

The International Tribunal for the Law of the Sea

John E. Noyes

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The International Tribunal for the Law of the Sea

John E. Noyes*

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* Professor of Law and Director, International Legal Studies Programs, California Western School of Law. B.A., Amherst College (1973); J.D., University of Virginia (1977). Thanks go to William Aceves, Peter H.F. Bekker, David Logan, Thomas McDonnell, and Daniel Yeager for their comments on early drafts, and to Thomas Barton and Shabtai Rosenne for helpful suggestions during discussions about various issues raised in this Article. Jill Klein and Linda Weathers provided valuable research assistance, and Sandra Murray and Anita Simons provided essential technical support.

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Introduction

Numerous international courts and tribunals are now available to address a broad range of international disputes.¹ One such court is the International Tribunal for the Law of the Sea (ITLOS). The 1982 United Nations Convention on the Law of the Sea² created the ITLOS as part of its compulsory³ third-party dispute settlement system. Because the Convention did not enter into force until November 1994,⁴ the ITLOS and the Convention's other dispute settlement mechanisms⁵ have only recently become available.

1. For a list of international courts and formal dispute settlement bodies, see Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 69-70 (1997) [hereinafter Charney, *Third Party Dispute Settlement*]. National courts also often decide issues of international law, and international legal disputes are frequently addressed through negotiations and other informal processes. For a survey of less formal interstate dispute settlement mechanisms, see David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 779-90 (1994).

2. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea Convention].

3. If all parties to a dispute have consented in advance of a dispute to the jurisdiction of an international court or tribunal, via treaty or declaration, that jurisdiction is said to be "compulsory" or "obligatory." One party may then unilaterally institute proceedings against another consenting party in the specified forum.

4. The Convention is now being implemented together with the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, U.N. Doc. A/RES/48/263 (1994), 1836 U.N.T.S. 3, 33 I.L.M. 1309 (1994) [hereinafter Part XI Agreement]; the latter modifies some of the technical and institutional features of the Convention's regime for mining the sea-bed that developed states had found problematic. For discussion of the mechanisms to implement the Part XI Agreement, which is to be interpreted and applied together with Part XI as a single instrument, see Moritaka Hayashi, *The 1994 Agreement for the Universalization of the Law of the Sea Convention*, 27 OCEAN DEV'T & INT'L L. 31 (1996).

5. The Convention also creates mechanisms for compulsory conciliation, arbitration, and (for disputes concerning fishing, the marine environment, marine scientific research, and navigation) special arbitration before panels of experts. See *infra* notes 56-60, 72-73 and accompanying text.

The ITLOS, headquartered in Hamburg, Germany, is now fully operational. It has already adjudicated cases and reached judgments in them.⁶ The Law of the Sea Convention has also been widely accepted. As of November 1998, there were 130 parties, including China, the European Union,⁷ France, Germany, Japan, Russia, South Korea, and the United Kingdom.⁸ The Convention's widespread acceptance makes the ITLOS available to address a variety of disputes.

Creation of the ITLOS has been controversial. The International Court of Justice (ICJ) has considerable experience in deciding law of the sea cases.⁹ The availability of the ICJ and other dispute settlement options for law of the sea disputes caused some people to worry that the ITLOS might contribute to divergent jurisprudence.¹⁰ Supporters of the ITLOS point out, however, that the ITLOS can handle cases involving international organizations, individuals, and corporations¹¹ that the ICJ, by virtue of its Statute, is precluded from hearing.¹² Proponents of the ITLOS also argue that the availability of a quick and efficient specialized tribunal, along with judges who possess acknowledged expertise, make the creation of the ITLOS a worthwhile enterprise.¹³ The ITLOS may receive a significant case load over time.

To analyze the actual and potential contributions of the ITLOS, it is important to view the Tribunal as a participant in separate (albeit related)

6. See *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea) (Request for Provisional Measures)* (Mar. 11, 1998) (visited Nov. 16, 1998) <<http://www.un.org/Depts/los/ord1103.htm>>, 37 I.L.M. 1202 (1998) [hereinafter *M/V Saiga (No. 2)*]; *The M/V "Saiga" (Saint Vincent and the Grenadines v. Guinea)* (Dec. 4, 1997) (visited Nov. 16, 1998) <http://www.un.org/Depts/los/judg_1.htm>, 37 I.L.M. 360 (1998) [hereinafter *M/V Saiga Case*].

7. The European Community shares competence with its member states with respect to some foreign affairs issues, notably fisheries policy.

8. See United Nations Division for Ocean Affairs and Law of the Sea, *Oceans and Law of the Sea* (visited Nov. 16, 1998) <<http://www.un.org/Depts/los/los94st.htm>> [hereinafter *Div. for Ocean Affairs, Law of the Sea*].

9. See Keith Highet, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AM. J. INT'L L. 646, 653 (1991) (concluding the ICJ was "continuing full speed ahead on its productive and convincing path toward mastery of the law of the sea."). The ICJ and its predecessor, the Permanent Court of International Justice, have handed down some 40 decisions and orders that involve the law of the sea. See Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 70 n.13 (1996) [hereinafter *Charney, Expanding Dispute Settlement Systems*]; Mark W. Janis, *The Law of the Sea Tribunal*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 245, 247-48 (Mark W. Janis ed., 1992).

10. See 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 287.1, at 41 (Shabtai Rosenne & Louis B. Sohn eds., 1989) [hereinafter 5 COMMENTARY]; Manfred Lachs, *The Revised Procedure of the International Court of Justice*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 21, 43-44 (Frits Kalshoven et al. eds., 1980); Shigeru Oda, *The International Court of Justice Viewed from the Bench (1976-1993)*, VII 244 *RECUEIL DES COURS* 9, 144-48 (1993); *infra* notes 355-57.

11. See *infra* notes 114-31 and accompanying text.

12. See Statute of the International Court of Justice, art. 35, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter *ICJ Statute*].

13. See Charney, *Expanding Dispute Settlement Systems*, *supra* note 9; Janis, *supra* note 9.

regimes.¹⁴ A regime encompasses the rules, policies, and international institutions related to an international issue area.¹⁵ Although the ITLOS's primary responsibility is to interpret and apply one treaty, the 1982 Law of the Sea Convention, the issues it may address and the roles it may fulfill vary tremendously. The law of the sea contains rules governing a wide range of issues, such as navigation, zones of coastal state jurisdiction and control, maritime boundary delimitation, fisheries and other oceans resources, marine scientific research, the marine environment, and mining of the continental shelf and the deep sea bed. Some of these rules are of long vintage, some were created during the negotiation of the Law of the Sea Convention, and some have been developed subsequently. A variety of international institutions and international treaty negotiations have relied on the Convention as a framework agreement.¹⁶ The different oceans law regimes are not isolated from each other, but are linked by their ties to the Law of the Sea Convention, to various international institutions, and to a network of international law norms and compliance mechanisms.¹⁷

Part I of this Article describes the origins of the ITLOS in the context of the negotiation of the Law of the Sea Convention and its dispute settlement mechanisms. Part II illustrates some of the functions the ITLOS may perform. Potential functions include: interpreting treaty provisions, providing legislative guidance for treaty parties, settling international disputes involving private entities, acting as a public forum for the airing of highly politicized interstate disputes, using equitable principles to assist in negotiations over a dispute, and engaging in a constitutional review of legislative actions. This focus on the ITLOS's various functions provides a basis for

14. Situating any international tribunal in the context of specific regimes seems indispensable, although general studies of the functions of the international courts also aid our understanding. See, e.g., RICHARD B. BILDER, *INTERNATIONAL DISPUTE SETTLEMENT AND THE ROLE OF ADJUDICATION* 47-95 (1986) [hereinafter BILDER, *INTERNATIONAL DISPUTE SETTLEMENT*]; John E. Noyes, *The Third-Party Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea: Implications for States Parties and for Nonparties*, in *ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION* 213 (Myron H. Nordquist & John Norton Moore eds., 1995) [hereinafter Noyes, *Implications*].

15. According to one standard definition, regimes are "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1992).

16. See, e.g., 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, opened for signature Dec. 4, 1995, U.N. Doc. A/CONF.167/37, 34 I.L.M. 1542 (1995) (not yet in force) [hereinafter Straddling Stocks Agreement].

17. Many regard the Law of the Sea Convention, which emerged from the Third United Nations Conference on the Law of the Sea, as an integrated "package deal." See, e.g., Tommy T.B. Koh, *A Constitution for the Oceans*, in *THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA* xxxiii, xxxiv, U.N. Sales No. E.83.V.5 (1983) [hereinafter *LAW OF THE SEA DOCUMENTS*]. For general discussion of links between regimes, see ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 100-04 (1984).

evaluating the significance of the Tribunal's work for other international institutions, individuals, corporations, states, and national courts.¹⁸ Furthermore, this emphasis on judicial functions provides a starting point for considering the different sorts of techniques that the ITLOS should employ to carry out each of these functions effectively.¹⁹ Finally, Part III explores concerns that the creation of the ITLOS could lead to damaging, inconsistent jurisprudence or duplicative proceedings and argues that these concerns are insignificant.

I. An Overview of the International Tribunal for the Law of the Sea and the Dispute Settlement Provisions of the United Nations Convention on the Law of the Sea

A. The Context: The 1982 United Nations Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea contains extensive provisions on dispute settlement.²⁰ Any State Party to the Convention or, in certain cases, another entity may refer a dispute related to the interpretation or application of the Convention or certain other international agreements to an international tribunal to obtain a legally binding decision. Although the Convention contemplates that some disputes may be taken to previously constituted bodies, e.g., the ICJ, it also provides for new third-party tribunals, such as the ITLOS. The jurisdiction of any international court or tribunal over an interstate dispute ultimately rests on the consent of the parties involved,²¹ and acceptance of the Convention expresses that consent for States Parties.

18. Some nonstate entities have legal "personality" and are recognized as subjects of international law in their own right. See, e.g., David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275 (1996); Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984). My concern is with the even broader community that enunciates and interprets norms and that contributes to compliance with norms. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2639-40 (1997). Despite this broad focus, I do not in this Article consider all the entities with which the ITLOS may interact. For example, I do not consider the roles of nongovernmental organizations vis-à-vis the ITLOS. See generally Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

19. Some factors bearing on the effectiveness of an international court, such as political relations among states or the decisions of states in the instrument creating the court (e.g., decisions concerning the court's composition), are largely beyond its control. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997). See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

20. Law of the Sea Convention, *supra* note 2, arts. 74(2), 83(2), 151(8), 159(10), 162(2)(u)-(v), 165(2)(i)-(j), 186-91, 264, 279-99, 302; Annex III, arts. 18(1)(b), 21(2); Annex V; Annex VI; Annex VII; Annex VIII; Annex IX, art. 7. See also Part XI Agreement, *supra* note 4, Annex, §§ 3.12, 6.1(f)-(g), 6.4, 8.1(f), 8(2).

21. With regard to interstate disputes, the requirement of mutual consent to international adjudication or arbitration provides an analog to the rules of sovereign immunity that apply in most noncommercial cases in national courts.

Most treaties relating to the international law of the sea have not provided for obligatory binding third-party dispute settlement. Informal dispute settlement mechanisms have been more common.²² While the ICJ and international arbitral bodies had decided many law of the sea cases before the Convention entered into force,²³ their jurisdiction generally depended on a special agreement (i.e., an agreement to submit just one particular dispute to the tribunal) entered into after the dispute had arisen.²⁴ At the 1958 Law of the Sea Conference (UNCLOS I), states adopted an optional protocol that provided for the compulsory settlement of disputes.²⁵ The Convention now allows States Parties to invoke the obligatory binding third-party dispute settlement mechanisms of the U.N. Convention on the Law of the Sea in many oceans law disputes.

Why would states mutually consent to the jurisdiction of international tribunals before a particular dispute arose? To answer this question, it is important to understand the negotiating context of the Convention's dispute settlement provisions. The Convention was negotiated during a time of considerable turmoil in ocean-related disputes. Technological developments had greatly increased the capacity to harvest both living and nonliving ocean resources, thereby increasing tensions over maritime boundaries. Some developing states were asserting sovereignty over broad coastal zones. Maritime powers, on the other hand, sought to safeguard their hitherto unimpeded passage through straits and other navigational freedoms. States also disagreed about how to address numerous other issues, such as the marine environment, marine scientific research, and a regime for mining the sea bed beyond the limits of national jurisdiction.

Negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III), which led to the 1982 Law of the Sea Convention, were extraordinarily complex. They involved more than 150 states and lasted for nine years (preceded by an additional six years of U.N. committee preparatory work). Although the Convention that emerged from UNCLOS III accepts extensive coastal state control over broad coastal zones, it limits the broadest unilateral claims of sovereignty over these zones and guarantees navigational freedoms to maritime powers. The Convention reflects compromises and trade-offs concerning virtually every issue relating to the oceans.²⁶

22. See, e.g., Reciprocal Fisheries Agreement, June 24, 1977, U.S.-U.K., art. VI, T.I.A.S. No. 9140 (specifying categories of disputes subject to bilateral consultations).

23. See *supra* note 9.

24. See, e.g., Delimitation of the Continental Shelf (U.K. v. Fr.), 18 R.I.A.A. 3, 18 I.L.M. 397 (1979); Continental Shelf (Libya v. Malta), 1985 I.C.J. 13 (June 3). Cf. Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14) (jurisdiction based on Article 36(2) of the ICJ's Statute).

25. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 U.N.T.S. 169 (ratified by 37 states).

26. For studies of the UNCLOS III negotiations, see EDWARD L. MILES, GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1973-1982 (1998); CLYDE SANGER, ORDERING THE OCEANS: THE MAKING OF THE LAW OF THE SEA (1987); Tommy T.B. Koh & Shanmugam Jayakumar, *The Negotiating Process of the Third United Nations Conference on the Law of the Sea*, in 1 UNITED NATIONS

Many negotiators at UNCLOS III thought that compulsory dispute settlement mechanisms could help cement the compromises embodied in the Law of the Sea Convention.²⁷ Some delegates from developing states believed that including third-party dispute settlement provisions in the Convention would counterbalance political, economic, and military pressures from powerful states.²⁸ The United States sought such provisions to deter new unilateral state claims that had questionable legal support and to increase the weight given to the positive law norms set out in the Convention.²⁹ U.N. officials also favored strong dispute settlement provisions, believing these could help maintain the integrity of the Convention's compromise "package deal." UNCLOS III President H.S. Amerasinghe, speaking in 1976, saw "the provision of effective dispute settlement procedures as essential for stabilizing and maintaining the compromise necessary for the attainment of agreement on a convention."³⁰ Absent such procedures, he went on, "the compromise will disintegrate rapidly and permanently."³¹

However, not all states favored the provisions for obligatory, binding third-party dispute settlement. Two sets of tensions were evident. First, while many states favored strong third-party dispute settlement, others were skeptical. The skeptics included several African states, which traditionally relied on informal, consensus-building methods of dispute settlement in their own cultures.³² Developing states distrusted the ICJ throughout the 1970s because they believed that it favored developed states.³³ Socialist states, reflecting their state-centric positivist views of international law, questioned the need for third-party tribunals that possessed the authority to issue binding decisions in a wide range of cases. The Law of the Sea Convention was the first general convention in which

CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 29 (Myron H. Nordquist ed., 1985).

27. The Statute of the International Tribunal for the Law of the Sea and other provisions concerning the settlement of oceans law disputes do not stand alone as separate protocols but are part of the UNCLOS III package. For accounts of the negotiating history of the Convention's dispute settlement provisions, see A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND COMMENTARY* (1987); 5 COMMENTARY, *supra* note 10.

28. See ADEDE, *supra* note 27, at 39, 241.

29. See *United States Policy for the Seabed*, 62 DEP'T ST. BULL. 737 (1970); *U.S. Presents Proposals at Preparatory Session for Law of the Sea Conference*, 69 DEP'T ST. BULL. 397, 414 (1973) (statement by Ambassador Stevenson); Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976) [hereinafter Sohn, *U.S. Policy*].

30. *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, U.N. Doc. A/CONF.62/WP.9/Add.1 (1976), ¶ 6, reprinted in V Third United Nations Conference on the Law of the Sea, Official Records 122, U.N. Sales No. E.76.V.8 (1976) [hereinafter V Official Records].

31. *Id.*

32. See H.G. Darwin, *General Introduction*, in *INTERNATIONAL DISPUTES: THE LEGAL ASPECTS* 57, 66-68 (Humphrey Waldock ed., 1972).

33. See GURDIP SINGH, *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA DISPUTE SETTLEMENT MECHANISMS* 72 (1985); R.P. Anand, *Attitude of the "New" Asian-African Countries Toward the International Court of Justice*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW* 163 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

the Soviet Union, its allies, and African states agreed to provisions on binding third-party dispute settlement.³⁴

Second, with respect to roles of third-party tribunals, tensions existed not only between the "maximalist" and "minimalist" states but also between coastal and noncoastal states. During UNCLOS III, developing coastal states asserting extensive claims over offshore zones argued against outside oversight of their exercise of authority in these zones. Other states, however, preferred outside, third-party review of the legality of such coastal state exercise of authority. Membership in the maximalist and non-coastal state camps, or in the minimalist and coastal state camps, did not necessarily overlap. For example, some coastal states that resisted any role for third-party tribunals in disputes involving their exclusive economic zones otherwise favored extensive jurisdiction for third-party tribunals.³⁵

Another issue at UNCLOS III concerned the management of mineral resources in the "Area."³⁶ The Convention refers to the Area and its resources as "the common heritage of mankind."³⁷ The regime for sea-bed mining, found in Part XI of the 1982 Convention as modified by the 1994 Part XI Implementation Agreement,³⁸ contains provisions on third-party dispute settlement that are largely separate from those applicable to other issues.³⁹

The ITLOS could not become operational until the Convention entered into force.⁴⁰ Although the Law of the Sea Convention attracted 159 signatories when UNCLOS III concluded in 1982, the Convention did not gain sufficient acceptances to enter into force until November 14, 1994.⁴¹ Between 1982 and 1994, developed states did not accept the Convention because of certain technical and organizational concerns with the Part XI

34. See Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 L. & CONTEMP. PROBS. 195, 196 n.5 (1983) [hereinafter Sohn, *Peaceful Settlement*].

35. See Shabtai Rosenne, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 73 AM. J. INT'L L. 89, 103 (1979) [hereinafter Rosenne, *Settlement of Fisheries Disputes*].

36. Law of the Sea Convention, *supra* note 2, art. 1(1) (defining the "Area" as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction").

37. *Id.* art. 136.

38. Part XI Agreement, *supra* note 4.

39. See *id.* Annex, §§ 3.12, 6.1(f)-(g), 6.4, 8.1(f), 8(2); Law of the Sea Convention, *supra* note 2, arts. 186-91.

40. After the conclusion of UNCLOS III and before the Convention entered into force, Special Commission 4 of the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea (Prepcom) undertook preparatory work relating to the establishment of the ITLOS. See Final Act of the Third United Nations Conference on the Law of the Sea, Res. I, art. 10, U.N. Doc. A/CONF.62/121 (1982), in LAW OF THE SEA DOCUMENTS, *supra* note 17, at 158, 176; Report of the Preparatory Commission To Be Convened in Accordance with Annex VI, Article 4 of the Convention Regarding Practical Arrangements for the Establishment of the International Tribunal for the Law of the Sea, U.N. Doc. LOS/PCN/152 (1995) (4 volumes) [hereinafter Prepcom Report].

41. The Convention entered into force one year after the deposit of the sixtieth instrument of ratification or accession. See Law of the Sea Convention, *supra* note 2, art. 308(1).

sea-bed mining regime. The 1994 Part XI Implementation Agreement, which is to be interpreted together with the Convention as a single instrument, assuaged the concerns of most developed states. Developed and developing states alike have now widely accepted the Convention as modified by the 1994 Agreement.⁴² The Convention's dispute settlement provisions posed no obstacle to states' acceptance of the Convention and, indeed, have garnered favorable comments by national officials.⁴³ Since 1994, the States Parties to the Convention, the U.N. General Assembly, and the ITLOS have done much work to make the Tribunal fully operational.⁴⁴

The Convention's provisions establishing the ITLOS and defining its jurisdiction were the product of difficult negotiations and political com-

42. The United States is one of the few major powers that has not yet accepted the Convention. The President has submitted the Part XI Implementation Agreement and the Convention to the Senate for its advice and consent. See Message from the President Transmitting the 1982 United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention, S. TREATY DOC. NO. 39, 103d Cong., 2d Sess. (1994) [hereinafter Message from the President].

43. U.S. officials have supported the dispute settlement provisions of the Law of the Sea Convention. See, e.g., J. Ashley Roach, *Dispute Settlement in Specific Situations*, 7 GEO. INT'L ENV'T'L L. REV. 775 (1995); Sohn, *U.S. Policy*, *supra* note 29, at 11. The skepticism of some U.S. politicians about the desirability of U.S. participation in international courts, see generally John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831, 844-50 (1994) [hereinafter Noyes, *Compromissory Clauses*], however, suggests that the Senate will debate the merits of the Convention's dispute settlement provisions. For a critique of these provisions, see Marianne P. Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577 (1982) (noting North-South tensions during the UNCLOS III negotiations and suggesting the potential for bias of some mechanisms in favor of developing states).

44. Since 1994, meetings of States Parties to the Law of the Sea Convention have elected judges of the Tribunal, adopted a budget for the Tribunal, and taken other steps necessary for the ITLOS's operation. Work has been completed on an Agreement on Privileges and Immunities of the International Tribunal for the Law of the Sea, *opened for signature* July 1, 1997, SPLOS/25 (1997), and on the Agreement on Cooperation and Relationship Between the United Nations and the International Tribunal for the Law of the Sea, *adopted* Sept. 8, 1998, G.A. Res. 52/521, U.N. GAOR, 52d Sess., 92d plen. mtg., U.N. Doc. A/RES/52/521 (1998). See ITLOS, *Relationship Agreement with United Nations Enters into Force* (visited Nov. 17, 1998) <http://www.un.org/Dept/los/Press/ITLOS/ITLOS_16.htm>. These agreements acknowledge the international legal personality of the Tribunal and its capacity to make treaties. The Tribunal has worked on its own internal organization, adopting Rules of the Tribunal, ITLOS/8, Oct. 28, 1997 (visited Nov. 17, 1998) <http://www.un.org/Depts/los/rules_e.htm> [hereinafter ITLOS Rules]; Guidelines Concerning the Preparation and Presentation of Cases Before the Tribunal, ITLOS/9, Oct. 28, 1997 (visited Nov. 17, 1998) <<http://www.un.org/Depts/los/guide.htm>>; and a Resolution on the Internal Judicial Practice of the Tribunal, ITLOS/10, Oct. 31, 1997 (visited Nov. 17, 1998) <http://www.un.org/Dept/los/itlos_10.htm>. See also ITLOS, *Judges Conclude Sixth Session of the Tribunal* (visited Nov. 17, 1998) <http://www.un.org/Dept/los/Press/ITLOS/ITLOS_18.htm> [hereinafter ITLOS Press 18] (reporting on internal ITLOS personnel and financial regulations). The U.N. General Assembly has also followed the Tribunal's progress. For a survey of the organizational developments since the entry into force of the Law of the Sea Convention, see Shabtai Rosenne, *Establishing the International Tribunal for the Law of the Sea*, 89 AM. J. INT'L L. 806 (1995) [hereinafter Rosenne, *Establishing the ITLOS*]; Shabtai Rosenne, *International Tribunal for the Law of the Sea: 1996-97 Survey*, 13 INT'L J. MARINE & COASTAL L. 487 (1998) [hereinafter Rosenne, *1996-97 Survey*].

promises. This section has provided an overview of the UNCLOS III negotiations that led to the Law of the Sea Convention and the ITLOS. It is also important to situate the Tribunal more particularly in the context of the Convention's provisions concerning dispute settlement and other available third-party mechanisms. The next section thus traces the contours of the Convention's dispute settlement system, focusing on the elements that characterize the system as a whole. Part I.C of this Article then describes features of the ITLOS that distinguish it from other third-party dispute settlement options. Part II of this Article presents a more complete picture of the ITLOS and analyzes its various functions.

B. The Dispute Settlement Provisions of the Law of the Sea Convention

UNCLOS III created Convention provisions that authorize third-party tribunals with compulsory jurisdiction to hear a wide range of oceans law disputes. This system includes such features as flexibility in the choice of third-party mechanisms, obligatory recourse to third-party tribunals that can render binding decisions, limited scope of subject matter jurisdiction, specified sources of applicable law, and limited possibilities for external review over proceedings. This section discusses these features and their connections to the political tensions in UNCLOS III.⁴⁵

1. Informal Mechanisms

Before examining the Law of the Sea Convention's third-party dispute settlement system, it is important to place that system in the context of the Convention's general dispute settlement provisions. Section 1 of Part XV contains these general provisions.⁴⁶ Article 279 obligates States Parties to "settle any dispute between them concerning the interpretation or application of th[e] Convention by peaceful means in accordance with" Article 2(3) of the U.N. Charter, and to "seek a solution by the means indicated in" Article 33(1) of the Charter.⁴⁷ Article 283 explicitly requires States Parties to exchange views regarding the settlement of disputes by negotiation or other peaceful means.⁴⁸

45. For overviews of the dispute settlement mechanisms of the Law of the Sea Convention, see, e.g., J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 170-96 (3d ed. 1998); SINGH, *supra* note 33; A.O. Adede, *The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention*, 11 *OCEAN DEV'T & INT'L L.* 125 (1982); E.D. Brown, *Dispute Settlement and the Law of the Sea: The UN Convention Regime*, 21 *MARINE POL'Y* 17 (1997) [hereinafter Brown, *Dispute Settlement*]; John King Gamble, Jr., *The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?*, 9 *B.U. INT'L L.J.* 39 (1991); John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 *CONN. J. INT'L L.* 675 (1989); Raymond Ranjeva, *Settlement of Disputes*, in *A HANDBOOK ON THE NEW LAW OF THE SEA 1333* (René-Jean Dupuy & Daniel Vignes eds., 1991); Sohn, *Peaceful Settlement*, *supra* note 34.

46. Section 1 of Part XV also applies to disputes arising under Part XI. See Law of the Sea Convention, *supra* note 2, art. 285.

47. *Id.* art. 279. The means indicated in Article 33(1) of the U.N. Charter include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice." U.N. CHARTER art. 33, para. 1.

