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The Contribution of the International Tribunal for the Law of the Sea to International Law

Helmut Tuerk*

Summary

The 1982 United Nations Convention on the Law of the Sea imposed an obligation on States Parties to settle disputes by peaceful means and, in particular, also provides for compulsory procedures with binding decisions. The International Tribunal for the Law of the Sea, composed of twenty-one judges representing the principal legal systems of the world, is one of the means for the settlement of disputes entailing such decisions. The Tribunal is open not only to States, but also to international organizations and, under certain conditions, to natural or legal persons. The jurisdiction of the Tribunal, in principle, includes any dispute relating to the law of the sea, subject to certain limitations and optional exceptions. The Tribunal has compulsory jurisdiction in two instances: provisional measures and the prompt release of vessels and crews.

In its eleven years of existence, the Tribunal has established a reputation for the expeditious and efficient management of cases and already has made a substantial contribution to the development of international law, including international environmental law. The total of fifteen cases heard so far—of which twelve were fisheries related and thirteen were introduced on the basis of the Tribunal's compulsory jurisdiction—may not appear impressive. This record, however, does not compare unfavourably to that of other international judicial bodies in the initial stages of their existence.

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I. Introduction

On November 16, 1994, the United Nations Convention on the Law of the Sea of December 10, 1982,¹ entered into force after eight years of protracted and arduous negotiations. This Convention is one of the most important treaties ever elaborated under the auspices of the United Nations,² as it provides a well-nigh universally agreed comprehensive regime for the seas, regulating all ocean space, its uses and its resources.³ At present, 154 States and the European Community are parties to the treaty,⁴ and this number will probably increase.

The impetus for what has rightly been called a “Constitution for the Oceans”⁵ was the Memorandum of Malta, presented at the United Nations General Assembly in 1967. This Memorandum proposed that the seabed and the ocean floor beyond the limits of national jurisdiction be declared “the common heritage of mankind,” not subject to national appropriation, and reserved exclusively for peaceful purposes.⁶ Such an overarching international instrument might never have been negotiated without this initial spark.

Since its entry into force, the United Nations Convention on the Law of the Sea has undoubtedly played a major role in bringing order to the oceans. In particular, the Convention establishes a clear and universal framework of coastal state maritime jurisdiction. The causes for many maritime disputes between States have thus been eliminated. At the same time, however, the Convention contains an innovative system for the settlement of such disputes. It has been observed that it is one of the most far-reaching and complex systems of dispute settlement found anywhere in international law. There can be no doubt that the underlying rationale for the creation of such a system was the wish to safeguard the many delicate compromises enshrined in the Convention and to secure its uniform interpretation and application.⁷

1. The United Nations Convention on the Law of the Sea (A historical perspective), http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Feb. 23, 2008).

2. *See id.*

3. *See* Judge Rüdiger Wolfrum, President, Int'l Tribunal for the Law of the Sea, Statement to the Sixth Committee of the General Assembly of the United Nations, 2 (Oct. 20, 2006).

4. *See* An International Tribunal for the Law of the Sea, http://www.itlos.org/start2_en.html.

5. T.T.B. KOH, *A Constitution for the Oceans, Remarks made by the President of the Third United Nations Conference on the Law of the Sea*, in OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, E.83.V.5, p. xxxiii.

6. Memorandum, The Permanent Mission of Malta to the United Nations, U.N. Doc. A/6695 (Aug. 17, 1967).

7. R. CHURCHILL, *Some Reflections on the Operation of the Dispute Settlement*

The Convention on the Law of the Sea created three important institutions: the International Seabed Authority in Jamaica,⁸ the International Tribunal for the Law of the Sea in Hamburg⁹ and the Commission on the Limits of the Continental Shelf,¹⁰ which meets in New York. Since the oceans and seas cover almost seventy-one percent of the Earth's surface, the Tribunal for the Law of the Sea has the largest geographical jurisdiction in the world, apart from the International Court of Justice.

Part XV of the Convention deals with the settlement of disputes.¹¹ It imposes an obligation on States Parties to settle disputes by peaceful means and, in particular, also provides for compulsory procedures with binding decisions.¹² Annex VI of the Convention contains the Statute of the International Tribunal for the Law of the Sea, which is one of the four means for the settlement of disputes entailing such decisions. The other alternative means are the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII of the Convention, and a special arbitral tribunal under Annex VIII for certain categories of disputes—fisheries, protection and preservation of the marine environment, marine scientific research or navigation, including pollution from vessels and dumping.¹³

II. Jurisdiction, Composition and Structure of the Tribunal¹⁴

The International Tribunal for the Law of the Sea, which became

System of the UN Convention on the Law of the Sea During its First Decade, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS, 388, 388 (D. Freestone, R. Barnes & D. M. Ong eds., 2006).

8. See International Seabed Authority, <http://www.isa.org.jm/en/about> (last visited Feb. 23, 2008).

9. See International Tribunal for the Law of the Sea, http://www.itlos.org/start2_en.html (last visited Feb. 23, 2008).

10. See Oceans and Law of the Sea, http://www.un.org/Depts/los/clcs_new/commission_purpose.htm#Purpose (last visited February 23, 2008).

11. See United Nations Convention on the Law of the Sea, pt. XV, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Convention].

12. *Id.*; see also T. TREVES, *The Exclusive Economic Zone and the Settlement of Disputes*, in THE EXCLUSIVE ECONOMIC ZONE AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982-2000: A PRELIMINARY ASSESSMENT OF STATE PRACTICE, 79, 79 (E. Franck & P. Gautier eds., 2003) (underlining the fact that compared to the provisions concerning the settlement of disputes "contained in other 'codification conventions,' the system for the settlement of disputes in the United Nations Convention on the Law of the Sea is remarkably different, because it provides, as a rule, the possibility of compulsory settlement").

13. See Convention, *supra* note 11, at pt. XV, art. 287.

14. See Convention, *supra* note 11, at Annex VI; see also International Tribunal for the Law of the Sea, Registry, *A Guide to Proceedings before the Tribunal*, 3-9 (2006), available at http://www.itlos.org/start2_en.html (last visited Feb. 23, 2008) [hereinafter *A Guide to Proceedings before the Tribunal*].

operational on October 1, 1996, is the specialized international judicial body established for the settlement of disputes concerning the interpretation or application of the Convention on the Law of the Sea, and for rendering advisory opinions.¹⁵ The jurisdiction of the Tribunal, in principle, includes any dispute relating to the law of the sea, such as disputes relating to maritime boundaries, fisheries, sea pollution or marine scientific research. Its jurisdiction is, however, subject to certain limitations and optional exceptions.¹⁶ These limitations relate to the exercise of certain discretionary powers by the coastal States; States Parties also have the right to exclude several categories of disputes, such as those relating to sea boundaries or military activities, from compulsory settlement procedures.¹⁷ The Tribunal has compulsory jurisdiction in two instances: article 290 regarding provisional measures and article 292 concerning the prompt release of vessels and crews.¹⁸

The Convention does not contain any provision conferring advisory jurisdiction on the Tribunal as such, which may, however, on the basis of Article 21 of its Statute give an advisory opinion on a legal question if this is provided for by an international agreement related to the purposes of the Convention conferring jurisdiction on it.¹⁹ Thus far, no use has been made of that interesting option in any international instrument.²⁰

The jurisdiction of the Tribunal may also be derived from relevant clauses included in international agreements relating to the law of the sea.²¹ At present, there are nine international agreements—six of which are fisheries-related—containing provisions making specific reference to the dispute settlement procedures of Part XV of the Convention and

15. See P. CHANDRASEKHARA RAO, *ITLOS: The First Six Years*, in 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 185, 185 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2002); see also L. DOLLIVER M. NELSON, *Reflections on the 1982 Convention on the Law of the Sea*, in *THE LAW OF THE SEA: PROGRESS AND PROSPECTS*, 28, 35 (David Freestone, Richard Barnes & David M. Ong eds., 2006).

16. Convention, *supra* note 11, at pt. XV, arts. 297-98.

17. See *id.*

18. See *id.* at pt. XV, arts. 290, 292.

19. H. CAMINOS, *The International Tribunal for the Law of the Sea: An Overview of its Jurisdictional Procedure*, in 5 *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS*, no. 1, 13, 22 (Eduardo Valencia-Ospina ed., 2006).

