and representatives of the US days after the decision to declare the MPA;
(b) internal UK correspondence showing “extensive concern with the U.S. reaction”—that is, acknowledging the UK’s need to

\(^{251}\) *Ibid* at para 520.
\(^{252}\) *Ibid*.
\(^{253}\) *Ibid* at para 519.
\(^{254}\) *Ibid* at para 531.
\(^{255}\) *Ibid* at para 528.
a. establish that the MPA was consistent with existing exchanges of notes between the UK and US;
b. articulate commitments to reassure the US (these being: no need to change any existing exchanges of notes; the UK will want to consult with the US; an area particularly important to the US would be excluded from the MPA; no change to the interests currently enjoyed by the US, any future changes to environmental controls will be through negotiation with US; US to be invited to inform the UK of any expected adverse impact on its interests from the MPA; no change to the purpose of the Territory, that being to serve the defence interests of the UK and US); and (c) a formal submission by the Territory Administration entitled “Implications for US Activities in Diego Garcia and [the Territory]”.256

This evidence, the Tribunal concluded, “demonstrate[d] a conscious balancing of rights and interests, suggestions of compromise and willingness to offer assurances by the [UK], and an understanding of the [US’s] concerns in connection with the proposed activities.”257

That conduct, noted the Tribunal, was in “stark contrast” to the bilateral consultation with Mauritius—a single meeting that the Tribunal characterized as:

… [like] ships passing in the night, in which neither side fully engaged with the other regarding fishing rights or the proposal for the MPA. … [but rather having] differing agendas and understandings at play…258

The Tribunal described this meeting between the UK and Mauritius representatives as having left issues unanswered, with promises made by the UK to provide information to Mauritius, and having left the impression that further work and consultations would be jointly undertaken.259

The Tribunal concluded on this basis that the UK’s proclamation of the MPA was incompatible with the provisions of LOSC, that the UK had “failed properly to balance its

256 Ibid at para 526.
257 Ibid at para 535.
258 Ibid at para 529.
259 Ibid at paras 525, 529-530.
own rights and interests with Mauritius’ rights”, and that accordingly the UK had breached its obligations to Mauritius under Article 56(2) and 2(3), together.\textsuperscript{260}

4.2.2 Arctic Sunrise Arbitration

The Annex VII Tribunal in the \textit{Arctic Sunrise Arbitration} (\textit{Netherlands v Russia}) issued its Award on the Merits on 14 August 2015. The dispute involved measures taken by Russia in its EEZ against the \textit{Arctic Sunrise}, an icebreaker flying the flag of the Netherlands.\textsuperscript{261} The Netherlands argued that Russia breached obligations owed by it to the Netherlands under LOSC Articles 56(2), 58(1), 58(2), 87(1)(a), and 92(1).\textsuperscript{262} The Tribunal ruled in favour of the Netherlands.\textsuperscript{263} Russia did not participate in the arbitration.\textsuperscript{264}

The relevant facts were as follows. The \textit{Arctic Sunrise} was chartered and operated by Greenpeace International, which was engaged in a protest campaign seeking a ban on offshore oil drilling and industrial fishing in Arctic waters.\textsuperscript{265} The \textit{Prirazlomnaya} was an offshore oil production platform operated by a Russian state-controlled company and located in the Pechora Sea (in the south-east Barents Sea), within Russia’s EEZ.\textsuperscript{266} Greenpeace used the \textit{Arctic Sunrise} in a protest staged at, on and around the \textit{Prirazlomnaya} on 18 September 2013.\textsuperscript{267} On 19 September 2013, Russian officials boarded the \textit{Arctic Sunrise}; the next day the Russian coast guard towed the vessel to Murmansk, where it was held despite requests from the Netherlands for its release.\textsuperscript{268} The Greenpeace crew (the “Arctic 30”) were initially detained under Russian criminal and administrative charges, then were released on bail in late November 2013 and granted amnesty.\textsuperscript{269} Non-Russian nationals were permitted to leave Russia shortly thereafter.\textsuperscript{270} The arrest of the \textit{Arctic Sunrise} was lifted 6 June 2014.\textsuperscript{271}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{260} \textit{Ibid} at para 535, 547.
\item\textsuperscript{261} \textit{Arctic Sunrise Award}, \textit{supra} note 15 at para 74.
\item\textsuperscript{262} \textit{Ibid} at para 140.
\item\textsuperscript{263} \textit{Ibid} at para 401.
\item\textsuperscript{264} \textit{Ibid} at para 7.
\item\textsuperscript{265} \textit{Ibid} at para 75, 77.
\item\textsuperscript{266} \textit{Ibid} at para 79.
\item\textsuperscript{267} \textit{Ibid} at paras 84-93.
\item\textsuperscript{268} \textit{Ibid} at para 100-101, 3.
\item\textsuperscript{269} \textit{Ibid} at para 106, 3.
\item\textsuperscript{270} \textit{Ibid} at para 3.
\item\textsuperscript{271} \textit{Ibid} at para 3.
\end{enumerate}
\end{footnotesize}
The Tribunal first identified the concurrent rights and duties subject to balancing in the EEZ and at issue in this dispute. Protest at sea is an internationally lawful use of the seas related to the freedom of navigation—limited, in another state’s EEZ, under Article 58(3), by a flag state’s duties of “due regard” and compliance with coastal state law.272 In the EEZ, a coastal state has sovereign rights to resources under Article 56, exclusive jurisdiction with respect to artificial islands, installations, and structures under Article 56 and 60, and is empowered to take certain enforcement measures in respect of same under Article 60, limited by the duty of “due regard” under Article 56(2).273 A flag state holds exclusive jurisdiction over ships flying its flag in the EEZ of another state under Articles 92 and 58; a coastal state may exercise jurisdiction over ships in the EEZ only with prior consent of the flag state, subject to some exceptions.274

