The International Tribunal for the Law of the Sea

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Chapter Four

The International Tribunal for the Law of the Sea

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A. Overview

1. Essential Information

Established within the framework of the United Nations Convention on the Law of the Sea (UNCLOS) (1982),¹ the International Tribunal for the Law of the Sea (ITLOS)² is a permanent judicial body, competent to adjudicate disputes arising from the interpretation or application of the said Convention.³ In some specific circumstances, it can render advisory opinions. It is operational only since August 1996, following the entry into force of UNCLOS.⁴ Seated in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany, the Tribunal is governed by its Statute set out in Annex VI of UNCLOS, and by Part XV and some provisions in Part XI section 5 of the Convention. The Tribunal is open to State parties to the Convention, amounting to 161 (162 with the European Union) in June 2011,⁵ but also in some specific circumstances, to international organizations, individuals, and corporations.

The Tribunal is composed of twenty-one judges elected by the State parties⁶ for renewable nine-year terms “from among persons enjoying the highest reputation for fairness and integrity and of recognized competence

³ ITLOS Statute, Art. 284, p. 130.
⁴ It entered into force on Nov. 16, 1994.
⁶ ITLOS Statute, Art. 3 § 2.
in the field of the law of the sea." The basic qualifications for judges are prescribed in Article 2 of the Statute. First, the judge must possess expertise in the international law of the sea. Second, the judge must be fair and impartial. Each regional group\(^8\) of the General Assembly of the United Nations has to be represented by at least three members.\(^9\) Every party to a dispute before the Tribunal, or a Chamber, is also entitled to have a member of its nationality or choice on the bench.\(^10\) In case there is no such judge, a party may appoint a judge \textit{ad hoc} chosen independently of his nationality,\(^11\) who will participate on an equal footing with the other judges.\(^12\) The Tribunal elects a President and a Vice-President for a mandate of three years.\(^13\) The Statute has established strict rules to avoid any conflict of interest. Article 8 declares for example that no judge may participate in a case in which he or she was previously involved as a lawyer, as a member of another dispute settlement body, or in any other capacity. The President of the Tribunal has the power to bring doubts pertaining to the previous involvement of a judge before the Tribunal.\(^14\) The Tribunal shall then decide about the issue by a majority of the other judges.\(^15\) If a judge is no longer in conformity with the conditions for service prescribed in the Statute, the other judges may decide unanimously to remove him or her from office.\(^16\)

Cases before the Tribunal are usually heard in plenary, requiring a quorum of eleven judges.\(^17\) The Statute also allows parties to choose special chambers that are composed of a smaller number of judges.\(^18\) ITLOS has so far established three such chambers to address problems of fisheries, marine

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\(^7\) ITLOS Statute, Art. 2 § 1.

\(^8\) These groups are African, Asian, Eastern European, Latin American and Caribbean, and Western European and other States.

\(^9\) ITLOS Statute, Annex VI, Art. 3 § 2.

\(^10\) \textit{Id.}, Annex VI, Art. 17.

\(^11\) \textit{Id.}


\(^13\) ITLOS Statute, Art. 12 § 1.

\(^14\) ITLOS Statute, Art. 8 § 4; ITLOS Rules, Art. 18.

\(^15\) \textit{Id.}

\(^16\) ITLOS Statute, Art. 9; ITLOS Rules, Art. 7.

\(^17\) ITLOS Statute, Art. 13 §§ 1, 3.

\(^18\) ITLOS Statute, Art. 15; ITLOS Rules, Arts. 28–31.
environment, and marine delimitation. In addition, a Chamber of Summary Procedure has been established; it can deal on a summary basis with any case that can be submitted to the full Tribunal.\textsuperscript{19} This chamber is composed of five members including the President and the Vice President.\textsuperscript{20} The Statute also provides for a Seabed Disputes Chamber composed of eleven judges elected for renewable three-year terms by a majority of the judges of the Tribunal and among them.\textsuperscript{21} It is the entity with the primary adjudicatory role in the Area as foreseen in Part XI of UNCLOS (The Area).\textsuperscript{22} Finally, the Tribunal can establish \textit{ad hoc} chambers for particular cases at the request of the parties.\textsuperscript{23} These chambers are composed of members selected by the Tribunal’s judges, with the approval of State parties.\textsuperscript{24} The Seabed Disputes Chamber may also establish such \textit{ad hoc} chambers if requested by the State parties;\textsuperscript{25} the latter are composed of three members elected by the Seabed Disputes Chamber, with the agreement of the parties.