48. Law of the Sea Convention, *supra* note 2, art. 283.

The primacy accorded informal dispute settlement mechanisms in the Convention reflects the reality of interstate diplomatic practice. Legal advisors in foreign affairs offices face a large number of routine, and often technical, differences of opinion over the interpretation of treaties. States resolve most disputes over the interpretation or application of the Law of the Sea Convention through negotiation rather than through referring disputes to third parties.⁴⁹

2. *Choice of Third-Party Fora and Obligatory Jurisdiction To Render Binding Decisions*

If recourse to negotiation or other mechanisms contemplated under Section 1 of Part XV should fail to settle a dispute, parties may choose among several third-party tribunals under Section 2 of Part XV. Article 287 offers States Parties a choice of four third-party fora: the ITLOS, the ICJ, arbitration, or (in cases involving fisheries, protection of the marine environment, marine scientific research, and navigation) special arbitration before panels of experts. States may declare their preferred tribunal at any time.

The flexibility in Article 287 is the result of states' inability, during UNCLOS III, to agree on a single third-party forum to which recourse should be had when informal mechanisms failed to resolve a dispute. Some states favored the ICJ.⁵⁰ They argued that its docket was not overly full, that it had successfully dealt with several law of the sea cases, and that a proliferation of tribunals might undercut the development of a uniform jurisprudence on law of the sea issues. Other states favored arbitration, criticizing the rigidity of standing tribunals and noting that arbitral tribunals could conduct their business expeditiously.⁵¹ A third group of states favored the "special arbitration" approach, which provided special procedures for navigation, fisheries, pollution, and marine scientific research disputes.⁵² These states stressed the technical nature of many law of the sea disputes, arguing that experts nominated by technically competent organizations, such as the International Maritime Organization, should be the decision makers. The remaining group of states favored establishing a new Law of the Sea Tribunal.⁵³ Some developing states in this group considered the ICJ too conservative and unrepresentative of worldwide legal systems. Given that the ICJ's jurisdiction only extends to states, other states in this last group wanted a standing tribunal that would be open to international organizations, corporations, and individuals. Article 287 acknowledges these different interests.

The choice of third-party fora under Part XV is actually greater than Article 287 suggests. Under Article 282, parties to a dispute may refer the

49. See, e.g., SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986*, at 279-80, 346 (1989).

50. E.g., Japan and Sweden. See 5 COMMENTARY, *supra* note 10, ¶ 287.1 (citing statements in the UNCLOS III Plenary during 1976).

51. E.g., France and the United Kingdom. See *id.*

52. E.g., the Soviet Union and Eastern European states. See *id.*

53. E.g., several African and Latin American states. See *id.*

dispute to a third-party tribunal different from one of the four noted in Article 287, such as an ad hoc arbitral tribunal with a number of arbitrators different from the five specified in the Convention.⁵⁴ According to Article 282, when "through a general, regional or bilateral agreement or otherwise" States Parties have agreed to settle a dispute by a procedure entailing a binding decision, that procedure controls.⁵⁵

Although states have a choice among fora, recourse to third-party dispute settlement is nonetheless obligatory. The Convention's drafters anticipated that parties to a dispute might not elect the same procedure. If the complainant state and the respondent state choose different fora, arbitration will be used; and if a state fails to declare a preferred forum, its choice defaults to arbitration.⁵⁶ Thus, an arbitral tribunal usually has residual compulsory jurisdiction under the Convention.⁵⁷

Two other features confirm the obligatory nature of jurisdiction under Section 2 of Part XV. First, the Convention's provisions disallow techniques that disputing parties historically have used to avoid interstate arbitrations. For example, a state's failure to appoint an arbitrator will not prevent the creation of an arbitral tribunal, because outside parties — the President of the ITLOS in the case of arbitration and the Secretary-General of the United Nations in the case of special arbitration — are authorized to appoint arbitrators should the parties fail to act within a specified time limit.⁵⁸ Lack of agreement on an arbitral tribunal's procedures also will not bar the arbitration, because the tribunal may determine its own procedures.⁵⁹ Furthermore, a state's failure to appear before an arbitral tribunal will not prevent the tribunal from reaching a binding decision.⁶⁰ The statutes of the ITLOS and the ICJ, both courts with elected judges and established rules of procedure, also provide that default of appearance does not

54. See Law of the Sea Convention, *supra* note 2, Annex VII, art. 3(a).

55. See also *id.* art. 280, which allows "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." A variety of tribunals and chambers also may decide Part XI sea-bed mining disputes, although the degree of flexibility under Part XI is less than that available with respect to other disputes. See *id.* arts. 187-88; Annex VI, arts. 35-36; Part XI Agreement, *supra* note 4, Annex, §§ 6(1)(f)-(g), 6(4); *infra* notes 161-68, 306-31 and accompanying text.

56. Law of the Sea Convention, *supra* note 2, art. 287(3), (5). Under some of the formulations advocated during UNCLOS III, the ITLOS would have been the default forum. See 5 COMMENTARY, *supra* note 10, ¶ 287.2; Ranjeva, *supra* note 45, at 1373. Shabtai Rosenne has traced the evolution of Article 287 in depth. See Shabtai Rosenne, *UNCLOS III — The Montreux (Riphagen) Compromise*, in REALISM IN LAW-MAKING 169 (Adriaan Bos & Hugo Siblesz eds., 1986).

57. The ITLOS, however, has residual compulsory jurisdiction with respect to Article 292 applications seeking the prompt release of vessels and their crews and with respect to provisional remedies. See Law of the Sea Convention, *supra* note 2, arts. 290(5), 292; *infra* notes 134-35, 149-50 and accompanying text. The chambers of the ITLOS operating under Part XI also exercise compulsory jurisdiction. See *infra* notes 161-68, 306-31 and accompanying text.

58. Law of the Sea Convention, *supra* note 2, Annex VII, art. 3(e); Annex VIII, art. 3(e).

59. See *id.* Annex VII, art. 5; Annex VIII, art. 4.

60. See *id.* Annex VII, art. 9; Annex VIII, art. 4.

preclude judgments.⁶¹

Second, the Convention generally prohibits reservations and exceptions to its articles.⁶² Because the obligatory dispute settlement provisions are found either in the main body of the Convention or in Annexes that "form an integral part of th[e] Convention,"⁶³ states cannot avoid them by making reservations.⁶⁴

The decisions of a third-party tribunal in contentious cases under Part XI or Part XV are legally binding. The binding nature of these decisions is made explicit in several articles of the Convention⁶⁵ and, with respect to the ICJ, in the U.N. Charter and the Court's Statute.⁶⁶ As a formal matter, a decision "shall have no binding force except between the parties and in respect of that particular dispute."⁶⁷

3. *The Scope of Subject Matter Jurisdiction*

During UNCLOS III, negotiators debated the desirability of obligatory third-party dispute settlement. Those debates led to limitations on, and optional exceptions to, the compulsory dispute settlement mechanisms of Section 2 of Part XV. For example, disputes over the following issues are not subject to automatic compulsory third-party proceedings before courts or tribunals: military activities, law enforcement activities related to certain fisheries and marine scientific research matters, historic bays and titles, maritime boundary delimitations, and situations in which the United Nations Security Council is exercising functions assigned to it by

61. See *id.* Annex VI, art. 28; ICJ Statute, *supra* note 12, art. 53.

62. Law of the Sea Convention, *supra* note 2, art. 309 ("No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.").

63. *Id.* art. 318.

64. The Law of the Sea Convention only refers to reservations in Article 309, the Article that provides reservations are generally prohibited. Article 298 of the Convention, however, authorizes States Parties to make limited exceptions to the applicability of the provisions for obligatory third-party dispute settlement. See also *id.* art. 310 (permitting declarations and statements).

65. *Id.* arts. 188(2), 292(4), 296; Annex VI, arts. 15(5), 33, 39; Annex VII, art. 11; Annex VIII, art. 4. Even provisional measures are legally binding. See *id.* art. 290(6); *infra* note 148 and accompanying text.

66. U.N. CHARTER art. 94; ICJ Statute, *supra* note 12, art. 59.

67. Law of the Sea Convention, *supra* note 2, art. 296(2). Because the decisions of the ITLOS, the ICJ, the chambers of those courts, arbitral tribunals, and special arbitral tribunals are legally binding, states and other entities may well comply with them. Other incentives that promote compliance with international law will also apply with respect to decisions of courts and tribunals operating under the Convention. These incentives include, for example, incorporation of international law into national legal systems, concerns with reputation, and potential countermeasures. See generally Koh, *supra* note 18. The Convention does contain a few provisions specifically directed at mechanisms for compliance with ITLOS decisions. For example, decisions of the ITLOS's Sea-Bed Disputes Chamber are explicitly said to be enforceable in national legal systems. Law of the Sea Convention, *supra* note 2, Annex VI, art. 39. Accord *id.* Annex III, art. 21(2). See *infra* notes 340-44 and accompanying text. The implications of a decision or obligation being legally binding may of course extend well beyond concerns with compliance. See, e.g., Gidon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 583-84 (1983).

the U.N. Charter. With respect to those categories of disputes, Article 298 provides that a state may "declare in writing that it does not accept any one or more of" the Part XV, Section 2 procedures.⁶⁸

Article 297 also limits the applicability of Part XV, Section 2. A coastal state does not have to submit to binding third-party dispute settlement procedures with respect to certain marine scientific research or fisheries disputes in the 200-mile exclusive economic zone (EEZ).

Part XV's treatment of EEZ fisheries disputes illustrates the difficult negotiations and resulting complex compromises during UNCLOS III. Some coastal states opposed third-party oversight of their actions in the EEZ.⁶⁹ They succeeded in exempting significant categories of disputes from the requirements of Part XV, Section 2. Article 297 provides that a coastal state is "not obliged to accept the submission" to a third-party tribunal

of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.⁷⁰

Furthermore, Article 294 assuaged the concerns of coastal states that they might be harassed by unfounded claims. Article 294 allows courts or tribunals to determine, in preliminary proceedings, whether a claim constitutes an abuse of legal process or whether *prima facie* it is not well-founded. If the claim is not well-founded, no further action is taken.⁷¹

The negotiations between coastal and non-coastal states led to an innovative dispute settlement procedure for some controversial cases. A coastal state will be subject to "compulsory conciliation" in certain categories of EEZ fishing disputes. For example, where a party alleges that "a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing," any party

68. As of November 1998, only 12 states had declared, under Article 298, that they would not accept compulsory third-party dispute settlement with respect to all or some of these categories of disputes. See THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 19-46, U.N. Sales No. E.97.V.3 (1997) [hereinafter DECLARATIONS AND STATEMENTS]; United Nations Division for Ocean Affairs and the Law of the Sea, *Declarations and Statements* (visited Nov. 15, 1998) <http://www.un.org/Depts/los/los_decl.htm> [hereinafter Div. for Ocean Affairs, *Declarations and Statements*]. An Article 298 declaration may be made not only on signing, ratifying, or acceding to the Convention, however, but at any time thereafter. Therefore, more states may in time select the Article 298 optional exceptions. The U.S. Secretary of State recommends that the United States, a signatory but not yet a party to the Convention, make such a declaration with respect to all the Article 298 exceptions. See Message from the President, *supra* note 42, at x, 85-87.

69. See *supra* note 35 and accompanying text.

70. Law of the Sea Convention, *supra* note 2, art. 297(3)(a). See *id.* arts. 61-62.

71. See Ranjeva, *supra* note 45, at 1387-90.

to the dispute may compel conciliation.⁷² Although the final product of a conciliation is technically nonbinding, the procedure may contribute to the settlement of disputes.⁷³ Thus, the settlement of some narrow categories of EEZ fisheries disputes is not left entirely to negotiation.⁷⁴

Despite the Article 297 limitations and Article 298 optional exceptions, many disputes are subject to the compulsory third-party dispute settlement procedures of Part XV, Section 2 of the Convention if no settlement can be reached informally. These include, for example, disputes relating to navigation, overflight, the laying of submarine cables, high seas fisheries, the prompt release of vessels, and marine pollution. The scope of disputes subject to compulsory adjudication is broad.⁷⁵

4. *Applicable Sources of Law*

Any international court or tribunal hearing a case under the Law of the Sea Convention may draw on a variety of sources of law. Article 293 directs courts or tribunals having jurisdiction under Section 2 of Part XV to apply "this Convention and other rules of international law not incompatible with this Convention."⁷⁶ Some Convention articles incorporate by reference "generally accepted international rules and standards" of the Interna-

72. Law of the Sea Convention, *supra* note 2, art. 297(3)(b)(ii). For other fishing disputes in which compulsory conciliation is available, see *id.* art. 297(3)(b)(i), (iii). Conciliation is also obligatory for certain disputes concerning marine scientific research that otherwise fall within one of the limitations of Article 297, see *id.* art. 297(2)(b), and for certain disputes concerning sea boundary delimitations and historic bays or titles that are exempted from compulsory binding third-party dispute settlement under an Article 298 declaration. See *id.* art. 298(1)(a). More broadly, conciliation, or any other procedure, is available with respect to any dispute excluded under Article 297 or falling within an Article 298 declaration, if the parties to the dispute so agree. See *id.* arts. 284, 299.

73. Several features of the Convention's conciliation articles suggest that the goal of the conciliation procedure is to promote dispute settlement. For example, third states may be invited to express their views before the conciliation commission, *id.* Annex V, art. 4, and, implicitly, to put pressure on the disputing states to arrive at a settlement. The conciliation commission also is to be proactive: it is directed to make proposals to the parties to try to reach an amicable settlement, and to draw the parties' attention to measures that might facilitate an amicable settlement. *Id.* Annex V, arts. 5-6. In addition, the final conciliation report is not released directly to the parties, but to the Secretary-General of the United Nations, who is to communicate the report to the parties and receive their reactions. *Id.* Annex V, art. 7(1). The report also is to be communicated to "appropriate international organizations." *Id.* art. 297(3)(d). This publicity may make it politically more difficult for a party whose positions are not supported by the conciliator to reject the report. For discussion of conciliation, see Ranjeva, *supra* note 45, at 1345-58.

74. For discussion of the narrow scope of EEZ fisheries disputes that may be subject to third-party process, see MOHAMED DAHMANI, *THE FISHERIES REGIME OF THE EXCLUSIVE ECONOMIC ZONE* 121-22 (1987); JOSÉ A. DE YTURRIAGA, *THE INTERNATIONAL REGIME OF FISHERIES* 148-51, 171 (1997); Rosenne, *Settlement of Fisheries Disputes*, *supra* note 35.

75. See, e.g., Roach, *supra* note 43. But see Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 *INT'L & COMP. L.Q.* 37, 46-47 (1997) [hereinafter Boyle, *Fragmentation and Jurisdiction*].

76. *Accord* Law of the Sea Convention, *supra* note 2, Annex VI, art. 23. With respect to disputes arising under Part XI, the Sea-Bed Disputes Chamber of the ITLOS is authorized to apply not only the sources noted in Article 293, but also the rules, regulations,

tional Maritime Organization.⁷⁷ Such rules and standards apply even to States Parties that have not separately accepted them. Other articles in the Law of the Sea Convention refer to international law developed outside the context of the law of the sea.⁷⁸

The “other rules of international law” applicable to disputes arising under Part XV include customary international law and other non-treaty sources of international law.⁷⁹ International courts and tribunals could construe Article 293(1)’s “other rules of international law” language to reach beyond law of the sea sources and could apply norms developed in other contexts, such as generally accepted human rights norms. For example, to analyze allegations that one state’s boarding of a flag state’s vessel was unauthorized and that the crew was mistreated, a court may need to consider human rights norms not found in the Convention.⁸⁰

Some treaties incorporate by reference the dispute settlement provisions of Law of the Sea Convention.⁸¹ Such treaties may in turn authorize third-party decision makers to apply a broad array of sources. For example, Article 30(5) of the 1995 Straddling Stocks Agreement provides that

[a]ny court or tribunal to which a dispute has been submitted under [the Agreement] shall apply the relevant provisions of the Convention [on the Law of the Sea], of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of

and procedures of the Sea-Bed Authority and, in appropriate cases, the terms of deep sea-bed mining contracts. *See id.* Annex VI, art. 38. *See also id.* Annex III, art. 21(1).

Article 293(2) of the Law of the Sea Convention also notes that a court or tribunal with jurisdiction under Part XV, Section 2, may have the power to decide a case *ex aequo et bono*. This discretion to decide a case according to what is right and good, without the need to refer to rules in the Convention or to other sources of international law, is expressly made subject to the agreement of the parties in the case. One suspects that such agreement will rarely, if ever, be given. In their 80-year history, the International Court of Justice and its predecessor, the Permanent Court of International Justice – whose Statutes contain language similar to Article 293(2) of the Law of the Sea Convention, *see* ICJ Statute, *supra* note 12, art. 38(2) – have never decided a case on the basis of *ex aequo et bono*.

77. *See, e.g.*, Law of the Sea Convention, *supra* note 2, art. 211(2), (5). For discussion of the meaning of the phrase “generally accepted,” *see* INT’L LAW ASS’N COMM. ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION, SECOND REPORT § 2.4.2 (1998).

78. *See, e.g.*, Law of the Sea Convention, *supra* note 2, art. 295 (referring to exhaustion of local remedies “where . . . required by international law”), 304 (“The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.”).

79. *See* ICJ Statute, *supra* note 12, art. 38(1) (listing sources of international law generally used even outside the ICJ).

80. *See generally* Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT’L L. 399 (1997) [hereinafter Oxman, *Human Rights*].

81. *See, e.g.*, Straddling Stocks Agreement, *supra* note 16, arts. 7(4)-(6), 27-32. *See also* Protocol to the London Convention on the Prevention of Marine Pollution by Dumping Waste and Other Matter of 1972, Nov. 7, 1996, art. 16, IMO Doc. LC/SM 1/6 (1996), 36 I.L.M. 1, 15 (1997).

international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.⁸²

5. *Absence of External Controls*

The courts and tribunals operating under the Law of the Sea Convention generally are not subject to external control, a characteristic they share with most international courts. No national court or other state entity can formally review an international tribunal's use of law during a proceeding. No external authority may compel entities to participate in the process. And no institution may formally review the tribunal's application of the law.⁸³

The Law of the Sea Convention explicitly authorizes one court or tribunal to oversee the decisions of another only in three respects. First, if the ITLOS is called on to make a provisional ruling, a subsequently constituted arbitral tribunal (or other mutually agreed forum) may "modify, revoke or affirm" provisional measures prescribed by the ITLOS.⁸⁴ Second, in one circumstance under Part XI, a chamber of the ITLOS may rule on an issue involved in an ongoing case before another tribunal. When a commercial arbitral tribunal adjudicates a sea-bed mining contract dispute, it lacks jurisdiction to interpret the Convention. Instead, the interpretation of Part XI "shall be referred to the Sea-Bed Disputes Chamber for a ruling."⁸⁵ Third, the Convention permits the parties in an arbitration to agree specifically to allow an appellate procedure.⁸⁶ In most respects, however, the Convention does not allow external review or control over decisions of the third-party tribunals operating under Parts XI and XV of the Convention.

Thus, controls to insure that procedures are fair and that rulings do not exceed established powers will be largely internal to the international court or tribunal. As Michael Reisman has noted, such controls include following regularized formalities, requiring reasoned written decisions,

82. Straddling Stocks Agreement, *supra* note 16, art. 30(5). Once the Straddling Stocks Agreement enters into force, parties to it that are involved in a dispute among themselves may use the dispute settlement mechanisms of the Law of the Sea Convention and invoke the sources in Article 30(5) of the Agreement. This is true even if they are not also States Parties to the Law of the Sea Convention. *See id.* art. 30(1)-(2).

83. *See* W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* (1992); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 111 (1990) [hereinafter Caron, *Claims Tribunal*]. By contrast, in international commercial arbitrations between private parties, national courts typically are available to determine the scope of arbitral clauses and review the fairness of arbitral procedures. *See id.* at 115; William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 654-57, 674 (1989).

84. Law of the Sea Convention, *supra* note 2, art. 290(5).

85. *Id.* art. 188(2)(a).

86. *Id.* Annex VII, art. 11; Annex VIII, art. 4. *See also* Chairman's Summary of Discussions on the Draft Rules of the International Tribunal for the Law of the Sea, U.N. Doc. LOS/PCN/SCN.4/L.4 (1985), in 3 *Prepcom Report*, *supra* note 40, at 55, 57-58.

and complying with pressures of learned peers.⁸⁷

6. Summary

The competing interests and compromises at UNCLOS III explain many features of the dispute settlement system under Part XV of the 1982 Convention on the Law of the Sea. Choice of forum provisions were a response to the lack of consensus on one third-party court or tribunal. The exceptions from compulsory third-party proceedings for most EEZ fishing disputes and for other sensitive disputes accommodated many of the concerns of coastal states and of states skeptical about any role for formal third-party tribunals. In response to the desire of most states to strengthen the rule of law in ocean disputes, however, the Convention ensured that jurisdiction of such tribunals was in fact obligatory and third-party decisions binding.

Under what circumstances will a state prefer the newly created ITLOS over other dispute settlement options of the Convention? Section C highlights those features of the ITLOS that set it apart from the Convention's other dispute settlement options. It also describes the categories of cases in which the Convention accords the ITLOS or its chambers a prominent role.

C. Features of the ITLOS

1. Composition of the ITLOS and Its Chambers

Article 2 of the ITLOS Statute prescribes two of the basic qualifications for a judge of the ITLOS. First, the judge must possess expertise in the international law of the sea. Second, the judge must be fair and impartial. States Parties to the Convention elect twenty-one judges for renewable nine-year terms "from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea."⁸⁸ Some provisions of the Tribunal's Statute emphasize the importance of judicial impartiality. Judges may not, for example, have a financial interest in operations connected with oceans resources or have acted as legal counsel for one of the parties.⁸⁹

The ITLOS "as a whole" must represent "the principal legal systems of

87. See REISMAN, *supra* note 83, at 1.

88. Law of the Sea Convention, *supra* note 2, Annex VI, art. 2(1). For a discussion of the desirability of the requirement that judges on international courts have previous experience as judges of national courts, see Helfer & Slaughter, *supra* note 19, at 300-01 (linking this feature to the legitimacy of constitutional interpretations by the European Court of Justice). Such a requirement is helpful when international tribunals depend regularly on national courts to accept their judgments. Although some of the ITLOS's decisions — particularly those discussed in Part II.A of this Article — require acceptance by national courts, expertise in the international law of the sea seems more likely to enhance the prestige of the Tribunal than the familiarity of its judges to national judiciaries.

89. See Law of the Sea Convention, *supra* note 2, Annex VI, arts. 7-8. For discussion of the requirement that judges of the ITLOS be independent, see NIELS-J. SEEBERG-ELVERFELDT, *THE SETTLEMENT OF DISPUTES IN DEEP SEABED MINING* 48-51 (1998). See also Peter H.F. Bekker, *Correspondence*, 90 AM. J. INT'L L. 645 (1996); Detlev F. Vagts, *The*

the world."⁹⁰ States Parties nominate and elect judges,⁹¹ and "each geographical group as established by the General Assembly of the United Nations" is to be represented by at least three members.⁹² In any particular case, each party also is entitled to have on the bench a member of its nationality or choice.⁹³

The Tribunal's twenty-one judges were elected and sworn into office in 1996.⁹⁴ They include academics with expertise in the law of the sea and officials familiar with the law of the sea through their involvement with UNCLOS III.⁹⁵ Although they hail from many different states, voting patterns in the ITLOS's first decision revealed no division along geographical or geo-political lines.⁹⁶

The availability of ITLOS chambers, which are in several respects different from ICJ chambers,⁹⁷ may prove attractive to some states. The Stat-

International Legal Profession: A Need for More Governance?, 90 AM. J. INT'L L. 250, 251-52, 255-57 (1996).

90. Law of the Sea Convention, *supra* note 2, Annex VI, art. 2(2).

91. *See id.* Annex VI, art. 4.

92. *Id.* Annex VI, art. 3(2). These geographical groups are the African, Asian, eastern European, Latin American and Caribbean, and western European and other states. *See* G.A. Res. 1192, U.N. GAOR, 12th Sess., 728th plen. mtg., U.N. Doc. A/3781 (1957).

93. *See* Law of the Sea Convention, *supra* note 2, art. 17. The Statute of the International Court of Justice includes a similar provision. ICJ Statute, *supra* note 12, art. 31.

94. The 21 judges are Joseph Akl (Lebanon), David Anderson (United Kingdom), Hugo Caminos (Argentina), Gudmundur Eiriksson (Iceland), Paul Engo (Cameroon), Anatoly Kolodkin (Russia), Edward Laing (Belize), Vicente Marotta Rangel (Brazil), Mohamed Marsit (Tunisia), Thomas Mensah (Ghana) (President), Tafsir Malick Ndiaye (Senegal), L. Dolliver Nelson (Grenada), Park Choon-Ho (South Korea), P. Chandrasekhara Rao (India), Tullio Treves (Italy), Budislav Vukas (Croatia), Joseph Warioba (Tanzania), Rüdiger Wolfrum (Germany) (Vice President), Soji Yamamoto (Japan), Alexander Yankov (Bulgaria), and Zhao Lihai (China). According to one observer, although an equitable geographical distribution of ITLOS judges is evident, "the element of the representation of the principal legal systems of the world played virtually no role" in the first election. SEEBERG-ELVERFELDT, *supra* note 89, at 56. Furthermore, as Shabtai Rosenne has remarked, an underrepresentation of Pacific Rim states and the absence of any women judges were notable outcomes of this first election. *See* Rosenne, 1996-97 Survey, *supra* note 44, at 492. For discussion of the election, *see id.* at 490-92. For discussion of other steps taken to establish the Tribunal, *see* Rosenne, *Establishing the ITLOS*, *supra* note 44.

95. Biographies of the judges appear in *Curricula Vitae of Candidates Nominated by States Parties for Election to the International Tribunal for the Law of the Sea: Note by the Secretary-General*, SPLOS/11 (1996).

96. *See* Eli Lauterpacht, *The First Decision of the International Tribunal for the Law of the Sea: The M/V Saiga*, in LIBER AMERICORUM PROFESSOR IGNAZ SEIDL-HOHENVELDERN 395, 417 (Gerhard Hafner et al. eds., 1998); Bernard H. Oxman, *International Decision*, 92 AM. J. INT'L L. 278, 279 n.4 (1998). The States Parties to the Law of the Sea Convention that, as of November 1998, have filed declarations under Article 287 accepting the Tribunal's jurisdiction are also geographically diverse. *See infra* note 112.