20. See R. Wolfrum, *The Tenth Anniversary of the International Tribunal for the Law of the Sea*, II *ROMANIAN J. INT'L L.*, no. 3, 76-77 (2002) (pointing out that the advisory function of the Tribunal is a significant innovation in the international judicial system and may offer a potential alternative for those seeking a non-binding opinion on a legal question or an indication as to how a particular dispute may be solved through direct negotiations. Such proceedings could be of particular assistance to parties to a dispute in the process of reaching a solution by negotiation, for example, in maritime delimitation cases).

21. *A Guide to Proceedings before the Tribunal*, *supra* note 14, at 6.

conferring therewith jurisdiction on the Tribunal.²² The best known are the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995²³ and the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001.²⁴ The most recent example is the Nairobi International Convention on the Removal of Wrecks²⁵ adopted in May 2007 at a diplomatic conference held by the International Maritime Organization.²⁶ With respect to these agreements, the procedures of Part XV apply whether a party to the agreement is a State Party to the Convention on the Law of the Sea or not. The inclusion of such jurisdictional clauses has thus become an established practice and it can only be of benefit to the parties if such clauses are included in every new maritime agreement that is being negotiated.²⁷

Finally, Article 22 of the Statute allows the Tribunal to exercise jurisdiction over disputes relating to the interpretation or application of treaties which are already in force, and concern the subject-matter covered by the Convention, provided that all the parties to that treaty so agree.²⁸

The law to be applied by the Tribunal comprises the Convention, and other rules of international law not incompatible with it.²⁹ This does not, however, preclude the Tribunal from holding jurisdiction to determine a matter *ex aequo et bono*,³⁰ if the parties so agree. Decisions are final and the parties to the dispute are required to comply with them. The decisions, however, have no binding force beyond the parties to the dispute.³¹ Nevertheless, they may be quite significant for the

22. See Doo-Young Kim, Deputy Registrar, Int'l Tribunal for the Law of the Sea, Statement to the First Meeting of the Regional Fishery Bodies—Secretariats Network, 4 (Mar. 13, 2007).

23. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88.

24. United Nations Educational, Scientific and Cultural Organization (UNESCO): Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 (2002).

25. Nairobi International Convention on the Removal of Wrecks, May 18, 2007, 46 I.L.M. 697.

26. Judge Rüdiger Wolfrum, President, Int'l Tribunal for the Law of the Sea, Statement at the Sixteenth Meeting of States Parties to the Convention on the Law of the Sea, 7 (June 19, 2006); see also *A Guide to Proceedings before the Tribunal*, supra note 14, at Annex 1 (offering a list of these agreements).

27. Wolfrum, supra note 26, at 8.

28. See *id.*

29. See Convention, supra note 11, at pt. XV, art. 293.

30. D. R. ROTHWELL, *The International Tribunal for the Law of the Sea and Marine Environmental Protection: Expanding the Horizons of International Oceans Governance*, 17 Ocean Y.B. 33 (2003).

31. See Convention, supra note 11, at pt. XV, art. 296.

development of the law of the sea in general, and may, in addition, influence the future interpretation of this body of law. It should also be noted that parties have no recourse to appeal a decision of the Tribunal.³²

The Tribunal is, at present, the largest world-wide judicial body, being composed of twenty-one judges, who are recognized experts in the field of the law of the sea. They are elected by the States Parties to the Convention for a term of nine years, whereby the term of one-third of the members of the Tribunal expires every three years. The composition of the Tribunal must ensure adequate representation of the principal legal systems of the world, and an equitable geographical distribution. The States Parties—which hold annual meetings in New York—have agreed to elect five judges each from Africa and Asia, four each from Latin American and Caribbean States, as well as Western European and Other States, and three from the Group of Eastern European States. This composition of the Tribunal clearly shows that added weight has been given to developing countries in comparison with the International Court of Justice,³³ where, in practice, judges from the five permanent members of the United Nations Security Council occupy one-third of the fifteen seats. In view of its larger size, the Tribunal is also more representative of the various legal systems and the different regions of the world. If the Tribunal does not include upon the bench a judge of the nationality of a party to a dispute, that party may designate a person of its choice to sit as a judge *ad hoc*.

The Tribunal is open to States Parties to the Convention, other States, as well as other entities, such as international organizations and natural or legal persons in any case expressly provided for in Part XI of the Convention—regarding exploration and exploitation of the International Seabed Area—or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the case. It has been pointed out that the fact that the European Community can be a party before the Tribunal renders it the Community's preferred choice for settling disputes with third countries relating to the law of the sea.³⁴

The jurisdiction of the Tribunal for the Law of the Sea is not as

32. ROTHWELL, *supra* note 30, at 34.

33. A.E. BOYLE, *The International Tribunal for the Law of the Sea and the Settlement of Disputes*, in *THE CHANGING WORLD OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: A TRIBUTE TO THE LATE KENNETH R. SIMMONDS*, 99, 118 (J.J. Norton, M. Andenas & M. Footer eds., 1998).

34. Judge Rüdiger Wolfrum, President, Int'l Tribunal for the Law of the Sea, Statement on the occasion of the Information Session organized by the Tribunal for the Diplomatic Corps, 6 (Oct. 6, 2005) (citing Joe Borg, Commissioner, Fisheries and Maritime Affairs of the European Union, Statement on the occasion of his visit to the International Tribunal for the Law of the Sea, (Sept. 2, 2005)).

broad *ratione materiae* as that of the International Court of Justice, as it is confined to matters provided for in the Convention and related instruments. However, it is certainly more comprehensive *ratione personae*, as in cases before the Court only States may be parties.³⁵ Access is probably the most significant difference between the Tribunal and the International Court of Justice.³⁶

Recourse to the Tribunal involves no costs for the States Parties to the Convention. When a dispute involves an entity that is neither a State Party nor the International Seabed Authority, the Tribunal fixes the amount which that party must contribute towards the expenses of the Tribunal.³⁷ Other costs, notably the fees for legal representation, are borne by the party incurring them, unless decided otherwise by the Tribunal.³⁸ The Secretary-General of the United Nations established a trust fund to assist developing States settling their disputes through the Tribunal, following a decision of the General Assembly.³⁹

The principal provision of Part XV of the Convention is Article 287, which outlines various procedures available to parties to settle their disputes peacefully through the compulsory mechanisms established by the Convention.⁴⁰ Article 287 provides that a State party, when signing, ratifying or acceding to the Convention or at any time thereupon, is free to choose one or more of the four means for the settlement of disputes aforementioned, by submission of a written declaration to the Secretary-General of the United Nations.⁴¹ So far only forty-one States have made such a declaration—and a mere twenty-three of those have accepted the Tribunal's compulsory jurisdiction.⁴² In the absence of such a declaration, parties are deemed to have accepted arbitration, which, in practice, has proven to be the general rule, while choosing the Tribunal or the International Court of Justice has remained the exception despite

35. See Statute of the International Court of Justice, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited Feb. 23, 2008).

36. A.E. BOYLE, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, in 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 37, 51 (P. C. Rao & R. Khan eds., 1997); see also R. WOLFRUM, *Verfahren zur Freigabe von Schiffen vor dem Internationalen Seegerichtshof*, in 70 SEEHANDELSRECHT UND SEERECHT: FESTSCHRIFT FÜR ROLF HERBER ZUM, 569 (Hamburg, LIT, 1999).

37. *A Guide to Proceedings before the Tribunal*, supra note 14, at 8 (citing Convention, supra note 11, at Annex VI, art. 19).

38. See *id.* at art. 34.

39. International Tribunal for the Law of the Sea Trust Fund (2004), available at http://www.un.org/Depts/los/ITLOS/itlos_trust_fund.htm

40. ROTHWELL, supra note 30, at 32.

41. Convention, supra note 11, at pt. XV, art. 287.

42. See Oceans and Law of the Sea, available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Feb. 23, 2007).

the fact that these two judicial bodies are institutions representing the international community.⁴³ It may seem somewhat doubtful whether this development was really anticipated at the time of the negotiations on the Convention, or whether it was believed that arbitration, despite being the default procedure, would turn out to be a rather subsidiary means for the settlement of disputes.⁴⁴

The Statute of the Tribunal contains a provision for the establishment of the Seabed Disputes Chamber, as well as special chambers for dealing with particular disputes or categories of disputes.⁴⁵ The Seabed Disputes Chamber, which is a “tribunal within a tribunal,” consists of eleven judges, each of whom are selected every three years. The Conference on the Law of the Sea had originally envisioned the establishment of a Seabed Tribunal as one of the principal organs of the International Seabed Authority to deal exclusively with seabed disputes. This approach was, however, abandoned in favour of establishing a fully-fledged Tribunal as an autonomous international organ with a Seabed Disputes Chamber.⁴⁶ That Chamber has not yet heard a single case, mainly because deep seabed mining is not yet commercially viable, and may not be anytime soon. Its future potential, however, cannot be denied. Experts from the German Federal Institute for Geosciences and Natural Resources have estimated that there is more dormant nickel and cobalt to be found in the manganese nodules on the bed of the Pacific Ocean than in all terrestrial deposits currently being exploited. According to these estimates, the metal content of the manganese nodules is enough to meet the world’s nickel, cobalt, copper and manganese needs for the whole of the twenty-first century.⁴⁷

The Seabed Disputes Chamber may also give advisory opinions at the request of the Assembly or the Council of the International Seabed Authority regarding legal questions arising within the scope of their activities. In particular, the Chamber may be requested to give an

43. See Wolfrum, *supra* note 26.

44. See Judge Rüdiger Wolfrum, President, Int’l Tribunal for the Law of the Sea, Statement at the Plenary of the 61st Session of the United National General Assembly, 7 (Dec. 8, 2006).