Following a request of a party to a case or acting \textit{proprio motu}, the Tribunal may appoint scientific and technical experts.\textsuperscript{26} These experts should be independent and enjoy the highest reputation for fairness, competence, and integrity.\textsuperscript{27} Once appointed, the expert will sit on the bench during the proceedings, but will not be able to vote. Such a request must be made by a party no later than with the closure date of the written proceedings.\textsuperscript{28} The Tribunal can also request an inquiry or an expert opinion after hearing the parties.\textsuperscript{29} The parties may present expert opinions before the Tribunal, as part of the oral proceedings,\textsuperscript{30} and question expert witnesses under the control of the President.\textsuperscript{31}

\textsuperscript{19} ITLOS Statute, Art. 15 \& 3; ITLOS Rules, Art. 28.
\textsuperscript{20} \textit{id.}
\textsuperscript{21} ITLOS Statute, Art. 35 \& 3; ITLOS Rules, Art. 23.
\textsuperscript{22} ITLOS Statute, Art. 36.
\textsuperscript{23} ITLOS Statute, Art. 15 \& 2. \textit{See, for example, the ad hoc chamber formed for the Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=6&lang=en#application (last visited Apr. 11 2011).}
\textsuperscript{24} ITLOS Statute, Art. 15 \& 2; ITLOS Rules, Art. 30.
\textsuperscript{25} ITLOS Statute, Art. 188 \& 1(b); ITLOS Rules, Art. 36.
\textsuperscript{26} UNCLOS, Art. 289; ITLOS Rules, Art. 15.
\textsuperscript{27} ITLOS Rules, Art. 15 \& 3.
\textsuperscript{28} ITLOS Rules, Art. 15 \& 1.
\textsuperscript{29} ITLOS Rules, Art. 82 \& 1.
\textsuperscript{30} ITLOS Rules, Art. 78.
\textsuperscript{31} ITLOS Rules, Art. 80.
2. Jurisdiction

The Tribunal is open to State parties to UNCLOS,\textsuperscript{32} as well as to other States and entities in specific circumstances.\textsuperscript{33} State parties to UNCLOS may submit their disputes to ITLOS by agreement or through general or special declarations of acceptance to be made at any time under the "choice of procedure" clause.\textsuperscript{34} The Tribunal has compulsory jurisdiction over State parties to UNCLOS with respect to certain matters – such as requests for a prompt release of vessels and crews – should the two parties to the dispute fail to agree upon an alternative forum and should one of the parties submit the dispute to ITLOS.\textsuperscript{35} ITLOS is also open to State parties to a treaty other than UNCLOS that is related to its purposes and confers jurisdiction to ITLOS or to State parties to an agreement which provides for the settlement of disputes in relation to its interpretation or application before ITLOS.\textsuperscript{36} The jurisdiction \textit{ratione personae} of the Seabed Disputes Chamber includes disputes between a State party and the International Seabed Authority, established to administer the seabed area, as well as disputes between parties to a contract governing activities in the seabed area and disputes between the Authority and prospective contractors.\textsuperscript{37}

The Tribunal has jurisdiction \textit{ratione materiae} over any dispute concerning the interpretation and application of UNCLOS which is submitted to it in accordance with the Convention.\textsuperscript{38} Disputes concerning the interpretation and application of international treaties, other than UNCLOS, may be submitted to the Tribunal if such treaties relate to the object and purpose of UNCLOS.\textsuperscript{39}

\textsuperscript{32} ITLOS Statute, Art. 20 \S 1.

\textsuperscript{33} ITLOS Statute, Art. 20 \S 2.

\textsuperscript{34} UNCLOS, Art. 287 \S 1. \textit{See} the declarations of acceptance at: \url{http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec} (last visited Apr. 11 2011).

\textsuperscript{35} ITLOS Statute, Art. 292 \S 1.

\textsuperscript{36} UNCLOS, Art. 288 \S 2; ITLOS Statute, Art. 20 \S 2 and Art. 21. Thus, for example, the Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement provides that "(t)he provisions relating to the settlement of disputes set out in Part XV of the Law of the Sea Convention apply \textit{mutatis mutandis} to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention." \textit{See} U.N. Agreement for the implementation of the Provisions of the UN Convention on the Law of the Sea of Dec. 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, Art. 30, Dec. 5, 1995, U.N. Doc A/CONF 164/37.

\textsuperscript{37} UNCLOS, Art. 187.

\textsuperscript{38} \textit{Id.} Art. 288 \S 1; ITLOS Statute, Art. 21.

\textsuperscript{39} \textit{Id.} Art. 288 \S 2; ITLOS Statute, Art. 21.
The provisions relating to the obligations of State parties to the Convention to settle their disputes by peaceful means are set out in section 1 of Part XV of UNCLOS. Section 2 sets out compulsory procedures entailing binding decisions. They apply where no settlement has been reached. ITLOS is one out of the four different dispute settlement mechanisms foreseen by the Convention. Article 287 of UNCLOS provides that State parties may select recourse to ITLOS, to the International Court of Justice, arbitration (Annex VII of UNCLOS), and special arbitration (Annex VIII of UNCLOS).

Favored by some States, arbitration was included in UNCLOS as an alternative to the rigidity of a standing tribunal and as a means to conduct their business expeditiously. According to Annex VII of UNCLOS, any party to a dispute may submit the dispute to arbitration by written notification addressed to the other party or parties to the dispute. An arbitral tribunal composed of five members shall be constituted by the State parties to adjudicate the dispute.

When the parties to a dispute have accepted the same dispute settlement mechanism, the latter will be resorted to settle the dispute. In case the parties have selected different procedures or have not selected a procedure in application of Article 287, the dispute will be submitted to arbitration.

