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(ITLOS) : innovations and prospects in the  
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after more than fifteen years of effective practice

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**Topic: The International Tribunal for the Law of the Sea  
(ITLOS):**

Innovations and prospects in the international maritime disputes  
settlement system after more than fifteen years of effective practice.

By

**OUSMANE DIOUF**

Senegal

A dissertation submitted to the World Maritime University in partial  
Fulfilment of the requirement for the awards of the degree of

**MASTER OF SCIENCE**

In

**MARITIME AFFAIRS**

(MARITIME LAW AND POLICY)

2014

## Declaration

I certify that the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): 

(Date): 22 October 2014

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## **Abstract**

**Title of dissertation:** The International Tribunal for the Law of the Sea (ITLOS): Innovations and prospects in the international maritime disputes settlement system after more than fifteen years of effective practice.

Created by the United Convention on the Law of the Sea, the International Tribunal of the Law of the Sea, along with the International Court of Justice, arbitration and special arbitration, is one of the four alternative “procedures” designated for the settlement of disputes regarding the interpretation or application of its provisions.

Since the adoption of the Convention in 1982 and after its entry into force in November 1994, many concerns were raised as regards the relevance of the Tribunal within the general system of the International Disputes Settlement. Indeed, many comments had been made on the proliferation of the tribunal and numerous writers have analyzed the establishment of the Tribunal as a potential source of fragmentation of international law.

This dissertation seeks to analyse the novelties brought by the Tribunal in the field of International disputes settlement in general and the law of the sea dispute settlement in particular.

In this perspective, an analysis of the organization of the Tribunal as well as its Jurisdictions and procedures will be conducted in order to highlight, whenever relevant, its difference to the other tribunals, especially the International Court of Justice. But moreover, its impact in the maritime disputes settlement system will be tackled throughout its jurisprudence in the merits and the advisory opinions delivered by it. Finally, as a conclusion, some of its advantages compared to the alternative “procedures” of disputes settlement will be exposed before taking a look at its future.

**Keywords:** International Tribunal for the law of the Sea, Maritime Disputes Settlement.

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## **Table of abbreviations**

ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
UNCLOS	United Nations Convention for the Law of the Sea



# **1. Introduction:**

## **1.1. Background:**

Covering five-sevenths of the earth's surface and playing a central role in supporting the human population, the oceans constitute indisputably the salient resources of the world. Each State in the world has political, strategic, economic and social interests in the oceans. These interests are visible in diverse maritime activities such as fishing, shipping of goods, hydrocarbon and mineral extraction, naval missions, and scientific research. The coexistence of these interests, which are often competing, have resulted in a proliferation of maritime claims that have progressively led to a high degree of regulation in the international system (Klein, 2005, P.1).

Nowadays, the principal instrument that governs the conduct of States in their use of the oceans is undoubtedly the United Nations Convention on the Law of the Sea (UNCLOS or the Convention or Montego Bay Convention) adopted on the 10<sup>th</sup> of December 1982 in Montego Bay, Jamaica. The Convention provides a comprehensive legal framework which regulates all ocean spaces, as well as their uses and the exploitation of their resources. Furthermore, it provides procedures for States to settle their discords relative to their competing claims. This “innovative system for the settlement of disputes, is perhaps one of the most far-reaching and complex systems of dispute settlement to be found anywhere in international law (Tuerk, 2012, P.123)”.

This assertion finds its justification certainly in the fact that before the entry into force of the UNCLOS, States generally solved their maritime conflicts through the traditional international disputes settlement system, which consists of the non-judicial procedure and judicial procedures (Vincent, 2008, P.158).

According to Vincent, dispute settlement through non-judicial procedures consists of negotiation and third parties settlement.

For this author, negotiation is the normal mode of international dispute settlement. It consists of discussions to reach a direct agreement between the parties to the dispute or to determine a procedure that they mutually agree upon for the solution of their dispute. He explains that there does exist in international law an obligation to negotiate that arises from Article 33, Chapter 1 of the UN Charter, which explicitly imposes on the parties of a dispute the recourse of peaceful means of settling international disputes, notably negotiation.

However due to the fact that negotiations between two States are sometimes impossible or lead to an impasse, a third party may intervene in a dispute to help States parties to find a solution. This solution can be found through the following means:

- ***The mission of good offices*** which is the friendly action of a third party (whether it is a State's personality, an organ of an international organization or any third personality) in order to bring the parties involved in a dispute to start or resume contact or negotiations to resolve their disagreement by peaceful means. The third party just proposes the basis of the negotiation and facilitates contact between partners and the organization of negotiations, but does not participate in the negotiation.

- ***Mediation*** through which the third personality will seek to establish contact between the protagonists in the dispute. Moreover, the third party will propose a solution to the dispute, taking into account the interests of the States concerned. Concerning the Law of the Sea, one of the most famous mediations is the intervention of the Holy See in the Beagle Channel case.

- ***The international investigation*** which is an impartial procedure of establishment of the facts. In this procedure the parties to a dispute conclude an agreement for the establishment of a commission of inquiry. This commission will examine the materiality and the nature of the facts presented as being the origin of a dispute and will give the parties a report with no binding effects. This mode of dispute settlement is therefore rarely used in practice.

- ***The international Conciliation*** which consists of the examination of the case by a preexisting or ad-hoc commission which will give to the parties a proposal to reach a solution to the dispute. The most famous example of conciliation in the Law of the Sea is the delimitation of the continental shelf between Iceland and Jan Mayen Island which belongs to Norway.

Still following Vincent's developments, judicial dispute settlement concerns the International Arbitration and the International Court of Justice (ICJ).

***The International Arbitration*** consists of the submission of a dispute to one (or more) third person (s) with the mandate to issue a binding sentence. It differs from the aforementioned diplomatic procedures in the sense that it is characterized by the application of the rules of international law. It continues to be frequently used in international law in particular because of its speed and lower cost compared to procedures in international courts.

***The International Court of Justice (ICJ)*** has general jurisdiction in any dispute arising between two States concerning the interpretation of a treaty or any international law issue<sup>1</sup>. Therefore disputes concerning the Law of the Sea, including those related to the interpretation of the Convention can be submitted to the court. It is an optional jurisdiction and States parties have to agree to submit their dispute there. Its jurisdiction is compulsory only if all states to the dispute have accepted the optional clause of compulsory jurisdiction provided in Article 36, Paragraph 2 of the Statute of the Court. Article 95 of the UN Charter also states that nothing prevents members of the United Nations from assigning the solution of their discord to other tribunals by virtue of existing or future agreements between States.

As already mentioned, with its entry in force, UNCLOS brought to the international scene an innovative system for the settlement of disputes through its Part XV and its Annex V to VIII. Part XV obliges parties to settle disputes by peaceful

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<sup>1</sup> (see Article 36 paragraph 2 of the Statute of the ICJ)

means and its section 2 is related to compulsory procedures with binding decisions. Prior to this option, alternative methods of dispute settlement must be tried by States parties which are allowed by Section 1 of Part XV to exploit a varied scope of peaceful methods, comprising settlement under separate agreements. Negotiation and settlement by diplomatic ways are highlighted through the obligation to exchange views. The inclusion of a separate procedure in Annex V of UNCLOS encourages also the use of conciliation. On top of that, States are offered the possibility to use procedures entailing binding decisions, under general, regional or bilateral agreements as an alternative of those provided for under Part XV. As such, a great deal of flexibility in choosing methods for dispute resolution is conferred to States parties, which remain complete masters regarding the manner of settling their disputes peacefully (Tuerk, 2012, P. 125).

The aforesaid Part XV of the Convention allows State Parties to choose one or more of the following four alternative means of dispute settlement: The International Tribunal for the Law of the Sea (ITLOS or the Tribunal), the ICJ, arbitration and special arbitration. In this set of mechanisms provided by UNCLOS, the Tribunal has an “*important role and authority*”, as declared by the United Nations General Assembly in its Resolution 54/31 of 16 November 1999. These qualities recognized in the tribunal and the debates surrounding its constitution justify the choice to devote study to it.

Indeed, the entry into force of the UNCLOS seemed to show that the ITLOS may duplicate the ICJ (Treves, 1999, P. 809). Therefore, the idea of a proliferation of international courts which could lead to a division of international law emerged as well as the question of the relevance of the tribunal<sup>2</sup>. Indeed, the Tribunal is not designed as a specialized judicial body to settle disputes concerning the law of the sea under the

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<sup>2</sup> See: “Is International Law Threatened by multiple International Tribunals?” (published in *Recueil des Cours: Collected Courses of The Hague Academy of International Law*, 1998, volume: 271, Page 115-382) and “the future of compulsory dispute settlement under the law of the sea convention” (Rosemary RAYFUSE, <http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-36-2005/issue-4/sea-rayfuse.pdf>)

supervision or control of the ICJ. It is a full-fledged separate jurisdiction of the Court; consequently, the central role of the ICJ regarding the control of the application of international law in the international field is undermined by this model. However, after more than fifteen years of effective practice and twenty cases already solved, these concerns and doubts seem to belong to the past. In fact, analyzing the statute of the ITLOS (Annex VI of UNCLOS) and its jurisprudence, it is noticeable that the Tribunal is a specialized court providing an original forum for the resolution of international disputes regarding both its procedures and its jurisdiction; and participates, through its jurisprudence, to the consolidation of the international law and widens the field of its application<sup>3</sup>.

## 1.2. Purpose, methodology and structure:

The study of the ITLOS will, in general, allow us to understand maritime dispute settlement from a new perspective, considering the specific status of this jurisdiction. But particularly, it will determine the exact nature of that court by highlighting the novelty it brings to the classical international dispute settlement system. Moreover it will give us the opportunity to analyze the impact and the prospects of this new jurisdiction within this said system.

This study will not only point out the innovations of the Tribunal in an isolated and exclusive manner. It will address these innovations in their specific context in order to allow the future reader to grasp and understand their relevance regarding the general context of the classical system of international dispute settlement as described above. This approach justifies the analytical and systemic method that will be used throughout this dissertation.

Subsequently, the innovations of the Tribunal will be captured with regard to its organization, its jurisdictions and its procedures. Moreover, the contribution and

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<sup>3</sup> See description of the book « Le Tribunal International du Droit de la mer : Organisation, Compétences et Procédures », Jean-Grégoire Mahinga, Edition Larcier, 2013 at : [http://editions-larcier.larciergroup.com/titres/130193\\_2/le-tribunal-international-du-droit-de-la-mer.html](http://editions-larcier.larciergroup.com/titres/130193_2/le-tribunal-international-du-droit-de-la-mer.html)

the prospects of this jurisdiction within the global field of international law will be analyzed and predicted. Throughout all these steps, references to the jurisprudence of the Tribunal will be made, whenever necessary, in order to illustrate the relevance of the statements and to strengthen the analysis herein.

## **2. Organization of the Tribunal**

### **2.1. Composition of the Tribunal**

#### **2.1.1. The Judges**

##### *2.1.1.1. The general criteria for the nomination of the Judges:*

As provided by article 2 of its Statute, the Tribunal is composed of 21 members “enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea”. According to Vukas, this provision related to the moral character and competences of the judge has, *mutatis mutandis*, been taken from art. 2 of the ICJ Statute. In this article, he noted that among the first 21 members elected by the Fifth Meeting of States Parties to the Convention on 1 August 1996 a great majority participated in the Third United Nations Conference on the Law of the Sea (two of them were chairmen of the Main Committees, three were members of the Secretariat of the Conference) and in the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (including its first President). A majority of them were also renowned authors in the field of the law of the sea. Furthermore Vukas explained that since the law of the sea is “an integral part of international law as a whole”, the fact that the nominees for ITLOS are required only to be persons of “recognized competence in the field of the law of the sea” and not in international law in general has created a fear. As a response, he noted that, even though it is difficult to determine when a person can be considered as having “recognized competence” in international law, 12 of the first 21 members of the Tribunal were at one time or another professors of international law, while 7 were members or associate members of the Institute of International Law (Institut de Droit International) (Vukas, 2001, P. 62).