45. Convention, *supra* note 11, at Annex VI, arts. 14-15.

46. A.O. ADEDE, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea—A Drafting History and a Commentary*, in 10 PUBLICATIONS ON OCEAN DEVELOPMENT, 173-74 (Dordrecht; Boston; Lancaster: Martinus Nijhoff Publishers, 1987); see also A. K. ESCHER, *Release of Vessels and Crews before the International Tribunal for the Law of the Sea*, in 3 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS: A PRACTITIONER’S JOURNAL, no. 2, 205, 237-38 (Eduardo Valencia-Ospina ed., 2004).

47. Brigitte Zypries, German Federal Minister of Justice, Speech at the Tenth Anniversary of the Founding of the International Tribunal for the Law of the Sea (Sept. 18, 2006).

opinion as to the conformity with the Convention of a proposal on any matter before the Assembly.⁴⁸ Thus far, these organs of the Authority have not made use of this possibility.

Following a similar system of the International Court of Justice, the Tribunal established several special chambers: the Chamber of Summary Procedure, composed of five members and two alternates; the Chamber for Fisheries Disputes and Chamber for Marine Environment Disputes, each consisting of seven members of the Tribunal; and the Chamber for Maritime Delimitation Disputes, which was set up in March 2007 and is comprised of eight judges. A judgment given by any of the special chambers is considered to have been rendered by the full Tribunal.⁴⁹

More importantly in practice, however, seems to be the possibility to form an *ad hoc* special chamber, such as that convened to settle the dispute between Chile and the European Community regarding the conservation of swordfish stocks in the South-Eastern Pacific Ocean. An *ad hoc* chamber consists of at least three members, who may be chosen from among the members of the Tribunal. The Parties may also designate *ad hoc* judges.⁵⁰ That system should be of particular interest to parties considering arbitration, since, as in arbitration, parties are given substantial freedom to choose the judges who are to sit in such a chamber, and may even propose modifications to the Tribunal's rules of procedure for the chamber to apply. Thus, the parties can enjoy all the benefits of arbitration, without being required to bear the expenses of the chamber.⁵¹

So far, the system of special chambers—apart from *ad hoc* chambers—has not proven particularly successful. Until now, all the cases dealt with by the Tribunal have, with the aforementioned exception, been submitted to the full Tribunal. This reflects the reality that chambers do not deliver their orders or judgments any more quickly than does the full Tribunal, nor are the costs for the parties significantly lower. Parties to a dispute might even consider that the judgment of a full Tribunal stands on a higher footing than the judgment of a Chamber—although the legally binding nature of the decision rendered is exactly the same in both cases.⁵² Likewise, recourse has been made to the system of chambers offered by the International Court of Justice in

48. Statement at the Sixteenth Meeting of States Parties to the Convention on the Law of the Sea, *supra* note 26, at 8.

49. Convention, *supra* note 11, at Annex VI, art.15.

50. International Tribunal for the Law of the Sea: Rules of the Tribunal, arts. 19-22 (Oct. 28, 1997), available at http://www.itlos.org/start2_en.html (last visited Feb. 23, 2008).

51. See RAO, *supra* note 15, at 194.

52. See *id.* at 195.

only a modest number of cases.

The Tribunal's compulsory jurisdiction in relation to disputes regarding the interpretation or application of the Convention in general is contingent upon declarations by States Parties pursuant to Article 287. The Convention, however, does confer compulsory jurisdiction upon the Tribunal in relation to two specific substantive matters already referred to—provisional measures and the prompt release of vessels and crews— independently of the choice of procedure mechanism. These particular instances of compulsory jurisdiction have been entrusted to the Tribunal because they concern functions which cannot be performed properly by an arbitral tribunal.⁵³ The drafters of the Convention therefore considered that such matters should be resolved before a permanently established body. Furthermore, it should be borne in mind that only permanent tribunals are institutions that allow the development of a corpus of jurisprudence as they have the capacity and the obligation to create a body of decisional law that will serve the long-term interests of all States.⁵⁴

III. Jurisprudence of the Tribunal

A. *Cases Relating to Provisional Measures*

The Tribunal may be requested to prescribe provisional measures in two situations, first where a dispute on the merits has been submitted to the Tribunal, and second when a dispute on the merits has been submitted to an arbitral tribunal, pending its constitution.⁵⁵

When a party to a dispute that has been submitted to an arbitral tribunal requests provisional measures, the Tribunal is empowered, pursuant to Article 290, paragraph 5, of the Convention, to grant such measures pending the constitution of the arbitral tribunal, unless the parties have agreed to seize another court or tribunal within two weeks of the date of the request for provisional measures. Thus, the Tribunal may, at the request of a State Party, prescribe provisional measures against another State Party pending the final decision to be given not by the Tribunal itself, but by an arbitral tribunal that is yet to be constituted. In order to prescribe provisional measures, the Tribunal must consider that the measures are required by the urgency of the situation and that, *prima*

53. T. Treves, *The Jurisdiction of the International Tribunal for the Law of the Sea*, 37 INDIAN J. INT'L L. 400 (1997).

54. See WOLFRUM, *supra* note 3, at 6.

55. See *id.* at 5 (noting that under the Straddling Fish Stocks Agreement of 1995 the Tribunal is empowered to prescribe provisional measures to protect the rights of the parties as well as to prevent damage to the fish stocks in question).

facie, the arbitral tribunal to be constituted would have jurisdiction. As regards disputes in relation to activities in the International Seabed Area, an arbitral tribunal dealing with a commercial dispute shall, according to Article 188, paragraph 2, refer any question of the interpretation of Part XI of the Convention and the annexes relating thereto to the Seabed Disputes Chamber for a ruling, either at the request of any party to the dispute, or *proprio motu*.

It is interesting to note in this regard important innovations introduced by the Convention. First, the measures prescribed by the Tribunal are binding upon the parties to the dispute. Second, the Tribunal may prescribe provisional measures not only to preserve the respective rights of the parties to the dispute, but also to “prevent serious harm to the marine environment.” In addition, the Tribunal may follow up the measures it has prescribed by requesting the parties to submit reports on compliance.⁵⁶ In order to strengthen the pressure of public opinion on the parties with respect to provisional measures, the Tribunal also has the possibility to send the notices relating to the prescription, modification, or revocation of provisional measures,⁵⁷ not only to the parties to the dispute, but also to such other States Parties to the Convention it considers appropriate. The Tribunal has made use of this possibility only once so far.⁵⁸

The Tribunal’s power to prescribe provisional measures has already been invoked in four cases dealing with the protection of the marine environment: the *Southern Bluefin Tuna Cases*, the *MOX Plant Case*, and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*.⁵⁹

In the *Southern Bluefin Tuna Cases*,⁶⁰ the applicants, Australia and

56. Statement by President Wolfrum to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, October 24, 2005, 5, available at http://www.itlos.org/start2_en.html (last visited Feb. 23, 2008).

57. To date there are no cases where provisional measures prescribed by the Tribunal have been modified or revoked by the Tribunal or Annex VII tribunals.

58. Only the Order of August 27, 1999 in the *Southern Bluefin Tuna Cases* made reference to the relevant Article 290, ¶ 4 of the Convention and Article 94 of the Rules of the Tribunal. The Tribunal decided that the provisional measures prescribed in this Order shall forthwith be notified by the Registrar through appropriate means to all States Parties to the Convention participating in the fishery for Southern Bluefin Tuna.