The applicability of compulsory procedures suffers from limitations and exceptions provided in Part XV section 3. It must be noted that, although certain categories of disputes may be excluded from the compulsory dispute settlement procedure under Part XV, such disputes may nonetheless be submitted to the Tribunal by agreement of the parties to the dispute. The Tribunal has compulsory jurisdiction over all State parties to UNCLOS in two categories of cases: in the case of applications for the prompt release of a vessel and its crew and when a party to a dispute wishes to request provisional measures.

The Seabed Disputes Chamber has exclusive jurisdiction over some particular cases. They include disputes between States over the interpretation or application of Part XI of UNCLOS (The Area) and related Annexes, subject to the possibility of the parties to a dispute submitting the dispute to a special

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41 UNCLOS, Annex VII, Art. 1.
42 Id. Art. 3.
43 UNCLOS, Art. 299.
44 Id. Art. 292.
45 Id. Art. 290 §§ 1, 5.
chamber,\textsuperscript{46} or disputes between a State party and the Authority over its acts which are allegedly in excess of jurisdiction, or misuse of power.\textsuperscript{47}

In principle, there is no time limit for reference of disputes to the Tribunal or the Seabed Dispute Chamber, except in cases where the Tribunal has compulsory jurisdiction. As an example, a request for prompt release of vessels and its crews can be submitted by the flag State of the detained vessel only if the parties failed to agree on an alternative forum within ten days from the date of detention.\textsuperscript{48}

Both the Tribunal and the Seabed Dispute Chamber can render advisory opinions. One may identify three different procedures: advisory opinions of the Seabed Disputes Chamber requested by the Assembly or the Council of the International Seabed Authority;\textsuperscript{49} advisory opinions delivered by the Chamber in the context of commercial arbitration; and advisory opinions rendered by the Tribunal in accordance with Article 138 of the Rules of the Tribunal. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. The Tribunal shall apply mutatis mutandis provisions for advisory opinions rendered by the Seabed Disputes Chamber.\textsuperscript{50}

3. Procedural Overview

a. Instituting Proceedings

Disputes before the Tribunal and the Seabed Dispute Chamber are submitted either by written application or by notification of a special agreement, addressed to the Registrar.\textsuperscript{51}

b. Languages

The official languages of the Tribunal are English and French.\textsuperscript{52} This entails that all pleadings must be submitted in one or both of these languages.\textsuperscript{53}

\textsuperscript{46} Id. Art. 187(a) § 1; Art. 188 § 1(a).
\textsuperscript{47} Id. Art. 187(b) § 2; Art. 189.
\textsuperscript{48} Id. Art. 292 § 1.
\textsuperscript{49} Id. Art. 191. The Seabed Disputes Chamber has rendered its first advisory opinion on Feb. 1, 2011 following the request of the International Seabed Authority on the case n°17, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.
\textsuperscript{50} ITLOS Rules, Art. 138 § 2.
\textsuperscript{51} ITLOS Statute, Art. 24 § 1.
\textsuperscript{52} Id. Art. 43.
\textsuperscript{53} Id. Art. 64 § 1.
However, the faculty is given to the parties to plead and to submit document in another language than the official languages. In both situations, a translation shall be submitted to the Tribunal. The same reasoning applies to the hearings, as all speeches or statements made or evidence given during the hearings in any unofficial language shall be interpreted into one of the official language. A decision of the Tribunal may be translated into any language if one of the parties to the dispute requests it, as long as it is one of the official languages of the United Nations.

c. Preliminary Proceedings and Objections
The Tribunal decides, at the request of the parties or proprio motu, whether a claim constitutes an abuse of legal process or whether prima facie it is well founded. If one of such situations occurs, it shall take no further action in the case.

Preliminary objections to the jurisdiction of the Tribunal or to the admissibility of the application shall set out the facts and the law on which the objections are based. They shall be submitted to the Tribunal in writing within ninety days from the institution of proceedings.

d. Provisional Measures
The Tribunal has the power to prescribe provisional measures. The conditions related to provisional measures are laid down in Article 290 of UNCLOS. A court or a tribunal referred to in Article 287 of UNCLOS may prescribe provisional measures if “appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.” The Tribunal must first determine that it has a prima facie competence over the dispute and that the measures requested are appropriate under the given circumstances. Such a request for provisional measures can be presented at any time during the course of proceedings. It may revoke or modify a provisional measure “as

54 Id. Art. 64 §§ 2, 3.
55 Id.
56 Id. Art. 85 § 1.
57 Id. Art. 64 § 4.
58 UNCLOS, Art. 294 § 1; ITLOS Rules, Art. 96 § 1.
59 Id.
60 ITLOS Rules, Art. 97 § 2.
61 Id. Art. 97 § 1.
62 UNCLOS, Art. 290 § 1; ITLOS Statute, Art. 25 § 1.
63 ITLOS Rules, Art. 89 § 1.
soon as the circumstances justifying it have changed or ceased to exist.\textsuperscript{64} If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, the provisional measures shall be prescribed by the chamber of summary procedure.\textsuperscript{65} The Seabed Dispute Chamber has also the power to prescribe provisional measures under Article 290 of UNCLOS.