The Tribunal next considered whether under any such exceptions the measures taken by Russia against the Arctic Sunrise and crew were lawful.275 The Tribunal categorized these exceptions generally as law enforcement measures and other legal bases, the latter of which included prevention of adverse or environmental consequences, prevention of terrorism, and prevention of interference with the exercise of a coastal State’s sovereign rights for the exploration and exploitation of non-living resources in its EEZ.

In its consideration of the last exception, the Tribunal examined the mutual duty of “due regard” in the context of the point at which a flag state’s conduct triggers a coastal state’s right to take measures:

In the view of the Tribunal, the protection of a coastal State’s sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfil the tests of reasonableness, necessity, and proportionality.

... At the same time, the coastal State should tolerate some level of nuisance through civilian protest as long as it does not amount to an “interference with the exercise of its sovereign rights.” Due regard must be given to rights of other States, including the right to allow vessels flying their flag to protest.276

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272 Ibid at para 227-228. As an aside, note that the Memorial of the Kingdom of the Netherlands dated 31 August 2014 at para 259 quotes the delegate of the USSR at UNCLOS 2nd Session 1974 who argued that any recognition of sovereign rights in the EEZ must not interfere with freedoms of the high seas.

273 Ibid at para 229-230.

274 Ibid at para 231.

275 Ibid at Part VII B.

276 Ibid at paras 326, 328.
In this case, the Tribunal found that the conduct of the *Arctic Sunrise* fell short of interference with the rights of the coastal state and was strictly an exercise of the freedom of navigation. The Tribunal also concluded that the boarding, seizure, and detention of the *Arctic Sunrise* had no basis in law under any of the exceptions and did not comply with the provisions of LOSC, and that accordingly Russia had breached its obligation under Article 56(2).^278^  

**4.2.3 South China Sea Arbitration**

The Annex VII Tribunal in the *South China Sea Arbitration (Philippines v China)* (SCSA) issued its Award on the Merits on 12 July 2016. The dispute involved the question of the parties’ entitlements in the South China Sea, the status of certain geographic features, and the lawfulness of certain actions taken by China. The Tribunal ruled in favour of the Philippines on almost all issues.^280^  

The Tribunal interpreted and applied the duty of “due regard” under LOSC Article 58(3) in the course of its consideration of Submission 9 by the Philippines. Submission 9 requested that the Tribunal declare that “China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines”.

The relevant facts of the case were as follows. The South China Sea is a semi-enclosed sea in the western Pacific Ocean, south of China and west of the Philippines, important for shipping, fisheries, a biodiverse coral reef ecosystem, and the potential for substantial oil and gas resource exploitation. Mischief Reef and Second Thomas Shoal are coral reefs located in the centre of the Spratly Islands, in the southern part of the South China Sea.  

Submission 9 concerned Chinese government and fishing vessel activities at Mischief Reef and Second Thomas Shoal, and was one of six submissions (8 to 13) dealing

^278^ *Ibid* at para 333.  
^279^ SCSA Award, *supra* note 15 at para 2.  
^280^ *Ibid* at para 1202.  
^282^ *Ibid* at paras 290, 3.
with Chinese activities in the South China Sea.\textsuperscript{283} The Tribunal’s considerations of Submissions 8, 12 and 14 all dealt with activities at Mischief Reef and Second Thomas Shoal, and so together comprise a broader factual background to Submission 9.