59. There are no other cases which have been submitted to other courts or tribunals requesting provisional measures under Article 290 of the Convention.

60. *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (*Provisional Measures*), Order of August 27, 1999, 3 Int’l Trib. L. of the Sea Rep. of Judgment Advisory Opinions and Orders 280-336 (1999), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “List of cases” hyperlink to “Cases No. 3 and 4” hyperlink) (last visited Feb. 23, 2008); Press Releases No. 27, Int’l Trib. L. of the Sea, *Southern Bluefin Tuna Cases Hearings Conclude*, (Aug. 26, 1999), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink

New Zealand, sought relief from the Tribunal in relation to Japan's unilateral decision to conduct an experimental fishing program, which was planned for a duration of three years. The two applicant countries argued that while the fish stock was at its lowest historical level, Japan's experimental fishing programme would effectively increase its catch by thirty percent; the total allowable catch of this species had been agreed by the three countries under the 1993 Convention for the Conservation of Southern Bluefin Tuna.⁶¹ Australia and New Zealand requested the Tribunal to prescribe provisional measures to the effect that Japan immediately cease its unilateral experimental fishing of southern bluefin tuna, restrict its catch to the national quatum as last agreed, and require all parties to act consistently with the precautionary principle—caution and vigilance—in fishing for southern bluefin tuna pending final settlement of the dispute. Japan contended that the Tribunal had no jurisdiction, and that even if it did, the prescription of provisional measures would not be appropriate, since there was no risk of irreparable damage to the fish stock in question.

In its Order of August 27, 1999, the Tribunal noted that there was no disagreement between the parties that the stock of southern bluefin tuna was severely depleted. It further considered that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment. An important finding in the Tribunal's Order was that the parties should, under the circumstances, act with "prudence and caution" to ensure that effective conservation measures were taken to prevent serious harm to stock of southern bluefin tuna. The Tribunal also ordered, *inter alia*, that the parties should resume negotiations without delay, with a view to reaching agreement on measures for the conservation and management of these fish stocks, and that the parties should restrict their catches.

What may be considered quite striking was the fact that the Tribunal decided that all of the parties had to adhere to the annual national allocation that had last been agreed upon unless the parties were able to agree otherwise. The prescription of fish catch totals is normally an exercise of authority taking place on a national basis, or cooperatively between the relevant States.⁶² Although there is no express reference in

to "Press Releases" hyperlink) (last visited Feb. 23, 2008); Press Release No. 28, Int'l Trib. L. of the Sea, Southern Bluefin Tuna Cases, Tribunal Prescribes Provisional Measures (Aug. 2, 1999), available at http://www.itlos.org/start2_en.html (follow "Site Index" hyperlink to "Press Releases" hyperlink) (last visited Feb. 23, 2008).

61. Convention for the Conservation of Southern Bluefin Tuna, 1994 Austl. T.S. No. 16, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1994/16.html> (last visited Feb. 23, 2008).

62. N. KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA, 81 (Cambridge University Press) (2005).

the Order to the precautionary principle itself, the Tribunal nevertheless prescribed *de facto* precautionary measures and seems at least implicitly to have relied on that principle.⁶³

It has been observed that the Tribunal's intervention at the stage of provisional measures played a very significant role in bringing the parties—Australia, New Zealand and Japan—back to negotiations with each other, with the eventual result that the Southern Bluefin Tuna Commission was revitalized and is now functioning well.⁶⁴

In the *MOX Plant Case*,⁶⁵ the Tribunal heard a dispute between Ireland and the United Kingdom regarding the potentially harmful impact on the marine environment of the operation of a MOX plant situated at Sellafield, United Kingdom, on the coast of the Irish Sea. Such a plant recycles material from nuclear reactors and converts it into a new fuel called MOX—mixed oxide fuel—intended for use as an energy source in nuclear power stations. The Irish Government had pointed out that the operation of the plant would contribute to the pollution of the Irish Sea, and emphasized the risks involved in the transportation of radioactive material to and from the plant. Ireland requested that the dispute be submitted to an arbitral tribunal to be established under Annex VII of the United Nations Convention on the Law of the Sea, and furthermore, submitted a request for the prescription of provisional measures under Article 290, paragraph 5, of the Convention to the Tribunal, pending the constitution of the arbitral tribunal. Ireland requested *inter alia* that the United Kingdom immediately suspend its authorization of the MOX plant, or alternatively take such measures as were necessary to prevent, with immediate effect, the operation of the MOX plant and furthermore ensure there are no movements of any radioactive substances or materials into or out of waters over which it has sovereignty. The United Kingdom requested that the Tribunal reject Ireland's request for provisional measures.

In its Order of December 3, 2001, the Tribunal found that the

63. G. Rashbrooke, *The International Tribunal for the Law of the Sea: A Forum for the Development of Principles of International Environmental Law*, 19 INT'L J. MARINE & COASTAL L. No. 4, 523 (2004); see also Rosemary Rayfuse, *The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention*, 36 VICTORIA U. WELLINGTON L. REV. 698 (2005).

64. See Rashbrooke, *supra* note 63, at 532; see also Rosemary Rayfuse, *supra* note 63.

65. The MOX Plant Case (*Ireland v. United Kingdom*) (*Provisional Measures*), Order of December 3, 2001, in *International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders 2001*, volume 5, 89-112; see also Press Release, The International Tribunal for the Law of the Sea, Order to be delivered in the MOX Plant Case on Monday, December 3, 2001, at 11 a.m. (Nov. 29, 2001) (on file with author); see also Press Release, The International Tribunal for the Law of the Sea, Order in The MOX Plant Case (*Ireland v. United Kingdom*) (Dec. 3, 2001) (on file with author).

urgency of the situation did not, in the short period before the constitution of the Annex VII arbitral tribunal, require the prescription of provisional measures as requested by Ireland. However, the Tribunal did consider that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention, as well as under general international law, and that rights arise therefrom, which the Tribunal may consider appropriate to conserve under Article 290 of the Convention. The Tribunal therefore ordered the litigants—pending a decision by the arbitral tribunal—to cooperate and enter into consultations in order to exchange further information regarding the possible consequences for the Irish Sea arising from the commissioning of the MOX plant, and to devise, as appropriate, measures to prevent pollution of the marine environment which might result from the plant's operation.

The Order itself contains no reference to the precautionary principle, except to note that Ireland had argued its application in the case.⁶⁶ The reason, therefore, may have been that in the opinion of the Tribunal, provisional measures should not anticipate a judgment on the merits.

In its judgment of May 30, 2006, in the case, *Commission of the European Communities versus Ireland*,⁶⁷ the Court of Justice of the European Communities stated that it had exclusive jurisdiction to rule on disputes concerning the interpretation and application of provisions of the Convention on the Law of the Sea, which form part of the Community legal order. As the provisions of the Convention relied on by Ireland in the context of the dispute with the United Kingdom regarding the MOX plant formed part of the Community legal order, the Court found accordingly that it had jurisdiction to deal with disputes relating to the interpretation or application of these provisions, and to determine whether a Member State had complied with them. The declaration of Community competence, so far as concerned, in particular, the provisions of the Convention with respect to the prevention of marine pollution, made the transfer to the Community of areas of shared competence subject to the existence of Community rules.

The Court held that by bringing proceedings under the dispute settlement procedure laid down in the Convention on the Law of the Sea, Ireland had failed to comply with its duty of cooperation under the European Community and Euratom Treaties, and accordingly was in

66. See Rashbrooke, *supra* note 63, at 527.

67. *Commission of the European Communities v. Ireland*, ECJ Judgment of May 30, 2006, C-459/3; see also N. Lavranos, *The MOX Plant Judgment of the ECJ: How Exclusive is the Jurisdiction of the ECJ?*, 15 EUR. ENVTL. L. REV. 291-96 (2006).

breach of Community Law. This judgment met with criticism in Ireland,⁶⁸ and clearly cannot please the Tribunal. For, the position taken by the Court of Justice of the European Communities may seriously affect the future possibility of Member States of the European Union to make use of the dispute settlement mechanism of the Convention on the Law of the Sea in cases of disputes among them.