Furthermore, as provided by article 2, paragraph 2 of its Statute, “in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution” have to be respected. To meet this requirement, in contrast to the ICJ, where the members of the Court are elected by the General

Assembly and by the Security Council (article 4 of the Statute of the I.C.J), the members of the Tribunal are elected by the States Parties to the Convention, which better reflects the principle of their equality (Nelson, 2001, P. 50).

The concept of "principal legal systems of the world" has not been clarified and supported by scientific data or legal arguments. There is no such common conventional definition because it is a complex notion covering many elements, (legal systems in terms of positive law; legal traditions; national, religious, historical, civilizational and other components; "common law", "continental law" "Muslim traditional law", ethnic law and the law based on aboriginal tradition, etc...). Nonetheless, the current composition of the Tribunal resembles generally the notion of the "principal legal systems of the world", whatever the scope and content that would be carried within this notion (Yankov, 2001, P. 42).

Another requirement related to this principle of equitable geographical repartition of the members of the tribunal is that from each geographical group established by the General Assembly of the United Nations, there shall be no fewer than three members. So the composition of the Tribunal from the point of view of geographical representation is as follows since 2009<sup>4</sup>:

- 5 judges from the African Group;
- 5 judges from the Asian Group;
- 4 judges from the Latin American and Caribbean Group;
- 3 judges from the Western European and other States Group;
- 3 judges from the Eastern European Group.

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<sup>4</sup> See: SPLOS/201



The remaining one member of the Tribunal shall be elected from among the Group of African States, the Group of Asian States and the Group of Western European and other States.

The application of this principle of equitable geographical distribution has led to the Tribunal being composed proportionally of more judges from developing countries compared to the ICJ. This situation seems more representative of the international community which in fact reflects the extensive participation in the Third United Nations Conference on the Law of the Sea (Nelson, 2001, P.55).

#### *2.1.1.2. The election of the Judges*

Applications for the nomination of Judges are submitted by each State Party, which may not appoint more than two candidates for each election. These candidates do not necessarily have the nationality of a State Party, as was the case during the first election; two elected judges were nationals of non-State-Parties of the convention (Mahinga, 2013, P. 23). The procedure of election is organized by Article 4 of the Statute of the Tribunal, which states that at least three months before the date of the election, the Secretary-General of the United Nations in the case of the first election and the Registrar of the Tribunal in the case of subsequent elections shall invite States Parties to send, within two months, the names of their candidates. An alphabetical list of all candidates shall be submitted to States Parties before the seventh day of the last month before the date of each election.

The judges are elected by secret ballot at a meeting of the States Parties. Paragraph 4 of Article 4 adds that “*the persons elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties*”. According to Mahinga, this tortuous wording simply means that, to be elected, a candidate must obtain a majority of two thirds of the votes of States Parties. This solution ensures that the Tribunal is not composed of Judges who represent only a minority of States Parties. Furthermore, the distribution of seats by

regional group helps to mitigate this risk, as the elected candidates are those who, after having been nominated by a State Party, are sponsored by their regional group. Then within each regional group there are consultations that lead States Parties to withdraw candidates who do not collect sufficient votes for the benefit of those who are better placed. Due to this consultation these candidates are sure to get the required majority to be elected. It should also be noted that the principle of the sovereign equality of states is respected since each State Party has only one vote.

Still, according to Mahinga, it should also be noted that the Statute of the Tribunal does not provide modalities in order to solve some situations that might arise during the election of judges. This could be the case if there still remain seats to be filled because no other candidate has obtained the required majority or in the assumption that two candidates of the same State party have been elected. The absence of such provisions, which are in Articles 10 Paragraph 3 and 12 of the statute of the ICJ, is certainly due to the fact that the procedure of the Tribunal, despite seeming formalistic, favors negotiation between States Parties, so that, by the subsequent compromise, States Party will always find solutions for potential blockages. In addition, the importance conferred *de facto* to regional groups in the selection of candidatures prevents the possibility of States Parties facing these kinds of difficulties.

After their election, the Judges take office only after having publicly pronounced the solemn declaration provided for in Article 11 of the Statute. The Rules adopted by the Tribunal<sup>5</sup> gave shape to this obligation by stating in its Article 5 that every elected member of the Tribunal must make the following statement: “*I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously*”. However, a member elected immediately after a previous term of office is exempt from this statement (article 5 of the rule of the Tribunal in fine). It is important to note also that the continuity of the Tribunal is guaranteed by the renewal of a third of its members every three years and that members

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<sup>5</sup> RULES OF THE TRIBUNAL, adopted the 17th March 2009,  
[https://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf)

who cease their functions as Judges continue to handle the cases they were seized before their cessation (art. 5, paragraph 1 and 3 of the Statute of the Tribunal).

### *2.1.1.3. Status of Judges*

Article 3 of the rule of the Tribunal provides that “*the elected judges of the Tribunal are, in the exercise of their functions, of equal status, irrespective of age, priority of election or length of service.*”

Nevertheless, for the determination of some administrative and procedural matters, such as who shall exercise the function of President in some cases, Article 4 of the Rules institutes a system of precedence among judges. Regarding the system of precedence, the President and Vice-President take precedence over the other members. The other members take precedence according to the day when their terms of office began. Members whose terms of office began on the same date take precedence in relation to one another according to seniority of age. A member who is re-elected to a new term of office which is continuous with his previous term conserves his precedence.

The aforesaid “equal status of Judges” must be considered relatively to the special position of the President of the Tribunal and, in some measure, the President of the Seabed Disputes Chamber, regarding general organizational functions and with respect to the conduct of a case. Equally to the functions related to the conduct of a case, the same applies to any person other than the President of the Tribunal who may be presiding over a case. For instance, Article 29 (2) of the Statute of the Tribunal provides that the President or the member of the Tribunal who acts in the President's place shall have a casting vote in the event of equality of votes when the Tribunal takes a decision (Eiriksson, 2000, P.39).

Another salient point of the Status of the Judges is the incompatibility of their function with some other activities. Indeed, Article 7 of the Statute provides:

- 1. “No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the*

*operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.*

2. *No member of the Tribunal may act as agent, counsel or advocate in any case.*
3. *Any doubt on these points shall be resolved by decision of the majority of the other members of the Tribunal present”.*

According to Eiriksson, the wording of this provision, which differs from article 16 of the statute of the ICJ prohibiting Judges from the Court from having any other professional occupation, reflects the fact the Judges are not expected to be fully employed with the work of the Tribunal (Eiriksson, 2000, P. 40).

Moreover, the provision has the effect of prohibiting a member of the Tribunal from possessing shares in enterprises engaged in the foresaid activities. It allows, in this way, the avoidance of potential conflicts of interest. However, such incompatibilities do not prevent a member of the Tribunal from exercising teaching activities at a university, since it is an activity based on the principle of independence. Similarly, a member of the Tribunal may be appointed as arbitrator in a dispute. Such activity is also carried out in accordance with the principles of independence and impartiality that characterize the functions of judges in the Tribunal. In addition, teaching and arbitration contribute to improve the quality and competence of the Judges as well as the institutions to which they belong. Specifically, the appointment of members of the Tribunal as arbitrators allows a kind of homogenization of international jurisprudence and provides more consistency in the development of international law (Mahinga, 2013, P. 45).

### 2.1.2. The judges ad hoc

#### *2.1.2.1. Conditions of designation of judges ad hoc*

The judge ad hoc refers to judges who are appointed by parties in dispute. Unlike the permanent Judges, the mission of the judge ad hoc is limited to the dispute

he or she is designated for and this mission ends with the decision of the Tribunal. The institution of the Judge ad hoc is comparable to the system applied by the ICJ in conformity with Article 31 of its Statute. In principle, a judge ad hoc is appointed only when a State party to a dispute does not have a Judge of its nationality within the Tribunal or when the Tribunal has no judge of the nationality of the litigants (Article 17, paragraph 2 & 3 of the Statute of the Tribunal). Since the Tribunal is composed of impartial judges, this option is linked to the fact that it would be unfair and contrary to this rule to offer to a party of a dispute the possibility to challenge a member of the Tribunal who has the nationality of the other party. So, the faculty to appoint a judge ad hoc is a procedural safeguard that is offered to the other party of a dispute. Conversely, when the Tribunal does not have Judges of the nationality of each of the parties in dispute, the appointment of a judge ad hoc adheres just to judicial policy considerations which aim to encourage States to resort to judicial settlement of disputes. So, the institution of the judge ad hoc is an assurance to States that, through the judge ad hoc they have appointed, the Tribunal will better know their position (Mahinga, 2013, P. 27).

#### *2.1.2.2. Procedure of designation of judges ad hoc*

According to Article 19, paragraph 1 of the Rules of the Tribunal, a party intending to choose a judge ad hoc shall notify the Tribunal of its intention as soon as possible. Indeed, in order to constitute the bench for a case at the earliest possible time, judges ad hoc must be chosen not later than two months before the date fixed for filing the counter-memorial. Within a time-limit set by the President not exceeding 30 days, the other party shall be notified and given an opportunity to make observations. The aforesaid Article 19, in its paragraph 3, provides that if, within the period fixed, the Party does not raise any objection or none appears to the Tribunal, the parties shall be so informed, but otherwise the matter shall be decided by the Tribunal, if necessary after hearing the parties.

In the case that a party wants to abstain from choosing a judge ad hoc on the condition of a similar abstention of the other party, it shall inform the Tribunal, which

shall inform the other party. If the other party notifies its intention to choose or chooses a judge ad hoc, the time-limit for the first party to choose a judge ad hoc may be prolonged by up to 30 days by the President as provided by Article 19 paragraph 2 of the rule.

The party that chooses a judge ad hoc shall inform the Tribunal of his or her name and nationality and provide brief biographical details according to article 19 § 1 of the Rule. The interest of the biographical detail is not only to better know the chosen person, it is also a means for the Tribunal to assess if the designed person meets the requirements of its Statute, namely fairness and integrity and the recognized competence in the field of the law of the sea.

If a judge ad hoc becomes unable to sit, it may be replaced according to Article 19 paragraph 4 of the Rule. Although, no time-limit is fixed for replacement, discretion would command that this should not happen too late in the proceedings, in order to allow the new judge to have a sufficient appreciation of the case to be able to participate in the decision (Mahinga, 2013, P. 35).

### *2.1.2.3. The Status of the Judges ad hoc*

When selected for a case, judges ad hoc take part in the case like the other Judges in complete equality (Statute Article 17 paragraph 6; Rules article 8 paragraph 1). Nevertheless, in cases in which they are sitting, they are not included in the calculation of the quorum for meetings (Statute articles 13 §1 and 35 §7; Rules, article 418) and are unlikely to preside over a case.

Depending on whether the case is before the Tribunal sitting as a whole, before the Seabed Disputes Chamber or before a special chamber, the possibility for a judge ad hoc to preside over a case varies.

A judge ad hoc cannot be elected President or Vice-President of the Tribunal or exercise the functions of the presidency of the Tribunal in case of vacancy in the presidency or of the incapability of the President to exercise its functions (Rules,

Article 13 paragraph 1). Therefore, judges ad hoc could never preside over cases before the Tribunal sitting as a whole.