In the case of Submission 8, the Tribunal noted that the core of the dispute with respect to living and non-living resources was that both the Philippines and China had acted on the basis that each, and not the other, had exclusive rights to these resources.\textsuperscript{284} With respect to living resources, for example, China promulgated a 2012 fishing moratorium in an area where the Philippines claimed fisheries jurisdiction.\textsuperscript{285} Although the Tribunal decided the Philippines had not established that China prevented Filipino fishermen from fishing at Mischief Reef or Second Thomas Shoal, it noted it could “readily imagine” that the presence of Chinese enforcement vessels at both locations, combined with China’s general claim to fisheries jurisdiction, could lead Filipino fishermen to avoid such areas.\textsuperscript{286}

In respect of Submission 12 on China’s occupation and construction activities on Mischief Reef, the Tribunal noted that these included the construction of artificial islands and installations (such as concrete platforms supporting three-story buildings, a helipad, communications equipment, wharves, fortified seawalls, temporary loading piers, cement

\begin{itemize}
\item \textsuperscript{283} Ibid at para 112.
\item \textsuperscript{284} Ibid at para 696.
\item \textsuperscript{285} Ibid at para 712.
\item \textsuperscript{286} Ibid at para 715. On the lawfulness of naval activities in another state’s EEZ and question of “due regard” in respect of such activities, see among others: Vukas, “New Law”, supra note 22 (“It is obvious that for the sake of peace and security military exercises and manoeuvres in foreign EEZs should be avoided. However, such a restriction to the freedom of activities of navies was not intended by the drafters of [LOSC].”); Shearer, supra note 22 at 8 (“In areas beyond the territorial seas, some States have extended their security laws so as to prohibit navigation or overflight without express permission. These laws have no basis in [LOSC]. The travaux préparatoires of the Convention reveal that the proposal to include ‘security’ in the catalogue of laws that a State might enforce in its contiguous zone… was expressly rejected.”); Hayashi, supra note 22 at 128 (“[T]he United States takes the view that such military survey activities in the EEZ are part of the freedom of the high seas…”); Stephens & Rothwell, “The LOSC Framework”, supra note 22 at 31 (“[T]he LOSC does not make clear whether naval manoeuvres and exercises, including weapons testing, surveillance, or survey activities, are permissible in the EEZ as high seas freedoms.”); Galdorisi & Kaufman, supra note 9; Valencia & Akimoto, supra note 9; Van Dyke, “The Disappearing Right” and “Military Ships”, supra note 22; Liacouras, supra note 22; Oxman, “Warships”, supra note 22 at 838 (“it is essentially a futile exercise to engage in speculation as to whether naval manoeuvres and exercises with the [EEZ] are permissible. In principle, they are. States simply never agreed to abandon such rights… The relevant inquiry is whether the particular activity in a particular place is consistent with the ‘due regard’ obligation. For example, it would be difficult to justify a weapons exercise that does significant damage to a valuable natural resource being exploited by the coastal State in the [EEZ]. On the other hand, a coastal State’s political or military interest in avoiding the presence of the warship is not in itself reflected in its economic zone rights under article 56…”).
\end{itemize}
plants, a 250-metre-wide channel to allow transit into the lagoon) and the presence of dredger vessels, cargo ships and ocean tugs.\textsuperscript{287}

Regarding Submission 14, the Tribunal took note of the vessel grounded on Second Thomas Shoal in 1999 by the Philippine Navy on board of which the Philippines has maintained a small detachment of marines, the reports of Chinese government vessels and unidentified aircraft in the vicinity, and the interception of two Philippines supply vessels by two Chinese Coast Guard vessels.\textsuperscript{288}

As factual background related specifically to Submission 9, the Tribunal noted that, since 3 May 2013, China had maintained a “significant presence” of naval and China Marine Surveillance vessels near Second Thomas Shoal.\textsuperscript{289} The government vessels were “accompanied by a number of fishing vessels.”\textsuperscript{290} The Tribunal also noted reports of Chinese fishing vessels escorted by Chinese government ships at Mischief Reef.\textsuperscript{291} The Tribunal concluded that accounts of officially organised Chinese fishing fleets and close coordination between Chinese fishing vessels and government ships in the area supported the inference that China’s fishing vessels were organised and coordinated by the government—and that, in any event, Chinese government vessels were aware of the actions of Chinese fishermen and would have been able to halt them.\textsuperscript{292}

With respect to the positions of the parties on this issue, in its submissions on issue 9 the Philippines relied on the ITLOS advisory opinion in the \textit{Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015 (Fisheries Advisory Opinion)} for the interpretation that, under LOSC Articles 58(3) and 62(4), a state has a due diligence obligation to ensure its nationals and vessels comply with coastal state regulations in the EEZ and do not engage in illegal, unreported and unregulated (IUU) fishing activities.\textsuperscript{293} China’s position (as described in diplomatic