The Case of *Land Reclamation by Singapore in and around the Straits of Johor*⁶⁹ concerned a dispute between Malaysia and Singapore relating to land reclamation activities carried out by Singapore which, according to Malaysia, impinged upon its rights in and around the Straits of Johor—the body of water separating Malaysia from the island of Singapore. Malaysia claimed that Singapore's actions were in breach of its duties under international law, including, *inter alia*, its duties to preserve and protect the marine environment. The application of the precautionary principle was also argued. Malaysia requested the Tribunal to order Singapore to suspend all land reclamation activities in the vicinity of the maritime boundary between the two States, to provide Malaysia with full information as to the current and projected works, and to agree to negotiate with Malaysia concerning any remaining unresolved issues. Singapore requested the Tribunal to dismiss Malaysia's request for provisional measures.

In its Order of October 8, 2003, the Tribunal considered that in the particular circumstances of this case, the land reclamation works may have adverse effects on the marine environment in and around the Straits of Johor. The Tribunal prescribed provisional measures, pending a decision by an Annex VII arbitral tribunal, requiring Malaysia and Singapore to cooperate and enter into consultation to establish promptly a group of independent experts to study the effects of Singapore's land reclamation. Singapore was, furthermore, directed not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the report of the group of independent experts. The Order also stated that "prudence and caution" require Malaysia and

68. See Dick Roche, *Statement by the Irish Minister for the Environment*, the IRISH TIMES, May 31, 2006, at 14; see also CHURCHILL, *supra* note 7, at 397.

69. See *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures)*, Order of October 8, 2003, in *International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders 2003*, volume 7, p. 10-64; see also Press Release, International Tribunal for the Law of the Sea, Order to be Delivered in Case No. 12 on Wednesday, 8 October 2003 at 3 p.m. (October 6, 2003) (on file with author); see also Press Release, International Tribunal for the Law of the Sea, Order in the Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (October 8, 2003) (on file with author).

Singapore to establish mechanisms for exchanging information, assessing risks of the reclamation projects, and devising mechanisms to deal with it, without, however, making reference to the precautionary principle as such.

It should further be mentioned that on April 26, 2005, Malaysia and Singapore settled their dispute by signing an agreement to this effect. On September 1, 2005, a final arbitral award was made in the case in accordance with the terms specified in the settlement agreement. The provisional measures ordered by the Tribunal in 2003 were obviously instrumental in bringing the parties together and providing a successful diplomatic solution to the dispute.⁷⁰

The record of the Tribunal on environmental disputes is thus a positive one, despite the absence of any opportunity to decide such a case on the merits.⁷¹ The aforementioned cases have enabled the Tribunal to contribute to the development of international environmental law, in particular by emphasizing the duty of cooperation,⁷² the notion of prudence and caution, and the importance of procedural rights, as essential components of environmental obligations. In its orders for provisional measures, the Tribunal followed the line of adopting a pragmatic approach and prescribing measures which, in its view, would assist the parties to find a solution.⁷³ It should also be noted that these cooperation orders were made notwithstanding findings that the evidence failed to show that irreparable harm was either imminent or likely.⁷⁴

B. *Cases Relating to Prompt Release of Vessels and Crews*⁷⁵

As already mentioned, the compulsory jurisdiction of the Tribunal encompasses cases in which it is alleged that by detaining a vessel flying the flag of another State and/or its crew for certain offences—for instance in respect of illegal fishing or pollution—a State has violated the provisions of the Convention for the prompt release of the vessel and its crew upon the posting of a reasonable bond or other financial security. It is important to point out that the Convention permits coastal States to exercise enforcement jurisdiction through the seizure of vessels and

70. See President Wolfrum on the Occasion of the Tenth Anniversary Ceremony at the *Vertretung der Freien und Hansestadt Hamburg*, Berlin, September 18, 2006.

71. See Alan Boyle, *The Environmental Jurisprudence of the International Tribunal for the Law of the Sea*, 22 *THE INT'L J. OF MARINE AND COASTAL L.* 369 (2007).

72. See P. Weckel, "Les premières applications de l'article 290 de la Convention sur le droit de la mer relatif à la prescription de mesures conservatoires," *Revue Générale de Droit International Public*, 2005, Tome CVIX, 838.

73. See Wolfrum, *supra* note 20, at 76.

74. See Boyle, *supra* note 71, at 11.

75. See generally Escher, *supra* note 46.

crews in certain limited circumstances.⁷⁶ Since its adoption, coastal States have with increasing urgency addressed the problem of illegal, unregulated and unreported fishing in their maritime zones. Coastal States are entitled to board and inspect any vessel within their two hundred nautical mile exclusive economic zones—where around ninety percent of commercial fishing takes place⁷⁷—in order to enforce their laws and regulations in respect of the living resources of that area.⁷⁸

Whenever it is alleged that the detaining State has not complied with its duty under the Convention of prompt release of vessels and crew, the flag State of the vessel is entitled under Article 292—a provision which constitutes a counterpart to the rights granted to coastal States—to request the release of the vessel before the Tribunal. The question of release may be submitted not only by the flag State, but also “on its behalf.”⁷⁹ This permits States either once and for all, or on a case-by-case basis, to entrust the interested ship owners, or for instance, associations of such ship owners with the power to act on their behalf. In this way, in practice even though not in principle, private parties may be allowed to further their interests directly before the Tribunal.⁸⁰

It is important to note that in prompt release proceedings, the Tribunal may deal only with the question of the release of the vessel without prejudice to the merits of any case before the appropriate domestic forum in respect of the vessel, its owner or its crew.⁸¹ In its jurisprudence, the Tribunal has strictly applied this requirement of the Convention.⁸²

The prompt release procedure before the Tribunal is also characterised by its swiftness. The Tribunal, according to its Rules, shall give priority to applications for the release of vessels or crews over all other proceedings.⁸³ The hearing must take place within a period of fifteen days commencing with the first working day following the date

76. See Convention, *supra* note 11, at art. 73, 220.

77. R. Churchill, “The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much In The Net?,” Summary of Presentation, Symposium of the International Tribunal for Law of the Sea: Assessments and Prospects, 29-30, September, 2006, ITLOS, Hamburg, 1.

78. See KLEIN, *supra* note 62, at 86.

79. See Wolfrum, *supra* note 34, at 577-78.

80. See Treves, *supra* note 53, at 401-02 (stating that normal practice has been for the application to be submitted on behalf of the flag State; however, in the *Volga* Case the submission was made directly by the flag State, as the agent of the Russian Federation was a member of the Foreign Ministry); see also P. Gautier, “Les affaires de ‘prompte mainlevée’ devant le Tribunal international du droit de la mer”, *The Global Community Yearbook of International Law and Jurisprudence*, 2003, volume 3(d), p. 8532.

81. See Convention, *supra* note 11, at art. 292, ¶ 3.

82. See Wolfrum, *supra* note 3, at 3.

83. See RULES OF THE TRIBUNAL, *supra* note 50, at art. 112.

on which the application is received, and the judgment must not be read later than fourteen days after the closure of the hearing.⁸⁴ In its practice, the Tribunal has acted in prompt release proceedings with remarkable efficiency and speed, having delivered its decisions, in accordance with its Rules, within the time frame of approximately one month. The urgency of these proceedings is justified in view of the financial burden resulting from the detention of a vessel, as well as humanitarian considerations regarding detained crews.⁸⁵ The Tribunal has so far been seized of applications for prompt release in nine cases, nearly all of them connected with fisheries.

The first such case concerned an application by Saint Vincent and the Grenadines for the prompt release of the oil tanker *M/V Saiga* and its crew from detention in Conakry, Guinea,⁸⁶ the applicant State, *inter alia*, accusing Guinea of piracy. Guinea had claimed that the *Saiga* was engaged in smuggling activities off its coast when arrested. The arrest at a point outside Guinean waters was claimed to be in the exercise of the right of hot pursuit. Guinea also maintained that the Tribunal had no jurisdiction in the matter and that the claim by Saint Vincent and the Grenadines was inadmissible. After a procedure of only three weeks, the Tribunal on December 4, 1997 delivered its judgment and ordered the prompt release of the vessel and its crew from detention upon the deposit of a bond of 400,000 US Dollars taking into consideration the value of the cargo, which was already with the Guinean authorities.⁸⁷ In that case, the Tribunal also held that a State may make an application under Article 292 of the Convention, not only where no bond has been set, but also where it considers that the bond set by the detaining State is unreasonable.

The next case regarding prompt release concerned the fishing vessel

84. V.P. Bantz, *Views from Hamburg: The Juno Trader Case or How to Make Sense of the Coastal State's Rights in the Light of its Duty of Prompt Release*, 24 U. QUEENSLAND L.J., no. 2, 418 (2005).