97. *See* ICJ Statute, *supra* note 12, arts. 26, 29. For discussion of the use of chambers in the International Court of Justice, *see, e.g.*, Monroe Leigh & Stephan D. Ramsey, *Confidence in the Court: It Need Not Be a "Hollow Chamber,"* in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 106, 111-17 (Lori Fisler Damrosch ed., 1987); Edward McWhinney, *Special Chambers Within the International Court of Justice: The Preliminary, Procedural Aspect of the Gulf of Maine Case*, 12 SYR. J. INT'L L. & COM. 1 (1985). For a comparison of chambers under the ITLOS's Statute and under the ICJ's, *see* Shabtai Rosenne, *The International Tribunal for the Law of the Sea and the International*

ute of the ITLOS allows consenting parties to choose chambers that are composed of a few expert judges.⁹⁸ The ITLOS has formed two standing special chambers to address problems that require specific expertise.⁹⁹ One is the Chamber on Fisheries Matters, and the second is the Chamber on the Marine Environment. In addition, the ITLOS has established a Chamber of Summary Procedure, which, at the request of parties to a dispute, can deal on a summary basis with any case that could be submitted to the full Tribunal.¹⁰⁰ The Law of the Sea Convention also provides for an ad hoc chamber of the full Sea-Bed Disputes Chamber, which is the entity with the primary adjudicatory role under Part XI.¹⁰¹ Finally, the ITLOS has the power to establish ad hoc chambers for particular cases at the request of the parties.¹⁰² The availability of chambers allows parties to choose a forum for either its efficiencies or its particular expertise.

The members of these various chambers are selected by the Tribunal's judges, rather than by the States Parties.¹⁰³ The disputing parties must approve the composition of an ad hoc chamber of the Sea-Bed Disputes Chamber or of a chamber of the ITLOS established to deal with a dispute under Part XV.¹⁰⁴ The Tribunal's deference to parties' wishes concerning the composition of these chambers also makes the Convention's dispute settlement system more flexible.

2. *The Conduct of Business by the ITLOS*

Whether the ITLOS will evolve into a respected international court depends on how it conducts its business. Are its decisions well-reasoned? Does it use standard methods of treaty interpretation? Does it adhere to the intent of the treaty drafters? Is it efficient? According to observers of other international courts and tribunals,¹⁰⁵ these factors bear on an international court's effectiveness. The ITLOS's early decisions may indicate how it approaches its work. Part II.A of this Article uses the ITLOS's first decision to analyze one of the Tribunal's roles.

Court of Justice: Some Points of Difference, in THE BALTIC SEA: NEW DEVELOPMENTS IN NATIONAL POLICIES AND INTERNATIONAL COOPERATION 200, 212-13 (Renate Platzöder & Philomène Verlaan eds., 1996) [hereinafter Rosenne, Points of Difference].

98. See Law of the Sea Convention, *supra* note 2, Annex VI, art. 15; ITLOS Rules, *supra* note 44, arts. 28-31.

99. See Oceans and the Law of the Sea: Law of the Sea, *Report of the Secretary-General*, 52d Sess., Agenda Item 39, ¶ 37, U.N. Doc. A/52/487 (1997) [hereinafter 1997 *Report of the Secretary-General*].

100. See *id.*; Law of the Sea Convention, *supra* note 2, Annex VI, art. 15(3); ITLOS Press 18, *supra* note 44.

101. See Law of the Sea Convention, *supra* note 2, Annex VI, art. 36.

102. See *id.* Annex VI, art. 15(2).

103. See *id.* Annex VI, arts. 15(1), 35(1); ITLOS Rules, *supra* note 44, arts. 23, 28-30. The composition of an ad hoc chamber of the Sea-Bed Disputes Chamber is determined by the Sea-Bed Disputes Chamber with the approval of the parties, rather than by the full Tribunal. See Law of the Sea Convention, *supra* note 2, Annex VI, art. 36.

104. See Law of the Sea Convention, *supra* note 2, Annex VI, arts. 15(2), 36; ITLOS Rules, *supra* note 44, arts. 27, 30(2)-(3).

105. See, e.g., REISMAN, *supra* note 83; Helfer & Slaughter, *supra* note 19.

Potential users of the ITLOS will also need to evaluate its procedural rules to understand how it will function. Consider, for example, the detailed rules concerning the ITLOS's fact-finding capacity. Tribunals gain credibility if they have the ability to develop a thorough and accurate factual record. As Helfer and Slaughter point out, "[a] guaranteed capacity to generate facts that have been independently evaluated, either through a third-party fact-finding process or through the public contestation inherent in the adversary system, helps counter the perception of self-serving or 'political' judgments."¹⁰⁶

States at UNCLOS III provided minimal guidance with respect to the fact-finding capacity of the ITLOS. Article 27 of the Court's Statute simply provides that the ITLOS shall "make all arrangements for the taking of evidence."¹⁰⁷ Rules of the ITLOS, however, set out detailed rules governing the taking of evidence.¹⁰⁸ They provide for the collection and evaluation of evidence through written and oral proceedings and certified copies of documents. The ITLOS may arrange for witnesses and experts to give evidence and may itself examine the parties and witnesses. It may "at any time call upon the parties to produce" any evidence or explanations the ITLOS considers "necessary for the elucidation of any aspect of the matter in issue, or may itself seek other information for this purpose,"¹⁰⁹ and it may request relevant information from nonparty intergovernmental organizations. The ITLOS may also revise a judgment if a material fact, unknown at the time of the case, is subsequently discovered. Overall, the ITLOS's rules provide a comprehensive system for gathering and evaluating facts.

3. *Features of the Law of the Sea Convention Bearing on the Use of the ITLOS*

The Law of the Sea Convention and the Statute of the ITLOS (Annex VI of the Convention) contain provisions, relating to access to the Tribunal and its jurisdiction, that suggest the ITLOS may receive more use than the ICJ or other tribunals in several situations. The following discussion first examines the provisions concerning access to the ITLOS. It then analyzes the types of cases – Article 292 prompt release cases, cases involving provisional measures, cases in which advisory opinions are sought, and Part XI sea-bed mining cases – in which the Convention accords the ITLOS a particularly significant role.

106. Helfer & Slaughter, *supra* note 19, at 303.

107. Law of the Sea Convention, *supra* note 2, Annex VI, art. 27. See also *id.* art. 289 (stating that a court or tribunal hearing a dispute involving scientific or technical matters may, either on its own motion or at the request of a party, select scientific or technical experts).

108. See ITLOS Rules, *supra* note 44, arts. 15, 60, 62-63, 71-72, 75-79, 80-82, 84, 87, 92-93, 96(7), 97(5), 127-28. Special Commission 4 of the Prepcorn, working during 1982-1994, developed the draft of the Tribunal's Rules. See Final Draft Rules of the International Tribunal for the Law of the Sea, in *Provisional Report of Special Commission 4*, U.N. Doc. LOS/PCN/SCN.4/WP.16/Add.1 (1994), reprinted in 1 *Prepcorn Report*, *supra* note 40, at 26, 32.

109. ITLOS Rules, *supra* note 44, art. 77(1).

a. Access to and Jurisdiction of the ITLOS

The Law of the Sea Convention contemplates that states will be the primary users of the ITLOS. The Convention expressly grants States Parties access to the ITLOS and its chambers.¹¹⁰ Numerous provisions in the Convention contemplate that States Parties will bring claims to the ITLOS.¹¹¹ Mutual declarations of states accepting the jurisdiction of the ITLOS under Part XV provide one way for the ITLOS to obtain jurisdiction over an interstate dispute.¹¹² States — even those not parties to the Law of the Sea Convention — may also gain access to the ITLOS if they so agree in another treaty or agreement, and the ITLOS will have jurisdiction over the disputes specified in that treaty or agreement.¹¹³

Although only states may appear as parties before the ICJ, other entities may appear before the ITLOS and other third-party tribunals under the Law of the Sea Convention. The Convention's definition of "States Parties"

110. Law of the Sea Convention, *supra* note 2, art. 291(1); Annex VI, arts. 20(1), 37.

111. *See id.* arts. 188, 287, 288(3), 290, 292(2); Annex VI, arts. 20-22. *See also id.* Annex VI, arts. 31-32 (on intervention). The Statute of the ITLOS addresses both the Tribunal's jurisdiction *ratione personae* and *ratione materiae* in the same section. *See* 5 COMMENTARY, *supra* note 10, ¶ A.VI.112, at 373.

112. Law of the Sea Convention, *supra* note 2, arts. 287-88. The 13 States Parties that, as of November 1998, have filed such declarations are Argentina, Austria, Belgium, Cape Verde, Chile, Finland, Germany, Greece, Italy, Oman, Portugal, the United Republic of Tanzania, and Uruguay. For the text of declarations, see DECLARATIONS AND STATEMENTS, *supra* note 68, at 19-46; Div. for Ocean Affairs, *Declarations and Statements*, *supra* note 68. For a summary of declarations concerning the settlement of disputes, see United Nations Division for Ocean Affairs and the Law of the Sea, *Settlement of Disputes Mechanism* (visited Nov. 1, 1998) <http://www.un.org/Depts/los/los_sdml.htm>. Only Greece, the United Republic of Tanzania, and Uruguay named the ITLOS alone as their preferred forum, although Uruguay added the caveat that its choice of the ITLOS was "without prejudice to its recognition of the jurisdiction of the International Court of Justice and of such agreements with other States as may provide for other means for peaceful settlement." Seven states — Argentina, Austria, Cape Verde, Chile, Germany, Oman, and Portugal — listed the ITLOS first, followed by at least one other forum; of these seven states, all but Oman and Portugal explicitly stated that their choices were listed "in order of preference" or "in the following order." Finally, Belgium listed both the ITLOS and the ICJ, Finland chose "the International Court of Justice and the International Tribunal for the Law of the Sea," and Italy chose "the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other." For further discussion of the choice of procedure by States Parties under Article 287, see Brown, *Dispute Settlement*, *supra* note 45, at 17.

113. *See* Law of the Sea Convention, *supra* note 2, arts. 288(2), 291(2); Annex VI, arts. 20-22. Thus, for example, the Straddling Stocks Agreement provides that

[t]he provisions relating to the settlement of disputes set out in Part XV of the Law of the Sea Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

Straddling Stocks Agreement, *supra* note 16, art. 30(1). *See also id.* arts. 30(2)-(4). For discussion of the dispute settlement provisions of the Straddling Stocks Agreement, see Ted L. McDorman, *The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention*, CAN. Y.B. INT'L L. (forthcoming 1999). *See also* Draft Agreement on Free Transit Through the Territory of Croatia to and From the Port of Ploce and Through the Territory of Bosnia and Herzegovina at Neum, Sept. 8, 1998, Croat.-Bosn. & Herz., art. 9(2) (parties shall request the ITLOS to nominate the President of a supervisory commission).

is not limited to states.¹¹⁴ The definition includes other entities entitled to become parties to the Convention, such as territories with full internal self-governance and international organizations with treaty-making competence.¹¹⁵ The Convention's third-party dispute settlement mechanisms are also "open to entities other than States Parties," but "only as specifically provided for" in the Convention.¹¹⁶ Such entities include the International Sea-Bed Authority¹¹⁷ and natural and juridical persons.¹¹⁸

The ITLOS may exercise jurisdiction in some cases where individuals or corporations are parties, although such jurisdiction is less extensive than some initially proposed. Arvid Pardo's 1971 draft treaty concerning International Ocean Space institutions¹¹⁹ included a proposal for an International Maritime Court with jurisdiction over natural and juridical persons "with respect to matters which have occurred in International Ocean Space."¹²⁰ No general Ocean Space institution emerged from UNCLOS III, however, and the Convention's provisions authorize only limited individual access to the ITLOS. The Soviet Union and its allies were reluctant to accept obligatory third-party dispute settlement mechanisms¹²¹ and resisted access for natural or juridical persons, particularly in cases against states. Opponents cited traditional state-centric views of international law and invoked "sovereignty" in arguing against proposals for broad judicial access both for international organizations and for natural and juridical

114. Law of the Sea Convention, *supra* note 2, art. 1(2)(2); *see id.* arts. 305-06.

115. *See id.* arts. 305-06; *id.* Annex IX, art. 1. This definition encompasses the European Union. Annex IX of the Convention contains a complementary provision authorizing such an intergovernmental organization to appear as a party in cases before the ITLOS, an arbitral tribunal, or a special arbitral tribunal. *See id.* Annex IX, art. 7. *See also* Straddling Stocks Agreement, *supra* note 16, art. 47 (addressing participation by international organizations).

116. Law of the Sea Convention, *supra* note 2, art. 291(2). *See Boyle, Fragmentation and Jurisdiction, supra* note 75, at 52-54.

117. The Sea-Bed Authority has access to the Sea-Bed Disputes Chamber of the ITLOS, and the Chamber has jurisdiction in cases in which the Authority is a party under Part XI. *See infra* notes 323, 328-31 and accompanying text.

118. For discussion of the concept of "juridical person" as used in the Convention, *see* SEEBERG-ELVERFELDT, *supra* note 89, at 73-75.

119. Draft ocean space treaty: Working paper submitted by Malta, U.N. Doc. A/AC.138/53 (1971), *reprinted in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, U.N. GAOR, 26th year, Supp. No. 21, at 105-93, U.N. Doc. A/8421 (1971), and in STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, REPORT ON THE UNITED NATIONS SEABED COMMITTEE, THE OUTER CONTINENTAL SHELF AND MARINE MINERAL DEVELOPMENT 168 (Comm. Print 1971) [hereinafter Draft Ocean Space Treaty].

120. *See id.* art. 161; Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUM. J. TRANSNAT'L L. 285, 291-92 (1997). A natural or juridical person that did not comply with a decision rendered against it also was to be subject to sanctions, including preclusion from use of the oceans. Draft Ocean Space Treaty, *supra* note 119, art. 162(4); *see id.* art. 149. The United States also favored individual access to third-party tribunals. *See* U.N. Doc. A/AC.138/97, art. 8(2), *reprinted in 2 Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction*, U.N. GAOR, 28th Sess., Supp. No. 21, at 22, U.N. Doc. A/9021 (1973), *quoted in* 5 COMMENTARY, *supra* note 10, ¶ 292.1; V Official Records, *supra* note 30, 61st plen. mtg., ¶ 20.

121. *See supra* note 34 and accompanying text.

persons.¹²²

Under the Law of the Sea Convention, natural or juridical persons may have access to the ITLOS in at least two types of cases. First, Article 292(2) contemplates individual access to the ITLOS to seek the prompt release of vessels and crews detained by a coastal state when such access is authorized by the flag state of the detained vessel.¹²³ Second, natural or juridical persons may bring Part XI claims to the ITLOS's Sea-Bed Disputes Chamber; some Part XI claims may also be brought against natural or juridical persons there.¹²⁴

In addition, a literal reading of the Statute of the ITLOS might allow the ITLOS to hear disputes involving private parties that are submitted pursuant to agreements conferring jurisdiction on the Tribunal.¹²⁵ Article 20 of the Statute grants nonstate entities access to the ITLOS not only in cases provided for in Part XI, but also "in any case submitted pursuant to *any other agreement* conferring jurisdiction on the ITLOS which is accepted by all the parties to that case."¹²⁶ Article 21 of the Statute complements Article 20, authorizing jurisdiction over "all matters specifically provided for in *any other agreement* which confers jurisdiction on the Tribunal."¹²⁷ The Statute of the ITLOS forms an integral part of the Law of the Sea Convention.¹²⁸ Nevertheless, the main jurisdictional article of the Convention, Article 288(2), refers to "international agreements," rather than "agreements," and the ITLOS's current Rules do not explicitly contemplate the Tribunal exercising jurisdiction in nonsea-bed mining private party disputes submitted pursuant to agreement.¹²⁹

122. See 5 COMMENTARY, *supra* note 10, ¶ 291.5.

123. Article 292(2) is discussed in detail in Part II.A *infra*.

124. The access of natural and juridical persons to tribunals in Part XI disputes is qualified by Article 190 of the Convention. This Article allows a "sponsoring State" of a natural or juridical person to submit written or oral statements if such a person is a party to a dispute. Law of the Sea Convention, *supra* note 2, art. 190(1). The Article also allows State Parties against whom a natural or juridical person has brought a claim to ask that person's sponsoring state to "appear in the proceedings on behalf of that person. Failing such appearance, the respondent State Party may arrange to be represented by a juridical person of its nationality." *Id.* art. 190(2). According to one official involved with negotiating the dispute settlement provisions of UNCLOS III, Article 190 "emerged as part of a continued reluctance of states to be sued directly in an international forum by natural or juridical persons." ADEDE, *supra* note 27, at 275. For further discussion of Article 190, see SEEBERG-ELVERFELDT, *supra* note 89, at 143-47. Part II.C of this Article discusses the role of the ITLOS in sea-bed mining cases in greater detail.

125. See Law of the Sea Convention, *supra* note 2, Annex VI, arts. 20-21; *id.* arts. 291(2), 308.

126. *Id.* Annex VI, art. 20(2) (emphasis added).

127. *Id.* Annex VI, art. 21 (emphasis added). For the history of Articles 20 and 21 of the Statute, see 5 COMMENTARY, *supra* note 10, ¶¶ A.VI.113-128.

128. See Law of the Sea Convention, *supra* note 2, art. 318.

129. See ITLOS Rules, *supra* note 44, arts. 57 (referencing disputes to which international organizations are party), 138 (concerning advisory opinions submitted pursuant to "an international agreement" related to the Convention's purposes). See also *Chairman's Summary of Discussions on the Draft Rules of the International Tribunal for the Law of the Sea: Addendum*, U.N. Doc. LOS/PCN/SCN.4/L.7/Add.1 (1987), in 3 *Prepcom Report*, *supra* note 40, at 103, 104-05 [hereinafter 1987 *Prepcom Summary*]; *Chairman's Summing up of the Discussions*, U.N. Doc. LOS/PCN/SCN.4/L.1 (1984), in 3 *id.* at 11, 13-

If this “any other agreement” basis for jurisdiction and access of individuals to the ITLOS were to be allowed, it could apply to a broad range of situations. For example, shipowners might enter agreements with flag or coastal states to allow the ITLOS to decide disputes concerning how IMO regulations or international environmental rules apply to vessels.¹³⁰ The subject matter of any agreement providing for jurisdiction of the ITLOS would probably relate closely to the law of the sea, given the expertise of judges of the ITLOS.¹³¹

b. Disputes Concerning the Prompt Release of Vessels and Their Crews

Under Article 292 of the Law of the Sea Convention, the ITLOS may have jurisdiction over applications for the prompt release of vessels and their crews, even when the disputing parties have not separately accepted the ITLOS’s jurisdiction. The Article concerns one particular situation in which the actions of coastal states are subject to third-party review. When a coastal state detains a vessel and allegations “that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security”¹³² can be established, an international tribunal may order the release of the vessel or its crew on the posting of a reasonable bond or other financial security. The United States, concerned with the seizures of U.S. fishing vessels in the 1960’s, was one of the chief proponents of a prompt release mechanism during UNCLOS III.¹³³

15; *Statement by the Chairman: Access by entities other than States*, U.N. Doc. LOS/PCN/SCN.4/1984/CRP.4 (1984), in 3 *id.* at 369; Boyle, *Fragmentation and Jurisdiction*, *supra* note 75, at 53 (Article 20(2) of the ITLOS Statute provides “the basis for believing that the ITLOS is open” to international organizations, nongovernmental organizations, “other entities which are not States or whose international status is doubtful, such as Taiwan,” and “fishing entities” noted in the Straddling Stocks Agreement, *supra* note 16, art. 1(3)). In the event of a dispute concerning whether the ITLOS has jurisdiction over a dispute involving non-state entities, the ITLOS itself will decide the matter. See Law of the Sea Convention, *supra* note 2, art. 288(4); ITLOS Rules, *supra* note 44, art. 58.

130. Whether agreements solely between private parties could confer jurisdiction on the ITLOS is questionable. Although some such agreements relate to oceans issues, e.g., Tanker Owners’ Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), Jan. 7, 1969, 8 I.L.M. 497 (discontinued in 1997), the settlement of many disputes relating to private agreements would not require recourse to international law. See *supra* notes 76-82 and accompanying text. The Sea-Bed Disputes Chamber of the ITLOS may, however, hear disputes concerning private contracts related to sea-bed mining, under Article 187(c)(i) of the Law of the Sea Convention. See SEEBERG-ELVERFELDT, *supra* note 89, at 124-26.

131. Although Article 288(2) provides that when jurisdiction is exercised over disputes concerning international agreements, such agreements must be “related to the purposes of [the] Convention,” nothing in the Statute of the Tribunal explicitly limits the Tribunal’s “any other agreement” jurisdiction to disputes involving law of the sea matters. It is thus conceivable that non-state entities could enter agreements to refer a variety of disputes to the Tribunal. See Boyle, *Fragmentation and Jurisdiction*, *supra* note 75, at 49-50.

132. Law of the Sea Convention, *supra* note 2, art. 292.

133. See U.N. Doc. A/AC.138/97, *supra* note 120, art. 8(2); V Official Records, *supra* note 30, 61st plen. mtg., ¶ 20. The U.S. position probably took account of seizures of U.S. fishing vessels by certain Latin American states, which resulted in prolonged deten-

Article 292 grants residual compulsory jurisdiction to the ITLOS, rather than an arbitral tribunal, when the parties are unable to agree on a tribunal.¹³⁴ Delays in constituting an arbitral tribunal could frustrate the quick time frame allotted for prompt release cases.¹³⁵ Given this concern, allocating residual jurisdiction to a standing tribunal is advantageous.¹³⁶

Scholars disagree on the scope of Article 292, particularly with respect to the Article's requirement that an application for prompt release allege noncompliance with Convention provisions "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security."¹³⁷ There is general agreement, however, that detentions of vessels for violating EEZ fishing regulations under Article 73,¹³⁸ rules concerning pollution from vessels under Article 220,¹³⁹ and investigations of foreign vessels for specified pollution violations under Article 226¹⁴⁰ fall within the scope of Article 292. Each of these Articles specifically refers to release of those vessels on the posting of a bond or financial security. Numerous other Convention provisions concerning the arrest of foreign flag vessels — e.g., for criminal activities in the territorial sea or for unauthorized broadcasting — do not refer to such a process.¹⁴¹ Although Article 292 does not authorize a tribunal to decide the merits of the underlying

tions that could deprive captains and vessel owners of their means of livelihood. See 4 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW § 22, at 1102 (1965). The problem of foreign detentions of U.S. fishing vessels continues in the 1990s. See Roach, *supra* note 43, at 785 (reporting 1992 Costa Rican detentions of U.S. fishing vessels). For a discussion of the serious consequences associated with detentions of vessels and their crews, see Bernard H. Oxman, *Observations on Vessel Release under the United Nations Convention on the Law of the Sea*, 11 INT'L J. MARINE & COASTAL L. 201, 203-04 (1997) [hereinafter Oxman, *Observations on Vessel Release*].

134. Law of the Sea Convention, *supra* note 2, art. 292(1).

135. See *id.* (submitting release questions to the ITLOS is possible failing mutual agreement on submission to another court or tribunal within 10 days of detention); ITLOS Rules, *supra* note 44, art. 112 (providing maximum of 10 days from receipt of application to fix hearing date; one day to present evidence; maximum of 10 days following close of hearing to render judgment).

136. See Ranjeva, *supra* note 45, at 1383.

137. Article 292 and prompt release procedures are the subject of a symposium entitled "The International Tribunal for the Law of the Sea: Establishment and 'Prompt Release' Procedures," which appears in Volume 11, No. 2 of *The International Journal of Marine and Coastal Law* (1996). The scope of detentions to which Article 292 applies is also addressed in E.D. Brown, *The M/V 'Saiga' Case on Prompt Release of Vessels: The First Judgment of the International Tribunal for the Law of the Sea*, 22 MARINE POL'Y 307, 311-18 (1998) [hereinafter Brown, *First Judgment*].

138. See Law of the Sea Convention, *supra* note 2, art. 73(2) (specifically referring to prompt release on the posting of reasonable bond or other security).

139. See *id.* art. 220(7) (referring to "appropriate procedures . . . either through the competent international organization [a reference to the International Maritime Organization] or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured.")

140. See *id.* art. 226(1)(b) ("release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security").

141. See David H. Anderson, *Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements*, 11 INT'L J. MARINE & COASTAL L. 165 (1996) [hereinafter Anderson, *Detention and Release*]; Brown, *First Judgment*, *supra* note 137, at 316-18.

dispute or to determine damages arising from a detention, the Article does allow some modest oversight of coastal state activities.

The ITLOS's first case, decided in December 1997, concerned a prompt release dispute under Article 292. In the *M/V Saiga Case*, Saint Vincent and the Grenadines brought a claim against Guinea, arguing that Guinea had failed to release a vessel flying the flag of Saint Vincent and the Grenadines and its crew on the posting of a reasonable bond.¹⁴² The ITLOS, rendering its decision only three weeks after the case was filed, ordered Guinea to release the vessel on the posting of a bond or financial security of \$400,000 in addition to the vessel's gasoil cargo. Guinea has complied with the order.¹⁴³ Part II.A of this Article analyzes the *M/V Saiga Case* and the ITLOS's role in Article 292 cases in greater detail.

c. Provisional Measures

Any court or tribunal finding "that *prima facie* it has jurisdiction" under Part XV or Part XI may prescribe provisional measures.¹⁴⁴ Article 290 of the Law of the Sea Convention sets out other conditions related to provisional measures. A court or tribunal may prescribe a provisional measure if "appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."¹⁴⁵ A court or tribunal may revoke or modify a provisional measure "as soon as the circumstances justifying [it] have changed or ceased to exist."¹⁴⁶ The parties "shall comply promptly with any provisional measures prescribed."¹⁴⁷ It is beyond cavil that provisional measures are binding.¹⁴⁸

142. *M/V Saiga Case*, *supra* note 6.

143. See ITLOS, *Guinea Complies with Judgment of the Tribunal*, (visited Nov. 17, 1998) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_14.htm>. The underlying dispute over the legality of the arrest and issues of hot pursuit and freedom of navigation are the subject of a separate case now before the Tribunal. See ITLOS, *Tribunal Seized of Merits in Case of "Bunkering" of Vessels at Sea* (visited Nov. 17, 1998) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_13.htm> [hereinafter ITLOS Press 13]. This pending case gave rise to a 1998 order prescribing a provisional measure, which is noted in the following subsection.