\textsuperscript{287} \textit{Ibid} at paras 994, 1003, 1009, 1004.
\textsuperscript{288} \textit{Ibid} at paras 1113, 1115, 1117, 1123.
\textsuperscript{289} \textit{Ibid} at para 719.
\textsuperscript{290} \textit{Ibid} at para 720.
\textsuperscript{291} \textit{Ibid} at para 721.
\textsuperscript{292} \textit{Ibid} at para 755.
\textsuperscript{293} \textit{Ibid} at para 726; and see SCSA Merits Hearing Transcript (Day 4) pp 84-87, citing \textit{Fisheries Advisory Opinion} at paras 123, 124, 128, 138.
correspondence with the Philippines, China being a non-participant in the proceedings) was that it did not consider the Philippines to have rights in the relevant area.294

The Tribunal identified the law applicable to the issue of China’s “presence” in the area of Mischief Reef and Second Thomas Shoal as including two elements.295 First, LOSC Article 61(1), (2) and (3) address the jurisdiction of the coastal state as to the allowable catch within the EEZ and access by flag state vessels to surplus allowable catch. Second, and with particular emphasis by the Tribunal, Article 62(4) deals with the obligations of flag state nationals fishing in a coastal state’s EEZ, and Article 58(3) sets out the obligation of flag states in the coastal state’s EEZ.

The Tribunal’s interpretation of “due regard” under Article 58(3) contained a number of steps.

First, with respect to the “nature” of the obligation of “due regard”, the SCSA Tribunal without further comment reproduced the observations of the Chagos Tribunal with respect to the textual interpretation and balancing test of “due regard”.296 The SCSA Tribunal did not exactly replicate the balancing of entitlements conducted by the Chagos Tribunal—that is, it did not directly contemplate the specific importance of the interests and activities of China and the Philippines, nor potential impairment or alternative approaches. Rather, it balanced the rights of the Philippines and the duties of China at issue in order to give specific content to the duty of “due regard” in this case:

Given the importance of fisheries to the entire concept of the exclusive economic zone, the degree to which the Convention subordinates fishing within the exclusive economic zone to the control of the coastal State, and the obligations expressly placed on the nationals of other States by Article 62(4) of the Convention, the Tribunal considers that anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.297

In other words, the balancing test described by the Chagos Tribunal was appropriate as between concurrent entitlements. In circumstances that do not involve the prioritization of

294 SCSA Award, supra note 15 at para 730.
295 Ibid at paras 735-741.
296 Ibid at para 742, citing Chagos Award, supra note 15 at para 519; and see supra note 250.
297 Ibid at 744.
lawful activities, a balance between the parties’ respective rights and duties may be required.

Second, remarking on the specific context of the duties of a flag state with respect to fishing by its nationals in a coastal state’s EEZ, the Tribunal noted its agreement with the reasoning of ITLOS in its *Fisheries Advisory Opinion*, stating that:

...[ITLOS] interpreted the obligation of due regard, when read in conjunction with the obligations directly imposed upon nationals by Article 62(4), to extend to a duty “to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.” The *Fisheries Advisory Opinion* goes on to note that:

the obligation of a flag State . . . to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation “of conduct” . . . as an obligation “of conduct” this is a “due diligence obligation”, not an obligation “of result” . . . The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag. 298

In other words, the Tribunal recognized that the flag state’s obligation under international law to exercise due diligence to ensure that its nationals comply with coastal state laws in the EEZ is part of its obligation under LOSC Article 58(3) to comply with coastal state laws in the EEZ (including coastal state conservation laws under LOSC Article 62(4)) and to pay “due regard”. With respect to the specific content of due diligence, the SCSA Tribunal went only so far as to note that:

In many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine. 299

In this case, China’s conduct was implicitly beyond the question of due diligence because its government vessels were found not simply negligent but to have escorted, protected, organized and coordinated IUU fishing activities. 300 Applying Article 58(3) the Tribunal

299 *Ibid* at para 754; and see *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, [2012] ITLOS Rep 7, 150 ILR 244 at para 117 (“The content of ‘due diligence’ obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that ‘due diligence’ is a variable concept.”).
300 SCSA Award, *supra* note 15 at paras 754-756.
determined that:

… [Evidence] support[s] an inference that China’s fishing vessels are not simply escorted and protected, but organised and coordinated by the Government… The obligation to have due regard to the rights of the Philippines is unequivocally breached when vessels under Chinese Government control act to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines’ [EEZ].