It must first be determined that the Chamber has a \textit{prima facie} competence under Part XI of UNCLOS.

e. \textit{Proceedings}

The proceedings before the Tribunal are divided in a written and an oral phase. All proceedings shall be conducted without unnecessary delay or expense.\textsuperscript{66} The written phase consists of the submission of a memorial and of a counter-memorial from the Applicant and from the Respondent respectively.\textsuperscript{67} The parties must append supporting documents to their submissions.\textsuperscript{68} The Tribunal may authorize or direct the parties to file a reply, on behalf of the Applicant, or a rejoinder, on behalf of the Respondent, if the parties agree to such a procedure, or if the Tribunal decides that such additional submissions are necessary. The oral phase takes place after the closure of the written proceedings and the initial deliberations at a date fixed by the Tribunal. The oral statements have to be as succinct as possible within the limits of what is requisite for the adequate presentation of that party’s contentions at the hearing, and should focus on issues which are still a matter of dispute between the parties after the written pleadings.\textsuperscript{69} Following the conclusion of the last statements made by a party at the hearing, a final submission will be read and a copy of the text must be filed with the Tribunal and transmitted to the other party.\textsuperscript{70}

f. \textit{Permission to Intervene}

A State party can also request permission to intervene as a third party to a case.\textsuperscript{71} If the Tribunal considers that this third party has an interest of a legal nature and that it may be affected by the decision of the Tribunal, it can permit this party to intervene independently of the acceptance of the jurisdiction of the Tribunal under Article 287 of UNCLOS.\textsuperscript{72} Intervention of

\textsuperscript{64} UNCLOS, Art. 290 § 2.
\textsuperscript{65} ITLOS Statute, Art. 25.
\textsuperscript{66} Id. Art. 49.
\textsuperscript{67} Id. Art. 60 § 1.
\textsuperscript{68} Id. Art. 44 § 2; Art. 63.
\textsuperscript{69} Id. Art. 75 § 1.
\textsuperscript{70} Id. Art. 75 § 2.
\textsuperscript{71} ITLOS Statute, Art. 31 § 1.
\textsuperscript{72} ITLOS Rules, Art. 99 § 3.
a third party is also possible in cases which raise general questions of treaty interpretation or application on the basis of Article 32 of the ITLOS Statute. A State party allowed to intervene by the Tribunal will receive copies of pleadings and documents and will be entitled to participate in the written and oral pleadings, but will not be able to appoint an ad hoc judge.\textsuperscript{73}

g. Amicus Curiae
Amicus curiae briefs can be submitted before the Tribunal by any intergovernmental organization that is not a party to a case.\textsuperscript{74} However, they must be submitted prior to the end of written pleadings.\textsuperscript{75} The Tribunal may request information or clarifications on information already supplied by the international organization. Furthermore, in all cases where an organization's constituent instrument or a treaty adopted under its auspices is in question, the Tribunal will invite the concerned organization to submit written observations and/or participate in the oral proceedings.

h. Decision
The decision – to be adopted by a majority of the judges – is final.\textsuperscript{76} The judgment shall be read at a public sitting of the Tribunal and becomes binding on the parties on the day of the reading.\textsuperscript{77} Parties to a dispute may make a request for interpretation to the Tribunal with respect to the meaning or scope of the judgment.\textsuperscript{78} A request for revision of the judgment can be made if based on the discovery of a fact of such a nature as to be a decisive factor and which was unknown to the Tribunal and to the party requesting a revision when the judgment was given.\textsuperscript{79}

i. Expenses
The expenses of the Tribunal are borne by State parties to UNCLOS and by the International Seabed Authority.\textsuperscript{80} The Tribunal will fix the amount that must be paid in the case a party to a dispute is not the International Seabed Authority or a State party to UNCLOS.\textsuperscript{81}

\textsuperscript{73} Id. Arts. 103, 104.
\textsuperscript{74} Id. Art. 84.
\textsuperscript{75} Id.
\textsuperscript{76} ITLOS Statute, Art. 29 \S 1.
\textsuperscript{77} ITLOS Rules, Art. 124 \S 2.
\textsuperscript{78} ITLOS Statute, Art. 33 \S 3.
\textsuperscript{79} ITLOS Rules, Art. 127 \S 1.
\textsuperscript{80} ITLOS Statute, Art. 19 \S 1.
\textsuperscript{81} Id. Art. 19 \S 2.
j. Financial Assistance

Financial assistance may be provided to State parties to UNCLOS. A “trust fund” has been established by the UN Secretary-General to provide financial assistance to State parties to the Convention for expenses incurred in connection with cases submitted, or to be submitted, to the Tribunal, including its Seabed Disputes Chamber and any other Chamber. An application for assistance from the Fund may be submitted by any State party to the Convention. The application should describe the nature of the case which is to be, or has been, brought by or against the State concerned and should provide an estimate of the costs for which financial assistance is requested. At the end of the procedure, the Secretary-General will provide financial assistance from the Fund on the basis of the recommendations of a panel of experts.

B. Review of the Case Law

As of March 31, 2011, eighteen cases have been brought before the Tribunal. Since the first application instituting a case before the Tribunal, in November 1997, fourteen cases have been resolved and two were discontinued. Two cases are still on the docket at the time of writing. With respect to arbitral proceedings under Annex VII, eight proceedings were instituted and two are still pending.