85. See Wolfrum *supra* note 3, at 4; see also Wolfrum, *supra* note 20, at 74.

86. *M/V "Saiga" Case (Saint Vincent and the Grenadines v. Guinea) (Prompt Release)*, Judgment of December 4, 1997, 1 Int'l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders, 16-38 (1997), available at http://www.itlos.org/start2_en.html (follow the "Site Index" hyperlink to the "List of Cases" hyperlink) (last visited Feb. 23, 2008); see also Press Release No. 9, Int'l Trib. L. of the Sea, Hearings in the *M/V Saiga* Case, (Nov. 21, 1997), available at http://www.itlos.org/start2_en.html (follow "Site Index" hyperlink to "Press Releases" hyperlink) (last visited Feb. 23, 2008).

87. Press Release No. 10, Int'l Trib. L. of the Sea, Hearings Concluded in the *M/V Saiga* case, (Dec. 14, 1997); see also Press Release No. 13, Int'l Trib. L. of the Sea, Tribunal Seized of Merits of Case of "Bunkering" of Vessels at Sea (Feb. 28, 1998); see also Press Release No. 14, Int'l Trib. L. of the Sea, Guinea Complies with Judgment of the Tribunal (Mar. 16, 1998), available at http://www.itlos.org/start2_en.html (follow "Site Index" hyperlink to "Press Releases") (last visited Feb. 23, 2008).

Camouco,⁸⁸ flying the Panamanian flag and arrested by France for alleged unlawful fishing in the exclusive economic zone of the Crozet Islands—French Southern and Antarctic Territories. The Tribunal was requested on behalf of Panama to order the prompt release of the *Camouco* and its Master, whereas France requested the Tribunal to reject the submissions of Panama and declare the application inadmissible. In case the Tribunal would decide that the *Camouco* were to be released upon the deposit of a bond, France requested that the bond be no less than twenty million French Francs. In its judgment of February 7, 2000, the Tribunal ordered the prompt release of the vessel on the deposit of a financial security of eight million French Francs, approximately 1.2 million US Dollars. The Tribunal observed in this case that Article 292 of the Convention provides for a quick, independent remedy during which local remedies—as France had argued—could normally not be exhausted.

A case involving the Seychelles and France concerned the vessel *Monte Confurco*,⁸⁹ registered in the Republic of the Seychelles, and licensed by it to fish in international waters. The vessel was apprehended by France for alleged illegal fishing and failure to announce its presence in the exclusive economic zone of the Kerguelen Islands. The Tribunal was requested on behalf of Seychelles to order the prompt release of the *Monte Confurco* and its master. France requested the Tribunal to declare that the bond set by the competent French authorities—56.4 million French Francs—was reasonable and that the application was inadmissible. The Tribunal in its judgment of December 18, 2000 ordered the prompt release of the vessel and its master by France upon the furnishing of a security of eighteen million French Francs by the Seychelles, as the bond set by the national French court was not considered reasonable.

88. The “Camouco” Case (*Panama v. France*) (*Prompt Release*), Judgment of February 7, 2000, 4 Int’l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders, 10-37 (2000); see also Press Release No. 35, Int’l Trib. L. of the Sea, vessel and Master to be Released on Deposit of FF 8 Million (Feb. 7, 2000), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

89. The “Monte Confurco” Case (*Seychelles v. France*) (*Prompt Release*), Judgment of December 18, 2000, 4 Int’l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders, 86-117 (2000), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “List of Cases” hyperlink) (last visited Feb. 23, 2006); see also Press Release No. 41, Int’l Trib. L. of the Sea, Judgment to be Delivered on the “Monti Confurco” Case (Dec. 15, 2000); see also Press Release No. 42, Int’l Trib. L. of the Sea, tribunal delivers Judgment on the “Monti Confurco” Case (Dec. 18, 2000), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

The fishing trawler *Grand Prince*,⁹⁰ at that time flying the flag of Belize, was arrested by the French authorities in the exclusive economic zone of the Kerguelen Islands for alleged illegal fishing. The competent French court confirmed the seizure of the vessel, and fixed a bond for its release in the amount of eleven million French Francs, which was later followed by a confiscation order. On April 20, 2001, the Tribunal delivered its judgment in that case and found that it had no jurisdiction under Article 292 of the Convention to entertain the application as the documentary evidence submitted by the applicant failed to establish that Belize was the flag State of the vessel when the application was made. This decision underlines the importance the Tribunal attaches to the matter of registration of ships.

The proceedings in the *Chaisiri Reefer 2 Case*⁹¹ were instituted by Panama against Yemen for the prompt release of that vessel, its crew and cargo, which had been detained by the authorities of Yemen. Following an agreement between Panama and Yemen on July 13, 2001—after the release of the vessel and its cargo and crew—the case was removed from the Tribunal’s list of cases. In this case, the availability of the relief provided by the Tribunal helped in reaching an out-of-court settlement.

The Russian vessel *Volga*⁹² was arrested in 2000 by Australia for alleged illegal fishing in the Australian fishing zone. The Russian Federation submitted an application to the Tribunal requesting the

90. The “Grand Prince” Case (*Belize v. France*) (*Prompt Release*), Judgment of April 20, 2001, 5 Int’l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders, 17-46 (2001), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “List of Cases” hyperlink) (last visited Feb. 23, 2008); see also Press Release No. 47, Int’l Trib. L. of the Sea, Judgment to be delivered on the “Grand Prince” Case (Apr. 19, 2001); Press Release No. 48, Int’l Trib. L. of the Sea, Tribunal Delivers Judgment on the “Grand Prince” Case (Apr. 20, 2001), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

91. The “Chaisiri Reefer 2” Case (*Panama v. Yemen*) (*Prompt Release*), Order of July 13, 2001, 5 Int’l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders 82-84 (2001), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “List of Cases” hyperlink) (last visited Feb. 23, 2008); see also Press Releases No. 51, Int’l Trib. L. of the Sea, Application Filed on Behalf of Panama Against Yemen, (July, 5, 2001); Press Release No. 52, Int’l Trib. L. of the Sea, “Chaisiri Reefer 2” Case Removed from Tribunal’s List (July 16, 2001), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

92. The “Volga” Case (*Russia v. Australia*) (*Prompt Release*), Judgment of December 23, 2002, 6 Int’l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders 10-41 (2002), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “List of Cases” hyperlink) (last visited Feb. 23, 2008); see also Press Releases No. 74, Int’l Trib. L. of the Sea, Judgment to be Delivered in the “Volga” Case (Dec. 20, 2002); Press Release No. 75, Int’l Trib. L. of the Sea, Judgment Delivered in the “Volga” case (Dec. 23, 2002), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

release of the *Volga* and its crew, the conditions for release imposed by Australia being neither permissible nor reasonable under the Convention. Australia requested that the Tribunal reject the application, maintaining that the bond sought was reasonable in the circumstances of the case. In its judgment of December 23, 2002, the Tribunal took note of the concern of Australia with regard to the depletion of stocks of Patagonian Toothfish in the Southern Ocean and also stated that the amount of 1,920,000 Australian Dollars sought for the release of the vessel was reasonable in terms of Article 292 of the Convention. The Tribunal, however, considered that the non-financial conditions laid down by Australia could not be considered as components of the bond or other financial security for the purposes of that provision of the Convention.

The *Juno Trader Case*⁹³ was submitted to the Tribunal on behalf of the flag State of the vessel, Saint Vincent and the Grenadines, against Guinea-Bissau. The dispute concerned the detention of that vessel and its crew by Guinea-Bissau for the alleged infringement of national fisheries legislation in its exclusive economic zone. Guinea-Bissau objected to the jurisdiction of the Tribunal on the grounds that, according to its national legislation, the ownership of the vessel *Juno Trader* had reverted to the State of Guinea-Bissau and that, therefore, Saint Vincent and the Grenadines no longer could be considered the flag State of the vessel. The Tribunal, however, considered that, whatever may be the effect of a definitive change in the ownership of a vessel upon its nationality, there was no basis in the particular circumstances of the case for holding that there had been such a definitive change. In its judgment of December 18, 2004, the Tribunal thus ordered the prompt release of the vessel *Juno Trader*, upon the posting of a bond of 300,000 Euros. It also declared that all members of the crew should be free to leave Guinea-Bissau without any conditions.