The Tribunal concluded that China was in breach of its obligation of “due regard” under LOSC Article 58(3):

… China has, through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013, failed to exhibit due regard for the Philippines’ sovereign rights with respect to fisheries in its exclusive economic zone. Accordingly, China has breached its obligations under Article 58(3) of [LOSC].

In the course of its brief consideration of the duty of “due regard,” the Tribunal made no explicit or implicit reference to the interpretative rules set out in the VCLT. Earlier in the Award, the Tribunal expressly elaborated on the procedural safeguards that ensured China suffered no disadvantage with respect to evidence and claims as a result of its non-participation in the proceedings—the Tribunal might well have taken a similar approach with an expressly reasoned interpretation of “due regard”.

Instead, as noted above, the SCSA Tribunal relied heavily on the reasoning of two prior decisions, the Chagos Award and the Fisheries Advisory Opinion. While not “strictly” a source of international law, reference to international judicial decisions is nevertheless commonplace in practice, whether for adjudicative consistency, efficient reference to existing law, or the making of new law through clarification of existing law.

301 Ibid at paras 755-756.
302 Ibid at para 757.
303 Ibid at paras 119-121; and see Ingo Venzke, How Interpretation Makes International Law: On Semantic Change and Normative Twists (Oxford: Oxford University Press, 2012) at 71 (“The decisions of judges are shielded by an outward show of judicial technique.”).
304 Crawford, supra note 20 at 37 (“Judicial decisions are not strictly a formal source of law, but in many instances they are regarded as evidence of the law. A coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition.”).
305 Venzke, supra note 334 at 71 (“The working of precedents is key in [international judicial institutions’] contribution to the making of international law. In many fields, participants in legal discourse can simply not avoid relating their argument to earlier judicial decisions. They are expected to do so. This constellation makes semantic struggles in the context of judicial proceedings one of the main areas where interpretation
On the other hand, the *Chagos* Award on its own might not obviously represent an interpretative consensus on the meaning (or nature) of “due regard”. Like the SCSA, *Chagos* was decided by an Annex VII Tribunal which did not elaborate extensively on its interpretative reasoning with respect to “due regard” although it did implicitly refer to the VCLT by identifying the “ordinary” meaning of the term. Furthermore, as noted by the SCSA Tribunal itself, the *Chagos* Tribunal had before it the “reversed situation”—that is, the question of the “due regard” duty of the coastal state in the EEZ under Article 56(2), rather than “due regard” duty of the flag state under Article 58(3).
Chapter 5: Conclusion

This chapter returns to the issue raised in Chapter One, that of “due regard” being an obligation “so indeterminate that its application by different decision makers will necessarily be unpredictable.”\(^{309}\) In theory, an open-textured term is only relatively indeterminate, its indeterminacy being limited by law.\(^{310}\) On the basis that the “ordinary” meaning of any treaty term is to be considered along with other interpretative means (at the very least, the context of the treaty and in light of its object and purpose)\(^{311}\) and the use of legislative history in the interpretation of open-textured LOSC terms is formally justified,\(^{312}\) the interpretation of “due regard” proposed in this thesis limits the term’s meaning as follows.

The first conclusion of this thesis is that the mutual duty of “due regard” in Articles 56(2) and 58(3) signifies a relationship based on legal equality among states in the EEZ, as it does in the high seas. In this respect, the mutual duty of “due regard” in the EEZ is a new site of balance in the law of the seas between the traditional doctrines of *mare liberum* and *mare clausum*. As a practical consequence of this interpretation, in any specific application of the duty of “due regard”, a coastal state would not benefit from a presumption of priority simply on the basis of the sovereign character of its entitlements in the EEZ.\(^{313}\) Likewise, a flag state would not benefit simply on the basis that its entitlements in the EEZ are extensions of freedoms of the high seas.\(^{314}\) There are no express considerations of this point in the adjudications of “due regard” discussed in this thesis.