1. Judgments on Provisional Measures

The Tribunal has received so far five requests for provisional measures. According to UNCLOS Article 290(5) the Tribunal is also the “default” tribunal with respect to provisional measures when the parties cannot agree on another proceeding. This procedure allows a party to a case, which has been instituted before an arbitral tribunal under Annex VII of UNCLOS, to file for interim measures before the Tribunal, pending the constitution of the arbitral tribunal. In this situation, any court or tribunal agreed upon by

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82 General Assembly Resolution 55/7, Annex 1.
83 Id.
84 Id.
86 These cases are Case n°2 – The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea); Case n°3 and 4 – Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan); Case n°10, The MOX Plant Case (Ireland v. United Kingdom); and Case n°12 – Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), available at http://www.itlos.org/start2_en.html.
87 Id. Art. 290 § 5.
the parties or, failing such agreement, within two weeks from the date of the request for provisional measures, the Tribunal or, with respect to activities in the Area the Seabed Disputes Chamber, may prescribe, modify, or revoke provisional measures in accordance with Article 290 of UNCLOS if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

The first case in which the Tribunal considered a request for the prescription of provisional measures was the M/V Saiga case. This dispute was submitted initially to the Tribunal under Article 290(5), since the merits of the dispute were then being submitted to an arbitral tribunal to be constituted under Annex VII of UNCLOS. However, the parties later agreed to submit the merits of the dispute to ITLOS. After the Tribunal had accepted the case, this request was converted from an application under Article 290(5) to a request under Article 290(1).

The request for provisional measures was introduced in relation to events that happened after the Tribunal’s judgment, deciding the prompt release of a vessel, the M/V Saiga. Indeed, after the release of the M/V Saiga by the Guinean Authorities in accordance with the Tribunal’s judgement of December 4, 1997, Guinea prosecuted the Master of this vessel for a violation of Guinean customs laws, which led to a Guinean court imposing a fine of approximately U.S.$15,000,000 and ordering the confiscation of the vessel and sentencing the Master to six months of imprisonment. The Tribunal delivered its order on March 11, 1998 demanding that Guinea refrain from taking or enforcing any judicial or administrative measures against the vessel and its crew, its owners or operators.

The Southern Bluefin Tuna cases were submitted under Article 290(5) of the Convention, and the measures prescribed were stated to be binding only until the constitution of an arbitral tribunal under Annex VII. The requests for provisional measures were introduced by Australia and New Zealand against Japan concerning the conservation of Southern Bluefin Tuna stocks. In an order dated August 27, 1999, the Tribunal prescribed five provisional measures. It demanded inter alia that the parties to the dispute refrain from conducting an experimental fishing programme involving the catching of Southern Bluefin Tuna, and ordered the parties each to submit an initial report on the steps taken or proposed to be taken in order to ensure prompt

88 Case n°2 – The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea).
89 See infra, p. 13.
91 Id.
compliance with the measures prescribed.\textsuperscript{92} It alluded to the precautionary principle in holding the view that the parties should act with “prudence and caution to ensure that effective conservation measures [were] taken to prevent serious harm to the stock of bluefin tuna.”\textsuperscript{93}

The MOX Plant case was also submitted under Article 290(5) of the Convention. The request for provisional measures was introduced by Ireland against the United Kingdom concerning the MOX plant, located at Sellafield, Cumbria, UK. The Tribunal, in its order of December 3, 2001, ordered the exchange of further information between the parties with regard to possible consequences for the Irish Sea arising from the commissioning of the MOX plant. It required the parties to monitor risks or the effects of the operation of the MOX plant for the Irish Sea, and to devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.\textsuperscript{94}

In Case no. 12, Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), the Tribunal had to decide whether provisional measures were appropriate in the dispute between Malaysia and Singapore. This dispute related to land reclamation activities carried out by Singapore which allegedly breached Malaysia’s rights in and around the Straits of Johor, which separate the island of Singapore from Malaysia. The Tribunal considered that the land reclamation works might have adverse effects on the marine environment in and around the Straits of Johor and ordered (1) provisional measures, including the interdiction for Singapore to conduct its land reclamation in ways that might cause irreparable harm to the rights of Malaysia and (2) the establishment by the parties of a group of independent experts to conduct a study to determine the effects of Singapore’s land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation.\textsuperscript{95} The group of experts was duly constituted and its report formed the basis of a settlement of the dispute entered into in April 2005.\textsuperscript{96}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{92} See Case no. 3 and 4 - Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Order of Aug. 27, 1999, pp. 15–19.
\item \textsuperscript{93} Id. \textsuperscript{97} 77.
\item \textsuperscript{95} Case no. 12 - Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Order of Oct. 8, 2003, \textsuperscript{96} 106.
\end{itemize}
\end{footnotesize}
2. Judgments on Prompt Release of Vessels and Crews

The Tribunal has received nine cases of prompt release of vessels and crews from detention.\textsuperscript{97} All of these cases were introduced by the flag State, or on its behalf, on the basis of compulsory jurisdiction. The Tribunal has jurisdiction over cases of prompt release of vessels from detention either for alleged non-compliance with laws and regulations concerning living resources in the exclusive economic zone that have been adopted by the coastal State in conformity with UNCLOS,\textsuperscript{98} or for pollution of the marine environment.\textsuperscript{99}

Other judicial mechanisms referred to in Article 287 of UNCLOS can exercise jurisdiction over cases on prompt release on the basis of an agreement between the parties. If no such agreement is reached within ten days of detention of the vessel, the flag State may institute the case before a court or a tribunal accepted by the detaining State under Article 287 or on a compulsory basis before the Tribunal.\textsuperscript{100} The flag State can therefore bring the dispute before the Tribunal ten days after the detention, even though the detaining State did not agree with the choice of the Tribunal as the forum to entertain the case. No case of prompt release has so far been instituted before the other courts and tribunals referred to in Article 287 of UNCLOS.