144. Law of the Sea Convention, *supra* note 2, art. 290(1). See also *id.* Annex VI, art. 25.

145. *Id.* The stated purpose of provisional measures under Article 290 is broader than the stated purpose of such measures under Article 41 of the ICJ's Statute. Article 41 gives the Court the power to indicate "any provisional measures which ought to be taken to preserve the respective rights of either party." As noted, Article 290 provisional measures may be prescribed to preserve the rights of the parties "or to prevent serious harm to the marine environment." See Rosenne, *Points of Difference*, *supra* note 97, at 206-08.

146. Law of the Sea Convention, *supra* note 2, art. 290(2).

147. *Id.* art. 290(6).

148. This conclusion follows from the use of the word "prescribe," see *id.* art. 290(1), (3)-(5), and the explicit requirement that parties "comply" with any provisional measure. *Id.* art. 290(6). See also *id.* Annex VI, art. 25. Article 41 of the ICJ Statute, by contrast, only authorizes the Court to "indicate" provisional measures, and the binding effect of ICJ provisional measures has been a matter of some dispute. See JEROME B. ELKIND, INTERIM PROTECTION: A FUNCTIONAL APPROACH 153-64 (1981); Rosenne, *Points of Difference*, *supra* note 97, at 206-08.

The Convention accords the ITLOS a significant role with respect to provisional measures by designating it the “default” tribunal when the parties cannot agree on one court or tribunal:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under [Part XV, Section 2], any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Sea-Bed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures¹⁴⁹

The motivation for allocating residual compulsory jurisdiction to the ITLOS with respect to provisional measures was the same as for Article 292 cases. The negotiators at UNCLOS III feared that giving such residual jurisdiction to an arbitral tribunal, as is done in other Article 287 cases, could cause undue delays given the time required to constitute an arbitral tribunal.¹⁵⁰

To date, the ITLOS has issued one order prescribing a provisional measure. Following the Tribunal’s 1997 decision ordering Guinea to release the *M/V Saiga*,¹⁵¹ the vessel’s flag state (Saint Vincent and the Grenadines) brought a new claim against Guinea related to the seizure. In this second case, the ITLOS unanimously prescribed a provisional measure requiring Guinea to “refrain from taking or enforcing any judicial or administrative measure against the *M/V Saiga*, its Master and the other members of the crew, its owners or operators, in connection with” the vessel’s 1997 arrest and detention and “the subsequent prosecution and conviction of the Master.”¹⁵² Judge Laing appended a separate opinion that set out the factors for deciding whether to prescribe a provisional measure:

[I]t is useful to recall the discretionary and equitable nature of the institution of provisional measures. This suggests that urgency should always be

149. Law of the Sea Convention, *supra* note 2, art. 290(5). This passage suggests a third difference – in addition to the two differences noted *supra* notes 145, 148 – between the approach to provisional measures in the ICJ and the ITLOS. The ITLOS, unlike the ICJ, may issue orders for provisional measures where the merits will be addressed before a different court or tribunal, whereas the ICJ’s order would precede consideration of the merits by the ICJ itself.

150. See Ranjeva, *supra* note 45, at 1381.

151. *M/V Saiga Case*, *supra* note 6. For analysis of this prompt release case, see *infra* notes 176-242 and accompanying text.

152. *M/V Saiga (No. 2)*, *supra* note 6. The Tribunal also unanimously recommended, but did not prescribe,

that Saint Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision, and to this end the two States should ensure that no action is taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal.

The merits of the dispute that gave rise to the arrest and seizure are now before the ITLOS. See ITLOS Press 13, *supra* note 143.

borne in mind as an aspect of any possible "circumstance." But equally or alternatively should there be borne in mind such aspects, if they exist, as (1) the wrong has already occurred or cannot be compensated or monetarily repaired (e.g. the continued detentions after 4 December 1997 in this case), (2) the certainty that the feared consequence will occur unless the Tribunal intervenes, (3) the seriousness of the threat, (4) the right being preserved has unique or particularly special value and (5) the magnitude of the underlying global public order value, e.g. such possibly *jus cogens* values as global peace and security or environmental protection.¹⁵³

Judge Laing correctly emphasizes that judicial balancing of several factors is the essence of any decision to prescribe provisional measures.

d. Advisory Opinions

The Law of the Sea Convention provides a narrow advisory role for the ITLOS. Whereas courts of member states in the European Union can seek advice from the European Court of Justice (ECJ) on issues of Community law,¹⁵⁴ and a similar proposal has been made with respect to the ICJ,¹⁵⁵ the Convention does not authorize national courts to seek advice from the ITLOS. Such a mechanism could promote uniform interpretation of the Convention among national courts.

The ITLOS also lacks general authority to issue advisory opinions at the request of international organizations. The ICJ, the judicial arm of the United Nations, may render an advisory opinion on any legal question at the request of the General Assembly, the Security Council, or (if the request is authorized by the General Assembly) other U.N. organs and specialized agencies; in the latter case, however, opinions are limited to legal questions arising within the scope of their activities.¹⁵⁶ Because the ITLOS is not the judicial arm of any international oceans organization with broad powers, its lack of general advisory jurisdiction is unsurprising.¹⁵⁷ With respect to legal issues arising under Part XI, however, a chamber of the ITLOS has an important interpretive role, including rendering advisory opinions.¹⁵⁸ Article 191 of the Convention authorizes the Sea-Bed Disputes Chamber to "give advisory opinions at the request of the Assembly or Council [of the International Sea-Bed Authority] on legal questions arising within the scope of their activities."¹⁵⁹

153. *M/V Saiga* (No. 2), *supra* note 6, ¶ 25 (Laing, J., separate opinion).

154. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 177, 298 U.N.T.S. 11, 377, as amended [hereinafter Treaty of Rome].

155. See Louis B. Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124 (1983).

156. ICJ Statute, *supra* note 12, art. 96. See Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (June 8).

157. Cf. Draft Ocean Space Treaty, *supra* note 119, art. 163 (authorizing organs of the proposed International Ocean Space Institution or its member states to request advisory opinions from the proposed International Maritime Court).

158. See *infra* notes 317, 327 and accompanying text.

159. See also ITLOS Rules, *supra* note 44, arts. 130-37; *Statement by the Chairman on the Question of Advisory Opinions*, U.N. Doc. LOS/PCN/SCN.4/1984/CRP.5 (1984), in 3 *Prepcom Report*, *supra* note 40, at 373.

Although national courts and (except under Part XI) international organizations may not seek advisory opinions from the ITLOS, states may, by treaty, authorize the submission of requests for advisory opinions to the Tribunal.¹⁶⁰ Thus, the ITLOS may give advisory opinions if an international agreement so provides.

e. Part XI Disputes

A chamber of the ITLOS plays a central role in Part XI's dispute settlement provisions, which concern the regime for sea-bed mining beyond the limits of national jurisdiction. These dispute settlement provisions are in many ways separate from the provisions of Part XV.¹⁶¹ Negotiators at UNCLOS III initially considered creating an entirely separate tribunal to address sea-bed mining disputes under Part XI. They ultimately settled on a distinct judicial chamber, the eleven-member Sea-Bed Disputes Chamber, within the ITLOS.¹⁶² The Sea-Bed Disputes Chamber has jurisdiction over disputes that arise out of the interpretation or application of Part XI, certain acts of the International Sea-Bed Authority, mining exploration and exploitation contracts, and certain activities on the deep sea bed.¹⁶³ States Parties, the Authority, the Enterprise (the Authority's sea-bed mining arm), state enterprises, and natural or juridical persons may appear before the Chamber in various categories of disputes.

Part XI affords disputants some flexibility in choosing a third-party forum by allowing tribunals other than the Sea-Bed Disputes Chamber to hear cases. For example, States Parties involved in a dispute concerning the interpretation or application of Part XI may agree to submit the dispute to a special chamber of the ITLOS rather than to the Sea-Bed Disputes Chamber.¹⁶⁴ Alternatively, any party to such a dispute may submit it to a different, three-member ad hoc chamber.¹⁶⁵ The parties to a dispute concerning the interpretation or application of mining contracts may opt for commercial arbitration.¹⁶⁶ Under the 1994 Part XI Implementation Agreement, disputes relating to subsidization of production, which are subject to the General Agreement on Tariffs and Trade and its codes and successor

160. See ITLOS Rules, *supra* note 44, art. 138. The Tribunal's Rules do not explicitly authorize private parties to request an advisory opinion from the ITLOS. See *supra* note 129 and accompanying text. See also Law of the Sea Convention, *supra* note 2, Annex VIII, art. 5(3) (parties to a dispute may authorize a special arbitral tribunal to formulate "recommendations"); 5 COMMENTARY, *supra* note 10, ¶ A.VI.99.

161. The provisions of Part XV, Section 1, however, which concern informal dispute settlement procedures and general dispute settlement obligations, do apply to Part XI disputes. See Law of the Sea Convention, *supra* note 2, art. 285.

162. See 5 COMMENTARY, *supra* note 10, ¶ A.VI.170; SINGH, *supra* note 33, at 59-60; *infra* notes 309-26 and accompanying text.

163. See Law of the Sea Convention, *supra* note 2, art. 187. The Sea-Bed Disputes Chamber was established in February 1997. See ITLOS, *Judges of the Tribunal Select the Seabed Disputes Chamber, the Chamber for the Marine Environment and the Chamber on Fisheries Matters* (visited Nov. 17, 1998) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_5.htm>.

164. See Law of the Sea Convention, *supra* note 2, art. 188(1)(a).

165. See *id.* art. 188(1)(b).

166. See *id.* art. 188(2).

agreements, may be decided by WTO dispute settlement procedures.¹⁶⁷

Under Part XI, entities authorized to use the Sea-Bed Disputes Chamber include States Parties to the Convention, international institutions (the Sea-Bed Authority and the Enterprise, which is the mining arm of the Authority), and certain natural or juridical persons.¹⁶⁸ Cases thus may involve the entities that are most directly concerned with a dispute. Part II.C of this Article will discuss some of the Chamber's functions in sea-bed mining cases in detail.

D. Summary

The dispute settlement provisions of the Law of the Sea Convention and the ITLOS are novel and complex constructs. The above discussion suggests that the ITLOS may play a significant role in addressing ocean-related disputes. The following Part will analyze the various functions that the ITLOS or its chambers may carry out in hearing some disputes.

II. The Functions of the ITLOS and the Relations of States and Nonstate Entities

When states endow an international court with compulsory jurisdiction to hear disputes related to the interpretation or application of binding treaty rules, those states do not traditionally allow the court's decisions to be enforceable against them through judicial process. Rather, states look to the presence of the court to deter violations of existing law, to settle disputes, to define or clarify the law, or perhaps to justify proportionate countermeasures against a violating state when the dispute cannot be resolved through negotiation or other informal mechanisms.¹⁶⁹

Commentators have noted certain judicial behaviors that contribute to the effectiveness and legitimacy of international courts.¹⁷⁰ These behaviors include issuing reasoned decisions, exercising independence, deciding cases with consistency, and, especially in a court's early years, interpreting treaties according to generally accepted methods of treaty interpretation. Although interstate relations will develop and adjust independent of judicial decisions, a court may nevertheless help shape the norms that influence interstate relationships.

167. If one or more States Parties to the Law of the Sea Convention as modified by the Part XI Agreement are not parties to such GATT agreements, recourse is to be had to the dispute settlement procedures set out in the Law of the Sea Convention. See Part XI Agreement, *supra* note 4, Annex, §§ 6.1(f), 6.4. For discussion of the GATT/WTO dispute settlement procedures, see *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (Ernst-Ulrich Petersmann ed., 1997) [hereinafter *GATT/WTO DISPUTE SETTLEMENT*].

168. Law of the Sea Convention, *supra* note 2, art. 187; *id.* Annex VI, art. 37. The Convention contains provisions concerning the participation of sponsoring states in cases in which natural or juridical persons are parties. See *id.* art. 190; *supra* note 113.

169. See Noyes, *Compromissory Clauses*, *supra* note 43; Noyes, *Implications*, *supra* note 14.

170. See, e.g., FRANCK, *supra* note 19; REISMAN, *supra* note 83; Helfer & Slaughter, *supra* note 19, at 284.

A picture of international law and process painted only in terms of interstate relationships is incomplete. When states create an international court or tribunal, they may affect the relationships of natural or juridical persons. The states may provide for international judicial action that can shape the relationships of those persons. The states may even grant natural or juridical persons direct access to the court or tribunal.¹⁷¹

The functions of specialized international tribunals that deal with individual claims vary considerably. For example, the Iran-U.S. Claims Tribunal¹⁷² decides how to distribute money to businesses and individuals harmed by the 1979 Iranian revolution.¹⁷³ Conceptually, those private claimants are no longer in a continuing relationship with Iran; the Claims Tribunal decides damages arising from one historical episode. To that end, the Tribunal controls a pool of money to provide compensation. By contrast, the functions of the European Court of Human Rights differ significantly.¹⁷⁴ This Court is successful because national courts respect, and national governments implement, its rulings. The European Court engages in an ongoing dialogue with national courts and accords national governments a margin of appreciation in addressing issues related to individual rights.¹⁷⁵

The ITLOS is a recent addition to the ranks of specialized international tribunals. Yet, the ITLOS operates within numerous different regimes, and its intended functions appear more varied than those of the Iran-U.S. Claims Tribunal or the European Court of Human Rights. To evaluate the ITLOS and understand its potential relationships with different entities, one must appreciate the specific functions it is designed to serve. Whether the Tribunal can gain legitimacy may well depend on its ability to develop decision-making techniques suitable to its different functions.

171. See generally David D. Caron & Galina Shinkaretskaya, *Peaceful Settlement of Disputes Through the Rule of Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 309 (Lori Fisler Damrosch et al. eds., 1995) (distinguishing interstate disputes, disputes involving private transnational relationships that may be of international concern, and human rights disputes).

172. Algiers Accords, 1 Iran-United States Claims Tribunal Rep. 3 (1981-1982), 75 AM. J. INT'L L. 418 (1981).

173. For an insightful analysis of the Iran-U.S. Claims Tribunal that places it in the context of the evolving structure of international dispute settlement, see Caron, *Claims Tribunal*, *supra* note 83. The Tribunal still faces unresolved interpretive claims, intergovernmental claims, and private claims. See Roger P. Alford & Peter H.F. Bekker, *International Courts and Tribunals*, 32 INT'L LAW. 499, 506 (1998).

174. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

175. See, e.g., Helfer & Slaughter, *supra* note 19, at 316-18. International courts, following a process of dialogue with national courts, may both respond to points made by national courts and look to those courts to implement international rulings concerning individuals. See Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in THE EUROPEAN COURT AND NATIONAL COURTS — DOCTRINE AND JURISPRUDENCE 227 (Anne-Marie Slaughter et al. eds., 1998); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) [hereinafter Slaughter, *Transjudicial Communication*].

Part II.A of this Article examines the ITLOS's first decision, an Article 292 prompt release case, in which the interests of individuals, states, and national courts are implicated. Part II.B evaluates some of the ITLOS's other potential roles — as a rule-applying body in a sensitive bilateral dispute, as a legislative body in a multilateral dispute, and as a court of equity — in different types of interstate cases. Part II.C then analyzes the potential role of the Sea-Bed Disputes Chamber as a constitutional court reviewing the validity of rules promulgated by an international institution.

A. Article 292 Prompt Release Cases

When a coastal state detains a flag state's vessel and crew, the flag state or its designee may ask the ITLOS to order their prompt release under Article 292 of the Law of the Sea Convention. The Tribunal's rulings, on an issue that traditionally has been within the purview of national admiralty jurisdiction, implicate relationships among the ITLOS, individuals, states, and national courts. The first decision of the ITLOS, in the *M/V Saiga Case*,¹⁷⁶ involved an application for release under Article 292.

1. *The M/V Saiga Case*

When a State Party to the Law of the Sea Convention has detained a vessel flying the flag of another State Party, Article 292 of the Convention may apply. An Article 292 proceeding can at most lead to an order for the release of the detained vessel and its crew on the posting of a reasonable bond; the decision maker does not consider the merits of the underlying dispute or award damages.¹⁷⁷ Article 292 allows applications "by or on behalf of" the flag state of a vessel, when the detaining state allegedly "has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security."¹⁷⁸ Article 73 explicitly addresses prompt release on the posting of a reasonable bond. Article 73 authorizes a coastal state to

176. *M/V Saiga Case*, *supra* note 6.

177. In the *M/V Saiga Case*, the ITLOS emphasized the language of Article 292(3) to the effect that prompt release proceedings shall be "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew." Thus, the Tribunal "shall deal only with the question of release." *Id.* ¶ 49. The Tribunal also concluded that,

while the States which are parties to the proceedings before the Tribunal are bound by the judgment adopted by it as far as the release of the vessel and the bond or other security are concerned, their domestic courts, in considering the merits of the case, are not bound by any findings of fact or law that the Tribunal may have made in order to reach its conclusions.

Id.

178. In such actions, the ITLOS has compulsory jurisdiction unless the parties agree on an alternative forum. *See supra* notes 134-36 and accompanying text; *infra* note 230 and accompanying text. A prompt release case could also be pursued as a normal Part XV case under Article 288, although the speedy action contemplated under Article 292 may not be obtainable under Article 288. Actions for provisional measures may also be pursued in such cases, although the Article 292 procedure may be speedier and is more closely tailored to the issue of release. *See Oxman, Observations on Vessel Release, supra* note 133, at 207-10. Applications for the prompt release of vessels and crews have prior-

arrest vessels to ensure compliance with its fishing laws in its exclusive economic zone (EEZ), but includes the proviso that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.”¹⁷⁹ Article 73 also explicitly precludes a coastal state from imposing imprisonment or corporal punishment for violations of fisheries laws in its EEZ.¹⁸⁰ The *M/V Saiga Case* involved both Article 292 and Article 73.

On October 28, 1997, Guinean customs patrol boats arrested the *M/V Saiga*, a vessel flying the flag of Saint Vincent and the Grenadines. The *M/V Saiga* entered Guinea’s EEZ to bunker, i.e., supply fuel oil, to fishing vessels “in all likelihood . . . within the contiguous zone of Guinea.”¹⁸¹ Guinea arrested the *M/V Saiga* for this activity, claiming that it was smuggling fuel in violation of Guinea’s customs laws.¹⁸² Guinea did not request a bond or other security when it detained the vessel, its captain, and the crew.¹⁸³

On November 13, 1997, Saint Vincent and the Grenadines instituted proceedings in the ITLOS against Guinea, filing an application with the ITLOS under Article 292 and claiming that Guinea failed to comply with Article 73’s requirements of prompt release and nonimprisonment.¹⁸⁴ The ITLOS promptly held hearings and, on December 4, 1997, rendered its decision.

The ITLOS unanimously found that it had jurisdiction under Article 292, and the judges all agreed that some of the prerequisites in Article 292(1) were satisfied. In particular, a vessel of one State Party to the Convention (Saint Vincent and the Grenadines) was detained by another State Party (Guinea), and the two states had not agreed on a forum different from the ITLOS within ten days after the arrest. The ITLOS was split, how-

ity even over proceedings for provisional measures. See ITLOS Rules, *supra* note 44, arts. 90(1), 112.

179. Law of the Sea Convention, *supra* note 2, art. 73(2). For discussion of other provisions of the Convention that explicitly address release on the posting of a bond or other financial security, see *supra* notes 132, 137-40 and accompanying text.

180. *Id.* art. 73(3).

181. *M/V Saiga Case*, *supra* note 6, ¶ 61. According to Guinea’s evidence, three vessels received fuel; two were Italian and one was Greek. See *id.* ¶ 7 (Anderson, J., dissenting).

182. See Letter from the Minister of Justice of the Republic of Guinea to the President of the International Tribunal for the Law of the Sea, Nov. 25, 1997, at 3, 6 (on file with author). The arrest occurred outside Guinea’s EEZ following pursuit by Guinean patrol boats. See *M/V Saiga Case*, *supra* note 6, ¶ 30.

183. See *M/V Saiga Case*, *supra* note 6, ¶¶ 30, 33.

184. Saint Vincent and the Grenadines may have regarded diplomatic protests as likely to be unavailing because it believed the arrest of the *M/V Saiga* was “part of a wider pattern of international piracy” in which Guinea was “actively engaged.” The *M/V Saiga*, Memorial of Saint Vincent and the Grenadines, Nov. 11, 1997, at 8 (on file with author). Saint Vincent and the Grenadines cited eight previous attacks on tankers by Guinean authorities. *Id.* Accord Request of Saint Vincent and the Grenadines for the Prescription of Provisional Measures Pursuant to Article 290(5) of the 1982 United Nations Convention on the Law of the Sea, Jan. 5, 1998, at 7.

ever, over the admissibility of the application for release,¹⁸⁵ because of disagreement concerning whether the application met Article 292(1)'s requirement that the flag state allege noncompliance with Convention provisions for "prompt release . . . upon the posting of a reasonable bond or other financial security." By a vote of twelve to nine,¹⁸⁶ the ITLOS found the application of Saint Vincent and the Grenadines admissible and ordered Guinea to promptly release the *M/V Saiga* and its crew from detention. It also decided, by the same vote, that the release was conditional on the posting of a reasonable bond or security, and that the security consisted of the *M/V Saiga's* full load of gasoil (valued at approximately \$1,000,000) plus an additional \$400,000.¹⁸⁷

The majority and the dissenting judges disagreed about the applicant's burden, or standard of proof, in Article 292 proceedings. The majority noted that "a case concerning the merits of the situation that led to the arrest of the *M/V Saiga* could later be submitted for a decision on the merits to the ITLOS or to another court or tribunal competent according to article 287," a point consistent with the text of Article 292.¹⁸⁸ The majority went on to indicate, however, that this circumstance required the ITLOS to consider "with restraint" the merits of the release:¹⁸⁹

The possibility that the merits of the case may be submitted to an international court or tribunal, and the accelerated nature of the prompt release proceedings, . . . are not without consequence as regards the standard of appreciation by the Tribunal of the allegations of the parties. The Tribunal in this regard considers appropriate an approach based on assessing whether the allegations made *are arguable or are of a sufficiently plausible character* in the sense that the Tribunal may rely upon them for the present purposes. By applying such a standard the Tribunal does not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion.¹⁹⁰

This reliance on an "arguable or sufficiently plausible" standard suggests that the majority viewed Article 292 orders as akin to provisional

185. Whether an application is admissible depends on "whether it falls within the scope of the [non-jurisdiction] requirements of article 292." *M/V Saiga Case*, *supra* note 6, ¶ 46. If an application is deemed admissible, the Tribunal must also determine whether the applicant's allegations are "well founded." *Id.* ¶ 79; *see* ITLOS Rules, *supra* note 44, art. 113(1)-(2). For a critical view of the Tribunal's use of the concept of admissibility, *see* Brown, *First Judgment*, *supra* note 137, at 319-20.

186. Four dissenting opinions were filed, one by President Mensah, one by Vice-President Wolfrum and Judge Yamamoto, one by Judge Anderson, and one by Judges Park, Nelson, Chandrasekhara Rao, Vukas, and Ndiaye.

187. The \$400,000 was "to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form." *M/V Saiga Case*, *supra* note 6, ¶ 5; *see id.* ¶¶ 35, 84-85. Differences between the parties over the bond were eventually resolved, and the *M/V Saiga* and its master and crew were released in accordance with the December 1997 judgment. *See* Rosenne, *1996-97 Survey*, *supra* note 44, at 514.

188. *M/V Saiga Case*, *supra* note 6, ¶ 50. *See* Law of the Sea Convention, *supra* note 2, art. 292(3). *Accord* *M/V Saiga Case*, *supra* note 6, ¶ 6 (Vice-President Wolfrum & Yamamoto, J., dissenting). Such a case, arising out of the same fact situation, has indeed been filed and is pending before the Tribunal. *See* ITLOS Press 13, *supra* note 143.

189. *M/V Saiga Case*, *supra* note 6, ¶ 50.

190. *Id.* ¶ 51 (emphasis added).

measures.¹⁹¹

The dissenting judges disagreed. According to Vice-President Wolfrum and Judge Yamamoto, Article 292 sets a “definite” and not a “preliminary or incidental” procedure. “[T]o develop a ‘standard of appreciation’ on the basis that later a decision might be taken on the legality of the . . . arrest blurs the differences between the procedure of article 292 and other procedures under Section 2 of Part XV of the Convention.”¹⁹² The dissenters held that Article 292 cases are not merely preliminary to other proceedings, and the applicant should present more than “sufficiently plausible” allegations:

[W]e do not consider that a mere allegation that the detaining state has not complied with the provisions of article 73 of the Convention will satisfy the condition for the application of article 292 of the Convention. There must be a genuine connection between the detention of the vessel and its crew and the laws and regulations of the detaining state relating to article 73. The burden to establish such a connection is upon the Applicant. Without such a connection, the Tribunal must conclude that the allegation that the detaining state has failed to comply with article 73 is unfounded.¹⁹³

The disagreement over the appropriate standard of proof helps explain the disagreement between the majority and dissent concerning the admissibility of the prompt release application. According to the majority, Guinea based its arrest on Article 40 of its Maritime Code and Law, which relates in part to sovereign rights over fisheries, and on another national law prohibiting unauthorized import, transport, and distribution of fuel in the country.¹⁹⁴ The majority believed the dispute could be characterized in different ways. Bunkering fishing vessels could be “assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone. It can be argued that refueling is by nature an activity ancillary to that of the refueled ship.”¹⁹⁵ This characterization was helpful to the applicants because it provided a link to Article 73 and that Article’s explicit requirement that arrested vessels and crews be promptly released. On the other hand, bunkering could be classified either as a customs viola-

191. In cases involving provisional measures, “the benefit of the doubt goes to the applicant state,” according to “wide practice of international courts and tribunals.” Rosenne, *1996-97 Survey*, *supra* note 44, at 513-14. For discussion of the Tribunal’s standard of proof in Article 292 cases, see Lauterpacht, *supra* note 96, at 403-09.

192. *M/V Saiga Case*, *supra* note 6, ¶ 6 (Vice-President Wolfrum & Yamamoto, J., dissenting).

193. *Id.* ¶ 4. The dissenters construed the text of Article 292, which uses the term “decision,” and Article 113(1) of the Rules of the Tribunal, which requires the Tribunal to “determine” that an allegation “is well-founded,” to support their position. *See id.* ¶ 8; *id.* ¶¶ 5, 7 (President Mensah, dissenting); *id.* ¶ 5 (Anderson, J., dissenting); *id.* ¶ 8 (Park, J., dissenting). The dissenters also thought that the majority’s decision on the burden an applicant must meet had adverse implications for the balance of coastal state powers in the EEZ; these concerns are discussed *infra* notes 220-27 and accompanying text.