Also, a judge ad hoc cannot be elected President of the Seabed Disputes Chamber and thus would never be able to preside over cases before the Chamber. However, in the event of a vacancy or inability of the President to act, judges ad hoc are not disqualified from exercising the functions of the presidency of the Chamber. They could, as a result, preside over cases in which they are sitting in the improbable event that all members of the Chamber with a higher seniority are unable to exercise the functions of the presidency (Rules article 26 paragraph 3), assuming also that they are not disqualified from presiding on account of their nationality.

However, a judge ad hoc can be elected president of a special chamber in the event that an election is required (Rules Article 31 paragraph 1).

#### 2.1.3. The experts

Article 289 of UNCLOS provides that “In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote”.

Article 15 of the Rules of the Tribunal defines the procedure for the appointment of experts.

In general, a request by a Party for the selection of an expert shall be formulated before the closure of the written proceedings. Nonetheless, a later request made before the closure of the oral proceedings may be considered by the Tribunal, if appropriate in the circumstances of the case (Rules, Article 15 paragraph 1). In the case that the Tribunal decides to select experts, it must be done on the proposal of the President after consultation of the parties (Rules, Article 15 paragraph 2). Paragraph 3 of Article

15 of the rules specifies that experts shall be independent and enjoy the highest reputation for fairness, competence and integrity. Moreover, they shall be chosen preferably from the lists prepared in accordance with Annex VIII to the Convention. Those lists, constituted by experts nominated by States Parties to the Convention, are established for the purposes of the special arbitral procedure provided for in Annex VIII. They cover the following fields: fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and dumping.

Article 15 paragraph 5 of the Rules of the Tribunal provides that before entering upon their duties, experts shall make the solemn declaration that *“they will perform their duties honourably, impartially and conscientiously and that they will faithfully observe all the provisions of the Statute and the Rules of the Tribunal”*.

Experts shall take part in the Tribunal's judicial deliberations as provided by Article 42 of the Rules.

It should be noted that experts appointed under article 289 are not the same as experts called by the parties or those convoked by the Tribunal on its own initiative. Their relationship to the Tribunal is more intimate and their advice is not subject to analysis by the parties. They resemble assessors which may sit with the ICJ without the right to vote in accordance with Article 30 paragraph 2 of its Statute (Eiriksson, 2000, P. 67).

## 2.2. The Chambers

### 2.2.1. The chambers entitled to settle the disputes relating to the seabed

#### 2.2.1.1. *The Seabed Disputes Chamber*

The Seabed disputes Chamber was initially previewed to constitute the judicial organ of the International Seabed Authority. However the works of the third Conference on the Law of the Sea permitted the successful integration of this judicial body within the ITLOS.



According to Article 35 of the Statute of the Tribunal which regulates its composition and its organization, the Seabed Disputes Chamber shall be composed of 11 members selected by a majority of the elected members of the Tribunal from among them. Similarly to the composition of the members of the Tribunal as a whole, article 35 paragraph 2 provides that in the selection of the members of the Chamber, representation of the principal legal systems of the world and equitable geographical distribution shall be assured. What is more noticeable in this article is that it entrusts the Assembly of the International Seabed Authority to adopt recommendations of a general nature relating to such representation and distribution. This provision results certainly from the fact that during the third United Nations Conference on the Law of the Sea, it was previously envisaged to assign the Assembly of the Authority the right to elect the members of the Chamber, in order to establish an institutional connection between the Chamber and the Authority. However, the drafters of the Convention opted for the independence of this Chamber regarding the Authority while preserving the possibility for the latter to express its opinion on the representation of the principal legal systems of the world and the equitable geographical distribution. In this respect, during the first election of the members of the Tribunal at New York in 1996, the meeting of States Parties held before the elections issued, after deep negotiations, some resolutions in order to meet this requirement (Akl, 2001, P. 77).

Still following Article 35 of the Statute, the members of the Chamber shall be selected every three years and may be selected for a second term. Amongst its members, the Chamber elects its President who will serve for the term for which the Chamber has been selected. The Chamber must complete the proceedings in its original composition, in case that proceedings are still pending at the end of any three-year period for which it has been selected. If a vacancy occurs in the Chamber, the Tribunal selects a successor amongst its elected members, who shall hold office for the remainder of his or her predecessor's term. A quorum of seven of the members selected by the Tribunal shall be required to constitute the Chamber.

Moreover, if the Chamber does not include upon the bench members having the nationality of the parties when hearing a dispute, it may include one or more

persons selected according to the provisions of article 17 of the Statute of the Tribunal to participate in the case as members of the Chamber (Akl, 2001, P. 77).

In its Article 23 the Rules of the Tribunal fixed that the mandate of the members selected to constitute the Chamber during the first election would expire on 30 September 1999. As a result, the subsequent mandates will end every 30 September of each triennial renewal period.

It seems that even if the Tribunal respects the principle of representation of the principal legal systems of the world and equitable geographical distribution when constituting the Chamber, it does not apply this principle in a strict manner. In fact, during the first election, the allocation of seats to each regional group was the following 3 Judges for the Asian group, 3 judges for the African group, 2 Judges for the Latin American and Caribbean group, 2 Judges for the Western Europe and other States group and 1 Judge for the Eastern European group. However, during the second election of 4 October 1999, the number of seats allocated to the African group decreased from 3 to 2 while the number of Judges for the Eastern European group increased from 1 to 2, while the other regional groups conserved the same number of judges

#### *2.2.1.2. The ad hoc Chambers of the Seabed disputes Chamber*

In the event of disputes between State Parties concerning the interpretation or the application of Part XI and the Annexes relating thereto, referred to in article 187 subparagraph a), these States have the choice, according to article 188 paragraph UNCLOS, to submit these disputes, at the request of the parties to the dispute, to a special chamber of the Tribunal or, at the request of any party to the dispute, to an ad hoc chamber of the Seabed Disputes Chamber. According to Article 36 of the Statute of the Tribunal, the Seabed Disputes Chamber shall form an ad hoc chamber composed of three of its members, for dealing with a particular dispute submitted to it in conformity with the above-mentioned article 188 paragraph 1-b. The composition of this ad hoc Chamber is determined by the Seabed Disputes Chamber with the agreement of the parties. In the situation where parties do not agree on the composition

of an ad hoc Chamber, Article 36 paragraph 2 of the Statute provides that each party to the dispute shall appoint one member and then agree on the choice of the third member. The Rules of Tribunal provide that the President of the Seabed Disputes Chamber shall establish time limits for the parties to make their choice. In the case they do not agree, or if any party fails to make its choice, the President of the Seabed Disputes Chamber is empowered to promptly make the appointment or appointments from among its members, after having consulted the parties.

Moreover, Article 36 of the Statute provides that the members of the ad hoc Chamber must not be in the service of, or nationals of, any of the parties to the dispute.

Lastly, it should be noted that Article 289 of the Convention stipulates that the Seabed Disputes Chamber or an ad hoc chamber may, in any dispute involving scientific or technical matters, at the request of a party or *proprio motu*, select in consultation with parties, no fewer than two scientific or technical experts to sit with the Chamber but without the possibility to vote.

#### 2.2.2. The Special chambers

The special chambers refer to the Standing Chambers dealing with particular categories of disputes, the Chamber of Summary Procedure and the ad hoc Chambers.

##### *2.2.2.1. The Standing Chambers dealing with particular categories of disputes*

Similarly to 26 paragraph 1 of the Statute of the ICJ, article 15 paragraph 1 of the Statute of the Tribunal provides that the Tribunal may establish chambers to deal with particular categories of disputes without giving examples of such categories. As such, it differs from the Statute of the Court which mentions, as examples, cases related to labour, transit and communications, as well as categories mandated by the Statute of its predecessor, the Permanent Court of International Justice (Eiriksson, 2001, P. 97).

The Statute provides that these chambers shall be composed of three or more of the elected members of the Tribunal and article 29 of the Rules defines in detail the procedure for the establishment of the chambers. So, according its paragraph 1, the

Tribunal has to determine the category of disputes concerned, the number of members, the period for which they will serve, the date when they enter upon their duties and the quorum for meetings.

In the selection of members of a given chamber, paragraph 2 of the Article provides that the Tribunal is to have regard to any special knowledge, expertise or previous experience of members in relation to the category of disputes concerned. A special role is foreseen for the President of the Tribunal who shall give advice to the Tribunal on a chamber's composition. This provision aims to provide some assurance that the factors of knowledge, expertise and experience are considered as well as other factors which in his or her consultations seem to be important to the Tribunal, for instance if the composition is representative of the Tribunal as a whole. Chapter 3 of Article 29 provides that the Tribunal may decide to dissolve a standing special chamber at any time provided that a chamber must finish any case pending before it. According to Judge Eiriksson, "In the case of dissolution, it can be argued that the chamber should in its then existing composition, complete each phase in respect of which it had already met at the time of dissolution in accordance with Article 68 of the Rules. With regard to each successive phase, the Tribunal should, if necessary, select new members to replace members who are no longer on the Tribunal following the expiration of their terms of office".

In its meeting of February 20, 1997, the Tribunal established two special chambers. The first was the Chamber for marine Environment Disputes which deals with disputes concerning the interpretation or application of any provision of the Convention concerning the protection and preservation of the marine environment, any provision of a special agreement relating to the protection and preservation of the marine environment referred to in article 237 of the Convention and any provision of an agreement relating to the protection and preservation of the marine environment which confers jurisdiction on the Tribunal. The second was the special chamber for fisheries disputes which deals with disputes concerning the interpretation or application of any provision of the Convention concerning the conservation and management of marine living resources and any other agreement relating to the

conservation and management of marine living resources which confers jurisdiction on the Tribunal. Thereafter, on March 16, 1997, the Tribunal created a third Chamber dealing with maritime delimitation.

#### *2.2.2.2. The Chamber of Summary Procedure*

Contrary to the two other types of special chambers, the establishment of the Chamber Summary Procedure is mandatory. The Tribunal is required by Article 15 of its Statute to form, annually, a chamber of five members with two alternates to hear and determine disputes by summary procedure. Article 28 of the Rules of the Tribunal governs the composition of the Chamber of Summary Procedure. This Article provides that the President and Vice-President of the Tribunal are members *ex officio* and the three other members and the two alternates are selected by the Tribunal upon the proposal of the President. According to Eiriksson, no guidelines on what proposals to make are given to the President, but it can be concluded from the composition of the Chambers formed in the Tribunal's first four years that the President in each case did his best to ensure the representative nature of the Tribunal among the membership of the Chamber. Moreover members and alternates are selected as soon as possible after 1 October each year and they serve until 30 September of the following year (Eiriksson, 2001, P. 94). However, in the case that it is not possible for the Tribunal to select a new Chamber with effect from 30 September in a given year, for instance because the Tribunal is not in session, Article 28 § 3 provided that members and alternates who remain on the Tribunal after that date continue to serve on the Chamber until the next selection takes place.

If a member of the Chamber is unable to sit in a given case, he or she is replaced for that case by the senior in precedence of the two alternates as provided by Article 28 paragraph 4. If a member of a Chamber ceases to be a member, he or she is replaced by the senior in precedence of the alternates and the Tribunal chooses a new alternate member (Article 28 paragraph 5 of the Rules). The quorum for meetings of the Chamber is three members (Article 28 paragraph 6 Rules of the Tribunal).