\(^{309}\) *Supra* note 11.
\(^{310}\) Hart, *supra* note 8 at 128; and *supra* note 116.
\(^{311}\) *Supra* note 95.
\(^{312}\) *Supra* notes 108-110, 113.
\(^{313}\) Contra Xiaofeng & Xizhong, *supra* note 25 at 145 (“The two ‘due regards’ do not mean that when conflicts arise between the coastal State exercising its rights and another State exercising its freedoms, the two parties have equal rights… To be more specific, the actions of other States should be subject to the sovereign rights and the exclusive jurisdiction of the coastal States. Logically speaking, when resolving conflicts between these two categories of rights, the sovereign rights and exclusive jurisdiction of the coastal States should be considered superior.”), cited in Kraska, *supra* note 25 at 84; and contra Proelss, *supra* note 9 at 93 (“[T]he approach of balancing priorities depending on the circumstances of the individual case at hand arguably does not sufficiently take into account the evolution, ratio and practical relevance of the pertinent provisions of the Convention.”), and 98 (“There are mainly two imaginable ways of implementing the shift in emphasis in favor of the coastal state. The first one would be to accept an implicit hierarchy between the sovereign rights of the coastal state and the rights of other states, the second a rebuttable mandatory presumption in favor of the coastal state.”).
\(^{314}\) Contra Kraska, *supra* note 25.
However, the Tribunals in the *Arctic Sunrise Arbitration* and the *South China Sea Arbitration* each observed the mutuality of this duty in the EEZ without expressing any view on coastal or flag state paramountcy in that relationship.\(^{315}\)

The second conclusion is that the shift to the less open-textured term “due regard” in LOSC Articles 56(2), 58(3), and 87(2) is a manifestation of the shift to a post-*laissez-faire* “new” legal order of the seas under and after LOSC, the character of which as a whole is more heavily normative than the traditional freedoms of the seas regime.\(^{316}\) The legislative history of these provisions supports this conclusion, notwithstanding that “reasonable regard” and “due regard” are often equated, and notwithstanding that the “freedoms” definition in LOSC Article 87 (rather than its provision for “due regard”) has been emphasized as the expression of this development in the high seas.\(^{317}\) Practically speaking, locating this shift also in the duty of “due regard” means foregrounding the following.

First, the duty of “due regard” is a treaty obligation if not also part of customary law,\(^{318}\) and the change from a “reasonableness” standard to an obligation that is “due” is a shift to a more strongly normative register.\(^{319}\) “Due regard” in the EEZ is a point of

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\(^{315}\) Arctic Sunrise Award, *supra* note 15 at paras. 227-230; SCSA Award, *supra* note 15 at para 742.

\(^{316}\) Galdorisi & Kaufman, *supra* note 9 at 256 (“In many ways, [LOSC] is much more than a piece of paper—to the majority of the community of nations it represents a commitment to the rule of law…”).

\(^{317}\) UN Legislative History Article 87, *supra* note 27 at 6 (“[LOSC] Article 87… modified in some important respects the relevant provisions of the [1958 Convention on the High Seas]. The change lies in the very definition of the ‘freedom of the high seas’ as set forth in article 87 in that it reflects the transition from the traditional approach of considering freedom of the high seas in an open-ended fashion to the new approach which ties the freedom of the high seas to the new order of the oceans as embodied in [LOSC].”).

\(^{318}\) Belsky, *supra* note 9 at 187 (“Whatever might be said about the nature of comity and its relationship with ‘due regard’, UNCLOS elevates ‘due regard’ to a positive command of law in its provisions.”); Chagos Award, *supra* note 15 at para. 518 (“In contrast to Article 2(3), the English text of Article 56(2) leaves no doubt that the provision imposes an obligation on the coastal State…”).

\(^{319}\) *Supra* notes 171, 178, 179, 189.
systemic integration between the EEZ regime and the international law system—
it expressly links to and balances norms, including norms external to the LOSC, and:

… it is precisely because LOSC seeks a due balance between the rights and
duties of the coastal State and those of other States [in the EEZ] that both
categories are subject to specific mechanisms of the settlement of disputes’
(emphasis added).

LOSC Article 297 establishes the relationship between rights and duties in the EEZ and
compulsory procedures entailing binding decisions under the LOSC. Under Article
297(1)(a), an alleged coastal state violation of a flag state right held under Article 58 is
subject to the compulsory procedures. Likewise, under Article 297(1)(b), an alleged flag
state violation of the LOSC, coastal state law or other rules of international law not
incompatible with the LOSC while exercising those rights is subject to the compulsory
procedures. Implicitly, “due regard”, the balancing mechanism of these interests, is part of
this normative relationship.