194. *See M/V Saiga Case*, *supra* note 6, ¶ 63.

195. *Id.* ¶ 57.

tion or as an exercise of freedom of navigation.¹⁹⁶ These latter characterizations provided no link to Article 73.

The majority's view of the appropriate "standard of appreciation" obviated the need to decide which characterization was the most accurate. To determine the admissibility of the application for prompt release, "it is sufficient to note that non-compliance with article 73, paragraph 2, of the Convention has been 'alleged' and to conclude that the allegation is arguable or sufficiently plausible."¹⁹⁷ In determining whether the allegation of Saint Vincent and the Grenadines was well-founded, the ITLOS also noted it was not bound by Guinea's classification of the dispute as one involving customs issues. Instead, a characterization connecting Guinea's arrest to Article 73 was preferable because a customs characterization made it "very arguable that . . . the Guinean authorities acted from the beginning in violation of international law."¹⁹⁸ Guinea's pursuit of the *M/V Saiga* might not be legally justifiable as "hot pursuit" under Article 111 of the Law of the Sea Convention if the seizure had been for a customs violation.¹⁹⁹ For these reasons, the ITLOS determined that the allegation of Saint Vincent and the Grenadines was well-founded and thus ordered the release of the vessel and its crew.²⁰⁰

The dissenting judges, on the other hand, found it plausible that Guinea's seizure and detention of the *M/V Saiga* had been for customs violations, and that Saint Vincent and the Grenadines thus had not demonstrated that their application was well-founded. The dissenters disagreed with the majority's reliance on Article 40 of Guinea's Maritime Code and Law, which the majority cited to support its conclusion that Guinea's action was fisheries-related. In the words of one dissenting judge, Article 40 merely "establishes and provides for the Exclusive Economic Zone (EEZ) of Guinea in standard terms drawn from Article 56 of the [Law of the Sea] Convention, terms which do not appear on their face to create any criminal offenses."²⁰¹ The dissenters noted that all the other applicable

196. *See id.* ¶¶ 58, 60.

197. *Id.* ¶ 59.

198. *Id.* ¶ 72.

199. *See id.* ¶¶ 61, 70. According to the Law of the Sea Convention, hot pursuit of a foreign flag ship is permitted "when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State." Law of the Sea Convention, *supra* note 2, art. 111(1). However, with respect to customs violations, the Convention seemingly requires such pursuit to be commenced "when the foreign ship . . . is within the internal waters, . . . the territorial sea or the contiguous zone of the pursuing State . . ." *Id.* The pending case on the merits may address the legality of hot pursuit for customs violations when the foreign ship was in the coastal state's 200-mile EEZ but not within its 24-mile contiguous zone when the pursuit began. *See ITLOS Press 13, supra* note 143.

200. Because the Tribunal found a sufficient nexus between Articles 73 and 292, it did not reach an alternative argument, based on a "non-restrictive interpretation" of Article 292, which Saint Vincent and the Grenadines argued to support the admissibility of its application. *See M/V Saiga Case, supra* note 6, ¶ 73. This non-restrictive interpretation is discussed *infra* notes 223-27 and accompanying text.

201. *M/V Saiga Case, supra* note 6, ¶ 6 (Anderson, J., dissenting). Article 56 sets out in general terms the rights, jurisdiction, and duties of the coastal state in its EEZ.

laws relied on by Guinea related to customs offenses.²⁰² Illegally supplying oil to vessels in Guinean waters was a type of smuggling that violated Guinea's customs laws.²⁰³

Because the dissenting judges were not convinced by the majority's attempt to link Guinea's seizure of the *M/V Saiga* to fisheries violations under Article 73, the dissenters believed that an essential requirement for an order of prompt release had not been established. They felt that the requisite connection between Article 292 and a Convention article explicitly providing for prompt release on the posting of a reasonable bond was lacking. As President Mensah argued in his dissent, "no action taken by any official or authority in Guinea, before and after the arrest of the *M/V Saiga*, has had the faintest link with fisheries."²⁰⁴ Moreover, there was no evidence that Guinean officials acted in bad faith or that Guinea's "customs violation" explanation was patently inconsistent with the facts. Absent such evidence, the ITLOS should not conclude "that the ostensible reasons given [i.e., that the seizure was for a customs violation] were not in fact the real reasons for" the seizure and detention.²⁰⁵ For the applicant's claim to be admissible and for the Tribunal to order prompt release, the applicant must establish a detention following an arrest as specified in Article 73. Given the plausibility of Guinea's argument concerning customs violations, Saint Vincent and the Grenadines could not establish such a detention. As a result, questions concerning the release of the *M/V Saiga* and its crew, along with all other aspects of the customs case, should be decided wholly by the national courts of Guinea.

2. Analysis: The ITLOS, Individuals, States, and National Courts

Article 292 cases place the ITLOS in a web of relationships involving individuals, states, and national courts. In construing and applying Article 292, the ITLOS must balance the rights and interests of all these entities. The following section discusses the ITLOS's relationship with these entities.

The Law of the Sea Convention reinforces individual liberty and due process rights in its prompt release provisions.²⁰⁶ When a coastal state exercises enforcement and adjudicative jurisdiction over foreign ships for violating its EEZ fisheries or pollution regulations, the Convention requires

202. See *id.*; *id.* ¶ 14 (Park, J., dissenting). Vice-President Wolfrum and Judge Yamamoto argued that fisheries-related laws would relate to issues listed in Article 62(4) of the Law of the Sea Convention; bunkering is not one of the issues listed. See *id.* ¶ 22 (Vice-President Wolfrum & Yamamoto, J., dissenting).

203. According to Guinea, revenue from petroleum products constitutes as much as 37% of its national revenue. See *id.* ¶¶ 10, 16 (Park, J., dissenting).

204. *Id.* ¶ 16 (President Mensah, dissenting).

205. *Id.* ¶ 18. Although the applicant contended that bunkering by the *M/V Saiga* "could come within Article 40 of Guinean law" — if, for example, Guinea was engaged in an anti-bunkering operation to protect fish stocks in its EEZ (by denying fishing vessels an easy refueling option) — no evidence supported such a theory. *Id.* ¶ 12 (Park, J., dissenting) (emphasis added); see *id.* ¶¶ 13-14. See also *id.* ¶ 10 (Anderson, J., dissenting) (concluding the *M/V Saiga* was not an "arrested vessel" under Article 73(2)).

206. See Oxman, *Human Rights, supra* note 80, at 423.

the coastal state to release the arrested vessel and crew on the posting of a reasonable bond or other financial security. The Convention also prohibits imprisonment, corporal punishment, and other non-monetary penalties.²⁰⁷ These individual rights are rights vis-à-vis a state. Because they relate to procedural due process and liberty interests, they are conceptually within the core of “first generation” civil and political rights (as opposed to economic, social, and cultural rights, or collective rights) recognized by international law.²⁰⁸

The scope of the specified rights is limited. Foreign flag vessels and their crews may benefit from Article 292; a coastal state’s own vessels do not have similar rights.²⁰⁹ Furthermore, although a flag state may raise these prompt release guarantees before the ITLOS or other tribunals, detained individuals have no assured access to courts. During the UNCLOS III negotiations, some delegations favored giving individuals access to the ITLOS in prompt release cases. For example, the United States advocated allowing “[t]he owner or operator of any vessel detained by any state” to “bring the question of the detention of the vessel before the [Law of the Sea] Tribunal in order to secure its prompt release.”²¹⁰ According to the compromise language of Article 292, however, “[t]he application for release may be made only by *or on behalf of* the flag State of the vessel.”²¹¹ The italicized language would be redundant if one were to interpret this provision as prohibiting an individual from bringing a prompt release claim.²¹² Yet a “state filter” remains. To initiate an Article 292 prompt release application, either the flag state must bring it or the flag

207. See Law of the Sea Convention, *supra* note 2, arts. 73(2)-(4), 226(1)(b), 230(1)-(2), 231; Oxman, *Human Rights*, *supra* note 80, at 422-24. The Convention includes various additional safeguards with respect to pollution violations. For example, a state exercising its pollution jurisdiction cannot discriminate against vessels of other states, see Law of the Sea Convention, *supra* note 2, art. 227, and has only a limited time to prosecute violations by foreign flag vessels. See *id.* art. 228. Article 230 specifically requires observance of “recognized rights of the accused” in proceedings concerning pollution violations “committed by a foreign vessel which may result in the imposition of penalties.” For discussion of Article 230, see Oxman, *Human Rights*, *supra* note 80, at 425-27.

208. See RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS* 194-98, 201 (3d ed. 1995). It is also arguable that prolonged detention of a vessel and its cargo may be so economically devastating to a ship owner and to cargo interests that it effectively amounts to a taking of property by the state. Cf. 5 COMMENTARY, *supra* note 10, ¶ 292.4.

209. A flag state could raise the Convention rights of a coastal state’s citizens only if the citizens happened to be adversely affected as members of the crew of a detained vessel.

210. U.N. Doc. A/AC.138/97, *supra* note 120, art. 8(2). See *supra* note 133 and accompanying text.

211. Law of the Sea Convention, *supra* note 2, art. 292(2) (emphasis added). The dispute settlement provisions of the Law of the Sea Convention were negotiated over 20 years ago, and the influence of socialist states, which took the attitude that private parties should not appear in proceedings involving states, is evident in these restrictive provisions. See 5 COMMENTARY, *supra* note 10, ¶¶ 291.5, 292.4.

212. See Oxman, *Observations on Vessel Release*, *supra* note 133, at 211-13.

state must designate the vessel captain, the vessel owner, a shipping association, or some other entity to do so.

The lack of assured individual access casts doubt on whether violations of individual rights are likely to be litigated. If vessel owners had the right to proceed directly against coastal states for prompt release violations, their decision to initiate the action would depend on how they estimate the financial interests at stake, the probability of a successful outcome, and the impact of litigation on their own relationship with the coastal state.²¹³ If states are the only entities that can bring prompt release applications, fewer applications would likely be filed. Many states will choose not to pursue disputes on behalf of private interests, either diplomatically or in litigation before the ITLOS. A state's foreign affairs office may prefer that vessel owners or captains pursue their own claims in the coastal state's courts or that they appeal to the coastal state's government officials.²¹⁴ States are often reluctant to bring claims against other states, even if they are meritorious or implicate important "state interests," for fear of upsetting friendly relations or disrupting negotiations on other matters.²¹⁵ Such concerns may likewise deter states from approving individual access in prompt release cases.

The ITLOS itself can take steps to focus on individual rights in prompt release situations. The ITLOS's orders of prompt release will implicitly recognize the individual rights at stake.²¹⁶ The ITLOS's "arguable or sufficiently plausible" standard for assessing Article 292 prompt release claims²¹⁷ sets a low threshold for the issuance of prompt release orders in future cases.²¹⁸ The ITLOS's speedy decision in the *M/V Saiga Case* should also encourage claimants to pursue prompt release applications. Lastly, the ITLOS could liberally construe the prerequisites concerning state authorization of private claims. The ITLOS's current Rules appear to recognize that states may grant blanket authorizations to captains or owners of vessels to bring Article 292 prompt release applications and do not require a flag state to grant a specific authorization with respect to each

213. See Caron, *Claims Tribunal*, *supra* note 83, at 154-55.

214. Certainly, the fact that the rights appear in the Convention is in itself significant; many states will give effect to these obligations without international litigation. See also Law of the Sea Convention, *supra* note 2, art. 232 (requiring access to national tribunals for actions against states for damage or loss attributable to unlawful or unreasonable enforcement measures taken in pollution cases).

215. See Hans von Mangoldt, *Arbitration and Conciliation Treaties*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 230, 232-33 (1992); Wirth, *supra* note 1, at 779.

216. Although the Tribunal did not engage in broadly worded "rights talk" in the first *M/V Saiga Case*, Judge Laing's separate opinion in the Tribunal's second case – involving a claim for provisional measures arising out of the seizure of the *M/V Saiga* – does explicitly recognize that the Convention embodies human rights claims. See *M/V Saiga* (No. 2), *supra* note 6, ¶ 21 (Laing, J., separate opinion).

217. See *supra* text accompanying note 190.

218. Some judges have suggested they might accept an even broader interpretation of Article 292's prerequisites for prompt release allegations. This "non-restrictive interpretation" would not be limited to situations, such as Article 73 fishing violations, linked to the Convention articles that specifically refer to the posting of a reasonable bond or other financial security. See *infra* notes 223-27 and accompanying text.

detention.²¹⁹ These steps may increase the number of prompt release applications and, incidentally, the attention given to individual rights.

Overall, however, the Convention limits the ability of individuals and corporations to pursue prompt release proceedings against coastal states in the ITLOS. Restricting the access of private entities to the Tribunal deprives them of opportunities to seek judicial clarification of their rights and to pursue remedies when their rights have been infringed.

Yet, prompt release cases are not simply about the rights of vessel owners and crew members. These cases also implicate geopolitical questions involving the balance of coastal and non-coastal state rights and obligations in the EEZ. The Law of the Sea Convention reflects delicate compromises on substantive provisions relating to fisheries activities in the EEZ and on the scope of third-party jurisdiction with respect to disputes concerning those activities. The Convention accords coastal states significant authority to regulate many economic activities in the EEZ. With respect to third-party settlement of EEZ disputes, Article 292, the prompt release provision, provides a narrow exception to Article 297, which limits the applicability of the Convention's mechanisms for binding third-party dispute settlement in EEZ fishing disputes.²²⁰ Article 292 was one product of the compromise at UNCLOS III concerning coastal state powers in the EEZ.

Certain aspects of the *M/V Saiga Case* raise troublesome questions about the ITLOS's role in maintaining the Convention's balance of coastal and noncoastal state rights in the EEZ. As Vice-President Wolfrum and Judge Yamamoto said in their dissent, "[t]he 'prima facie test' adopted by the Judgment for deciding whether an allegation made by a flag state is inadequate . . . under Article 292 . . . would radically upset that balance in favour of flag states."²²¹ One dissenter also criticized the decision for limiting the coastal state's ability to prosecute customs and smuggling violations. According to Judge Anderson, the Convention leaves such issues largely to the discretion of coastal states. Enlarging the scope of the ITLOS's jurisdiction could be dangerous:

[T]he Convention . . . does not confine permissible penalties in respect of smuggling offences to fines and confiscation orders (as, generally, in the case of fisheries offences in Article 73) or to monetary penalties . . . ; imprisonment remains available in regard to smuggling offences. Prompt release orders reduce the penalties available to the appropriate domestic forum and may even prejudice the holding of the trial in the first place. Part XV of the Convention is available to the flag state party in the event of any abusive use by a coastal state party of its powers of arrest and prosecution, whether on smuggling or any other criminal charges. . . . Article 292 is not the appropri-

219. See ITLOS Rules, *supra* note 44, art. 110(2)-(3). See also Oxman, *Human Rights*, *supra* note 80, at 423.

220. See *M/V Saiga Case*, *supra* note 6, ¶ 18 (Vice-President Wolfrum & Yamamoto, J., dissenting). See also *supra* notes 68-75 and accompanying text.

221. *Id.* ¶ 9.

ate remedy in such cases.²²²

In sum, aspects of the ITLOS's opinion in the *M/V Saiga Case* arguably modify the negotiated balance in the Convention concerning the EEZ and dispute settlement. By requiring the applicant to satisfy only an "arguable or sufficiently plausible" burden, the majority threatens to tilt this balance against coastal states.

Future prompt release cases will likely test whether the Tribunal is willing to tilt the balance even more sharply toward flag states by broadly construing Article 292. In particular, future cases may well consider Article 292's requirement that a flag state must allege "that the detaining State has not complied with the provisions of th[e] Convention for . . . prompt release . . . upon the posting of a reasonable bond or other financial security."²²³ At least one ITLOS judge finds plausible a "non-restrictive interpretation" of Article 292. Tullio Treves, writing prior to the creation of ITLOS and before he became a judge, found it "absurd . . . that the prompt release procedure should be available in cases in which detention is permitted by the Convention, such as those of Articles 73, 220, and 226, and not available in cases in which it is not permitted" by the Convention.²²⁴ According to this interpretation, Article 292 could apply when a vessel is arrested in violation of international law and is then detained, even if the rule prohibiting the arrest does not specifically provide for prompt release on the posting of a bond or other financial security.

In fact, Saint Vincent and the Grenadines argued this "non-restrictive interpretation" of Article 292 in the *M/V Saiga Case*.²²⁵ The ITLOS did not take a position on the non-restrictive interpretation, concluding instead that the applicant's allegations based on Article 73 were well-founded.²²⁶ The majority's mere mention of the non-restrictive position, however, prompted some of the dissenters to stress the importance of rejecting such an interpretation and adhering closely to the text of the Convention.²²⁷

222. *Id.* ¶ 13 (Anderson, J., dissenting). See also *id.* ¶ 18 (Vice-President Wolfrum & Yamamoto, J., dissenting).

223. Law of the Sea Convention, *supra* note 2, art. 292(1).

224. Tullio Treves, *The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea*, 11 INT'L J. MARINE & COASTAL L. 179, 186 (1996). He cites Convention Article 28(2), which prohibits coastal state arrests of foreign ships passing through the territorial sea for purposes of civil proceedings, and Article 97(3), which prohibits the arrest or detention of foreign ships in matters of collision or incidents on the high seas. *Id.*

225. According to Saint Vincent and the Grenadines, Guinea had violated Article 56(2) of the Convention, and this alleged violation provided a basis for finding the application admissible and for finding that an order to release the vessel and crew was well-founded. See *M/V Saiga Case*, *supra* note 6, ¶ 53. Article 56(2) requires the coastal state to "have due regard to the rights and duties of other states and . . . act in a manner compatible with the provisions of this Convention" when exercising rights and performing duties in its EEZ. Law of the Sea Convention, *supra* note 2, art. 56(2).

226. See *M/V Saiga Case*, *supra* note 6, ¶ 73.

227. Judges Park, Nelson, Chandrasekhara Rao, Vukas, and Ndiaye noted both the text and legislative history of Article 292 in arguing against a non-restrictive interpretation:

Adoption of the non-restrictive position would favor flag state interests over those of coastal states in a manner not contemplated at UNCLOS III.

Article 292 cases also involve the relationship between the ITLOS and national courts. To what extent will the ITLOS defer to a national court in a prompt release case? The Law of the Sea Convention requires a party pursuing a claim involving the interpretation or application of the Convention first to exhaust local remedies "where this is required by international law."²²⁸ But the preference for states to address their own "internal" problems in their own courts before "elevating" the dispute to an interstate confrontation²²⁹ does not apply with respect to Article 292 prompt release cases. The Law of the Sea Convention explicitly authorizes the submission of prompt release applications to the ITLOS when a coastal state fails to release the vessel or its crew on the posting of a reasonable bond, and when the parties do not agree on another court or tribunal to hear the question of release within "10 days from the time of detention."²³⁰ Article 292 does not preempt national courts from ruling on the underlying merits of the dispute and subsequent arrest.²³¹ The negotiators at UNCLOS III understood that the exhaustion of local remedies rule "was not likely to apply in cases relating to the prompt release of vessels,"²³² and the judges did not

A textual analysis of article 292 . . . clearly establishes that it applies only where the Convention contains specific provisions concerning the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. If article 292 was also intended to cover other cases of ship arrests, it would have been phrased differently. . . . In a statement made in the Preparatory Commission by the Secretariat in 1985, as a result of its examination of the legislative history of article 292, this text was interpreted as meaning that "where a ship or vessel has been detained for violation of coastal state regulations, such as fisheries or marine pollution, and if the substantive provisions of the Convention provides for its release upon the posting of a bond or financial security, then access could be had to an international court or tribunal if the release could not be obtained promptly. Relevant substantive provisions are to be found, for instance, in Articles 73, 220 and 226."

M/V Saiga Case, *supra* note 6, ¶ 23 (Park, J., dissenting) (quoting 3 *Prepcom Report*, *supra* note 40, at 390) (emphasis in original). *Accord id.* ¶¶ 24-25; *id.* ¶ 16 (Vice-President Wolfrum & Yamamoto, J., dissenting); 5 COMMENTARY, *supra* note 10, ¶ 292.5.

228. Law of the Sea Convention, *supra* note 2, art. 295; see 5 COMMENTARY, *supra* note 10, ¶ 295.6.

229. For discussion of the rule's doctrinal contours and theoretical justifications, see C.F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 45-366 (1990); Matthew H. Adler, *The Exhaustion of Local Remedies Rule After the International Court of Justice's Decision in ELSI*, 39 INT'L & COMP. L.Q. 641 (1990).

230. Law of the Sea Convention, *supra* note 2, art. 292(1). If the parties fail to agree on a court or tribunal within 10 days of a detention, a prompt release application may also be submitted to "a court or tribunal accepted by the detaining State under Article 287" or to some mutually agreed-upon forum, instead of to the ITLOS. *Id.* See also *supra* note 178.

231. The Convention also does not preempt altogether the authority of national courts even as to release questions. According to Article 292(3), "[t]he authorities of the detaining state remain competent to release the vessel or its crew at any time." Law of the Sea Convention, *supra* note 2, art. 292(3).

232. 5 COMMENTARY, *supra* note 10, ¶ 295.7. *Accord Chairman's Summary of Discussions: Addendum*, U.N. Doc. LOS/PCN/SCN.4/L.10/Add.1 (1989), in 3 *Prepcom Report*, *supra* note 40, at 152, ¶¶ 27-31 [hereinafter 1989 *Prepcom Summary*]. See also 5 COM-

mention the rule in the *M/V Saiga* prompt release decision.²³³

A more difficult question in prompt release cases, bearing on the relationship of the ITLOS to national courts, concerns the conditions for release. In particular, if a national court determines that a specific bond or security is "reasonable," on what basis should the ITLOS overturn that determination? The Convention authorizes the ITLOS to exercise independent judgment on the question but does not specify the standards of "reasonableness."²³⁴ In exercising its judgment, the ITLOS has a strong incentive to accord national courts a broad "margin of appreciation" in determining the reasonableness of a bond.²³⁵ If the ITLOS wishes to build support for its decisions, when reviewing a national court's determination on the reasonableness of the bond,²³⁶ the ITLOS should proceed cautiously, respecting national rulings that are not out of harmony with the practice of other states.²³⁷

If the courts and executive agencies of detaining States Parties regard the ITLOS's rulings as well-reasoned and believe that the ITLOS has considered the viewpoints expressed in national court rulings, then those courts and agencies are more likely to carry out their Convention obligation to respect Article 292 prompt release decisions.²³⁸ Similarly, when a party

MENTARY, *supra* note 10, ¶ 292.7; Anderson, *Detention and Release*, *supra* note 141, at 170, 177.

233. The scope of the local remedies rule is likely to be debated in other cases before the ITLOS. Indeed, the rule will likely be an issue in the merits stage of the case brought by Saint Vincent and the Grenadines against Guinea arising out of the same facts as in the first *M/V Saiga Case*. In that case, Saint Vincent and the Grenadines alleges that Guinea's arrest of its flag vessel, which was bunkering fishing vessels in Guinea's EEZ, interfered with navigational freedoms. See ITLOS Press 13, *supra* note 143. Arguments that local remedies have not been exhausted "generally entail complex issues," according to one of the Tribunal's judges, and Guinea's invocation of the rule could not be decided "at the stage of provisional measures, which are required to be expeditious and procedurally urgent." *M/V Saiga No. 2*, *supra* note 6, ¶ 9 (Laing, J., separate opinion).

234. In the first *M/V Saiga Case*, the Tribunal did not specify the factors or reasons that led it to conclude that the financial security it required was "reasonable." For discussion at Prepcum concerning the ITLOS's draft rules on Article 292 and the "reasonable bond" requirement, see *Chairman's Summary of Discussions*, U.N. Doc. LOS/PCN/SCN.4/L.10 (1988), in 3 *Prepcum Report*, *supra* note 40, at 140, ¶¶ 37-75; 1989 *Prepcum Summary*, *supra* note 232; 1987 *Prepcum Summary*, *supra* note 129, at 113-15.

235. The concept of "margin of appreciation" has been extensively developed in the jurisprudence of the European Court of Human Rights. See J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 136-59 (2d ed. 1993); HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF THE EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE* (1996).

236. The legal questions likely to arise most frequently [in Article 292 prompt release cases] concern the amount of the bond or other financial security that must be posted and, at least on occasion, whether more time is reasonably required for investigation prior to release. Particular cases may pose the question of whether release of a ship has been properly refused or made conditional on proceeding to a repair yard because the ship is not seaworthy or poses an unreasonable threat.

Oxman, *Observations on Vessel Release*, *supra* note 133, at 214.

237. See Helfer & Slaughter, *supra* note 19, at 316-17.

238. According to Article 292(4) of the Convention, when the bond or other financial security determined by the ITLOS (or another international tribunal) is posted, "the

seeking the release of a vessel or its crew brings proceedings before the national court of the detaining state instead of the ITLOS, the national court will be more likely to rely on the ITLOS's decisions in previous cases if the court regards such decisions as legitimate.²³⁹ But deference by national courts is by no means automatic.²⁴⁰ National courts are more likely to endorse international judicial decisions concerning the scope of treaty provisions vis-à-vis the rights of natural or juridical persons when national and international courts have engaged in a "judicial dialogue" about the issue.²⁴¹

David Anderson, now a judge of the ITLOS, has suggested that Article 292 helps to fulfill the "need for an International Court of Pie Powder in the maritime sector."²⁴² He was referring to courts at medieval fairs that expeditiously decided disputes, often involving minor property matters, among traveling merchants. Although the ITLOS renders speedy decisions, the analogy to the "court of pie powder" is imperfect for several reasons. First, individuals – vessel owners or captains – lack assured access to the ITLOS in Article 292 prompt release cases. Their access depends on state authorization. States, however, may not grant such access and may themselves refuse to pursue prompt release claims for political reasons. Second, Article 292 only authorizes the ITLOS to order release and to determine a reasonable bond – not to rule on the underlying dispute. The ITLOS cannot determine damages or the legality of the underlying arrest and detention. Third, despite the limited scope of the ITLOS's authority in prompt release cases, the rights of individuals at issue in such cases, and the implications of Article 292 decisions for the balance of coastal and flag state activities in the EEZ, are not trivial "pie powder" issues.