### 2.2.2.3. *The ad hoc Chambers*

Copied from the model of article 26, paragraph 2 of the Statute of the International Court of Justice, article 15, paragraph 2 of the Statute of the Tribunal provides for the establishment, at the request of the parties to a particular dispute, of an ad hoc Chamber that will deal with that dispute. The composition of these ad hoc Chambers is determined by the Tribunal with the consent of the parties. Judge Eiriksson noticed that Article 262 of the Statute of the Court refers to the approval of the parties of the “number of judges to constitute such a chamber”, while article 15, paragraph 2 of the Statute of the Tribunal mentions the “composition of such chamber”. He concluded that, “there is no room for any doctrinal debate as to the role of the parties in determining which of the judges of Tribunal are to serve on a given chamber” (Eiriksson, 2001, P. 99).

Article 30 of the Rule of the Tribunal sets out the modalities for the formation of an ad hoc chamber. Thus, within two months after the institution of proceedings, a request for the formation of a chamber must be made. In the case that the request is made by one party instead of the parties jointly, the President shall check if the other party agrees. Upon the agreement of the parties for the formation of an ad hoc chamber, the President ascertains the views of the parties in respect of its composition and reports to the Tribunal consequently. The procedure applicable for the establishment of the original composition of the chamber is followed in the case of vacancies. The Tribunal determines the quorum for meetings of the chamber but judges ad hoc are not included in the quorum (Article 41, paragraph 3 of the Rules of the Tribunal).

According to paragraph 4 of Article 30 of the Rules of the Tribunal, members of an ad hoc chamber who are no longer members of the Tribunal following the expiration of their terms of office shall continue to sit in all phases of the case, whatever the stage it has then reached. Judge Eirikson argued that this symbolizes a different interpretation of “proceedings” in article 5 paragraph 3 of the Statute of the Tribunal than is usually applied in conformity with article 17 of the Rules which provide for continued participation only until the completion of any phase in respect of which the Tribunal met in accordance with article 68 of the Rules. For him, the ad

hoc chamber will, therefore, deal with the whole case in its original composition, or as recomposed to fill vacancies, irrespective of the results of elections to the Tribunal, thus making sure that the approval of the parties to the case of the composition of the chamber is respected for the duration of the case.

### 2.2.3. The Registry

According to Eiriksson, the Registry is the administrative structure of the Tribunal and the regular tool of communications to and from the Tribunal. The Registrar accomplishes essential functions related to the judicial work of the Tribunal and also the necessary secretariat functions required of an independent international organization (Eiriksson, 2000, P. 59).

The Registry is composed of the Registrar, the Deputy Registrar and the staff serving in different other posts. The regular staff of the Registry is supplemented as required by temporary staff, in particular to provide linguistic services and other meeting services during sessions of the Tribunal.

Article 12, paragraph 2 of the Statute of the Tribunal governs the position of the Registrar. In the discharge of his or her functions, the Registrar is responsible to the Tribunal Rules. According to Article 32 and 33 of the Rules of the Tribunal, the Registrar of the Tribunal, the Deputy Registrar and the Assistant Registrar are elected for five-years terms (they may be re-elected) by the Tribunal by secret ballot from among candidates nominated by judges. The relevant information on the candidates shall accompany the nomination whose date of closure is fixed by the President of the Tribunal. The candidates who obtain the votes of the majority of the judges composing the Tribunal at the time of election are elected.

Before taking up their duties, the Registrar, the Deputy Registrar and the Assistant Registrar make a solemn declaration at a meeting of the Tribunal in accordance with Article 34 of the Rules.

Before taking up their duties, the other members of the staff perform a similar declaration before the President in the presence of the Registrar as specified by Article 35, paragraph 3 of the Rules.



### **3. Jurisdictions of the tribunal**

#### **3.1. Preliminary remarks**

Due to the fact that the work of the Tribunal is linked, as a general rule, to a single document which is the Convention, the jurisdiction of the Tribunal is globally much less complicated than the jurisdiction of the ICJ whose work is based on hundreds of treaties that show the larger subject-matter scope of its jurisdiction. Despite this remark, the jurisdictional provisions of the Convention are extremely complex, with different ways the Tribunal can be seized of a dispute and a wide variety of exceptions and limitations (Eiriksson, 2000, P. 112).

Article 288 of UNCLOS is the basis of the jurisdiction of the Tribunal. Indeed this Article provides that the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention and any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention. However, such jurisdiction is not exclusively conferred to the Tribunal. Article 288 of the Convention has also assigned jurisdiction to all other international courts and tribunals under Article 287 Paragraph 1. There are the ICJ., the arbitral tribunal constituted in accordance with Annex VII of the Convention and, for disputes over certain matters relating to the Convention (fishing, protection and preservation of the marine environment, marine scientific research and navigation and ship pollution and dumping), the Special Arbitral Tribunal provided for by Annex VIII of the Convention. So, under Article 287 paragraph 1 of the Convention, this jurisdiction is concurrently recognized by all international judicial bodies likely to intervene in disputes concerning the law of the sea.

Jurisdiction recognized by the Tribunal is binding and is not subject to the consent of the States Parties. It is on the basis of Article 286 of the Convention that the compulsory jurisdiction of the Tribunal will be exercised. Nevertheless, this Article allows the exercise of the compulsory jurisdiction only under the conditions prescribed in Articles 281, 282 and 283 of the Convention.

Moreover, the jurisdiction of the International Tribunal for the Law of the Sea is not limited to the provisions of Article 288 of the Convention. Indeed, Article 21 of the Statute also empowers the Tribunal whenever the parties to an agreement expressly recognize its jurisdiction. Also, Article 20 Paragraph 2 of the same Statute provides that the Tribunal has jurisdiction in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

Throughout these different provisions, some differences are noticeable between the ITLOS and the ICJ. These differences or particularities that embody the novelties of this Tribunal can be addressed in respect of its jurisdiction *ratione personae* and its jurisdiction *ratione materiae*.

### 3.2. Jurisdiction *ratione personae*

The jurisdiction *ratione personae* relates to the questions “who may become parties to a case before the Tribunal or who may have access to the Tribunal?”

These questions are addressed in Article 291 of the Convention and articles 20 and 37 of the Statute which are phrased in a positive manner in the form of enabling provisions indicating to which entities the different procedures are open (Eiriksson, 2000, pp. 114-115).

Article 291 of the Convention covers in general the dispute settlement procedures detailed in Part XV and declares them open to States Parties. Provisions resulting from Paragraph 1 of this Article relating to jurisdiction *ratione personae* are relatively different from that included in article 34 of the Statute of the ICJ which provides that “*only states may be parties in cases before the Court*”. Indeed, according to Article 1 of UNCLOS, the notion of “States Parties” refers not only to States which have consented to be bound by the Convention but also entities other than States, which have consented to be bound by the Convention and which are mentioned in article 305, paragraph 1(b), (c), (d), (e) and (t). These include, especially, international organizations to which member States have transferred competence over matters

governed by the Convention like the European Community which is the only such organization that has become a party to the Convention (Treves, 2001, P. 113).

Paragraph 2 of the same Article states that these disputes are also open to other entities "only as specifically provided for in the Convention". Thus, while the situation concerning States Parties is clear, one must look somewhere else regarding the other entities.

Regarding the Tribunal specifically, article 20 paragraph 1 of its Statute confirms that it is open to States Parties. Vis-à-vis the other entities, paragraph 2 of this same article specifies that the Tribunal is open to entities other than States Parties in any case expressly provided for in Part X of the Convention. Read together with article 37 of the Statute, it can be inferred from both articles that the Seabed Disputes Chamber shall be open to States Parties, the International Seabed Authority and the other entities referred to in Part XI, section 5. Article 187 of the convention identifies the entities other than States Parties referred to in Part XI, section 5, as the Authority, the Enterprise, state enterprises and natural and juridical persons referred to in article 153 Paragraph 2-b.

It is also specified in Article 20 Paragraph 2 of the Statute that the Tribunal is open to entities other than States Parties "in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case".

The possibility given to private entities to seize the Tribunal is thus considered by some authors as one of the main novelties brought by ITLOS in International Disputes Settlement System. Indeed, Mensah stated that, "*A major feature of the jurisdiction of the Tribunal is that it has competence to deal with disputes involving not just States parties to the convention*" (Mensah, 2001, P. 29). Also, in its statements delivered during the OLDEPESCA XX<sup>th</sup> Conference of Ministers held in La Paz, Bolivia, from 2 to 4 September 2009, the President Jose Luis Jesus declared that "*The jurisdiction of the Tribunal razione personae also represents an interesting*

*development of procedural international law. Traditionally, as is known, only States have access to international courts. In the case of the Tribunal, however, there has been a notable development in procedural law in this respect” (Jésus, 2009, P .3).*

However these declarations should be mitigated. In fact, even as this possibility exists, articles of the Convention allowing it are limited by other provisions of the same Convention, especially regarding natural and juridical persons.

Firstly, during the negotiations at the Third United Nations Conference on the Law of the Sea, there were States which were opposed to allowing access to natural and juridical persons and inter-governmental organizations. They finally had to admit the fact that in the nature of things these entities must have the right to access the Seabed Disputes Chamber with regard to seabed mining disputes (Nelson, 2001, P. 57). However, respect for the sovereignty of States was maintained in article 190 of the Convention which states that:

*“1) If a natural or juridical person is a party to a dispute referred to in article 187, the sponsoring State shall be given notice thereof and shall have the right to participate in the proceedings by submitting written or oral statements*

*2) If an action is brought against a State Party by a natural or juridical person sponsored by another State Party in a dispute referred to in article 187, subparagraph (c), the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person. Failing such appearance, the respondent State may arrange to be represented by a juridical person of its nationality.”*

This article reflects, according to Mahinga, the difficulty for States to face natural or juridical persons during international judicial actions. The implementation of these provisions leads to change the physiognomy of the proceeding by transforming it to a dispute between States (Mahinga, 2013, pp. 125-126).

The second limitation may be found in a comparison of Article 20 Paragraph 2 of the Statute with article 288 paragraph 2 of the Convention which refers to an

international agreement and thus, would limit possible entities to those empowered to conclude "international agreements", that is to say states, including entities identified in article 305 as having the capacity to enter into treaties, and other intergovernmental organizations with treaty-making capacity (Eiriksson, 2000, pp. 114-115).

### 3.3. Jurisdiction *ratione materiae*

The jurisdiction *ratione materiae* relates to the subject matter of the dispute which could be brought before the Court or the Tribunal.

According to Article 287 of UNCLOS, ITLOS is one of the four means offering “compulsory procedures entailing binding decision” for the settlement of disputes relating to the application or interpretation of the Convention. The other three are:

- the International Court of Justice;
- arbitration tribunals constituted in accordance with Annex VII to the Convention; and
- special arbitration tribunals constituted in accordance with Annex VIII to the Convention, if the dispute falls within one of the categories referred to in that Annex.

Every State Party to the Convention has the possibility to choose one or more of these procedures that it is willing to accept for the settlement of a dispute in which it may be involved. Apart from the cases specifically provided in the Convention, the Tribunal will only have competence to deal with a dispute between States Parties concerning the interpretation or application of the Convention if all the parties to the dispute have accepted the Tribunal as the forum of choice. But in some cases, the competence of the Tribunal to deal with a dispute does not depend on prior explicit acceptance of jurisdiction by the parties. It is the case when:

- disputes are brought before the Seabed Disputes Chamber in respect of activities in the Area as specified in article 187;

- requests are made to the Tribunal or the Seabed Disputes Chamber to prescribe provisional measures pursuant to paragraph 5 of article 190 of the Convention; and
- applications are made to the Tribunal to order the prompt release of arrested vessels or their crew under article 292 of the Convention.

Through these compulsory jurisdictions, the Convention gives to the Tribunal special competences that make it significantly different from the other procedures designated in article 287 (Mensah, 2001, P. 27). On top of that the Tribunal has an advisory jurisdiction, accessory jurisdictions and optional jurisdictions.