The *Hoshinmaru Case*,⁹⁴ which focused on the question of the

93. The “*Juno Trader*” Case (*Saint Vincent and the Grenadines v. Guinea-Bissau*) (*Prompt Release*), Judgment of December 18, 2004, 8 Int’l Trib. L. of the Sea Rep. of Judgments Advisory Opinions and Orders 17-92 (2004), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “List of Cases” hyperlink) (last visited Feb. 23, 2008); see also Press Release No. 92, Int’l Trib. L. of the Sea, hearing in the “*Juno Trader*” Case Postponed (Dec. 1, 2004); Press Release No. 95, Int’l Trib. L. of the Sea, Judgment Delivered in the “*Juno Trader*” Case (Dec. 18, 2004), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

94. Press Releases No. 110, Int’l Trib. L. of the Sea, Two applications filed at the Tribunal on behalf of Japan against the Russian Federation for release of two arrested fishing vessels (July 6, 2007); see also Press Release No. 111, Int’l Trib. L. of the Sea, Tribunal to deliver its Judgments in *The “Hoshinmaru” Case* and *The “Tomimaru” Case* (Aug. 2, 2007); see also Press Release No. 112, Int’l Trib. L. of the Sea, Tribunal Delivers Judgment on Case No. 14 (Aug. 6, 2007), available at <http://www.itlos.org/>

reasonableness of the bond, concerned a dispute submitted by Japan on July 6, 2007 regarding the detention of that fishing vessel by the authorities of the Russian Federation for the alleged infringement of national fisheries legislation in its exclusive economic zone. On July 13—more than five weeks after the detention of the vessel—Russia set a bond of twenty-five million Roubles (approximately 980,000 US Dollars) and claimed that the application was therefore inadmissible. Japan maintained that the amount of the bond was unreasonable and did not meet the requirements of Article 292 of the Convention. Both parties further disagreed as to whether the crew and the Master were being detained along with the vessel. In its judgment of August 6, 2007, the Tribunal confirmed its previous jurisprudence regarding the reasonableness of a bond or other financial security and, *inter alia*, stated that it did not consider it reasonable for a bond to be set on the basis of the maximum penalties applicable to the owner and the Master, nor that a bond be set on the basis of the confiscation of the vessel given the circumstances of the case. The amount of the bond should be proportionate to the gravity of the alleged offences. The Tribunal thus considered the amount of the bond fixed by the Russian Federation not to be reasonable and decided that the *Hoshinmaru*, including its catch on board, should be promptly released upon the posting of a bond or other security as determined by the Tribunal and that the Master and the crew should be free to leave without any conditions. It further determined that the bond should amount to ten million Roubles (approximately 390,000 US Dollars). On August 16, 2007 the bond was received by the Russian Federation and the vessel and crew were released on the same day.⁹⁵

The *Tomimaru Case*⁹⁶ was submitted by Japan on the same day as the *Hoshinmaru Case* and also concerned the detention of that fishing vessel by the authorities of the Russian Federation for the alleged infringement of national fisheries legislation in its exclusive economic

start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008); see also the website of the Tribunal at www.itlos.org (last visited Feb. 23, 2008).

95. Press Release No. 114, Int’l Trib. L. of the Sea, The “*Hoshinmaru*” Case Release Of the Vessel and Crew After Posting of the Bond Ordered by the Tribunal (Aug. 17, 2007), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008).

96. Two applications filed at the Tribunal on behalf of Japan against the Russian Federation for release of two arrested fishing vessels (July 6, 2007), Press Release No. 111, Int’l Trib. L. of the Sea, Tribunal to deliver its Judgments in *The “Hoshinmaru” Case* and *The “Tomimaru” Case* (Aug. 2, 2007); Press Release No. 113, Int’l Trib. L. of the Sea, Tribunal Delivers Judgment in Case No. 15 (Aug. 6, 2007), available at http://www.itlos.org/start2_en.html (follow “Site Index” hyperlink to “Press Releases” hyperlink) (last visited Feb. 23, 2008); see also the website of the Tribunal at www.itlos.org (last visited Feb. 23, 2008).

zone. In that case, the Tribunal had to deal with the thorny issue of the effects of the confiscation of a fishing vessel—a measure that many States have in their legislation with respect to the conservation and management of natural resources. The *Tomimaru* had already been detained on October 31, 2006 and the crew had been allowed to leave the Russian Federation long before the application was submitted by Japan. The competent Russian Courts had decided to confiscate the vessel and Russia thus maintained that the application by Japan had been rendered without object. In its judgment of August 6, 2007 the Tribunal expressed the view that the decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. It, however, also observed that such a decision should not be taken in such a way as to prevent the ship owner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention. The Tribunal further underscored that a decision to confiscate the vessel did not prevent it from considering an application for prompt release while proceedings are still before the domestic courts of the detaining State. Note was taken of the fact that the decision of the Supreme Court of the Russian Federation, which confirmed the decision of the lower courts to confiscate the *Tomimaru*, had brought to an end the procedures before the domestic courts. The Tribunal thus found that the application of Japan no longer had any object and that it was therefore not called upon to give a decision thereon.

In respect of the six cases in which the Tribunal ordered the release of the vessel and/or its crew upon the posting of a reasonable bond, it can fairly be said that it has developed a coherent jurisprudence, particularly as regards the relevant factors for determining the reasonableness of bonds or other financial security. These factors, which by no means constitute a complete list, include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form. The assessment of the relevant factors by the Tribunal is an objective one, taking into account all information provided by the parties and having regard to all the circumstances of the particular case.⁹⁷

The procedure for the prompt release of vessels and crews, with the

97. See ITLOS Reports 2000, p.10, at p.31, ¶ 67, ITLOS Reports 2002, p.10, at p.32, ¶ 65, and ITLOS Reports 2004, p.17, at p.41, ¶ 85; see also T.A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 62, 2002, 1-2, ¶ 46.

possibility for private parties, if properly authorized by the flag State, to appear before the Tribunal, is certainly a significant innovation provided by the Convention, if not the most important novel feature of its entire dispute settlement mechanism.⁹⁸ This procedure constitutes an appropriate and cost-effective mechanism for parties faced with the arrest of vessels and crews. It seems, however, that the possibility to institute such proceedings is not yet known well enough neither by ship owners nor by flag States. It has not without some reason been said that the existence of the International Tribunal for the Law of the Sea is one of the better-guarded secrets of the United Nations system. Flag States may also sometimes hesitate to have recourse to the Tribunal. It has therefore been suggested that owners who register their ships with flag States should, in the negotiations prior to registration, obtain the right to act on behalf of the flag State in the event of a dispute with a coastal State regarding prompt release of vessels and crew.

C. *Cases Relating to the Merits*

The parties may also submit a particular dispute to the Tribunal at any time by means of a special agreement, which, to date, has been done on two occasions. In the *M/V Saiga (No. 2) Case*,⁹⁹ Saint Vincent and the Grenadines and Guinea agreed to submit to the Tribunal the merits of the dispute relating to the arrest and detention of the vessel *M/V Saiga*, the only case which the Tribunal has so far decided on the merits. The other case,¹⁰⁰ also relating to the merits and still on the docket, is based on a special agreement and concerns the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, a dispute—as already mentioned—between Chile and the European Community.

In the *M/V Saiga (No. 2) Case*, the Tribunal had to deal with both the merits and the request for the prescription of provisional measures. The vessel and its crew continued to be held by Guinea even after the Tribunal had prescribed their prompt release. Guinea had not only arrested the tanker *M/V Saiga*, but also its master for providing fishing vessels with gasoil—bunkering—off the coast of Guinea, which it

98. See Bantz, *supra* note 84, at 436-37.

99. *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) (Merits)*, Judgment of July 1, 1999, in *International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders 1999*, volume 3, 10-78; see also Press Release, International Tribunal for the Law of the Sea, Summary of opinions appended to the Judgment of July 1, 1999 (July 1, 1999) (on file with author).

100. Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile v. European Community*), Order of 29 December 2005, ITLOS Reports 2005-2007, at 4 (still with publisher).

alleged was an offence under its customs laws. Saint Vincent and the Grenadines claimed, however, that the bunkering of the vessels is within the freedom of navigation in the exclusive economic zone. The arrest of the *Saiga* took place at a point outside Guinea's exclusive economic zone, with Guinea claiming that the arrest followed its right of "hot pursuit." Saint Vincent and the Grenadines in particular requested the Tribunal to prescribe that Guinea should not interfere with the exercise of the freedom of navigation and related rights, release the *Saiga* and its crew, desist from enforcing its customs laws within the exclusive economic zone, and refrain from undertaking hot pursuit of vessels otherwise than authorized under the Convention. Guinea asked the Tribunal to reject that request.