In sum, in Article 292 proceedings, the ITLOS needs to balance the interests of individuals, states, and national courts. In some respects, this balance is a zero-sum game. Actions that favor one class of entities may

authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

239. On the concept of legitimacy, see *supra* note 170 and accompanying text; *infra* notes 257-59 and accompanying text.

240. Some states ratifying the Convention have enacted legislation to insure that their responsibilities under Article 292(4) will be carried out by their domestic courts. See, e.g., Scott Davidson, *New Zealand-United Nations Convention on the Law of the Sea Act 1996*, 12 INT'L J. MARINE & COASTAL L. 404, 407-08 (1997). This legislation may make enforcement of an ITLOS prompt release decision conditional; for example, if national judicial proceedings involving the vessel or crew in question affect the rights of third parties not named in an ITLOS decision, the ITLOS decision may not be given effect. See *id.* at 407. Article 292(3) provides that the decision of the international tribunal shall be "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew." Thus, the ITLOS itself should take into account the interests of third parties not before it in evaluating any application for release. See *id.* at 408.

241. See Alter, *supra* note 175; Slaughter, *Transjudicial Communication*, *supra* note 175.

242. D.H. Anderson, *Legal Implications of the Entry Into Force of the UN Convention on the Law of the Sea*, 44 INT'L & COMP. L.Q. 313, 325 (1995) (citing Cecil J.B. Hurst, *Wanted! An International Court of Pie Powder*, 4 BRIT. Y.B. INT'L L. 61 (1925)).

adversely affect the interests of others. For example, by adopting an “arguable or sufficiently plausible” burden for applicants in prompt release cases, the ITLOS may help to make itself an attractive forum for the flag states whose vessels or crews have been detained. Yet this burden may tilt the balance struck in the Law of the Sea Convention between coastal and flag state rights in the EEZ against the interests of coastal states. And should the ITLOS adopt a “non-restrictive interpretation” of Article 292 in a future case, this balance – an important principle guiding interstate relations – will be further skewed.

Prompt release cases also require the ITLOS to consider the interests of national courts and admiralty authorities. Developing a margin of appreciation for the work of national courts on release questions, adhering closely to the text of the Law of the Sea Convention, and confining its asserted competence to the release question will help this new international court to gain the respect of national courts and other components of states.

B. Interstate Cases

Interstate cases remain at the core of the ITLOS’s jurisdiction. Although Article 292 prompt release cases may be interstate cases, they are in many ways *sui generis*. Article 292 proceedings differ from traditional interstate cases because they may involve claims by individuals, because they directly involve individual rights, and because the ITLOS lacks competence to rule on the underlying dispute that gave rise to the arrest and detention.

In light of the political disincentives for one state to sue another²⁴³ and the availability of other fora,²⁴⁴ it is questionable whether the ITLOS will hear many interstate cases. Nevertheless, the ITLOS may in time establish itself as a plausible alternative to the ICJ and other fora. The ITLOS, unlike many other “specialized” international courts, may perform a great variety of functions, and states may come to value the Tribunal’s contributions in at least some types of cases. The following discussion examines some of the functions that the ITLOS could exercise in different types of interstate cases.

1. *The ITLOS as Rule Interpreter in Politicized Disputes?*

The ITLOS may interpret and reaffirm rules in highly sensitive disputes related to navigation rights, fishing on the high seas, and environmental degradation. A government may use an international court as a public forum to air its grievances against another government. The ICJ has seen its share of “public forum” cases.²⁴⁵ Should such cases be litigated in the

243. See *supra* notes 49, 215 and accompanying text.

244. See *supra* notes 50-64 and accompanying text.

245. Such cases have been brought, for example, to condemn hostage taking, see *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24); nuclear testing, see *Nuclear Tests Case (Ausl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20), and *Nuclear Tests Case (N.Z. v. France)*, 1974 I.C.J. 457 (Dec. 20); apartheid policies, see *South West Africa Case (Eth. v. S. Afr.)*, 1966 I.C.J. 4 (July 18),

ITLOS under Article 290 (on provisional measures) or pursuant to a pre-dispute mutual declaration,²⁴⁶ the ITLOS, like the ICJ, will probably find itself faced with nonappearing respondent states and states that ignore adverse judgments.²⁴⁷

How should the ITLOS handle sensitive interstate disputes? Suppose, for example, that a state has illegally proclaimed a straight baseline extending far from its coastline. The state may have done so to expand its EEZ and to give its nationals increased fishing rights. Or the state may be using the extended baseline to claim an expanded area of internal waters.²⁴⁸ Or perhaps the state extended the baseline in good faith, believing that it was legal to do so. But many straight baselines proclaimed worldwide appear to be illegal under the criteria set forth in the Law of the Sea Convention.²⁴⁹ One ought not assume that a "binding" decision against a state's straight baseline claim by the ITLOS (or another court or tribunal) will automatically lead the political authorities of that state to reverse their position. The ITLOS should recognize that it could lose credi-

and South West Africa Case (Liber. v. S. Afr.), 1966 I.C.J. 325 (July 18); and the use of force, see Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 24).

246. See Law of the Sea Convention, *supra* note 2, art. 287(4).

247. See, e.g., Mark W. Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144 (1987). Although third-party tribunals do, on occasion, help to resolve highly politicized disputes and to defuse crises, whether they are able to do so will in large measure depend on whether both disputing governments, at the time the case begins, agree that a third-party proceeding is desirable. See, e.g., T.D. Gill, *Political and Legal Disputes and the Problem of "Real Consent,"* in INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 195 (A.H.A. Soons ed., 1990).

A state claiming that a respondent state is responsible for some wrongful act may have various reasons for resorting to such a "public forum" — even if nonappearance of the respondent state is foreseen. The applicant state may, for example, be seeking a clear legal ruling that could be used in future disputes with other states concerning a similar issue. Or it may be trying to place additional public pressure on the wrongdoer. If the severity of the violation and the status of relations between the states make proportional countermeasures an option, a judicial decision against the wrongdoing state also could obviate an aggrieved state's need to convince others that a violation exists before taking countermeasures. For discussion of the international law relating to countermeasures, see ELISABETH ZOLLER, PEACETIME UNILATERAL MEASURES: AN ANALYSIS OF COUNTERMEASURES (1984).

248. Such a claim could not affect the right of innocent passage. See Law of the Sea Convention, *supra* note 2, art. 8(2) ("Where the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.").

249. According to Article 5 of the Law of the Sea Convention, "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast." Straight baselines are appropriate only in limited geographical situations (e.g., "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity"). *Id.* art. 7(1). Furthermore, even when such situations do exist, "[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast." *Id.* art. 7(3). For the case that many straight baseline claims are illegal, see J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONDS TO EXCESSIVE MARITIME CLAIMS § 4.6 (2d ed. 1996); W. Michael Reisman et al., *Straight Baselines in International Law: A Call for Reconsideration*, 1988 PROC. AM. SOC'Y INT'L L. 260 [hereinafter Reisman, *Baselines*].

bility when the accused state either ignores the ITLOS's decision or does not even bother to appear before the ITLOS to defend itself.

In analyzing straight baseline claims, the ITLOS should acknowledge that Articles 297 and 298 reflect serious concerns of states. In ruling on the scope of its jurisdiction²⁵⁰ and on other preliminary issues relating to the admissibility of claims,²⁵¹ the ITLOS should realize that an expansive attitude concerning its competence could cause it to lose credibility. If the ITLOS accepts jurisdiction on suspect grounds, it may be viewed as a politicized, nonindependent body.²⁵²

That said, the ITLOS may face difficult characterization problems. Is a case "really" about baselines or navigational freedoms (issues not within the Article 297 and 298 limitations and exceptions), or is it about a coastal state's military activities or EEZ fishing rights (issues that may be subject to those limitations and exceptions)? Although many characterization issues are difficult to resolve in a principled manner,²⁵³ the ITLOS may still reach clear conclusions if it interprets the Convention "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."²⁵⁴ Suppose, for example, that a distant water fishing state challenged another state's control over fishing at the outer edge of the latter state's asserted EEZ. If a right to exercise control could be claimed only by virtue of the state's proclamation of a straight baseline, a court or tribunal probably would characterize the dispute as involving baselines rather than EEZ fishing rights. The Convention straightforwardly defines the EEZ in terms of its baseline,²⁵⁵ and the coastal state's right to exercise control thus fundamentally depends on the legality of its straight baseline.²⁵⁶

250. Any dispute over whether a court or tribunal has jurisdiction in a case is to be settled by that court or tribunal. See Law of the Sea Convention, *supra* note 2, art. 288(4). See also *id.* Annex VII, art. 9; Annex VIII, art. 4; ITLOS Rules, *supra* note 44, art. 58.

251. For example, the court or tribunal to which an application is made has the authority to determine whether a complaint is well-founded. See Law of the Sea Convention, *supra* note 2, art. 294.

252. Cf. REISMAN, *supra* note 83, at 22-24 (criticizing the ICJ's exercise of jurisdiction in the *Nicaragua Case*).

253. See, e.g., FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 71-74 (1993); Boyle, *Fragmentation and Jurisdiction*, *supra* note 75, at 44-45.

254. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). The Vienna Convention authorizes recourse to a treaty's preparatory work and the circumstances of the treaty's conclusion as supplementary means of interpretation. See *id.* art. 32. See generally IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 114-54 (2d ed. 1984); Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?*, 65 AM. J. INT'L L. 358 (1971) (criticizing teleological approaches to treaty interpretation).

255. "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Law of the Sea Convention, *supra* note 2, art. 57. The concept of baseline is also defined in the Convention. See *id.* arts. 5, 7; *supra* note 249 and accompanying text.

256. Furthermore, any claim that a baseline dispute was only a component of broader international tensions likely would not change the characterization of the dispute. See, e.g., *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v.

After the ITLOS finds that it has jurisdiction over a highly politicized dispute, its determination on the merits could be straightforward. The Convention rule at issue – relating, say, to straight baselines – may be relatively determinate. The Tribunal would be faced with the traditional judicial task of applying the rule in light of its purpose.

The ITLOS may use several techniques to bolster its credibility and legitimacy.²⁵⁷ One such technique is demonstrating its judicial autonomy and neutrality. When deciding politically sensitive cases, the ITLOS should not accommodate the political views of particular judges' states. Nor should it avoid political confrontation. As Helfer and Slaughter write, "tribunals must be willing to brave political displeasure, searching always for generalizable principles, even as they search for formulations or procedural mechanisms to render the principles more palatable to the states concerned."²⁵⁸ Furthermore, the use of standard, rather than teleological, methods of treaty interpretation may inspire confidence.²⁵⁹ The ITLOS should emphasize the core values reflected in the text, object, and purpose of the Law of the Sea Convention. For example, in a straight baseline case, the ITLOS should emphasize that a stable system of internationally recognized baselines undergirds an important balance struck at UNCLOS III. This balance, between the 200-mile EEZ on the one hand, and freedom of navigation and restrictions on even broader encroachments of coastal state control over the commons on the other, could be upset by allowing unilateral claims of straight baselines far from the coastline.²⁶⁰ Decisions of new international courts have been most effective when the courts apply formalistic reasoning and rely closely on their own precedents and the texts of their constitutive instruments.²⁶¹

Iran), 1980 I.C.J. 3, 19-20 (May 24) (rejecting Iranian argument that the Court could not rule on Iranian violations of international law protecting diplomats and consular officials without also addressing alleged longstanding U.S. interference in Iranian internal affairs).

257. The concept of legitimacy, as applied to judicial behavior, includes structural and process components: "impartiality; principled decisionmaking; reasoned decision-making; continuity of court composition over time; consistency of judicial decisions over time; respect for the role of political institutions . . . ; and provision of a meaningful opportunity for litigants to be heard." Helfer & Slaughter, *supra* note 19, at 284. See *supra* note 170 and accompanying text.

258. Helfer & Slaughter, *supra* note 19, at 314.

259. The approaches of the ECJ and European Court of Human Rights to treaty interpretation are not now formalistic or restricted to the original intended meaning of the applicable conventions. These approaches, however, have evolved only after many years and with incremental acceptance of the courts' "constitutional nature." See, e.g., *id.* at 314-17, 382. For sources on treaty interpretation, see *supra* note 254.

260. See also Reisman, *Baselines*, *supra* note 249 (purposes of original expression of a straight baseline regime tied to economic needs of coastal state, which now may be satisfied via general acceptance of the EEZ regime).

261. See Helfer & Slaughter, *supra* note 19, at 314-20. See also Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (1996) (cautioning against "activist" postures by GATT/WTO panels); Mark W. Janis, *The European Court of Human Rights*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 105, 108-14 (Mark W. Janis ed., 1992) (noting link between the effectiveness of the European Court of Human Rights and the

When the ITLOS interprets and applies the rules of the Convention, it must anticipate the interests of third states.²⁶² A straight baseline case, for example, will affect the interests of all maritime powers. Third states may therefore wish to intervene in such a case. According to Article 31 of the ITLOS's Statute, a State Party may request permission to intervene if it "consider[s] that it has an interest of a legal nature which may be affected by the decision in any dispute."²⁶³ More broadly, States Parties have a "right to intervene" when the ITLOS's Registrar has notified them that "the interpretation or application of this Convention is in question," and parties to an international agreement whose interpretation or application is at issue also have such a right.²⁶⁴ Any intervening party is bound by the ITLOS's decision.²⁶⁵ The ICJ's jurisprudence on intervention under its Statute is controversial and complex,²⁶⁶ and application of the ITLOS's rules on intervention also may well be controversial in some instances.²⁶⁷ One benefit of a liberal construction and application of the intervention articles in the ITLOS Statute is that the Tribunal would more likely be fully informed about the arguments and interests of third states when it renders its decision.

2. *The ITLOS as Legislature?*

At times, the ITLOS may be called on to develop legislative standards for the operation of regimes. This is not a typical function for international courts or tribunals. Legislative standards usually are negotiated by states or specified by international regulatory bodies.

care of the Court's judges to extend their authority only gradually). The practice of the ITLOS in this regard bears watching. See *supra* notes 223-27 and accompanying text. See also *M/V Saiga Case*, *supra* note 6, ¶ 6 (President Mensah, dissenting); *id.* ¶¶ 20, 25 (Vice-President Wolfrum & Yamamoto, J., dissenting); *id.* ¶¶ 19-22 (Anderson, J., dissenting) (criticizing the majority for addressing some questions that went beyond those necessary to decide the prompt release application before the ITLOS).

262. It is uncertain what criteria the ITLOS will apply to determine whether a case can proceed if a state whose legal interests would likely be affected by a decision is not a party to the case. The ICJ will find a case inadmissible if the determination of an absent third state's rights and obligations would "constitute the very subject matter of" the Court's judgment, a situation the Court contrasts to one where its findings "might affect the legal interests" of third states. See *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 105 (June 30); *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240, 261 (Preliminary Objections, Judgment of June 26). See generally CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* (1993).

263. Law of the Sea Convention, *supra* note 2, Annex VI, art. 31(1). If the State Party seeking to intervene has not elected the ITLOS as its preferred forum under Article 287, the ITLOS nonetheless may grant the request to intervene. See ITLOS Rules, *supra* note 44, art. 99(3).

264. Law of the Sea Convention, *supra* note 2, Annex VI, art. 32(2).

265. See *id.* Annex VI, arts. 31(3), 32(3). See also ITLOS Rules, *supra* note 44, arts. 99-104.

266. See, e.g., MERRILLS, *supra* note 45, at 131-35; 3 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, at 1481-1555, 1637-55 (3d ed. 1997).

267. For discussion of issues concerning the scope of intervention that may be allowed in ITLOS proceedings, see Rosenne, *Points of Difference*, *supra* note 97, at 208-12.

After states adopt a multilateral convention, they may need to adjust its terms to account for changes in factual circumstances or shifts in political relationships. The parties to the convention also may want to add detailed rules that states could not agree on, or wanted to leave unspecified, in the initial treaty negotiations. Some multilateral conventions are framework agreements that authorize states to make subsequent adjustments by majority or supermajority vote (rather than through the normal treaty amendment process).²⁶⁸ Instead of requiring further interstate negotiations to change or add standards, states sometimes delegate standard-setting roles to institutions. For example, the International Maritime Organization (IMO) has developed technical standards in recommendatory codes that states can choose to incorporate in their national laws.²⁶⁹ The IMO may also develop treaty amendments that can be tacitly accepted unless a specified percentage of states vote not to accept them.²⁷⁰ Less frequently, states may grant courts or tribunals the authority to supply missing regulations in multilateral conventions.

Following UNCLOS III and the 1992 Rio Conference on Environment and Development, U.N.-sponsored negotiations led to the 1995 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.²⁷¹ This Straddling Stocks Agreement embodies the precautionary approach with respect to dwindling straddling and highly migratory fish stocks, broadens the scope of application of regulations of regional fisheries organizations, and increases the enforcement powers of coastal states to insure compliance with such regional regulations. The Agreement also contemplates future negotiations. For example, the Agreement requires states to work together to achieve conservation and management measures that are compatible in the high seas and the EEZ.²⁷² Finally, the Agreement envisions that regional and subregional fisheries organizations may exercise significant powers related to establishing conservation and management measures.²⁷³

268. See, e.g., Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1529 (1987). See also Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992).

269. See, e.g., International Maritime Dangerous Goods Code (1965), as amended, IMO Sales No. IMO-200E.

270. See, e.g., International Convention for the Safety of Life at Sea, Nov. 1, 1974, art. VIII, 1184 U.N.T.S. 2, 280.

271. Straddling Stocks Agreement, *supra* note 16. For discussion of the Straddling Stocks Agreement, see Peter Örebeck et al., *The United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 INT'L J. MARINE & COASTAL L. 119 (1998); André Tahindro, *Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 28 OCEAN DEV'T & INT'L L. 1 (1997).

272. See Straddling Stocks Agreement, *supra* note 16, art. 7(2).

273. See *id.* arts. 9-13.

The states that negotiated the Straddling Stocks Agreement did not leave all the authority for developing compatible high seas/EEZ conservation and management measures to the parties or intergovernmental organizations. They also contemplated that the ITLOS could play a role in developing such measures. When states cannot agree on compatible conservation and management measures "within a reasonable time," any party to the Straddling Stocks Agreement can invoke the Agreement's dispute settlement provisions,²⁷⁴ which incorporate by reference the dispute settlement provisions of Part XV of the Law of the Sea Convention.²⁷⁵ Although an arbitral tribunal, rather than the ITLOS, has residual compulsory jurisdiction, the ITLOS may well be asked to prescribe provisional measures. Should states fail to agree on provisional management and conservation arrangements, the Straddling Stocks Agreement provides that any state may seek provisional measures.²⁷⁶ Because the Agreement incorporates by reference the Convention's provisions on provisional measures, the ITLOS, as the forum with residual compulsory jurisdiction in provisional measure cases, probably will be the initial forum to prescribe such measures.²⁷⁷

A decision by states to authorize international tribunals to set standards has domestic and international political dimensions. When tribunals set conservation standards, they may help national commerce or fisheries agencies mollify citizens who are opposed to stringent conservation measures.²⁷⁸ For foreign affairs offices, allocating standard-setting

274. *Id.* art. 7(4). *See id.* art. 7(3). This step may not be taken until the Agreement enters into force; as of November 1998, the Agreement has received 19 of the 30 acceptances necessary for its entry into force.

275. *Id.* art. 30. Thus, invocation of third-party procedures under this provision will result in arbitration – the third-party forum with residuary compulsory jurisdiction under Article 287 of the Convention – unless all states concerned have agreed on the ITLOS or on some other forum. *See id.*; *supra* notes 56-57 and accompanying text.

276. *See id.* arts. 7(5), 31(2). *See also id.* art. 7(6). Provisional measures are also contemplated when states have been unable to agree on conservation and management measures for areas of high seas surrounded entirely by an area under the national jurisdiction of one state. *See id.* art. 16(2), 31(2). More generally, a court or tribunal hearing a dispute under the Straddling Stocks Agreement may also "prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks in question." *Id.* art. 31(2).

277. *See id.* arts. 30, 31(2); Law of the Sea Convention, *supra* note 2, art. 290(5); *supra* notes 149-50 and accompanying text. The ITLOS will not have jurisdiction if the parties have agreed on another court or tribunal to issue provisional measures. *See id.* Furthermore, a party to the Straddling Stocks Agreement that is not a party to the Law of the Sea Convention "may declare that, notwithstanding article 290, paragraph 5, of the Convention, the [ITLOS] shall not be entitled to prescribe, modify or revoke provisional measures without the agreement of such State." Straddling Stocks Agreement, *supra* note 16, art. 31(3). *See Tahindro, supra* note 271, at 47-48. Among the 19 states that, as of November 1998, have accepted the Straddling Stocks Agreement, only the United States is affected by Article 31(3); all the others are parties to the Convention on the Law of the Sea. For a list of parties to the Agreement, see Div. for Ocean Affairs, *Law of the Sea, supra* note 8.

278. If the ITLOS renders a decision prescribing provisional conservation measures, it could serve as a scapegoat; its decision may be followed, though at the same time being publicly criticized by some governmental officials and other important entities.

competence to a tribunal is one response to the difficulty, in multilateral negotiations, of devising specific remedies to conserve endangered fish stocks quickly.

If states, *in extremis*, do turn to the ITLOS for assistance in fashioning a high seas/EEZ management regime, the Tribunal will face some daunting challenges. It is not certain that the ITLOS would have jurisdiction to issue provisional measures with respect to all affected states.²⁷⁹ Even if the ITLOS does have jurisdiction, it, like other international institutions that set standards affecting the economic interests of individuals and businesses, may face challenges insofar as it is not representative, its proceedings are insufficiently transparent, and its actions lack legitimacy.²⁸⁰

How should the ITLOS handle the delicate task of formulating conservation measures? The Straddling Stocks Agreement provides that any provisional measures shall, *inter alia*, "have due regard to the rights and obligations of all States concerned [and] shall not jeopardize or hamper the reaching of final agreement on compatible conservation measures . . ." ²⁸¹ The ITLOS must be sensitive to the status of interstate negotiations when the case is submitted. If there is a high degree of consensus among states, the ITLOS should accept and build on that consensus. If, on the other hand, states are bitterly divided, the ITLOS should, consistent with international law, specify the contours for further negotiations.²⁸² Particularly at

See, e.g., BILDER, *INTERNATIONAL DISPUTE SETTLEMENT*, *supra* note 14, at 61-62; Robert E. Hudec, "Transcending the Ostensible": *Some Reflections on the Nature of Litigation Between Governments*, 72 *MINN. L. REV.* 211 (1987).

279. If all the states whose interests are significantly affected by a straddling stocks management regime are parties to the Straddling Stocks Agreement, a state asking the ITLOS to help formulate standards for a comprehensive regime might name those states as parties to the litigation. If all affected states are not parties to the Agreement but are parties to the Law of the Sea Convention, they might still be brought into the litigation. Disputes characterized as EEZ fishing disputes are, however, subject to jurisdictional limitations. *See* Law of the Sea Convention, *supra* note 2, art. 297. *See also id.* Annex VI, arts. 31-32 (on intervention).

A multiparty proceeding may also pose management problems for the ITLOS. Because the Rules of the ITLOS do not provide details concerning the conduct of a multiparty case before the Tribunal or its Fisheries Chamber, *see supra* note 99 and accompanying text, consultation among the Tribunal and the parties about details of procedure is likely. *See* ITLOS Rules, *supra* note 44, arts. 45, 48. *See also id.* art. 47 (Tribunal may direct the joinder of proceedings in two or more cases).

280. Such concerns have been raised with respect to the U.N. Security Council, which, since the end of the Cold War, has taken steps that increasingly affect private entities. *See, e.g.,* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *AM. J. INT'L L.* 552 (1993).

281. Straddling Stocks Agreement, *supra* note 16, art. 7(6).

282. *Cf.* Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3 (July 25). It is not certain that the ITLOS or another court or tribunal could alter a coastal state's fisheries regulations in an effort to develop compatible conservation measures. This is because the Straddling Stocks Agreement incorporates by reference the dispute settlement provisions of the Convention on the Law of the Sea, including Article 297's limitations concerning EEZ fisheries disputes. *See supra* notes 70, 81-82, 275 and accompanying text. If the coastal state's measures are effectively unmodifiable, then a coastal state would have some leverage in arguing that any conservation measures applicable on the high seas conform to its EEZ measures. *See* McDorman, *supra* note 113.

the provisional measures stage, it is questionable whether the ITLOS should prescribe highly detailed measures; instead, it may be desirable to encourage states to continue negotiating pursuant to a prescribed general framework while the merits stage of the case is pending.

The ITLOS should bear in mind that the goal of standard-setting in such a case is to help implement important community rights or interests. The Straddling Stocks Agreement, in particular, reflects concerns that fish stocks are in serious decline,²⁸³ and that this decline poses a serious problem for humanity. Thus, the ITLOS should prescribe provisional measures appropriate not only to "preserve the respective rights of the parties to the dispute" but also to "prevent damage to the stocks in question."²⁸⁴ The Agreement explicitly authorizes an international court or tribunal to apply, among other sources, "generally accepted standards for the conservation and management of living marine resources," and the law is to be applied "with a view to ensuring the conservation of the straddling fish stocks . . . concerned."²⁸⁵ In broader terms, the Agreement's overall objective "is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks."²⁸⁶ The Law of the Sea Convention also, albeit less directly than the Straddling Stocks Agreement, aims to further community interests in the conservation of species.²⁸⁷

Neither the Law of the Sea Convention nor the Straddling Stocks Agreement gives individuals or nongovernmental organizations standing to institute conservation actions. Nevertheless, the ITLOS, if asked to set standards in fisheries management disputes, should take community interests in the conservation of species into account.²⁸⁸ Its decisions in support of a conservation regime, particularly if unanimous,²⁸⁹ could underscore the importance of the community interests involved.

283. See 1997 Report of the Secretary-General, *supra* note 99, ¶¶ 191-97.

284. Straddling Stocks Agreement, *supra* note 16, art. 31(2).

285. *Id.* art. 30(5); see *supra* text accompanying note 82.

286. *Id.* art. 2. Among the Agreement's general purposes is "the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations." *Id.* Preamble.

287. Part XII of the Convention contains both detailed provisions implementing the obligation of states "to protect and preserve the marine environment." Law of the Sea Convention, *supra* note 2, art. 192, and general provisions requiring states to take steps to conserve and manage living resources. See *id.* arts. 116-20. Furthermore, the Convention authorizes provisional measures, *inter alia*, "to prevent serious harm to the marine environment." *Id.* art. 290(1). See *supra* note 145 and accompanying text; Oxman, *Human Rights*, *supra* note 80, at 408-10.