In its first decision, the \textit{M/V Saiga} Case, the Tribunal decided the prompt release of a vessel, flying the flag of Saint Vincent and the Grenadines, which had been arrested by Guinean customs patrol boats in October 1997. The \textit{M/V Saiga} entered Guinea's Economic Exclusive Zone to bunker, i.e. supply fuel oil, fishing vessels "in all likelihood...within the contiguous zone of Guinea."\textsuperscript{101} Guinea arrested the vessel for this activity, claiming that it was smuggling fuel in violation of Guinea's customs laws.\textsuperscript{102} In November 1997, Saint Vincent and the Grenadines instituted proceedings before ITLOS against Guinea, filing an application under Article 292 of UNCLOS and claiming that Guinea failed to comply with the requirements related to

\begin{itemize}
\item \textsuperscript{97} These cases are Case n°1, \textit{The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)}; Case n°5, \textit{The "Camouco" Case (Panama v. France)}; Case n°6, \textit{The "Monte Con­furco" Case (Seychelles v. France)}; Case n°8, \textit{The "Grand Prince" Case (Belize v. France)}; Case n°11, \textit{The "Volga" Case (Russian Federation v. Australia)}; Case n°13, \textit{The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)}; Case n°14, \textit{The "Hoshimaru" Case (Japan v. Russian Federation)}; and Case n°15, \textit{The "Tomimaru" Case (Japan v. Russian Federation)}.
\item \textsuperscript{98} UNCLOS, Art. 73 § 1.
\item \textsuperscript{99} Id. Art. 220 § 7.
\item \textsuperscript{100} Id. Art. 292 § 1.
\item \textsuperscript{101} Case n°1, \textit{The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)}, Judgment of Dec. 4, 1997, § 61.
\item \textsuperscript{102} Id. § 30.
\end{itemize}
prompt release and non-imprisonment as provided for by Article 73. By a vote of twelve to nine, the Tribunal found admissible the application and ordered Guinea to promptly release the vessel and its crew from detention.

3. Pending Cases

As of March 2011, two new cases are pending before the Tribunal. Case n°16 relates to the dispute between the People's Republic of Bangladesh and the Union of Myanmar concerning the delimitation of their maritime boundary in the Bay of Bengal. What is at stake in the delimitation of this maritime frontier between these two countries concerns essentially strong prospects for newly accessible gas in the overlapping claims and also heightened demand for natural gas by the two countries. This dispute has been initially submitted to an arbitral tribunal to be constituted under Annex VII of UNCLOS. However, after both parties had accepted the jurisdiction of the Tribunal, the latter was recognized by the Minister of Foreign Affairs of Bangladesh as "the only forum for the resolution of the parties' dispute." It was entered in the list of cases of the Tribunal on December 14, 2009. After holding consultations with the representatives of the parties, the President has set time limits for the presentation of the memorial and the counter-memorial, which were submitted on July 1 and December 1, 2010 respectively. The written phase should be concluded by July 2011. Both parties have chosen ad hoc judges.

Case n°18 relates to the dispute between Saint Vincent and the Grenadines against Spain concerning the MV Louisa, flying the flag of Saint Vincent and the Grenadines, which allegedly was arrested in February 2006 by the Spanish authorities. According to Saint Vincent and the Grenadines, the MV Louisa was involved in conducting sonar and cesium magnetic surveys on the sea floor of the Bay of Cadiz in order to locate and record indications of oil and methane gas. The applicant claimed that Spain violated several

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103 Case n°16 – Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal; Case n°17 – 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); and Case n°18 – The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain).


106 Id.


108 Id.
Articles of UNCLOS and requested the Tribunal to award compensation for damages caused. These proceedings instituted before the Tribunal included a request for provisional measures under Article 290 para. 1 of UNCLOS. The Tribunal did not find that there was a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute before the Tribunal so as to warrant the prescription of the provisional measures requested by Saint Vincent and the Grenadines. On January 13, 2011, the President of the Tribunal fixed the time limits for the filing of the memorial and counter-memorial in the case.

4. Discontinued Cases

According to Article 105 of the Rules of the Tribunal, the parties have the faculty to notify the Tribunal in writing “that they have agreed to discontinue the proceedings, [...] at any time before the judgment on the merits has been delivered.” The discontinuance will then be recorded in an order of the Tribunal and the Registrar will be directed to remove the case from the list of cases. To date, two cases were discontinued from the Tribunal’s list of cases.

The Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union) was the first, and to date the only, contentious case to be submitted to an ad hoc Special Chamber of the Tribunal formed under Article 15(2) of the Statute of the Tribunal. In January 2001, the parties reached a provisional agreement on the dispute that suspended the proceedings before the Tribunal. After several and successive extensions of the suspension, the case was discontinued at the request of both parties.