On March 11, 1998, the Tribunal delivered its Order regarding the prescription of provisional measures¹⁰¹ in response to the request by Saint Vincent and the Grenadines. The Tribunal ordered that Guinea should refrain from taking or enforcing any judicial or administrative measures against the *Saiga*, its master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the master. The vessel, its captain and its crew had in fact already been released shortly before in compliance by Guinea with the judgment of the Tribunal of December 4, 1997.

The Tribunal delivered its judgment on the merits of that case on July 1, 1999, within fifteen months of the proceedings being instituted. Compared with other judicial bodies, this can certainly be considered a reasonable period of time.¹⁰² The Tribunal declared that Guinea had violated the rights of Saint Vincent and the Grenadines in arresting the *Saiga*, and awarded Saint Vincent and the Grenadines 2,123,357 US Dollars, with interest, as compensation. In that judgment, the Tribunal made several important pronouncements concerning issues such as freedom of navigation, enforcement of customs laws, nationality of claims, reparation, use of force in law enforcement activities, hot pursuit and the question of the genuine link between the vessel and its flag State,¹⁰³ thereby making an important contribution to the development of international law regarding these aspects.

101. *M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) (Provisional Measures)*, Order of March 11, 1998, in *International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders 1998*, volume 2, 24-40; see also Press Release, International Tribunal for the Law of the Sea, 21 Judges decide unanimously on Order for provisional measures (March 11, 1998) (on file with author).

102. See Wolfrum, *supra* note 56, at 8.

103. See Statement by President Wolfrum at the Sixteenth Meeting of States Parties, *supra* note 26, at 6.

The following points made by the Tribunal in that case are to be highlighted:

In considering whether the arrest was lawful, the Tribunal found that by applying its customs laws to a customs radius, which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention and that, consequently, the arrest and detention of the *Saiga*, the prosecution and conviction of its master, the confiscation of the cargo and the seizure of the ship were unlawful. With respect to the right of hot pursuit claimed by Guinea, the Tribunal came to the conclusion that the alleged pursuit was interrupted and that no laws or regulations of Guinea applicable in accordance with the Convention were violated by the *Saiga*, and that thus there was no legal basis for the exercise of the right of hot pursuit. The Tribunal furthermore found that Guinea's officials used excessive force and endangered human life before and after boarding the *Saiga*.

In addition, the Tribunal, in dealing with the contention by Guinea that the ship was unregistered for a certain period of time under Article 91 of the Convention, observed that it was for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. As regards the question also raised by Guinea of the genuine link between the *Saiga* and Saint Vincent and the Grenadines, the Tribunal concluded that the purpose of the provision of the Convention requiring a genuine link between a ship and its flag is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

In examining the question whether certain claims could be entertained because they related to violations of the rights of persons who were not nationals of Saint Vincent and the Grenadines, the Tribunal declared that the relevant provisions of the Convention consider the ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under Article 292 of the Convention. Thus, the ship, everything on it and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant. If each person sustaining damage were obliged to look for protection to the State from which such person is a national, undue hardship would ensue.

In the *Case concerning the Conservation and Sustainable*

Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean,¹⁰⁴ the Tribunal, at the request of Chile and the European Community, on December 20, 2000 formed a special chamber to deal with the dispute, consisting of four judges of the Tribunal and one judge *ad hoc*.¹⁰⁵ This has so far been the only case where one of the parties to the dispute is an international organization, namely the European Community.¹⁰⁶ The case, *inter alia*, concerns whether the European Community has complied with its obligations under the Convention to ensure the conservation of swordfish in the fishing activities undertaken by vessels flying the flag of its Member States in the high seas adjacent to Chile's exclusive economic zone. At the request of the parties, the time limits for the proceedings continue to be suspended until January 1, 2009, with both parties maintaining their right to revive them at any time.¹⁰⁷

IV. Conclusion

In its eleven years of existence the International Tribunal for the Law of the Sea has established a reputation for the expeditious and efficient management of cases,¹⁰⁸ and has already made a substantial contribution to the development of international law.¹⁰⁹ According to the United Nations Convention on the Law of the Sea it has the competence and means to deal with a wide range of disputes, and is well equipped to discharge its functions speedily, efficiently and cost-effectively. The total of fifteen cases, of which twelve were fisheries related and thirteen

104. See Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile v. European Community*), *supra* note 100.

105. See Press Release, International Tribunal for the Law of the Sea, Case on Conservation of Swordfish Stocks between Chile and the European Community in the South-Eastern Pacific Ocean before Special Chamber of the Tribunal (Dec. 21, 2000) (on file with author).

106. The European Community became a party to the UN Convention on the Law of the Sea on April 1, 1998.

107. Statement by President Wolfrum at the Plenary of the 61st Session of the General Assembly, *supra* note 44, at 4; see also, Press Release, International Tribunal for the Law of the Sea, Case on Conservation of Swordfish Stocks between Chile and the European Community in the South-Eastern Pacific Ocean Time-limits extended at the request of the parties (Jan. 8, 2004) (on file with author); see also Press Release, International Tribunal for the Law of the Sea, Case between Chile and the European Community Concerning the Conservation of Swordfish Stocks in the South-Eastern Pacific Ocean—The Special Chamber adopts an order for a further extension of time-limits (Nov. 30, 2007) (on file with author).

108. See Statement by President Wolfrum at the Sixteenth Meeting of States Parties, *supra* note 26, at 5.

109. See also M. Kamto, "Regard sur la jurisprudence du tribunal international du droit de la mer depuis son entrée en fonctionnement (1997-2004)," *Revue générale de droit international public*, 2005, Tome CVIX, p.828; see also Wolfrum, *supra* note 15, at 76.

were introduced on the basis of the Tribunal's compulsory jurisdiction, may not appear impressive. This record, however, does not compare unfavourably to that of other international judicial bodies in the initial stages of their existence.¹¹⁰ It should be borne in mind that the Tribunal is a relatively new judicial body which is yet to fulfil its potential as the specialized judicial organ of the international community for the settlement of disputes relating to the law of the sea.¹¹¹

The creation of the International Tribunal for the Law of the Sea has from the very beginning been subject to a certain degree of criticism as being unnecessary and risking a fragmentation of international law.¹¹² It has even been suggested that the establishment of the Tribunal has been a "great mistake."¹¹³ It is certainly true that States, under the Convention on the Law of the Sea, have a wide choice of forum for the settlement of disputes, which has been significantly expanded by the creation of the Tribunal. The evidence so far nevertheless suggests that a choice of forum is more beneficial than harmful¹¹⁴ and that the danger of conflicting jurisdiction has been widely overestimated.¹¹⁵ Fragmentation of the law of the sea has thus far not occurred, and the Tribunal also makes every effort to keep abreast of the developments that take place in other international judicial fora, in particular the International Court of Justice.¹¹⁶

The relative paucity of cases brought before the Tribunal, and the fact that it is thus underutilized is certainly a matter of concern for the judges, but one over which they have little or no control.¹¹⁷ It could, however, also be said that the relatively few cases of litigation among the States Parties to the United Nations Convention on the Law of the Sea is a compliment to the work of the negotiators of the Convention.¹¹⁸

110. See Speech by Judge L. Dolliver M. Nelson, President of the International Tribunal for the Law of the Sea on the occasion of the visit to the Tribunal by Mr. Horst Köhler, President of the Federal Republic of Germany, September 1, 2004, ¶ 4.

111. See Statement by President Wolfrum at the Sixteenth Meeting of States Parties, *supra* note 20, at 76.

112. See Boyle, *supra* note 33, at 120; see also Boyle, *supra* note 36, at 37; see also Klein, *supra* note 62, at 55; see also Rayfuse, *supra* note 63, at 686; see also Churchill, *supra* note 7, at 416.

113. Jillaine Seymour, *The International Tribunal for the Law of the Sea: A Great Mistake?*, 13 INDIANA J. OF GLOBAL LEGAL STUDIES 1, 35 (2006).

114. See Boyle, *supra* note 33, at 54.

115. See Klein, *supra* note 62, at 59; see also Churchill, *supra* note 7, at 416; see also Rayfuse, *supra* note 63, at 710-11.

116. See Judge Rüdiger Wolfrum, *supra* note 44.

117. See Seymour, *supra* note 113, at 35.

118. See A. Serdy, "The paradoxical Success of UNCLOS Part XV: A Half-hearted Reply to Rosemary Rayfuse", 36 VIRGINIA UNIVERSITY WORLD L. REV. 717 (2005).