### 3.3.1. The compulsory jurisdiction

#### *3.3.1.1. The compulsory jurisdiction resulting from the choice made in application of article 287*

It is difficult to consider independently the jurisdiction *ratione materiae* of the Tribunal and the way it is linked to the will of the parties, and to some extent, it highlights the originality of the Tribunal compared to the other means of disputes settlement. The main difference between the “compulsory” jurisdiction of the ICJ and that of the Tribunal lies in the fact that the compulsory jurisdiction of the Court is optional, while that of the Tribunal is not; albeit it is determined (at least partially) by an option. Indeed, the Court can be seized by party only if a special declaration of acceptance of its “compulsory” jurisdiction has been made by all parties to the dispute<sup>6</sup>, in case of treaties providing for compulsory jurisdiction<sup>7</sup> or on the basis of an ad hoc consent. Conversely, the Tribunal can be seized without this previous declaration of acceptance on the basis of the rules of the Convention conferring the power to settle disputes to a court or tribunal whose decisions are binding. The only condition is that the Tribunal should have been chosen, through a declaration of general scope, by the States and other entities to which such power is recognized and

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<sup>6</sup> The “optional” compulsory jurisdiction clause provided for in article 36, paragraph 2 of the Statute of the ICJ.

<sup>7</sup> See pact of Bogota : <http://www.oas.org/juridico/english/treaties/a-42.html>

which are parties to the dispute. This mechanism is set out in article 287 of the Convention and is called “*Montreux formula* (Treves, 2001, pp. 114-115)”. According to this mechanism, when the Convention institutes cases of compulsory jurisdiction, the Tribunal (or the ICJ depending on the case) can function as a dispute-settlement body which may be seized unilaterally by parties submitting disputes on the matters indicated by the Convention. However, this prerogative is only allowed when all parties to the dispute, with a declaration made at the time of signature or ratification or later, have select it (article 287 paragraphs 1 and 4). In event that the parties to the dispute have not made the same choice, an arbitral tribunal established under Annex VII of the Convention shall be seized on the basis of "compulsory" jurisdiction according to paragraph 5 of the same Convention.

#### *3.3.1.2. The compulsory jurisdiction resulting from urgent proceedings*

As previously mentioned, while compulsory jurisdiction of the Tribunal on disputes concerning, in general, the interpretation or application of the Convention depends on the declarations, the Convention bestows, independently of the "choice of procedure" mechanism, the Tribunal with compulsory jurisdiction regarding two specific substantive matters. These are cases in which it is essential to recourse to a permanent pre-established body. In these cases, and those of disputes relating to activities in the international seabed area that will be addressed later, the Tribunal operates (at least in practice) as the unique dispute-settlement body with compulsory jurisdiction. Indeed, Judge Treves stated that these specific cases of compulsory jurisdiction have been delegated to the Tribunal for the reason that they relate to functions which must be accomplished by a pre-established judicial body. Thus the Tribunal was preferred to an arbitral tribunal although paragraph 5 of Article 287 provides that arbitration is the "default" procedure regarding cases in which different choices of procedure have been made by the parties to the dispute. The Convention, while having a choice between the Tribunal and the International Court of Justice, which are the only two pre-established bodies among those which can be selected under article 287, gave its preference to the Tribunal. In this regard, the Tribunal

exercises exclusive jurisdictions that make it different in many significant aspects from the other judicial bodies listed in article 287 (Treves, 2001, pp. 115-116).

The first case in which the Tribunal may exercise such compulsory jurisdiction independently of the choice of procedure mechanism concerns its competence to prescribe provisional measures. Besides its general power to prescribe provisional measures in disputes submitted to it in application of Article 290, paragraphs 1 to 4 of UNCLOS, the Tribunal is allowed under paragraph 5 of the same article to prescribe, modify or revoke provisional measures in a dispute over which the Tribunal does not otherwise have jurisdiction. This faculty applies when the parties to a dispute have agreed to bring it to arbitration in conformity with Annex VII to the Convention but have not yet finalized the constitution of the arbitration tribunal. In this case the competence of the Tribunal is "conditional and residual" and may only be applied if one of the parties to a dispute has made a request for such provisional measures, and if, within two weeks from the date of the request, the parties do not agree on a court or tribunal to consider the request. In that case, at the request of the party concerned, the Tribunal may prescribe, modify or revoke appropriate provisional measures "if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction" to deal with the dispute and that "the urgency of the situation so requires" (Article 290, paragraph 5 UNCLOS). All provisional measures prescribed by the tribunal in exercise of this jurisdiction may be modified, revoked or affirmed by the appropriate tribunal when constituted and acting in conformity with the relevant provisions of the Convention. This procedure was followed by the Tribunal for the first time in the Southern Bluefin Tuna case where Australia and New Zealand, after having seized under article 287 an arbitral tribunal of a fisheries dispute against Japan, demanded, under article 290, paragraph 5, the Tribunal to prescribe provisional measures pending the establishment of the arbitral tribunal<sup>8</sup>.

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<sup>8</sup> See Order of the Tribunal, 27 August 1999:  
[http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_3\\_4/Order.27.08.99.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf)



Moreover, the same jurisdiction to prescribe or modify provisional measures is also recognized to the Seabed Disputes Chamber, subject to the same conditions and limitations, regarding disputes related to activities in the international seabed area (Mensah, 2001, pp. 28-29). This would seem, according to Treves, to refer to cases in which a dispute has been submitted to "binding commercial" arbitration according to article 188, paragraph 2 of the Convention (Treves, 2001, P.116).

ITLOS has a second form of compulsory jurisdiction independent of the choice of procedure mechanism in cases relating to the prompt release of vessels and crews arrested by authorities of States Parties to the Convention. According to Article 292 of UNCLOS, the Tribunal has competence to order the release of a vessel flying the flag of a State Party or its crew, in the event that they have been arrested or are being detained by the authorities of another State Party. That can be done in the case that the flag State asserts that the arresting State has failed to comply with a provision of the Convention for the release of the vessel or its crew notwithstanding the prompt posting of reasonable bond or other financial security. There, still according to Treves, the cases provided notably for in article 73, paragraph 2, about detention of ships decided in view of ensuring compliance with the coastal State's sovereign right relating to fisheries in the exclusive economic zone; in article 220, paragraph 7, when it has been decided in case of violations of international rules and standards for the prevention of pollution from vessels resulting in a discharge causing major damage or threat thereof, on condition that appropriate procedures for bonding have been agreed; in article 226, 1(b) when investigations on matters of pollution by dumping or from vessels show violation of applicable laws and regulations or international rules and standards; and in subparagraph(c) of article 226, paragraph 1, when a vessel has been detained due to the fact that it presents a unreasonable threat to the environment and its release has been refused or made conditional.

In such circumstances, the question relating to the release of the vessel or its crew from detention may be deferred to a court or tribunal agreed upon by the States concerned. Yet, if no agreement has been reached by parties on such a court or tribunal

within ten days from the date of the detention, the question of the release of the vessel or its crew may be deferred to the Tribunal by or on behalf of the flag State of the detained vessel. In this event also, the failure of the parties to agree on a mutually acceptable procedure for resolving the dispute determines the competence of the Tribunal to deal with the application. When there is no such agreement, the jurisdiction of the Tribunal becomes automatic and may be exercised if an application is deferred to it by or on behalf of the flag State of the arrested ship. The detaining State is thus constrained to submit to the jurisdiction of the Tribunal, and to comply with its decision concerning the release of the vessel or its crew upon the posting of the bond or other financial security determined by it (Article 292 paragraph 4 UNCLOS).

*3.3.1.3. The compulsory jurisdiction of the disputes related to the activity in the area*

According to Treves, “*the provisions on disputes concerning activities in the Area contain the most innovative concepts to be found in the Convention as regards the settlement of dispute*”. He explained that, while the provisions on the Tribunal were largely copied from the model of the ICJ, those regarding disputes in respect of activities in the Area were borrowed from the model of the Court of Justice of the European Communities (Treves, 2001, pp. 124-127).

In fact, as provided for in Part XI, Section 5 of the Convention, the Seabed Disputes Chamber of the Tribunal has mandatory jurisdiction over disputes arising in connection with activities in the Area. Article 187 of the Convention provides that the Chamber “shall have jurisdiction ... with respect to activities in the Area” whenever they fall within categories indicated in paragraphs (a) to (f) of the article. These categories consist of disputes between States Parties regarding the interpretation or application of the Convention or relevant Annexes; disputes between States Parties and International Seabed Authority regarding the compatibility or, otherwise, acts or omissions of the Authority with applicable provisions of the Convention; and disputes concerning parties to a contract. As already mentioned, under Part XI of the Convention, parties to contracts may be States, the Authority, the Enterprise, state

enterprises and natural or juridical persons. Disputes under these categories may be related to the interpretation or application of the contracts in question or plans of work or acts or omissions of parties to the contract. They may also concern alleged failure to conclude a contract or questions of liability for wrongful act or omission, pursuant to the relevant provisions of the Convention or its Annex III (Mensah, 2001, P. 27).

However, there are some limitations to the competence of the Seabed Disputes Chamber. The most important of them relates to disputes concerning the decisions of the International Seabed Authority. According to Article 189 of the Convention, the Seabed Disputes Chamber has “*no jurisdiction with regard to the exercise by the Authority of its discretionary powers*” under Part XI of the Convention. Especially, the Chamber shall not “*substitute its discretion for that of the Authority*” or pronounce itself on the question whether any rules, regulations and procedures of the Authority conform to the Convention. The Chamber may also not declare valid any such rules regulations and procedures of the Authority. The competence of the Chamber in that case “*is confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual rights of parties to the dispute or their obligations under the Convention; to claims concerning excess of jurisdiction or misuse of power, or to claims for damages for failure to comply with “contractual obligations or obligations under the Convention”*”. According to Mensah, this significant limitation on the Tribunal's jurisdiction was incorporated in the Convention in order to ensure that, to the extent compatible with the requirements of fairness and accountability in the exercise of its powers and prerogatives, the International Seabed Authority would be afforded the freedom, powers and discretion that it needs to discharge its important and innovative responsibilities on behalf of “*humankind as a whole*”. However, still according to Mensah, it does not detract from the fact that the Seabed Disputes Chamber has extensive power to supervise the decisions of the Authority that may affect the rights and interests of States and other entities working in the international Area. Nor does it considerably affect the Chamber's competence to pronounce on the rights and

obligations of parties to contracts, or on their prerogative to seek compensation or other suitable redress, when their rights have been unjustifiably trespassed.

### 3.3.2. The advisory jurisdiction

According to Judge José Luis Jesus, Since the Permanent Court of International Justice (PCIJ) was established, the call for advisory opinions has been a common procedure followed and has played a significant role in the development of international law. Thus, the practice set by the PCIJ in this kind of procedure and the experience gained since then by that Court and the ICJ were in large part followed by the Statute and the Rules of the Tribunal (Jésus, 2009, P. 6). Indeed, the provisions of the Rules of the PCIJ and ICJ are reproduced, with some adaptations, in the Convention, specifically in its Annex VI, which contains the Statute of the Tribunal, and in Part XI of the Convention regarding the jurisdiction of the Seabed Disputes Chamber.

The Tribunal exercises advisory function throughout the Seabed Disputes Chamber but also throughout the Tribunal as a full court.

The Seabed Disputes Chamber may be invited to provide an advisory opinion firstly at the request of the Assembly of the International Seabed Authority “*on the conformity with the Convention of a proposal before the Assembly of the International Seabed Authority on any matter*”; and secondly at the request of the Assembly or the Council of the International Seabed Authority “on legal questions arising within the scope of their activities”<sup>9</sup>.