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111 ITLOS Rules, Art. 105.
112 Id.
113 See Case n°7 – Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), Order of Dec. 20, 2000.
115 See Case n°7 – Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), Order of Nov. 16, 2009.
The "Chaisiri Reefer 2" Case (Panama v. Yemen) was introduced in July 2001 as an application for the prompt release of the vessel Chaisiri Reefer 2, a fishing boat, arrested by Yemeni coastguard officials for alleged violation of fishery laws. Since an agreement was reached between the parties a few days after the request was made, the case was removed from the list of cases even before the Tribunal could begin working on it.

Although it is indisputable in both cases that the Tribunal only indirectly participated in the settlement of the disputes, it is also very likely that the availability of relief may have helped the parties to reach an out-of-court settlement.

5. Arbitrations Under Annex VII

According to UNCLOS Article 287(3) arbitration under Annex VII is the default means of dispute settlement if a State has not expressed any preference with respect to the means of dispute resolution available under UNCLOS Article 287(1) (and has not expressed any reservation or optional exceptions pursuant to Article 298 of UNCLOS). Furthermore, if the parties have not accepted the same procedure for the settlement of the dispute, arbitration under Annex VII is also the default means of dispute settlement.

Since the entry into force of UNCLOS, eight cases have been instituted under Annex VII. Five of these cases were arbitrated under the auspices of the Permanent Court of Arbitration (PCA). Given the unique role played by the PCA, it is important to recall that the latter and ITLOS have agreed to cooperate with respect to relevant legal and administrative matters. Under the arrangement, the PCA and ITLOS have undertaken to exchange documents,

119 These cases are St. Vincent and the Grenadines/Guinea (Jan. 1998); Australia and New Zealand/Japan (Aug. 1998); Ireland/United Kingdom ("MOX Plant Case") (Nov. 2001); Malaysia/Singapore (July 2003); Barbados/Trinidad and Tobago (Feb. 2004); Guyana/Suriname (Feb. 2004); Bangladesh/India (Oct. 2009 – Pending); and Mauritius/United Kingdom (Dec. 2010 – Pending).
particularly those connected with disputes under Annex VII of UNCLOS, and to explore cooperation in other areas of common concern.  

The Southern Bluefin Tuna case, however, has not been managed by the PCA. It related to disputes between Australia, New Zealand and Japan concerning the control of the stock of the southern bluefin tuna, a species of pelagic fish included in the list of highly migratory species in UNCLOS Annex I. This species is also regulated by the trilateral Convention for the Conservation of Southern Bluefin Tuna (CCSBT) of May 10, 1993.  

On July 15, 1999, after attempts to settle the dispute through the machinery of the 1993 Convention failed, a formal notification and statement of claim were submitted by both countries to Japan in accordance with Annex VII. Requests for provisional measures before ITLOS were also made by Australia and Japan in July 1999. An arbitral tribunal was constituted by the parties and rendered its award on Jurisdiction and Admissibility on August 4, 2000.  

One of the central questions discussed by the arbitral tribunal was whether the dispute fell solely under the CCSBT or whether it also arose under UNCLOS. Japan argued for example that the dispute arose solely under the CCSBT, and that accordingly the arbitral tribunal could not be compelled to arbitrate the merits of the dispute.  

The arbitral tribunal interpreted Article 281 of UNCLOS so as to mean that the compulsory dispute settlement provisions of UNCLOS only applied where the State parties to a dispute had agreed to seek settlement of disputes by peaceful means and no settlement had been reached by recourse to such means; moreover, the agreement between the parties would not exclude any further procedure. Another important point was to determine if the condition of the exchange of views between the parties had been fulfilled. According to Australia, the obligation for the parties to have a full exchange of views on the dispute, foreseen in Article 283(1) of UNCLOS had indeed been satisfied. This view was contested by Japan which declared that “in all the
diplomatic correspondence exchanged between the parties of the dispute, there is no mention of conducting negotiations."\(^{127}\) The arbitral tribunal proved the applicants to be right, given the fact that "negotiations (between the parties) have been prolonged, intense and serious. Since in the course of those negotiations, the Applicants invoked UNCLOS and relied upon provisions of it, while Japan denied the relevance of UNCLOS and its provisions, those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of Article 283."\(^{128}\)

The arbitral tribunal did not agree with Japan which had argued that the dispute solely concerned the CCSBT.\(^{129}\) The tribunal held that a dispute could arise under more than one treaty. However, it agreed with Japan's argument that a provision of the CCSBT excluded compulsory jurisdiction over disputes arising both under this convention and the UNCLOS. It held that in this case the same States were grappling not with two separate disputes but with what in fact was a single dispute arising under both Conventions, and that it "would be artificial"\(^{130}\) to find that the dispute arising under the UNCLOS was distinct from the dispute that arose under the CCSBT.