In practical terms, specific claims of the entitlements and duties balanced by “due
regard” provide the specific character of the obligation of “due regard”—or, the balance
due—in any particular case. In the adjudicated disputes considered in this thesis,
determinations arising from such claims have been as follows:

(a) a coastal state’s extension of its customs law into its EEZ outside of the scope of
Article 60(2) was determined to be contrary to the LOSC, implicitly a violation of
“due regard” under Article 56(2);
(b) a coastal state’s failure to consult regarding the establishment of an MPA in the EEZ was determined to be a breach of good faith under Article 2(3) contrary to the LOSC and a breach of “due regard” under Article 56(2), applied together,\(^\text{324}\) (c) the boarding, seizure, and detention of a flag state’s vessel by a coastal state in its EEZ with no basis in law was determined to be contrary to the LOSC, a breach of “due regard” under Article 56(2),\(^\text{325}\) and (d) a flag state’s organization and coordination of unlawful fishing activities by its nationals in another state’s EEZ was determined to be a breach of the flag state’s duty of due diligence (under international law) to ensure its nationals comply with a coastal state’s fishing laws established under LOSC Article 62(4) and a breach of the duty of “due regard” under Article 58(3).\(^\text{326}\)

In other words, the rights and duties to which “due regard” has been applied in these adjudications have included rights based on bilateral undertakings external to the LOSC (in the *Chagos Marine Protected Area Arbitration*), rights determined to be within the scope of freedom of navigation (protest at sea, in the *Arctic Sunrise Arbitration*), and the state duty of due diligence under international law with respect to conduct of its nationals (in the *South China Sea Arbitration*).\(^\text{327}\)

Second, “due regard” incrementally reduces the scope of non-actionable injurious conduct from that under the standard of “reasonable regard”. The traditional “reasonableness” standard is an expression of *laissez-faire* freedoms of the high seas. Post-*laissez-faire*, the limit is necessarily not only harder but narrower, insofar as “due regard” does not refer to a subjective, unilateral protection of singular state interests but to an objectively specific (on application) positive interaction with another other party’s interests and with those of the international community as well. This is manifestly so in the EEZ,

\(^{324}\) Chagos Award, *supra* note 15 at paras. 520-521, 534, 547.

\(^{325}\) Arctic Sunrise Award, *supra* note 15 at paras. 330, 333.

\(^{326}\) SCSA Award, *supra* note 15 at paras. 743-744, 755-756.

\(^{327}\) Timo Koivurova, “Due Diligence” in *Max Planck Encyclopedia of Public International Law*, online: Oxford Public International Law <www.mpepil.com> at para 46 ("Due diligence obligations play an important role in the field that was excluded from the State Responsibility Project for codification reasons, and that formed the classical focus of due diligence: responsibility of a State for violations of international law by private persons under its exclusive jurisdiction and control... [Such cases] are of increasing importance given that the globalizing world is shifting societal power to non-State actors.“ (emphasis added)).
which shifted that zone from the traditional system of uncorroborated freedoms to a structure of rights and correlative duties:

The multifunctional character of the EEZ and the applicability of modified *mare clausum* and *mare liberum* approaches to different problems in the same area of the zone necessitated a detailed a detailed articulation not only of coastal and other states’ rights, but also of obligations corresponding to these rights.\(^\text{328}\)

In circumstances of concurrent entitlements in the EEZ, the *Chagos* Tribunal noted that the obligation is a positive duty that will require at least some consultation in most cases.\(^\text{329}\)

This shift may be more incremental and indeterminate in the high seas regime than in the EEZ, insofar as “due regard” under Article 87(2) in part balances “freedoms” rather than rights and correlative duties. Nevertheless, the high seas regime is a zone of increasingly competing entitlements (including rights in the deep seabed) and shares its normative vocabulary (“due regard”) and character with the comprehensive, post-*laissez-faire* legal order of which it is necessarily an integrated part.\(^\text{330}\)

In practical terms, the consequence of this interpretation of the duty of “due regard” is that in the high seas, as in the EEZ, “due regard” would never be constrained merely to the matter of a state’s subjective, unilateral protection of its interests.\(^\text{331}\)

Finally, the interpretation of “due regard” as a post-*laissez-faire* balancing duty may have practical consequences with respect to its application. As noted, the interpretation of “due regard” offered in this thesis concludes among other things that the duty of “due regard” encompasses not only a mutual duty between competing states to balance bilaterally their activities in the EEZ but also a duty of “due regard” to the interests of the international community.\(^\text{332}\)

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\(^{328}\) Kwiatkowska, *supra* note 20 at 5.

\(^{329}\) Id. at paras. 518-9, 535.

\(^{330}\) See Koskenniemi, *From Apology, supra* note 12 at 44 (“While… the meaning of the “High Seas” used to be a relatively clear one, the introduction of the [EEZ] as well as other zones of special jurisdiction has made it increasingly uncertain.”); Scott, *supra* note 20 at 12 (“Closest to the usual meaning of the term ‘regime’ as applied to the [LOSC] would … be each separate part of the [LOSC]: the continental shelf regime, the dispute settlement regime, and so on. And yet none of these legal regimes can be treated as separate regimes if we have any sense of the history of this Convention or of the unity of the final legal document.”).