To a certain extent, the procedural mechanism by which the Seabed Disputes Chamber may be requested to entertain an advisory opinion is the same as the one applicable before the PCIJ and ICJ. The decision to request an advisory opinion is to be taken by a collective body, which in the case of the Seabed Disputes Chamber is either the Assembly or the Council of the International Seabed Authority. In this

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<sup>9</sup> See article 159, paragraph 10, and Article 191 of the Convention

regard, on the 06<sup>th</sup> of May 2010 the Seabed Disputes Chamber was seized by the Council of the International Seabed Authority in order to give an advisory opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. The Advisory opinion was rendered on 1<sup>st</sup> February 2011<sup>10</sup>.

On top of the advisory role of the Seabed Disputes Chamber, the Tribunal, as a full court, has as well advisory jurisdiction, under article 138 of its Rules. Indeed, this article provides that 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”<sup>11</sup>.

In Contrast with requests for an advisory opinion to be introduced before the Seabed Disputes Chamber, requests to the Tribunal for an advisory opinion can be made on the basis of an international agreement. According to Jesus, a bilateral or a multilateral agreement appears to be considered an international agreement for this purpose. Most probably such an international agreement may be made between States, between States and international organizations or between international organizations. This is an important procedural novelty which introduces a supple and fresh approach to the issue of entities entitled to request advisory opinions.

The Convention does not explicitly mention the advisory role of the Tribunal as a full court. But, article 21 of the Statute of the Tribunal indirectly provides for such role. Actually, article 138 of the Rules of the Tribunal is based on article 21 of the Statute of the Tribunal, which confers broad competence by stating that “*the*

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<sup>10</sup> See Case n°17 of the Tribunal

[http://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR\\_161\\_E.pdf](http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_161_E.pdf)

<sup>11</sup> The advisory jurisdiction of the Tribunal is based on Rule 138 of the Convention. However, article 21 of the Statute of the Tribunal confers to the Tribunal large jurisdiction, which is also interpreted as providing an advisory function, by stating that “the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”

*jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.*

For Jesus, advisory opinions are non-binding but can play an essential part in clarifying the interpretation of the law. In fact, the advisory function of the Tribunal as a full court is a flexible tool for those looking for a clarification of points of law or legal questions. Thus, on 28 March 2013, ITLOS received a request from the Sub-Regional Fisheries Commission (SRFC) to render an Advisory Opinion on the following matters:

*“1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?*

*2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?*

*3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?*

*4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?”<sup>12</sup>*

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<sup>12</sup> See ITLOS case n°21: <http://www.itlos.org/index.php?id=252>

The decision of the Tribunal is still pending and the public hearings held from 2 to 5 September 2014 were presided by Judge Shunji Yanai, President of the Tribunal who has planned to deliver the advisory opinion in spring 2015<sup>13</sup>.

In relation to these requests, many countries have already contested the jurisdiction of the Tribunal in its full composition to deliver such a decision<sup>14</sup>. For instance, Australia in its written statement evoked the position of the authoritative University of Virginia Commentary to the 1982 Convention, which states that: “*the Tribunal itself has no advisory jurisdiction, and the advisory jurisdiction of the Chamber is limited to legal questions that may be referred to it only by the Assembly or Council, within the scope of their activities*”. Thus, beyond the substantive issues that must be answered by the Tribunal, its decision with respect to its power to give an advisory opinion will have a remarkable impact on the scope of its jurisdiction *ratione materiae* in the future.

### 3.3.3. The “accessory” jurisdictions

Besides the above different titles of jurisdiction conferred on the Tribunal, the Convention provides for titles of jurisdiction which, although directly created by it, as those previously examined, are in some ways accessory to other titles of jurisdiction established or to be established.

The first of such jurisdictions is the “competence of the competence” which refers to the power of the Tribunal to judge whether or not it has jurisdiction to settle a dispute submitted to it (article 288).

The second relates to the jurisdiction to judge whether a claim in a dispute referred to in article 297 constitutes an abuse of legal process or is *prima facie* well founded (Article 294).

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<sup>13</sup> See ITLOS Public sitting held on Friday, 5 September 2014, at 10 a.m. : [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/verbatims/ITLOS\\_PV14\\_C21\\_4\\_E\\_checked.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/verbatims/ITLOS_PV14_C21_4_E_checked.pdf)

<sup>14</sup> See notably written statements of the People’s Republic of China, Ireland, Australia, France and the United Kingdom: <http://www.itlos.org/index.php?id=252>

The third jurisdiction is the aptitude of the Tribunal to interpret its own decisions, in case of a dispute relating to the meaning or scope of one such decision (article 33 Paragraph 1, of the Statute of the Tribunal).

The fourth jurisdiction refers to the power to statute on questions of application or interpretation of the Convention or an agreement conferring jurisdiction to the Tribunal, with binding effect on a State Party to the Convention or to the agreement, which has intervened in a pending case in accordance with article 32 of the Statute.

The last accessory jurisdiction relates to the competence of the Tribunal to pronounce with regard to costs, when it is exceptionally decided to make an exception to the general rule providing that each party shall bear its own costs (article 34 of the Statute of the Tribunal).

#### 3.3.4. The optional jurisdictions

In accordance with paragraph 1 of Article 24 of the Statute of the Tribunal, States Parties can submit a dispute to the Tribunal by notification of a special agreement. Moreover, Article 280, in general terms, provides that nothing in the Part of the Convention concerning the settlement of disputes “*impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice*”. Such peaceful means include clearly the procedure before the Tribunal as well as the procedures before the other adjudicatory bodies mentioned in Article 287. Also Article 287 of the Convention provides that the rule giving preference to the procedure chosen by both parties (paragraph 4) and to arbitration when the parties have chosen different procedures (paragraph 5) applies only “*unless the parties otherwise agree*”. Therefore, even when the mechanism of choice of procedure according to article 287 would have excluded its jurisdiction, the Tribunal may have jurisdiction thanks to the agreement between the parties to a dispute.

Moreover, pursuant to article 282, in the event that parties to a dispute regarding the interpretation or application of the Convention “*have agreed, through a*



*general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties otherwise agree*". As a result, previous agreements assigning compulsory jurisdiction to a body other than the Tribunal shall prevail over the jurisdiction of the Tribunal recognized by article 287.

The agreement on the basis of which the Tribunal can be seized of a case and which allows widening the jurisdiction of the Tribunal is not only the "*special agreement*" (*compromis*) stated in article 24 of the Statute. It may be a unilateral application by a party in the event that the Tribunal does not have competence before a consent to jurisdiction given by the other party. This so-called "*forum prorogatum*" is not mentioned in the Statute of the Tribunal but resides in Article 54, paragraph 5 of its Rules (Treves, 2001, P. 23).

## 4. Procedure before the Tribunal

### 4.1. Preliminary Remarks

The procedure before the Tribunal is principally detailed in its Rules which were adopted on 28 October 1997 then amended on 15 March and 21 September 2001 and on 17 March 2009. In elaborating the Rules, the Tribunal, following the main lines drawn in its Status, had to take the Rules of the ICJ as a basis while taking into account the particular aspects of the Tribunal's jurisdiction and the need to reach a good administration of justice. Indeed the Tribunal was well aware that the ICJ was criticized because its justice is too slow and too expensive, and that, at least, some of the reasons for this were to be found in its Rules and in its internal judicial practice (Treves, 2001, P. 136). Thus, the Tribunal decided through Article 49 of its Rules that, without limiting the right of the parties to a fair trial and to argue fully their case, its proceedings should be as expeditious and cost-effective as possible<sup>15</sup>.

This article can be seen as the cornerstone of the Rules and can serve as a general clause useful for its understanding, particularly of the provisions related to the procedure to be followed in cases submitted to it. However, the Tribunal recognized that the policy stated in this article would be effective only if applied in all the relevant rules and in the internal judicial practice of the Tribunal. The desire to implement this policy explicates why many of the features of the Rules and the Resolution on the internal judicial practice of the Tribunal differ from those of the ICJ (Treves, 2001, pp. 135-136).

The aim in this chapter is not to discuss systematically and in detail the 138 articles of the Rules, but only to emphasize the procedural features that make the Tribunal different from the ICJ.

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<sup>15</sup> Article 49 of the Rules of the International Tribunal for the Law of the Sea: "The proceedings before the Tribunal shall be conducted without unnecessary delay or expense."

## 4.2. The time-limits in proceedings before the Tribunal

Time-limits are set in a number of provisions in the Rules of the Tribunal with the purpose of making the procedure expeditious. Article 59, paragraph 1 which lies in the section on the written proceedings, provides that: “*The time-limits for each pleading shall not exceed six months*”. This so-called “six-month rule” was proposed, according to Judge Treves, by scholars and practitioners to avoid the problems faced by the ICJ (Treves, 2001, P. 137). So, according to Judge Eiriksson, the written pleadings in cases with two rounds of pleadings would finish, excepting incidental proceedings or other situations causing delay, no later than two years after the relevant order is adopted (Eiriksson, 2001, P. 169). For instance, in the *M/V “SAIGA” Case*, as fixed by the Tribunal, the time offered to file the Memorial was 88 days. For Counter-Memorial 119 days thereafter, for the Reply 35 days thereafter and for the Rejoinder 38 days thereafter, for a total of 280 days. Thus, the total period from the institution of proceedings until the closure of written proceedings was 340 days, considering that the case began as arbitral proceedings.

Regarding oral proceedings, Article 69, Paragraph 1 of the Rules provides that the date to be fixed by the Tribunal for the opening of oral proceedings shall fall within a period of six months from the closure of written proceedings unless the Tribunal is satisfied that there is adequate justification for deciding otherwise. Moreover, according to paragraph 2 of article 69 “*when fixing the date for the opening of the oral proceedings or postponing the opening or continuance of such proceedings, the Tribunal shall have regard to:*

- (a) the need to hold the hearing without unnecessary delay;*
- (b) the priority required by articles 90 and 112;*
- (c) any special circumstances, including the urgency of the case or other cases on the list of cases;*

Other time-limits in the Rules lie in its Article 67, which allows the parties and other entities authorized to appear before the Tribunal to ask to take cognizance in the beginning of the written pleadings in a case. So, Article 99 paragraph 1 of the Rules provides that from the moment the requesting State has taken such cognizance, it has 30 days to submit its request for permission to intervene in the proceedings. This provision shortens the time limits for the Tribunal to decide to grant or not such permission. Furthermore, for the submission of preliminary objections (which will be discussed later), the Rules fix a time-limit of 90 days at the latest after the institution of proceedings. Conversely, before the review of Article 79 of the Rules of the ICJ<sup>16</sup>, such time-limit coincided with the time-limit for the submission of the counter-memorial (Eiriksson, 2001, P. 137).

Another feature that makes the procedure before the Tribunal more expeditious is the duration of its public sittings. Indeed while the Tribunal sits between 09:00 hours and 13:00 hours on all days in which it holds oral proceedings, the second sits only once a day from 10:00 to 13:00 hours.

#### 4.2.1. The policy of transparency and written proceedings before the Tribunal

Contrary to the confidentiality principle which governs the Rules of the ICJ<sup>17</sup>, transparency is, as regards Article 67 of the Rules of the Tribunal, the basic principle followed throughout all the procedure before the Tribunal. Indeed States and other entities entitled to appear before the Tribunal as well the public at large have access to the written pleadings of the case.

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<sup>16</sup> Amendment entered into force on 1 February 2001. Article 79 of the Rules of Court as adopted on 14 April 1978 has continued to apply to all cases submitted to the Court prior to 1 February 2001.