288. If the Tribunal's Rules were amended to allow nongovernmental organizations to file amicus briefs, its access to perspectives on conservation issues would increase. See generally Shelton, *supra* note 18.

289. The ITLOS's first provisional measure order, in a case related to the seizure and detention of a vessel by a coastal state, was unanimous. See *M/V Saiga (No. 2)*, *supra* note 6. For discussion of the advantages and disadvantages of unanimous decisions by international courts, see Helfer & Slaughter, *supra* note 19, at 326-28.

3. *The ITLOS as Court of Equity?*

The ITLOS could hear disputes involving the delimitation of adjacent and opposite maritime boundaries, relying on equity.²⁹⁰ The ICJ's decision in the *North Sea Continental Shelf Cases*²⁹¹ illustrates how equity might be used in deciding such disputes. The ICJ's reliance on equity was controversial in those cases because the ICJ's Statute does not list equity among the sources of international law to which the Court may refer.²⁹² Nevertheless, it was sensible for the ICJ to refer to equity, in light of the fact-intensive nature of maritime boundary delimitations, the uncertainty of the applicable positive law, the ICJ's desire to reach a fair result helpful to the parties, and the discretion inherent in the judicial process.²⁹³

Should the ITLOS hear maritime boundary delimitation cases involving States Parties to the Convention, the Tribunal will refer initially to Convention articles rather than equity. Nevertheless, the ICJ's use of equity in its delimitation cases remains instructive. The Convention's provisions governing delimitations of the EEZ and the continental shelf provide few definite standards for a tribunal to apply.²⁹⁴ The fact-intensive nature of maritime delimitations make it unlikely that very precise norms will ever be accepted to govern such disputes.²⁹⁵

In some cases involving maritime boundary delimitation disputes, the states may not want the court or tribunal actually to delimit the boundary. For example, in the *North Sea Continental Shelf Cases*, the ICJ was asked only to determine the principles applicable to the delimitation of the continental shelf, and not to set the boundary itself.²⁹⁶ The ICJ's decision left room for the parties to continue negotiations after the decision. It only provided principles to help guide them in their negotiations. Should states submit such cases, the ITLOS should be open to the states' need for flexi-

290. If the states involved have not filed an optional exception under Article 298(1)(a) of the Law of the Sea Convention, then an arbitral tribunal would have residual jurisdiction in maritime boundary delimitation disputes. Thus, jurisdiction of the ITLOS would depend on mutual agreement, either in the form of mutual declarations under Article 287(4), a compromissory clause in a treaty, or a special agreement. If one or more of the states involved have filed relevant Article 298 exceptions, the states nonetheless remain free to agree to submit a particular maritime boundary dispute to the ITLOS. See Law of the Sea Convention, *supra* note 2, art. 299.

291. *North Sea Continental Shelf Cases* (Ger. v. Den., Ger. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

292. See ICJ Statute, *supra* note 12, art. 38(1). The states involved had not agreed to allow the Court to decide the case *ex aequo et bono*. See *supra* note 76. If an international court broadly uses equity, unconstrained by legal standards, it may open itself to criticisms that its adjudication approaches a standardless conciliation. See MERRILLS, *supra* note 45, at 154-55.

293. See generally CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW 215-46 (1993).

294. See Law of the Sea Convention, *supra* note 2, arts. 74, 83.

295. See Jonathan I. Charney, *Introduction*, in 1 INTERNATIONAL MARITIME BOUNDARIES xxiii, xliii-xliv (Jonathan I. Charney & Lewis M. Alexander eds., 1993) [hereinafter 1 MARITIME BOUNDARIES].

296. *Accord Continental Shelf* (Tunis. v. Libya), 1982 I.C.J. 18 (Feb. 24). In other cases, the Court has been asked to determine the boundary. See, e.g., *Continental Shelf* (Libya v. Malta), 1985 I.C.J. 13 (June 3).

ble guidelines.²⁹⁷

It is far from certain that the ITLOS will hear maritime boundary delimitation disputes. The absence of compulsory jurisdiction over such cases, the experience of the ICJ and arbitral tribunals in handling such disputes, and the desire of some states to have the prestige of the ICJ associated with any delimitation may restrict the number of boundary disputes submitted to the ITLOS. Should the Tribunal hear such disputes, however, it may operate as a "court of equity."

C. The ITLOS as Constitutional Court?

Part XI of the 1982 Convention on the Law of the Sea, as modified by the 1994 Part XI Implementation Agreement,²⁹⁸ contains a comprehensive regime that governs the mining of resources in the Area, i.e., "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."²⁹⁹ The Council of the International Sea-Bed Authority has the power to approve plans of work for exploration and exploitation of the Area.³⁰⁰ In 1997, it approved exploration plans for seven state and private pioneer investors.³⁰¹ Once an application for a plan of work is approved, the applicant enters into a contract with the Authority.

The Part XI regime recognizes property rights for entities seeking to explore for or exploit minerals in an international common space. As mod-

297. Should two states bring a maritime boundary dispute to the ITLOS, the interests of third states may be implicated. The Tribunal may face difficult questions concerning admissibility and the scope of intervention in such cases. See *supra* notes 262-67 and accompanying text. See also David Colson, *The Legal Regime of Maritime Boundary Agreements*, in 1 MARITIME BOUNDARIES, *supra* note 295, at 41, 63.

298. Part XI Agreement, *supra* note 4.

299. Law of the Sea Convention, *supra* note 2, art. 1(1). "Resources" include "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules." *Id.* art. 133(a).

300. Approval follows a recommendation from the Authority's Legal and Technical Commission. Procedures for approval are near-automatic once prospective miners have met specified conditions. See Part XI Agreement, *supra* note 4, Annex, § 3, art. 11. Removing discretion in the approval process was only one of several changes made in the 1994 Agreement to assuage concerns of developed states. Other changes concern costs to States Parties, subjecting the functioning of the Enterprise to market-oriented principles, the decision-making process of the Authority, the procedure for amending Part XI, removing limits on the production of sea-bed minerals, economic assistance, and other financial issues. See Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AM. J. INT'L L. 687 (1994); *Recommendation and Report on the United Nations Convention on the Law of the Sea*, 29 INT'L LAW. 252 (1995), reprinted in THE UNITED NATIONS AT 50: PROPOSALS FOR IMPROVING ITS EFFECTIVENESS 161 (John E. Noyes ed., 1997).

301. See 1997 Secretary-General's Report, *supra* note 99, ¶ 25. Most sea-bed mineral resources are in the continental shelf and thus within areas of national jurisdiction. The future commercial viability of deep sea-bed mining remains uncertain. See Panel on the Law of Ocean Uses, *Deep Seabed Mining and the 1982 Convention on the Law of the Sea*, 82 AM. J. INT'L L. 363, 363 (1988). But see Michael Field, *Norway and Cook Islands in Major Seabed Mining Deal*, AGENCE FRANCE-PRESSE, Sept. 22, 1997, available in 1997 WESTLAW 13399707 (describing advances in sea-bed mining technology). Politically motivated deep sea-bed mining remains conceivable. See SEEBERG-ELVERFELDT, *supra* note 89, at 20.

ified by the 1994 Implementation Agreement, Convention provisions allow the boundaries of claims to be established, guarantee exclusive access to mine sites with security of tenure, protect mining contracts against unilateral revision, and protect intellectual property.³⁰² It is true that Part XI of the Convention recognizes that “[t]he Area and its resources are the common heritage of mankind”³⁰³ and provides that the “financial and other economic benefits derived from activities in the Area” be shared equitably, “taking into particular consideration the interests and needs of developing States.”³⁰⁴ Nevertheless, the power to implement these goals does not rest with developing states. The 1994 Agreement gives developed states an effective veto over “[r]ules, regulations, and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the decisions to be made thereon.”³⁰⁵

The Sea-Bed Disputes Chamber of the ITLOS plays a central role in the regime for mining the Area. The focus in the following discussion is not on the Chamber’s role as a commercial court, ruling on the interpretation of a mining contract.³⁰⁶ Rather, the focus is on the Chamber’s potential role as a “constitutional court,” reviewing the legality of the Sea-Bed Authority’s rules, regulations, and procedures that affect private commercial mining rights. If, for example, the Authority acted administratively to impair a consortium’s contract to explore for polymetallic nodules because the Authority concluded that the consortium had not complied with one of the Authority’s regulations, would a “constitutional” challenge of the Authority’s action be possible? If so, what form might the challenge take? Suppose the regulation in question addressed procedures to assure noninterference with historical shipwrecks,³⁰⁷ and the consortium argued that the Authority’s regulation was not, as the Law of the Sea Convention requires, within the Authority’s express powers and functions.³⁰⁸

302. See Law of the Sea Convention, *supra* note 2, arts. 153(3), (6), 168(2)-(3) & Annex III, arts. 4, 8, 19, 22; Part XI Agreement, *supra* note 4, Annex, §§ 1(9), 5.

303. Law of the Sea Convention, *supra* note 2, art. 136.

304. *Id.* art. 160(f)(i); see *id.* art. 140(1). For discussion of the common heritage of mankind concept, see, e.g., Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT’L & COMP. L.Q. 190 (1986).

305. Part XI Agreement, *supra* note 4, Annex, § 9(7)(f). These rules, regulations, procedures, and decisions are to be made by the Authority’s Council following recommendations of the Finance Committee, and must be based on those recommendations. See *id.* §§ 3(7), 9(7)(f). The Finance Committee, on which developed states are represented, must operate by consensus, which means that the objection of any member may block action. See *id.* § 9(8).

306. A commercial arbitral tribunal is also available for this purpose, at the request of any party to a mining contract. See Law of the Sea Convention, *supra* note 2, art. 188(2)(a); *infra* text accompanying notes 321-22.

307. See *id.* art. 149. For discussion of Article 149, see ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA* 296-312 (1995).

308. See Law of the Sea Convention, *supra* note 2, art. 157(2). The Convention does grant the Authority “such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those [express] powers and functions with respect to activities in the Area.” *Id.* See also *id.* art. 145 (Authority may take necessary measures, with respect to activities in the Area, to protect the marine environment).

To evaluate how the Sea-Bed Disputes Chamber might review the Authority's actions, it is important to place this eleven-member Chamber in the context in which it was created. The Sea-Bed Disputes Chamber is a product of an UNCLOS III compromise "between those who wanted a separate tribunal to deal with disputes relating to activities in the Area and those who felt that a single tribunal should be adequate."³⁰⁹ Those who favored a separate Sea-Bed Tribunal envisioned it as a principal organ — the judicial arm — of the Sea-Bed Authority.³¹⁰ The 1976 proposal of the President of UNCLOS III to create a Sea-Bed Disputes Chamber of the ITLOS instead of a separate Sea-Bed Tribunal³¹¹ found its way into the 1977 Informal Composite Negotiating Text (ICNT).³¹² According to the ICNT, however, members of the Chamber were to be elected by the Assembly of the Authority, thereby establishing a strong linkage between the organizations. Although this election mechanism was ultimately abandoned in favor of electing Chamber members by a majority of the ITLOS's judges,³¹³ some links between the Authority and the Chamber remain. In particular, the Authority's Assembly may adopt general recommendations concerning representation in the Chamber of the world's different regions and principal legal systems.³¹⁴ In addition, the Authority, as well as States Parties to the Law of the Sea Convention, are to bear the expenses of the ITLOS.³¹⁵ The Authority may be a party to proceedings before the Sea-Bed Disputes Chamber.³¹⁶ And the Chamber must give advisory opinions, when so requested by the Assembly or Council, relating to "legal questions arising within the scope of their activities."³¹⁷ In sum, although the ITLOS is an independent legal entity, and its Sea-Bed Disputes Chamber is by no means an organ of the Authority,³¹⁸ legal ties between the Chamber and the Authority remain.

Whether the Sea-Bed Disputes Chamber may function effectively as a constitutional court also depends on whether it was designed to be the sole

309. 5 COMMENTARY, *supra* note 10, ¶ A.VI.170, at 399. For a pre-UNCLOS III proposal concerning an Ocean Floor Tribunal, noting various categories of disputes such a Tribunal could hear, see *Report of the Deep-Sea Mining Committee*, in INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-FOURTH CONFERENCE 870, 886, 890, 905-06 (1971).

310. See ADEDE, *supra* note 27, at 143, 185-86, 267.

311. *Revised Single Negotiating Text*, U.N. Doc. A/CONF.62/WP.9/Rev.2 (1976), Annex II, art. 15, reprinted in VI Third United Nations Conference on the Law of the Sea, Official Records, at 144, 151, U.N. Sales No. E.77.V.2 (1976).

312. U.N. Doc. A/CONF.62/WP.10 (1977), Annex V, reprinted in VIII Third United Nations Conference on the Law of the Sea, Official Records 1, 59, U.N. Sales No. E.78.V.4 (1977) [hereinafter ICNT].

313. See Law of the Sea Convention, *supra* note 2, Annex VI, art. 35.

314. See *id.* Annex VI, art. 35(2).

315. See *id.* Annex VI, art. 19(1).

316. See *id.* arts. 162(2)(u), 165(2)(i); *supra* notes 116-17 and accompanying text; *infra* notes 323, 328-31 and accompanying text.

317. *Id.* art. 191; see *supra* text accompanying note 148. For discussion of these various links between the Authority and the Sea-Bed Disputes Chamber, see 5 COMMENTARY, *supra* note 10, ¶¶ A.VI.174-175, 177.

318. Efforts have been made to insure the independence of the Tribunal and its administrative functions in the arrangements respecting the establishment of the Tribunal and the Authority. See Rosenne, *Points of Difference*, *supra* note 97, at 204-05.

arbiter of Part XI disputes. UNCLOS III negotiators debated this point. Some delegations preferred arbitration, which would allow parties to select some of the decision makers, and also wanted to give parties considerable flexibility in their choice of forum.³¹⁹ On the other hand, many held that it was more important to have a uniform interpretation of Part XI:

The regime established with respect to activities in the Area was new, unusual and without precedent, and required strengthening through consistent jurisprudence. That consistency would not be achieved if parallel forums — the International Court of Justice, the Tribunal, and general or special arbitral tribunals — were all to have equal jurisdiction over disputes concerning the interpretation or application of Part XI, notwithstanding the general applicability of Part XV to the remainder of the Convention. To ensure consistent jurisprudence, exclusive jurisdiction over disputes concerning the interpretation or application of Part XI would have to be conferred on a single body.³²⁰

The compromise that emerged at UNCLOS III generally favored maintaining the Sea-Bed Disputes Chamber as the central interpretive body for Part XI. Although, in contract disputes, one party may elect commercial arbitration,³²¹ the arbitral tribunal must refer questions of interpretation of Part XI and its Annexes to the Sea-Bed Disputes Chamber.³²² Only the Sea-Bed Disputes Chamber may hear disputes between the Authority and a State Party concerning acts of the Authority alleged to violate Part XI or to exceed its jurisdiction.³²³ States Parties have limited flexibility to choose fora in disputes among themselves,³²⁴ and when interpretation of Part XI is at issue, the Sea-Bed Disputes Chamber or its ad hoc chamber will be the likely forum.³²⁵ According to one commentator, “a practically uniform adjudication” of Part XI disputes “can be assumed.”³²⁶

Part XI provides several possible avenues for the Sea-Bed Disputes Chamber to review the legality of the Authority’s measures. First, the Chamber can use its advisory jurisdiction.³²⁷ An advisory opinion, however, may lack efficacy. The Authority must request such an opinion, and

319. These delegations noted with approval the flexibility provided by Part XV’s Article 287. See ADEDE, *supra* note 27, at 187. For discussion of Article 287, see *supra* notes 50-54, 56-57 and accompanying text.

320. 5 COMMENTARY, *supra* note 10, ¶ A.VI.191, at 409.

321. Law of the Sea Convention, *supra* note 2, art. 188(2)(a).

322. *Id.*

323. See *id.* art. 187(b).

324. See *id.* art. 188(1).

325. Instead of proceeding before the full Sea-Bed Disputes Chamber, one State Party may choose to have a dispute concerning the interpretation or application of Part XI heard before a smaller, ad hoc chamber of the Sea-Bed Disputes Chamber. *Id.* art. 188(1)(b); see *id.* Annex VI, art. 36. Alternatively, all the parties may agree to refer the dispute to another special chamber of the ITLOS. *Id.* art. 188(1)(a); see *id.* Annex VI, arts. 15, 17; *supra* notes 164-65 and accompanying text. The Part XI Implementation Agreement also provides for the use of GATT/WTO dispute settlement mechanisms in certain cases. See *supra* note 167 and accompanying text.

326. SEEBERG-ELVERFELDT, *supra* note 89, at 81.

327. See Law of the Sea Convention, *supra* note 2, art. 191; *supra* notes 158-59 and accompanying text.

the phrasing of the question is likely to shape the scope of the Chamber's opinion.

Second, in cases between the Authority and a State Party, Part XI authorizes the Sea-Bed Disputes Chamber to exercise jurisdiction in disputes over the legality of certain measures of the Authority. The Chamber has jurisdiction in disputes between those entities concerning:

- (i) acts or omissions of the Authority or of a State Party alleged to be in violation of [Part XI] or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or
- (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.³²⁸

Third, it is possible that natural or juridical persons may challenge the Authority's measures. In general, Part XI and the Statute of the ITLOS contemplate that natural or juridical persons registered with the Sea-Bed Authority to engage in deep sea-bed exploration or mining may (along with States Parties, the Authority or the Enterprise, and state enterprises) be parties to cases before the Sea-Bed Disputes Chamber involving mining contract disputes.³²⁹ Article 187(c)(ii) provides for jurisdiction of the Sea-Bed Disputes Chamber in disputes between parties to a contract, including natural or juridical persons and the Authority, concerning "acts or omissions of a party to the contract [e.g., the Authority] relating to activities in the Area and directed to the other party or directly affecting its legitimate interests."³³⁰ The Chamber may also hear other types of disputes between the Authority and natural or juridical persons.³³¹

Article 189 limits the Sea-Bed Dispute Chamber's ability to review the legality of a rule or regulation of the Authority. Article 189 reads:

The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority.

328. *Id.* art. 187(b). For discussion of Article 187(b), see SEEBERG-ELVERFELDT, *supra* note 89, at 101-10.

329. *See id.* art. 187 (jurisdiction of the Sea-Bed Disputes Chamber); *id.* Annex VI, art. 37 (access).

330. For discussion of the application of Article 187(c)(ii) to suits by investors against the Authority, see SEEBERG-ELVERFELDT, *supra* note 89, at 122-30. Article 187(c)(ii) contains a cross-reference to Article 153(2)(b), which concerns the requirement of state sponsorship for natural or juridical persons seeking to engage in sea-bed mining. For discussion of the requirement of state sponsorship, see *id.* at 76-77.

331. Article 187(c)(i) provides for jurisdiction of the Sea-Bed Disputes Chamber in disputes concerning "the interpretation or application of a relevant contract or plan of work." Article 187(e) authorizes Chamber jurisdiction in disputes "in which it is alleged that the Authority has incurred liability" for, *inter alia*, disclosure of confidential or proprietary information. *See* Law of the Sea Convention, *supra* note 2, art. 168(2); Annex III, art. 22. For discussion of Article 187(e) and the liability of the Authority and its organs, see SEEBERG-ELVERFELDT, *supra* note 89, at 101-02, 132-37. Article 187(d) provides for Chamber jurisdiction in "disputes between the Authority and a prospective contractor . . . concerning the refusal of a contract or a legal issue arising in the negotiation of the contract." For discussion, see *id.* at 116-22. *See also supra* note 300. Article 190 allows some participation of States Parties in certain proceedings in which natural or juridical persons are parties. For discussion of Article 190, see *supra* note 124.

Without prejudice to article 191 [concerning advisory opinions], in exercising its jurisdiction pursuant to article 187, the Sea-Bed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures. Its jurisdiction in this regard shall be 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 obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.

Thus, although the Chamber is not authorized to invalidate any rules, regulations, or procedures of the Authority, the Chamber does retain some formal powers of review. It may decide whether the “application” of the Authority’s rule, regulation, or procedure in a particular case conflicts with the “obligations under th[e] Convention” of any party to a case (which could include the Authority). The Chamber may also rule on “claims concerning excess of jurisdiction or misuse of power.”³³² These concepts could provide a basis for checking any abuses of power by the Authority.

During UNCLOS III, some delegations sought to shield the Authority from any judicial review whatsoever. They analogized the Authority’s power to that of coastal states, noting that the Convention insulates many discretionary coastal state actions from judicial review.³³³ One may criticize this restrictive view of judicial review on two related levels. First, the analogy to review of coastal states’ exercise of power is inapposite. Historically, international courts or tribunals have not subjected states’ acts to judicial review. Instead, the legality of a state’s actions is traditionally challenged by other states through diplomatic procedures — procedures unavailable to challenge the Authority’s rules. Second, states, in their

332. For discussion of these concepts, see SEEBERG-ELVERFELDT, *supra* note 89, at 103-07. Early negotiating texts at UNCLOS III omitted the language concerning “excess of jurisdiction or misuse of power” and reflected, in stronger form than the final version of Article 189, a desire to shield the Authority’s actions from judicial review. For example, the relevant provision of the 1977 Informal Composite Negotiating Text read:

In exercising its jurisdiction . . . the Sea-Bed Disputes Chamber . . . shall not pronounce itself on the question whether any rules, regulations or procedures adopted by the Assembly or by the Council are in conformity with the provisions of the present Convention. Its jurisdiction with regard to such rules, regulations and procedures shall be confined to their application to individual cases. The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Assembly or by the Council or any of its organs of their discretionary powers under this Part of the present Convention; in no case shall it substitute its discretion for that of the Authority.

ICNT, *supra* note 312, art. 191.

333. See ADEDE, *supra* note 27, at 150; SEEBERG-ELVERFELDT, *supra* note 89, at 96 (noting view that legislative decisions of the Authority are “those of a sovereign and as such not subject to any revision” by the Sea-Bed Disputes Chamber). Coastal states’ acts concerning EEZ activities are, to a significant extent, shielded from compulsory third-party dispute settlement. For discussion, see *supra* notes 69-74 and accompanying text.

EEZs, have the discretion to decide whether to allocate fisheries and other resources to private parties. Because the Convention guarantees private property rights with respect to sea-bed mining, mechanisms to help ensure that the Authority's rules or regulations do not denigrate these rights are desirable.³³⁴

That said, judicial review follows different models. Judicial review does not always entail the capacity to invalidate a legislature's measures, even in national legal systems.³³⁵ The ICJ currently is addressing the proper scope of its review of U.N. Security Council decisions. In the *Lockerbie Case*,³³⁶ Libya has asked the ICJ to find that the Security Council exceeded its powers by issuing binding decisions that allegedly violate terms of a treaty.³³⁷ Only a few ICJ judges have been willing to entertain the notion that, perhaps in some egregious case of Security Council abuse, the ICJ might find that the law is not in accordance with a Security Council decision.³³⁸ It seems probable that the ICJ will not declare the Security Council's actions illegal or invalid, but may instead suggest the outer limits of fair application or interpretation of a Security Council decision.

One must be cautious about drawing close analogies between the ICJ's reluctance to engage in judicial review and the likely attitude of the Sea-Bed Disputes Chamber. The Chamber, unlike the ICJ, will face a Convention article (Article 189) that speaks directly to the scope of judicial review. Furthermore, the Law of the Sea Convention does not contain an analog to Article 103 of the U.N. Charter, which makes state obligations under the U.N. Charter (including the Article 25 obligation to accept and carry out Security Council decisions) supreme over other treaties. At a minimum, these distinctions suggest that the Chamber should be able to review whether the Sea-Bed Authority applied its rules and regulations legally in individual cases. Still, the scope of the Chamber's review of legislative/executive actions will develop only over time, as part of an evolutionary process in which the Chamber and the Authority work out their relationship with each other. Although the Chamber is not a coordinate body of the Authority, in the sense that the ICJ is the judicial arm of the United

334. Cf. Treaty of Rome, *supra* note 154, art. 173. The revised procedures for approving plans of work and for adopting rules, regulations, and procedures of the Authority, contained in the 1994 Part XI Implementation Agreement, suggest that measures contrary to the interests of any powerful block of states likely would not be taken in the first place. See Part XI Agreement, *supra* note 4, Annex, §§ 1, 3, 8-9; *supra* note 300.

335. See José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 24 n.132 (1996) [hereinafter Alvarez, *Judging the Security Council*].

336. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14) (Provisional Measures); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14) (Provisional Measures). See also Peter H.F. Bekker, *International Decision*, 92 AM. J. INT'L L. 503 (1998).

337. Articles 25, 48, and 103 of the U.N. Charter provide for the binding effect and priority of Security Council decisions.

338. See *Libya v. U.S.*, at 142 (Shahabuddeen, J., separate opinion); *id.* at 164-81 (Weeramantry, J., dissenting). But see *id.* at 210 (El-Koshi, J., dissenting) (declaring portion of Security Council Resolution 748 to be *ultra vires*).

Nations, the Chamber nevertheless maintains significant ties to Part XI and the Authority. The Chamber has a strong interest in the effective and proper functioning of the Part XI regime. It may prod the Authority, through interpretations of Part XI, to uphold the basic precepts underlying that regime.³³⁹

Whether the ITLOS's Sea-Bed Disputes Chamber can become the authoritative "constitutional" interpreter of Part XI will depend on its relationships with other entities involved with the international law of the sea, including national courts. Article 39 of the ITLOS Statute provides an explicit link between the Sea-Bed Disputes Chamber and national courts. This Article provides that "decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."³⁴⁰ Annex III contains a complementary provision: "Any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the Authority and of the contractor shall be enforceable in the territory of each State Party."³⁴¹ Despite some uncertainties about the application of these provisions,³⁴² the evident goal is to contribute to the cohesiveness of the Part XI system, and to ensure that the rights protected by Part XI, as modified by the 1994 Implementation Agreement, are given full effect. These provisions have a parallel in Articles 187 and 192 of the Treaty of Rome,³⁴³ which require the national courts of member states to recognize judgments of the European Court of Justice (ECJ).³⁴⁴

Despite the enforcement provisions just noted, the Sea-Bed Disputes Chamber's rulings against States Parties or the Authority may well be unenforceable in national courts. A Chamber decision against a State Party might conflict with rules that grant immunities to states when national courts seek to attach state property to enforce a judgment.³⁴⁵ The privileges and immunities of the Authority could also render it immune from national legal process (absent waiver by the Authority) and immunize its property and assets from seizure.³⁴⁶

339. See generally Alvarez, *Judging the Security Council*, *supra* note 335; Antonio R.F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997).