\(^{331}\) Chagos Award, *supra* note 15 at paras 476-477.

\(^{332}\) See Gavouneli, *Functional Jurisdiction, supra* note 10 at 69 (“There is no doubt that the general thrust of articles 56 and 58 of the [LOSC] remains attached to a balance of interests, which would involve a general obligation to be aware of and take into consideration the interests of the other party and a specific obligation to take any decision with the third party interests included in the calculation.”).
community interests must now also be identified with ecology, including climate change mitigation.\textsuperscript{333} Consequently, circumstances relevant to any specific application of the duty of “due regard” may now always include (howsoever to be weighted) the worldly reality of global ecological imperatives—in order that this balancing test be a calculus of “the most efficient interest-fulfilment for all”\textsuperscript{334}

\textsuperscript{333} See Koivurova, \textit{supra} note 327 at para 3 (“A good example of the trend [in the development of state due diligence obligations] in customary law is what is known as the no harm principle/rule, which broadens States’ due diligence obligations even towards the environment of the global commons.”); Scheiber & Caron, \textit{supra} note 23 at 8 (“The devastation of global fisheries had gone forward despite the vesting of full jurisdiction in the coastal states over fishery management in their EEZs, despite efforts at limiting entry, despite the general obligations set forth in the [LOSC], and, finally, despite a series of initiatives by the UN Food and Agriculture Organization (FAO) and new multilateral agreements…”); Heather N Nicol & Lassi Heininen, “Human security, the Arctic Council and climate change: competition or co-existence?” (2014) 50 Polar Record 80 at 80 (“No longer does security mean military security, that is protection from potential enemy troops. Airpower and missiles massing on polar fronts, as was the popular image of the Arctic in the cold war. Now, if current discourses on climate change are reflective, there is equal, or even greater concern about the survival of polar bears and other Arctic fauna and resulting (due to climate change) food shortages for both Canada’s and Greenland’s Inuit and the potential environmental impact of oil rigs drilling for this valuable resource in coastal shelves of the Arctic Ocean, or leaky hulls and petroleum spills in fragile icy northern waters.”). See also Saiga 2 Judgment, \textit{supra} note 15 at para. 131: Guinea submitted among other defences that its application of its customs law in its EEZ was in relation to fisheries and environmental interests, on the basis of a “public interest” principle—however, ITLOS noted that the character of this principle as submitted was in respect of that which would “affect [Guinea’s] economic ‘public interest’ or entail ‘fiscal losses’ for it” (emphasis added), a principle it found incompatible with the rights of the coastal state in the EEZ under Article 56 and 58.

\textsuperscript{334} Koskenniemi, \textit{From Apology}, \textit{supra} note 12 at 49. See also Oxman, “The Territorial Temptation”, \textit{supra} note 20 at 843 (“The strongest [challenge to the balance of the EEZ regime] might well be the environmental challenge”); Emily Barritt, “Conceptualising Stewardship in Environmental Law” (2014) 26:1 Journal of Environmental Law 1 at 9, 20 (stewardship, while viewed as a “trust”, is not necessarily “exercised with due account taken of human… present and future… and ecological needs”); Treves, “UNCLOS at Thirty”, \textit{supra} note 23 at 60 (“[T]he reasons for discussing and developing ocean governance with regard to activities that have a general interest do not stop at the 200-mile line. Concepts such as the ecosystem approach, concerns such as those linked to climate change and its effect on the oceans, or to the preservation of marine biodiversity, are global in character, or not limited to the high seas, as is the rational management of many fisheries.”); Long, \textit{supra} note 7 at 181 (“[I]t should not be forgotten that there are many implicit references to eco-system-based management in the LOSC including the preamble, which clearly acknowledges that the problems of ocean space are closely interrelated and need to be considered as a whole.”); Gavouneli, \textit{Functional Jurisdiction}, \textit{supra} note 10 at 85 (“Environmental concerns, including obligations of prevention, were certainly incorporated into the [LOSC]…”); and, in the context of provisional measures: “The second element [in Article 290 para 1] constitutes a novelty introduced by the [LOSC]. Being the first comprehensive global environmental treaty that it is, it was appropriate for it to recognise the intrinsic value of the environment and this allow for the possibility of prescribing provisional measures in cases where serious harm to the marine environment may be at stake.”); Richard Barnes, “The Law of the Sea Convention and the Integrated Regulation of the Oceans” in David Freestone ed, \textit{The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas} (Leiden: Martinus Nijhoff, 2013) 185 at 185 (“[I]s it meaningful to talk of a legal duty to adopt an integrated approach?”).
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