<sup>17</sup> According to article 53 of the Rules of the ICJ, the written pleadings cannot be put at the disposal of a State entitled to appear before the Court and having requested to be furnished with copies, or be made accessible to the public, unless the Court so decides ascertaining the views of the parties. While States can make their request "at any time", accessibility to the public may only be granted "on or after the opening of the oral proceeding".

Article 67 of the Rules of the Tribunal states that: *“Copies of the pleadings and documents annexed thereto shall, as soon as possible after their filing, be made available by the Tribunal to a State or other entity entitled to appear before the Tribunal and which has asked to be furnished with these documents.”*

In order to avoid any inequality of treatment the same paragraph specifies that: *“If the party submitting the memorial so requests, the Tribunal shall make the memorial available at the same time as the counter-memorial”*

According to Treves, it seems reasonable to apply the same principle to the furnishing of copies of the reply when a rejoinder is to be filed, although this aspect is not mentioned in article 67 (Treves, 2001, P. 141).

Concerning the public, paragraph 2 of article 67 mentions that: *“Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal is not sitting or the President of Tribunal decides after having ascertained the views of the parties.”*

However, the principle of transparency implemented in the previous paragraphs is not without exception. Indeed, paragraph 3 of article 67 provides that: *“the Tribunal, or the President if the Tribunal is not sitting, may, at the request of a party, and after ascertaining the views of the other party, decide otherwise than as set out in this article.”*

On this point, Treves argued that the principle of transparency seems to be weakened more deeply concerning access to written pleadings before the commencement of oral proceedings than concerning their accessibility by the public at the moment of such commencement. When a request is needed in both situations considered in paragraphs 1 and 2, it seems predictable that the Tribunal will inform the parties to the dispute and ask them to indicate, probably within a time-limit, if they wish to exercise their right to request it to decide "otherwise than set out" in Article 67. Regarding access of the public at the commencement of the oral proceedings, the party opposing the request

for access has the burden of doing so on its own initiative, without any need for the Tribunal to remind it that it is entitled to do so (Treves, 2001, pp. 141-142).

### 4.3. Preliminary objections

A preliminary objection is an objection raised in a case before a tribunal, which when upheld, will render further proceedings before the tribunal impossible or unnecessary.

In adopting the provisions relating to preliminary objections the Tribunal took into account the need to foster expeditiousness but also the need to ensure equal treatment of the parties. Consequently, the procedural rules regarding this subject are substantially different from those of the ICJ.

Before its amendment, which entered into force on 1<sup>st</sup> February 2001, Article 79, paragraph 1 of the Rules of the ICJ, provided that “*preliminary objections shall be made in writing within the time-limit fixed for the delivery of the counter-memorial*”. This provision had been criticized due to the fact that it was permitting the respondent to wait up to the last minute to present its preliminary objections, and thus, enjoy a “free ride” since, if its objection was rejected, it would obtain the advantage of doubling the time available to prepare the counter-memorial. This provision was finally modified on 5 December 2000, bringing the new time-limit within three months after the delivery of the Memorial (Treves, 2001, pp. 142-143).

To avoid these inconveniences and deal as quickly as possible with the preliminary objection, Article 97, paragraph 1 of the Rule of the Tribunal provides that a preliminary objection shall be made in writing within 90 days from the institution of proceedings.

This time-limit is half of the maximum time-limit of six months provided for in the Rule for submitting the memorial and moreover, paragraph 3 of the same article provides that, within 60 days, the other party may present written observations and submissions in response to the preliminary objection while observations and

submissions in reply shall be presented by the objecting party within a further lime-limit of 60 days. So, contrary to what happened before the ICJ, questions related to preliminary objections can be resolved in a very brief time before the Tribunal. Moreover parties always have the possibility, through an agreement, to refer the preliminary objections to the examination of the merits. Thus, in the “*M/N Saiga*” case, Saint Vincent and the Grenadines and Guinea agreed to notify the Court that the matter relating to preliminary objections of Guinea would be examined in the merits<sup>18</sup>.

#### 4.4. Preliminary proceedings

One type of incidental proceedings which is not in the Rules of the ICJ appears in the Rules of the Tribunal. These are the "preliminary proceedings" present in article 96 with the purpose of implementing article 294 of the Convention, which has the same title. According to this article of the Rules, when an application “in respect of an dispute referred to in article 297” is submitted to a court or a tribunal, at the request of a party, or “*proprio motu*”, this court or tribunal shall determine “whether the claim constitutes an abuse of legal process or is *prima facie* unfounded”. This provision is related to the compromise concerning the limitations to compulsory jurisdiction provided for in article 297 of the Convention (Treves, 2001, P. 147).

Continuing, article 96 of the Rules provides that the Registrar, when transmitting to the respondent an application filed with the Tribunal, shall notify the respondent of the time-limit set by the President of the Tribunal for requesting a determination under article 294 of the Convention. Within that time-limit, the respondent may introduce a request in writing specifying the grounds for the Tribunal to determine that:

- (a) the application is made in respect of a dispute referred to in article 297 of the Convention; and
- (b) the claim constitutes an abuse of legal process or is *prima facie* unfounded.

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<sup>18</sup> See The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)

Within a time-limit not exceeding 60 days from the receipt of the request, parties "may present their written observations and submissions". Unless otherwise decided, the further proceedings shall be oral.

Upon receipt of the request, "the proceedings on the merits shall be suspended". According to Treves, this aspect as well as the provision resulting from paragraph 7<sup>19</sup> of Article 96 make "preliminary proceedings" similar to proceedings concerning "preliminary objections". However, these two proceedings are not identical. Indeed, the proceedings on preliminary objections have a more articulated written phase while "Preliminary proceedings" may be started *proprio motu* by the Tribunal (Treves, 2001, P.148).

#### 4.5. Intervention

Similarly to articles 62 and 63 of the Statute of the ICJ, article 31 and 32 of the Statute of the Tribunal, with some differences in the formulation of the provisions, envisaged two types of intervention in the proceedings envisaged before it; the "optional" intervention, initiated by request upon which the Tribunal shall decide and the intervention "as of right", to which a third State is entitled when the construction of a convention to which it is a party is in question (Treves, 2001, P. 143).

According to Wolfrum the most remarkable difference between the two bodies concerning intervention is to be found in paragraph 3 of article 31 of the Statute of the Tribunal, as there is no corresponding provision in the Statute of the Court (Wolfrum, 2001, P. 170). This provision provides that the decision of the Tribunal shall be binding upon the intervening State as regards the matter for which it had intervened. This deviates also from the practice of the Court whose Chamber, in the Judgment on the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua

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<sup>19</sup> The written observations and submissions referred to in paragraph 5, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters which are relevant to the determination of whether the claim constitutes an abuse of legal process or is prima facie unfounded, and of whether the application is made in respect of a dispute referred to in article 297 of the Convention. The Tribunal may, however, request the parties to argue all questions of law and fact, and to adduce all evidence, bearing on the issue.



intervening) of 11 September 1992, stated that “...a State permitted to intervene under article 62 of the statute, but which does not acquire the status of a party to the case, is not bound by the Judgment given in the proceedings in which it has intervened...”<sup>20</sup>.

Regarding intervention “as of right”, Article 32<sup>21</sup> of the Statute of the Tribunal replicates the structure and content of Article 63<sup>22</sup> of the Statute of the ICJ which states that the construction of the Convention concerned will be binding on the intervenor. However, Article 32 of the Statute of the Tribunal envisages a different situation. Indeed, according to Wolfrum, paragraph 1 of Article 32 of the Statute of the Tribunal refers to the “*interpretation or application of the Convention*” rather than to the “construction of a convention” as provided for in Article 63 of the Statute of the ICJ. So, this clause contains a reference to article 288 of the Convention and indicates clearly that the possibility to intervene in proceedings related to the Convention is open to all States Parties. Furthermore, Wolfrum argued that paragraph 2 of Article 32 of the Statute of the Tribunal has no equivalent in Article 63 of the Statute of the ICJ. On top of that, article 21 of the Statute of the Tribunal, which is made reference to in this chapter talks about “agreements” rather than “international agreement” and, so, may broaden the jurisdiction of the Tribunal (Wolfrum, 2001, P. 171). Indeed, for Wolfrum, since such agreements may include the participation of non-state entities, they too will have the right to intervene when the interpretation or application of the relevant agreement is in question<sup>23</sup>.

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<sup>20</sup> See ICJ Case n° 75 : <http://www.icj-cij.org/docket/files/75/6671.pdf>

<sup>21</sup> Article 32 of the Statute of ITLOS Read:

1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith.
2. Whenever pursuant to article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all the parties to the agreement.
3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.

<sup>22</sup> Article 63 of the Statute of the ICJ, read:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

<sup>23</sup> Article 101 of the Rules of the Tribunal refers explicitly to non-state entities.

## **5. Impact of the Tribunal on the peaceful settlement of international disputes**

The International Tribunal for the Law of the Sea has developed in its jurisprudence in the merits some rules of law of the sea. That has been the case in international maritime boundary delimitation. In this subject, the Tribunal carried out maritime delimitation on the basis of rules derived from the Convention. The application of the rules set by the Convention resulted in a convergence between the Tribunal and the ICJ. The Tribunal has also been seized on subjects related to State's responsibility concerning activities in the Area. On this occasion, the decision of the Tribunal has contributed to the consolidation of the principles of International responsibility of States. On top of that, the Tribunal, throughout its jurisprudence, has played a central role in the consolidation of the principle of precautionary approach.

### **5.1.1. The contribution of the Tribunal in the delimitation of maritime boundaries**

The judgment in the Bangladesh-Myanmar case<sup>24</sup> issued on 14 March 2012 allowed the Tribunal to implement its first jurisprudence on Maritime boundary delimitation. But, moreover, it is the first time that the delimitation of the continental shelf was carried out beyond 200 nautical miles. With this decision, the Tribunal has shown its place in the International Disputes Settlement system and thus becomes a relevant tool for the settlement of all disputes that arise in connection with the Convention, including maritime boundary disputes. The significance of the judgment of the Tribunal is that it has focused on the delimitation of all maritime spaces and that the Tribunal did not depart from the methods of delimitation established by the ICJ (Mahinga, 2013, P. 294). Indeed, as regards Paragraph 184, 226 and 240 of the judgment, the Tribunal expressly emphasized its will to follow previous case law of the ICJ. Moreover, as stated by Papanicolopulu, many elements of the decision support

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<sup>24</sup> See Case ITLOS Case No. 16, Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar).  
<http://www.itlos.org/index.php?id=108>

this assertion. There are, notably, the continuous allusions of almost all previous decisions in the field, the language utilized, the distinction between delimitation of the territorial sea and delimitation of the single boundary between exclusive economic zones and continental shelves, the method of delimitation chosen and the principal role of geography in drawing the boundary line (Papanicolopulu, 2012, Para. 8). Therefore, the decision is, in its main lines, similar to the previous ones developed by the ICJ and arbitral tribunals.

However, in some aspects, the Tribunal has remarkably contributed to the development of new principles and rules in maritime boundary delimitation. In this regard Franckx and Benatar declared that, *“the most innovative part of the judgment certainly relates to the section concerning the continental shelf beyond 200 nautical miles. Until then, no tribunal or court had ever established a continental shelf beyond 200 nautical miles, either because it consider that it had no jurisdiction or because under the specific circumstances of the case before them it was either unnecessary or inappropriate to do so”* (Franckx & Benatar, 2013, P. 447).