The arbitral tribunal thus decided that it was without jurisdiction to decide on the merits of the case and that the provisional measures decided by ITLOS were revoked as from the day of the signature of the award. The arbitral tribunal also indicated that "the revocation of the Order for provisional measures does not mean that the parties may disregard the effects of that Order or their own decisions made in conformity with it."\(^{131}\) Following the ITLOS order, a scientific research program was established and an agreed settlement of the dispute reached and announced by the Australian Government in May 2001.\(^{132}\)

The Mox Plant case gave rise as well to arbitral proceedings under Annex VII of UNCLOS. The case was initiated on October 25, 2001 by Ireland against the United Kingdom pursuant to Article 287, and Article 1 of Annex VII. The dispute dealt with discharges into the Irish Sea from a mixed oxide fuel (MOX) plant located at Sellafield nuclear facility in the United Kingdom, and related movements of radioactive material through the Irish Sea.\(^{133}\) As earlier noted, a request for the prescription of provisional measures was also

\(^{127}\) Id. p. 27.

\(^{128}\) Id. p. 42, ¶ 55.

\(^{129}\) Id. ¶ 52.

\(^{130}\) Id. ¶ 54.

\(^{131}\) Id. ¶ 67.


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introduced by Ireland on November 2001. After the order of the Tribunal was delivered, the Rules of Procedure of the arbitral tribunal were adopted and Ireland's first memorial was filed on July 2002. During the proceedings, the Commission introduced a claim before the European Court of Justice against Ireland. The Commission argued that by instituting proceedings against the United Kingdom under UNCLOS, Ireland failed to fulfil its obligations under several provisions of the Community Law. Following this, the arbitral tribunal issued its Order n°4 suspending all further proceedings until the European Court of Justice had given judgment or the Tribunal determined otherwise. It considered, inter alia, "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, (...) that it would be inappropriate for it to proceed further with hearing the parties on the merits of the dispute in the absence of a resolution of the problems referred to." The European Court of Justice rendered its judgment on May 30, 2006, declaring that Ireland had failed to fulfil its obligations under Community Law and declared that the Community provisions for the settlement of disputes "must in principle take precedence over [those] contained in Part XV of the Convention." After this decision, the arbitral tribunal decided to suspend the obligations of the parties to submit reports and information on compliance with the provisional measures as well as Ireland's obligation to report on developments in the European Court of Justice (as decided by its Order n°4). Ireland formally notified the Tribunal of the withdrawal of the case on February 15, 2007. On June 6, 2008, the arbitral tribunal declared the termination of the procedure in its Order n°6.

The arbitral proceedings Bangladesh v. India were instituted by the People's Republic of Bangladesh in October 2009 concerning the delimitation of the maritime boundary with the Republic of India. The case, arbitrated under the auspices of the PCA, is still pending.

134 See supra, p. 11.
135 European Court of Justice, Case n° C-459/03, Commission of the European Communities v. Ireland, 2006 E.C.R. I-4635.
138 European Court of Justice, Case n° C-459/03, Commission of the European Communities v. Ireland, § 125.
The most recent UNCLOS arbitral proceedings were instituted on 20 December 2010 by Mauritius against the United Kingdom over the Chagos Archipelago. In April 2010, most of the exclusive economic zone of this Archipelago had been declared as a marine protected area ("MPA") and off-limits to all fishing by the United Kingdom. Mauritius is claiming title to the archipelago and also asserts that Mauritius and the people who previously lived there (the Chagossians or Îlois) have rights to the archipelago’s fisheries and other resources. The arbitral tribunal was established on March 25, 2011.141

6. Advisory Opinion

On February 1, 2011, the Seabed Disputes Chamber rendered its first advisory opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area following a request from the Council of the International Seabed Authority received in May 2010. A significant number of State parties and international organizations participated in the written and oral proceedings.142

In this advisory opinion, the Chamber clarified questions such as legal responsibilities and obligations of State parties with respect to the sponsorship of activities in the Area, the extent of liability of a State party for any failure to comply with the provisions of the Convention by an entity whom it has sponsored, and finally, necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention.143

Many interesting questions have been answered by the Seabed Dispute Chamber in this advisory opinion. The Chamber recognized for example that sponsoring States have a “responsibility to ensure,”144 which is interpreted as an obligation for such States to “deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain (...) that the sponsored contractor complies with the obligations under the Convention.”145 According to the

145 Id. § 110.
Chamber, this obligation may be characterized as an obligation “of conduct” and not “of result,” and as an obligation of “due diligence.”

C. Conclusions

At first glance, it might appear that the International Tribunal for the Law of the Sea has not been used as much as it could have been used. This said, one cannot deny that there is a strong interest from States in bringing cases under the *aegis* of UNCLOS. ITLOS is not the only dispute settlement mechanism foreseen in UNCLOS. The recourse to arbitration under Annex VII is increasingly common.

It is also clear that when proceedings have been brought to the Tribunal, it has shown a great efficiency when dealing with them. Most of the proceedings have been handled expeditiously.

The contribution of the Tribunal to the international law of the sea as well as to general international law is already significant. The recent use of its advisory powers may open new ways to use the Tribunal’s competence. As noted by the President of the Tribunal, the use of the advisory powers by the Seabed Disputes Chamber has “enormous potential,” and it is very likely that the number of such cases will increase, in parallel with the constant increase of seabed activities. Contemporary challenges such as piracy, environmental degradation, or fishery issues could be brought into the purview of the Tribunal under both its contentious and its advisory powers. This would help clarify the contours of the applicable law.

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146 *Id.*