Besides that novelty, Papanicolopulu argued that, first, the Tribunal has redefined the law concerning another issue in maritime delimitation which is the prevalence of the territorial sea upon the exclusive economic zone<sup>25</sup> and has recognized the right of States to *“exercise rights in an area of overlap that do not impede the exercise of rights by the other State”*. On the other hand the Tribunal has clarified the term “agreement” in Article 15 of UNCLOS which provides for the right to a continental shelf beyond 200 nautical miles and the rapport between the role of the Commission on the Limits of the Continental Shelf and that of the binding dispute settlement mechanism in Part XV of UNCLOS.

Besides being the first dispute related to boundary delimitation submitted to ITLOS, the Bangladesh/Myanmar case constitutes a novelty as regards the content of the decision. Indeed, in the past, *“boundary disputes were resolved via International*

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<sup>25</sup> See ITLOS Case n°16, paragraph 169.

*Court of Justice and arbitral tribunals with the express consent of the states, but with mixed results” (Rosen, 2013, P. 13).*

The decision of both countries to defer their dispute to ITLOS and their acceptance of the verdict may encourage countries facing the same issues to seize the Tribunal in that it is a fair forum for dispute settlement, but, moreover, because the tribunal acts with relative speed, if we consider that the dispute was submitted to it in January of 2010 and the final decision issued in March of 2012 (Rosen, 2013, P. 15).

### 5.1.2. The consolidation of the principles of International responsibility of States.

In the *M/V Saiga Case*, the Tribunal stated that the fact that a State party does not comply with the Tribunal's decision is likely to entail the responsibility of that State Party. But it did not go further in its developments. It is in its *Advisory Opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area rendered the 1<sup>st</sup> February 2011* that the Tribunal has been given the opportunity to pronounce on issues regarding International liability of States Parties of the Convention. In this perspective, the Tribunal was led to consolidate the principle of International Responsibility of States (Mahinga, 2013, P. 338) but, also, to give a possible solution to some insufficiencies of these principles.

The Advisory Opinion was submitted to the Seabed Disputes Chamber by the Council of the International Seabed Authority whose questions were as follows:

*1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?*

*2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by*

*an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?*

*3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?*<sup>26</sup>

The answers given by the Chamber have as basis the rule defined in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts<sup>27</sup> adopted in 2001 by the International Law Commission (ILC). Indeed, regarding the liability of sponsoring States for the damages caused by sponsored entities, the Chamber stated that *“under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility)”*<sup>28</sup>. By this assertion, it is clear that the Chamber acknowledged and adopted the provisions of the Draft Article of the ILC.

However, under the Convention, the liability of the sponsoring State may also result from a breach of its obligation. In this respect, the Chamber specifies that, according to Article 139, paragraph 2 of the Convention, two conditions are required for liability to arise: the failure of the sponsoring State to carry out its responsibilities; and the occurrence of damage<sup>29</sup>. But for the Chamber, this provision constitutes an exception to the customary international law rule on liability since the ILC Articles on State Responsibility do not require the existence of damage as a condition of State liability. In fact, a State may be held liable under customary international law even if

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<sup>26</sup> See ITLOS, Case No. 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):

[http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/17\\_adv\\_op\\_010211\\_en.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf)

<sup>27</sup> Responsibility of States for Internationally Wrongful Acts 2001:

[http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)

<sup>28</sup> See ITLOS, Case N° 17, Para. 182.

<sup>29</sup> See ITLOS, Case N° 17, Para. 176

no material damage results from its failure to meet its international obligations<sup>30</sup>. Going further, the Chamber defines the characteristics of damage and specifies the legal regime of the amount and form of compensation. So, it is clear that the Chamber implemented in a very relevant way the Draft Article of the ILC.

Nevertheless, regarding the case in which the sponsoring State has not failed to meet its obligations, the Chamber notes that “*there is no room for its liability under article 139, paragraph 2, of the Convention even if activities of the sponsored contractor have resulted in damage*” and that “*a gap in liability which might occur in such a situation cannot be closed by having recourse to liability of the sponsoring State under customary international law*”. Thus the Chamber, considering the effort made in vain by the ILC to address this issue, advocates the use of a trust fund to cover such damages not covered otherwise<sup>31</sup>.

### 5.1.3. The consolidation of the principle of precautionary approach

The ITLOS has successfully amplified its legitimacy by demonstrating an effective principle through incorporation of the precautionary approach in its judgments. Indeed, in 1999, in the Southern Bluefin Tuna case, ITLOS encouraged the parties to act with “prudence and caution” in order to ensure preservation of marine life. Its decision showed a precautionary approach and came to be the first case of an international judicial judgment using this notion (Cho, 2009, P. 1).

In December 2001, in the Mixed Oxide Fuel plant case (“MOX”)<sup>32</sup>, to avoid abuse of the precautionary approach, which could result in lessened legitimacy, ITLOS established a clear view of this notion. The MOX case implied a dispute over marine pollution between the United Kingdom (UK) and Ireland in which, amongst other provisional measures, Ireland invited ITLOS to stop the UK from discharging

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<sup>30</sup> See ITLOS, Case N° 17, Para. 178

<sup>31</sup> See ITLOS, Case N° 17, Para. 209.

<sup>32</sup> See ITLOS, Case N° 10.

radioactive waste from the MOX plant into the Irish Sea. The Tribunal took this occasion to shed light on the extent and limits in the use of the precautionary approach. Subsequently, the Tribunal stressed the necessity of showing the seriousness of the potential harm to the marine environment. It decided that Ireland had failed to meet the required threshold in establishing the urgency and the seriousness of the potential harm. So, for Cho, this decision in the MOX plant case was in agreement with principle 15 of the Montreal Protocol on Substances that Deplete the Ozone Layer, in which the precautionary approach was narrowly interpreted.

Going further, in 2011 the Seabed Disputes Chamber of ITLOS, in its advisory opinion in Responsibilities and obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area stated that *“the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration”*. The Chamber unanimously agreed that *“this has initiated a trend towards making this approach part of customary international law”*<sup>33</sup>.

In order to invoke the precautionary approach, Cho states that the harm to be prevented cannot be general, but has to be identifiable and clear. Moreover, the threat must pose serious or irreversible damage to the environment. And still according to Cho, in practice, the precautionary principle is not without its constraints, in fact *“there is a threshold that the parties have to prove in order for the Tribunal to use the approach”*.

As regards the developments above, the will of ITLOS to invoke the precautionary approach in its judgments has confirmed its appreciation and concern for environmental issues, but moreover, it has given this notion its legitimacy and a practical formulation to enhance its role. In doing so, the Tribunal participates in the consolidation of the international law in general and the environmental law in particular.

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<sup>33</sup> See ITLOS, Case N° 17, Para. 135.

## 6. Conclusion

Created by the 1982 United Nations Convention on the Law of the Sea, the International Tribunal for the Law of the Sea is a standing judicial body that in many aspects differs from other international courts such as, for instance, the International Court of Justice. Its innovative features offer many benefits over the alternative mechanisms of international dispute settlement.

Firstly, the fact that the tribunal is a specialized judicial body allows it to resolve, more easily, cases that demand special expertise like fisheries, marine environment and marine research. Furthermore, the fact that the jurisdiction of the tribunal is limited, in principle, to decide on the interpretation and application of the UNCLOS, offers it the advantage to judge a case more expeditiously than the ICJ, which has to deal with several other matters different from the law of the sea.

Secondly, the special composition of the Tribunal with 21 Judges (against 15 judges at ICJ) specialized in the field of the law of the sea, might be the subject of consideration by parties before submitting a dispute to the Tribunal. Compared to ICJ, the Tribunal is a much larger body regarding the strength of the bench and the fact that the election of its members is totally independent from the United Nations unlike ICJ. Moreover, Judges from developing countries are proportionally more numerous at ITLOS than at the ICJ.

Thirdly, ITLOS has broader jurisdictional power and is, in this respect, different from other international judicial bodies. Indeed, in terms of jurisdiction "*ratione personae*", contrary to the ICJ, "*entities other than States*" can submit their disputes to the Tribunal. Moreover, the Convention recognizes the exclusive jurisdiction of the Seabed Disputes Chamber of the Tribunal to deal with both disputes related to interpretation or application of the provisions of the Convention concerning activities in the Area, and requests for advisory opinions submitted by the Assembly or the Council of the Authority "on legal questions arising within the scope of their activities". In contrast, none of the other "means of dispute settlement" listed in article



287 of the Convention has jurisdiction to deal with such disputes or requests. In matters requiring immediate action, such as in case of prompt release of vessels and crews and provisional measures, the jurisdiction of the Tribunal becomes compulsory unless the parties otherwise agree. So, this residual jurisdiction offers the Tribunal an advantage over other courts or tribunals referred to in article 287.

Fourthly, one major feature of the Tribunal is that it saves time as it requires much less time to put a panel in place compared to the case of selecting an arbitral tribunal, but more specifically, several provisions of the Rule of the tribunal set time-limits for the proceedings in order to make the procedure expeditious .

Apart from its specificities in terms of organization, jurisdiction and procedure, the Tribunal, throughout its jurisprudence, has shown its ability to play a major role in the development of international law, particularly in the field of maritime boundary delimitation and environmental law.

Although a great deal has been written and said about the Tribunal's lack of cases (Nain, 2013, Para. 3), since it received its first case in 1998, a total of 22 cases have been filed. Of these, 19 have been decided, two were discontinued and one is under way.

Of the 19 cases that have been resolved, eight were prompt release cases, eight involved provisional measures pending the constitution of an arbitral tribunal, one dealt with compensation for the illegal arrest of vessels, one involved a request for an advisory opinion; and one dealt with a maritime boundary dispute. Thus, the Tribunal has developed a substantial corpus of jurisprudence in this regard. However, some authors still consider ITLOS as a failure or remain skeptical as regards to its future (Nain, 2013, Para. 2). But, in our opinion, this pessimistic perspective is without real basis. Indeed, on top of the above cited innovations of the Tribunal that give it a substantial advantage over the other arbitral or judicial bodies, many factors will militate in the future for the consolidation of its place within the system of international disputes settlement.

Firstly, as a judicial body established by the United Nations, its decisions, as it is the case with ICJ, may be considered as having greater authority than that of the arbitral tribunals.

Secondly, “*developing States which are parties to a dispute before the Tribunal may qualify for financial assistance to help them cover the costs related to lawyers' fees or travel and accommodation of their delegation during the oral proceedings in Hamburg*”<sup>34</sup>. This provision naturally will motivate these countries to submit their disputes to ITLOS rather than to the other Courts.

Finally, the provisions of the Convention regarding dispute settlement are not easily understood, and this fact is reflected in its procedures. To cope with this drawback, the Tribunal has initiated a number of campaigns to broadcast information on its work. Moreover, it has published a guide to its procedures and has organized ten regional workshops for government legal officers<sup>35</sup>.

As regards to these observations, the declarations of the current President of the Tribunal in an interview<sup>36</sup> should be seen as a prediction of the future of ITLOS. Indeed according to Judge Shunji Yanai, “*this tribunal is still young. States have not yet fully understood the role of ITLOS. But gradually they will recognize those specific features that make ITLOS the most probable port of call for them*”.

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<sup>34</sup> See ITLOS website: <http://www.itlos.org/index.php?id=139&L=0>

<sup>35</sup> The Tribunal has so far held ten regional workshops in Dakar, Kingston, Libreville, Singapore, Bahrain, Buenos Aires, Cape Town, Fiji, Mexico City and Nairobi.

<sup>36</sup> See interview published in Hydro-International on 08 March 2012: [http://www.hydro-international.com/issues/articles/id1318-More\\_Maritime\\_Boundary\\_Issues\\_at\\_ITLOS.html](http://www.hydro-international.com/issues/articles/id1318-More_Maritime_Boundary_Issues_at_ITLOS.html)

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