340. Law of the Sea Convention, *supra* note 2, Annex VI, art. 39.

341. *Id.* Annex III, art. 21(2).

342. For example, the implications of the reference to "the highest court" in Article 39 of the ITLOS Statute may not always be clear, if the highest court of a particular state does not render enforceable decisions, or if atypical procedures are used for enforcing decisions of the highest court. See 5 COMMENTARY, *supra* note 10, ¶ A.VI.203, at 415.

343. Treaty of Rome, *supra* note 154.

344. *Accord* Convention on the Settlement of Investment Disputes Between States and Nations of Other States, Mar. 18, 1965, art. 54(1), 575 U.N.T.S. 160, 194 (1996).

345. See ADEDE, *supra* note 27, at 146, 164 n.37.

346. See Law of the Sea Convention, *supra* note 2, arts. 177-79. See also *id.* Annex IV, art. 13 (privileges and immunities of the Enterprise); Agreement on Privileges and Immunities of the International Tribunal for the Law of the Sea, *opened for signature* July 1, 1997, art. 5, SPLOS/25 (1997).

More fundamentally, the deep sea-bed mining regime lacks several features that would make the Sea-Bed Disputes Chamber a central “constitutional” component of an integrated international system. The Law of the Sea Convention, unlike the Treaty of Rome, contains no provision authorizing a preliminary reference procedure from national courts to the international tribunal.³⁴⁷ ECJ doctrines holding that provisions of the Treaty of Rome apply directly to individuals in national courts without the need for implementing legislation, that European Community law supercedes conflicting national law in national courts, and that conflicting national legislation is preempted³⁴⁸ seem unlikely to be developed in the context of disputes over deep sea-bed mining. Even if some such disputes were heard in national courts, the common European socio-legal traditions, necessary preconditions to the gradual expansion of the ECJ’s authority, are not replicated universally.

In sum, one must qualify the notion that the Sea-Bed Disputes Chamber may act as a “constitutional” court. Structurally, the Chamber is a part of the independent ITLOS, rather than an organ of the Sea-Bed Authority. It may, however, rule on whether the Authority’s rules and regulations have been applied consistently with Part XI of the Convention and the 1994 Part XI Implementation Agreement in individual cases. It also may decide claims concerning misuse of power or excess of jurisdiction on the part of the Sea-Bed Authority.³⁴⁹ Such rulings, along with opinions rendered in the exercise of the Chamber’s advisory jurisdiction, may guide the Authority’s actions and help protect property rights under the Part XI regime.

D. Summary

This Part of this Article has characterized the ITLOS as an institution that, within the broad field of the law of the sea, could exercise positive norm-reinforcing, legislative, equitable, and constitutional functions. It may conceivably play other roles as well; I do not claim to have set out a complete typology of its functions.³⁵⁰ In the exercise of these functions, the ITLOS will address different audiences – sometimes the political branches of two states, sometimes multiple states, sometimes individuals, sometimes national courts, and sometimes other international institutions. I have also suggested some techniques that the ITLOS might employ in deciding these different types of cases. Those assessing the work of this new international court should consider its various audiences and the different decision-making techniques its judges may need to use.

347. See Treaty of Rome, *supra* note 154, art. 177.

348. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413-19 (1991).

349. See Law of the Sea Convention, *supra* note 2, arts. 187(b), 189.

350. For example, a chamber of the ITLOS might adopt some of the characteristics of an arbitral tribunal when hearing bilateral disputes submitted pursuant to a special agreement, e.g., by deferring to the parties’ wishes concerning the composition of the chamber. See *supra* note 104 and accompanying text. In addition, the Tribunal’s Sea-Bed Disputes Chamber could function as a commercial court in disputes concerning sea-bed mining contracts. See *supra* note 306 and accompanying text.

III. Reflections on the Risks of Inconsistent Jurisprudence and Duplicative Proceedings

The risk of inconsistent jurisprudence exists whenever parties may freely choose among various third-party dispute settlement fora. As Jonathan Charney has argued, inconsistent interpretations of international law “may undermine the presumed uniformity and universality” of the international legal system³⁵¹ and “place[] at risk” the coherence of that system.³⁵² Inconsistent interpretations could also undercut the important utility of compulsory third-party adjudication in stabilizing Law of the Sea Convention norms.³⁵³ With respect to law of the sea disputes, the Convention allows parties to choose among several fora. This flexibility led negotiators at UNCLOS III,³⁵⁴ officials participating in the work of Prepcom’s Special Commission 4,³⁵⁵ judges on the ICJ,³⁵⁶ and commentators³⁵⁷ to highlight the potential problem of inconsistent jurisprudence. The remainder of this Article addresses this concern, along with the related issue of potential parallel proceedings in the same case.

A. The Risk of Inconsistent Jurisprudence

The risk of inconsistent decisions is minimal when the ITLOS has exclusive or residual compulsory jurisdiction. In sea-bed mining cases, for example, the Sea-Bed Disputes Chamber exercises primary jurisdiction. Despite the fact that different chambers may hear certain cases,³⁵⁸ the Sea-Bed Disputes Chamber has exclusive jurisdiction in disputes between States Parties to the Convention and the Authority. The Chamber will also review rulings of commercial arbitral tribunals concerning interpretations of Part XI. Furthermore, the Authority may ask the full Chamber for advisory opinions if there is any significant divergence in interpretations of Part XI

351. Charney, *Third Party Dispute Settlement*, *supra* note 1, at 81.

352. *Id.* at 89.

353. See *supra* notes 29-30 and accompanying text.

354. See 5 COMMENTARY, *supra* note 10, ¶¶ 287.1, A.VI.191.

355. Prepcom’s Special Commission 4 discussed the risk of inconsistent rulings among the ITLOS and its chambers after UNCLOS III and before the Convention entered into force. A harmonization proposal was put forward to address the risk of inconsistent views between the ITLOS and one of its chambers, or between two or more of the Tribunal’s chambers. See Brown, *Dispute Settlement*, *supra* note 45, at 43. The ITLOS Rules, *supra* note 44, do not, however, provide any mechanism to respond to the potential of inconsistent chamber rulings.

356. See, e.g., Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L & COMP. L.Q. 848, 855 (1995); Oda, *supra* note 10, at 144-55; Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT’L & COMP. L.Q. 863 (1995). See also Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 2 (1995). Some judges on the ICJ also fear that the ITLOS could cause the ICJ to lose business. See Oda, *supra* note 10, at 144.

357. See, e.g., SINGH, *supra* note 33, at 73-74, 96. Jonathan Charney has thoughtfully analyzed concerns about inconsistent jurisprudence. See Charney, *Third Party Dispute Settlement*, *supra* note 1, at 76-89.

358. See *supra* notes 101-03, 323-25 and accompanying text.

in cases decided by different chambers.³⁵⁹

The ITLOS is also likely to hear almost all of the Article 292 prompt release cases. Although an arbitral tribunal normally has residual jurisdiction under Part XV, the ITLOS has residual compulsory jurisdiction in Article 292 cases. The time it would take to constitute an arbitral tribunal, and the fact that the ICJ normally takes considerable time to decide its cases,³⁶⁰ make it unlikely the parties would agree on a forum other than the ITLOS for such cases. Furthermore, if the flag state authorized an individual to pursue an Article 292 prompt release claim, the ICJ could not hear the individual's application because only states may appear before the ICJ in contentious cases. Thus, although the ITLOS does not have *de jure* exclusive jurisdiction in prompt release cases, it may, in practice, be the only forum that will hear such cases and thus the only forum that will develop the law relating to the reasonableness of conditions for release.³⁶¹

Any new international court must attract cases, either by providing an avenue for relief that did not previously exist or by offering benefits unavailable in other tribunals. The manner in which the ITLOS decided its first Article 292 prompt release case should help make the Tribunal appealing to applicants. The ITLOS's "arguable or sufficiently plausible" standard for assessing applicants' prompt release claims may help to attract claims.³⁶² Most significantly, the ITLOS has also acted quickly and efficiently. The ITLOS handed down its prompt release decision in the *M/V Saiga Case* only three weeks after the application was filed, and the ITLOS's Rules provide for prompt action in future cases.³⁶³ As ITLOS President Mensah put it, "[w]e are fast, and that makes it more likely we will get a lot of cases."³⁶⁴

As for interstate cases that do not involve sea-bed mining or prompt release claims, the ITLOS will have to compete with other courts or tribu-

359. Compare the experience of the Iran-U.S. Claims Tribunal, whose different chambers have developed inconsistent approaches on some issues. See George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585 (1994). The Claims Tribunal lacks an advisory jurisdiction mechanism.

360. *But see* Case Concerning the Vienna Convention on Consular Relations (Par. v. U.S.) (Apr. 9, 1998) (visited Nov. 17, 1998) <http://www.icj-cij.org/icj/idocket/ipaus/ipausorder/ipaus_iorder_090498.htm> (Provisional Order) (order rendered six days after application filed); Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12 (Advisory Opinion) (Apr. 26) (decided in eight weeks). See also ICJ Communiqué No. 98/14, Apr. 6, 1998 (outlining steps to streamline ICJ decision-making processes).

361. See also *supra* note 231.

362. The Tribunal might attract additional applications if, in the future, it were to adopt a "non-restrictive interpretation" of Article 292, expanding the categories of cases in which it will find prompt release applications to be well-founded. See *supra* notes 223-27 and accompanying text.

363. See *supra* notes 135, 178. The Tribunal also issued its second order, for provisional measures, less than two months after the request for provisional measures was filed.

364. Carsten Hoefler, *International Sea Court To Calm the World's Stormy Seas*, DEUTSCHE PRESSE-AGENTUR, Dec. 4, 1997, available in LEXIS, News Group File.

nals for business. There are many grounds for preferring one tribunal over another in a system of open competition. The expertise of the ITLOS's judges and the high level of prestige often associated with international courts may cause some to prefer it over arbitral tribunals. The speed with which it is able to decide cases may give it an edge over the ICJ.³⁶⁵ The structure or composition of various chambers also may cause disputing parties to prefer one forum over another.

This competition will not necessarily create a serious risk of inconsistent jurisprudence. For example, when two states ask a third-party tribunal to delimit a maritime boundary or formulate a particular fisheries management regime, it seems unlikely that significantly inconsistent jurisprudence will develop. The decisions in such cases are highly fact specific. Furthermore, different courts and tribunals may interpret the broadly worded governing legal standards³⁶⁶ in similar fashion.

Nevertheless, it is conceivable that various courts and tribunals may develop inconsistent interpretations of the same legal rules. In law of the sea cases that present similar legal issues, different courts and tribunals may obtain jurisdiction pursuant to declarations filed under Article 287 of the Law of the Sea Convention or pursuant to special agreements. Although different fora may have jurisdiction in similar disputes, the possibility of inconsistent rulings seems unlikely to present significant new problems for international law and process. First, given that multiple fora presently hear issues of international law, the potential for divergent interpretations of law of the sea norms is a problem of degree rather than kind. In particular, national courts often interpret international legal rules, even with respect to matters over which international courts also have jurisdiction.³⁶⁷ Only in a highly integrated system – something most unusual in international law and procedure – would an international court be able to impose its interpretations on national legal systems.³⁶⁸ Furthermore, there

365. Sometimes, however, disputants may prefer a leisurely pace of adjudication, so as to allow a cooling period for tensions to ease. See Richard B. Bilder, *International Dispute Settlement and the Role of Adjudication*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 155, 165 (Lori Fisler Damrosch ed., 1987).

366. E.g., several "equitable" factors relevant to deciding a maritime boundary dispute, or broadly worded community interests in the conservation of species.

367. Any divergence of interpretations is muted when national and international courts communicate in efforts to develop acceptable interpretations of a treaty. See Slaughter, *Transjudicial Communication*, *supra* note 175.

368. For a description of doctrines of the ECJ that reinforce its primacy over national courts, see *supra* notes 343-44, 347-48 and accompanying text. Even with respect to the ECJ, however, controversy continues over the problem of "kompetenz-kompetenz," i.e., over whether the ECJ has ultimate jurisdiction to determine its own jurisdiction. See J.H.H. Weiler & Ulrich R. Haltern, *Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz*, in *THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE* 227 (Anne-Marie Slaughter et al. eds., 1998). Furthermore, any court at the apex of a hierarchical system may face some inconsistent decisions. In national legal systems with a hierarchical court structure, inconsistencies among lower courts abound, not all of which can be resolved by a national supreme court. See Charney, *Third Party Dispute Settlement*, *supra* note 1, at 78-80, 82-84.

is no assurance of a completely consistent jurisprudence even within a single court as its composition changes and different perspectives on international law gain currency.

Second, the risk of significantly inconsistent interpretations is minimized when judges rely on similar sources and apply similar reasoning processes. International jurists and arbitrators may reach similar interpretations of the law even if they differ at the margins regarding its application in close cases. This is true regardless of whether they sit on the ITLOS, the ICJ, a chamber of one of those courts, or an arbitral tribunal. In all of these fora, the decision makers are typically well-grounded in public international law.³⁶⁹ In sum, because international jurists often follow a standard method of treaty interpretation (which is likely to lead them to find many Convention rules to be quite determinate),³⁷⁰ and because they may rely on the decisions of other tribunals,³⁷¹ interpretations of many rules may not diverge significantly from tribunal to tribunal.³⁷²

Third, interforum competition for cases could decrease the risk of inconsistent jurisprudence. Different tribunals could develop a reputation for expertise in different types of cases. A tribunal with a particular expertise may hear all the cases of one type, and inconsistent rulings will not develop.

Fourth, it remains debatable whether inconsistent jurisprudence is undesirable. National legal systems function quite capably when lower courts rule inconsistently. Inconsistent rulings on minor, technical matters may help to resolve particular disputes without harming the fabric of the rule of law.³⁷³ But even if different tribunals were to interpret a material norm in the Convention differently, that difference would simply illuminate the reality that agreement on the precise content of the norm is

369. See generally TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 173-77 (1983) (discussing the community of international lawyers). The Law of the Sea Convention's provisions for special arbitration do envision decisions by panels of experts in some cases, and these experts may be less familiar than judges with the substance of international law and with international legal reasoning processes. However, suggestions that the law of the sea involves only "technical" issues and is of a different jurisprudential nature from other rules of international law are belied by great similarities between rules of the law of the sea and other rules of general international law. See Charney, *Expanding Dispute Settlement Systems*, *supra* note 9, at 72-73. See also Law of the Sea Convention, *supra* note 2, art. 289 (experts available to assist courts and tribunals with technical issues).

370. See *supra* note 254 and accompanying text. But see also *supra* note 261.

371. See ICJ Statute, *supra* note 12, art. 38(1)(d); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (documenting increasing reliance on decisions of courts and tribunals to determine content of international law rules). International courts and tribunals may, however, place somewhat more reliance on their own prior decisions and on ICJ decisions than on decisions of other tribunals. See Charney, *Third Party Dispute Settlement*, *supra* note 1, at 72-73.

372. See Charney, *Third Party Dispute Settlement*, *supra* note 1, at 77; Noyes, *Implications*, *supra* note 14, at 219-20. But cf. Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983) (discussing implications of increase in number of cases on certainty).

373. See Charney, *Third Party Dispute Settlement*, *supra* note 1, at 78-80.

lacking.³⁷⁴ Furthermore, both for parties involved in a dispute and for observers seeking guidance as to the state of the law, even inconsistent interpretations of the Convention may help focus debates concerning how a Convention norm should be applied in a particular situation.

One should ask not only whether the risk of inconsistent jurisprudence is "minimal," but also what other values might outweigh that risk. One such value is flexibility in choosing fora. When picking a forum, disputing parties often base their choice on the identity of decision makers, procedures, timetables, and costs associated with the various international courts, tribunals, chambers, and less formal dispute settlement fora. The potential for inconsistent rulings from these various fora should also be balanced against the value of having any compulsory jurisdiction. Delegates to UNCLOS III accepted the possibility of inconsistent jurisprudence because having only one court or tribunal to interpret the Law of the Sea Convention would have precluded a system of compulsory binding third-party arbitration or adjudication. Given the varying attitudes of the participants in UNCLOS III, it was impossible for the negotiators to agree on one forum.

B. The Risk of Parallel Proceedings

In theory, the ITLOS and another tribunal could face the same case under Part XV of the Convention. At first glance, this scenario seems unlikely, given that Article 287 grants jurisdiction to an arbitral tribunal unless the parties agree on another forum, and Articles 290 and 292 vest the ITLOS with residual compulsory jurisdiction with respect to provisional measures and prompt release cases. Nevertheless, it is possible for the same dispute to be pursued simultaneously in two fora. For example, in a straight baseline dispute, if the coastal state and the complainant state both accept the jurisdiction of the ITLOS under their Article 287 declarations, and the two states each previously had filed a declaration accepting the ICJ's jurisdiction under Article 36(2) of the Court's Statute, then parallel proceedings are possible. Even though Article 282 of the Convention would seem to favor recourse to the ICJ,³⁷⁵ a dispute over jurisdiction could arise because the scope of the ICJ's jurisdiction is not always clear.³⁷⁶ If the legality of

374. The drafters of the Law of the Sea Convention certainly appreciated that some articles in the Convention were indeterminate. See, e.g., 5 COMMENTARY, *supra* note 10, ¶ 300.6 (commenting on Article 300).

375. See *id.* ¶ 282.3. Article 282 provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this 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 Part XV, unless the parties to the dispute otherwise agree.

376. See, e.g., Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) (Jurisdiction of the Court and Admissibility of the Application); D.W. Grieg, *Nicaragua and the United States: Confrontation Over the Jurisdiction of the International Court*, 62 BRIT. Y.B. INT'L L. 119 (1991). The scope of Article 36(2) reservations was a central issue in dispute in the *Fisheries*

the coastal state's baseline is challenged in the ITLOS, the coastal state might seek a delay by asking the ICJ to rule on the dispute. Unless the complainant state acquiesces in the ICJ's jurisdiction and terminates its case in the ITLOS, or unless one court develops and uses some principle of prudential abstention in deference to the other, there could be dual proceedings. Conceivably each court could enter a judgment in the same case, with the ITLOS hypothesizing that the ICJ did not have proper jurisdiction and the ICJ later ruling that it did.³⁷⁷

Parallel proceedings in national courts, involving private parties from different states, have posed vexatious problems. Duplicative litigation has led to inconsistent results. To mitigate the problems of parallel proceedings, courts have developed various priority or prudential abstention devices. These devices include *forum non conveniens*, a rule of deference to the court where the case was first filed, and various balancing tests that may result in a stay or dismissal of one pending case (or, alternatively, an injunction against proceeding in the other court).³⁷⁸

The prospect of parallel proceedings in interstate law of the sea disputes appears remote. The priorities laid out in Articles 282, 287, and 290 will solve the jurisdictional question in most cases. Under the Law of the Sea Convention, where jurisdiction is based only on mutual consent,³⁷⁹ the possibility of duplicative proceedings is minimal. It also is far from certain that litigants would expend the considerable resources necessary to pursue parallel interstate litigation in different international courts, even if such an option were available.

Choice-of-law considerations suggest that the risk of inconsistent judgments in parallel law of the sea proceedings is far less likely than in

Jurisdiction Case, resolved in 1998 against Spain and in favor of Canada. Fisheries Jurisdiction (Spain v. Can.) (Dec. 4, 1998) (Jurisdiction) (visited Dec. 14, 1998) <[http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment\(s\)/iec_ijudgment_981204.htm](http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ijudgment_981204.htm)>. Even when Article 36(2) declarations include no reservations, states still have managed to formulate preliminary objections. See Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.) (June 11, 1998) (Preliminary Objections Judgment) (visited Nov. 17, 1998) <http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_980611_content.htm>.

377. Disputes over jurisdiction also could arise, for example, between states that were parties to a bilateral Friendship, Commerce and Navigation (FCN) Treaty that referred disputes related to its interpretation or application to the ICJ. See, e.g., Treaty of Friendship, Commerce and Navigation, Aug. 3 and Dec. 26, 1951, U.S.-Greece, art. XXVI(2), 5 U.S.T. 1829, 1913. States might debate whether a dispute involving maritime matters fell within the scope of the FCN Treaty, and whether deference was due to the ICJ under Article 282 of the Law of the Sea Convention on the grounds that the dispute was one "concerning the interpretation or application of th[e] Convention."

378. See, e.g., LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION §§ 7-1 to 7-5 (1996). The issues occasionally arise in international tribunals. See Frederick M. Abbott, *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, in GATT/WTO DISPUTE SETTLEMENT, *supra* note 167, at 413, 435-36 (discussing abstention issues related to dual proceedings in the WTO's Dispute Settlement Body and a World Intellectual Property Organization forum).

379. This consent may be expressed by mutual acceptance of the Law of the Sea Convention itself, another treaty or agreement providing for the jurisdiction of a particular court or tribunal, or a special agreement entered into after a dispute has arisen.

parallel national court proceedings. The plaintiff in each national court will typically have sought a forum that is likely to choose a law leading to a favorable judgment on the merits or a favorable antisuit injunction. In parallel national court proceedings, each national court may well apply its own state's law, which could potentially lead to inconsistent results. In parallel law of the sea proceedings, however, each international tribunal is applying the same international law, thereby minimizing the possibility of inconsistent outcomes.

Even in the "worst case" scenario in which the ITLOS and another international court or tribunal reached inconsistent judgments in the same law of the sea case, the parties would still be no worse off – and perhaps better off – than if there were no decision. The two fora could reject some of the competing claims, which would narrow the scope of subsequent negotiations between the parties in their continuing efforts to resolve their dispute.

Some disputes may overlap previously unrelated legal regimes, each with a binding dispute settlement system. Consider, for example, the connection between international trade and law of the sea disputes. Assume that the government of a maritime power (Y) is upset at the refusal of a coastal state claiming straight baselines (X) to allow foreign flag vessels to fish on a "high seas" rise within X's asserted EEZ – a rise that would not be within X's EEZ if X used a normal baseline. Y therefore issues trade sanctions to prevent the import of all fish from X. If X and Y are Member States of the World Trade Organization (WTO), X could challenge the legality of Y's unilateral trade sanctions before a WTO dispute settlement panel.³⁸⁰ The resulting decision would be legally binding.³⁸¹ Could the ITLOS then also hear Y's claim challenging the legality of X's actions? The answer appears to be affirmative if X and Y have both selected the ITLOS under Article 287 of the Law of the Sea Convention. Article 282 of the Convention requires deference to another tribunal (here, a WTO panel) only if the parties mutually agree to submit "a dispute concerning the interpretation or application of [the Law of the Sea] Convention" to that alternative tribunal. X's challenge of Y's trade sanctions before a WTO panel

380. For discussion of the WTO's Dispute Settlement Understanding, Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, in General Agreements on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125, 1216 (1994), and prospects for its future, see Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, in GATT/WTO DISPUTE SETTLEMENT, *supra* note 167, at 1, 54-122. Before January 1, 1995, GATT panel decisions could be blocked by the disadvantaged state. The WTO Dispute Settlement Understanding removes that option. The Understanding also establishes a clear timetable for proceedings before the WTO Dispute Settlement Body, creates a new appellate procedure, and describes means of implementing formal rulings. For an overview of activity by the WTO Dispute Settlement Body, see WTO, *Overview of the State-of-Play of WTO Disputes* (visited Nov. 9, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

381. See John H. Jackson, *The WTO Dispute Settlement Understanding – Misunderstanding on the Nature of Legal Obligation*, 90 AM. J. INT'L L. 60 (1997).

should not preclude litigation of the dispute over X's baselines — a dispute concerning the interpretation and application of the Convention — before the ITLOS.³⁸²

If X and Y were to pursue their disputes under the WTO's Dispute Settlement Understanding and before the ITLOS, the resulting decisions might be compatible.³⁸³ To pick just one permutation of the hypothetical baselines example, the ITLOS might rule that X's straight baseline is illegal because it does not meet the requirements of Article 7 of the Law of the Sea Convention, while a WTO panel might rule that Y's unilateral sanctions were illegal under the GATT. The two results would not be inconsistent; the losing state in each case could correct its illegal behavior and comply with the relevant judgment.

The analysis becomes more difficult if the ITLOS were to pass judgment on the legality of Y's unilateral trade sanctions. Although most commentators believe that the Law of the Sea Convention does not authorize the various courts or tribunals recognized in Part XV to address trade law disputes, the issue is problematic.³⁸⁴ The Convention addresses this issue generally when it specifies the sources of law that the ITLOS and other tribunals are authorized to apply.³⁸⁵ The ITLOS, in applying "other rules of international law not incompatible with" the Convention,³⁸⁶ seemingly could address the law governing permissible countermeasures or remedies in the baselines dispute.

If the ITLOS's decision on the permissibility of Y's trade sanctions did conflict with that of the WTO panel, a question of hierarchy of procedures would arise. Article 311 of the Convention, read literally, suggests that the Convention's mechanisms would "trump" the WTO's mechanisms. According to Article 311, agreements among States Parties "modifying . . . the operation of provisions of" the Convention are permissible only if "such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention."³⁸⁷ To maintain the integrity of the well-established WTO system, in which the issue of permissible trade sanctions is central, the ITLOS might adopt a prudential abstention rule, refusing to pass judgment on the legality of trade sanctions governed by the WTO Agreement. This question

382. See Richard J. McLaughlin, *Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENV'T'L L. REV. 29, 72 (1997).

383. The 1994 Part XI Agreement, *supra* note 4, explicitly addresses the relative priority of the Sea-Bed Disputes Chamber and GATT or WTO panels with respect to disputes over the subsidization of sea-bed mining. See *supra* note 167 and accompanying text. Part XV of the Law of the Sea Convention, by contrast, contains no explicit references to GATT/WTO panels.

384. See McLaughlin, *supra* note 382, at 52-53, 73 n.66. But cf. Part XI Agreement, *supra* note 4, Annex, §§ 6.1(f), 6.4 (authorizing Convention mechanism to take up subsidization disputes related to sea-bed mining, but only if parties to the dispute are not all parties to the GATT/WTO).

385. See *supra* notes 76-81 and accompanying text.

386. Law of the Sea Convention, *supra* note 2, art. 293(1).

387. *Id.* art. 311(3). See McLaughlin, *supra* note 382, at 57-59, 74-76.

of hierarchy is thus transformed into a question of reaching an accommodation among different international regimes.

Conclusion

The International Tribunal for the Law of the Sea has jurisdiction over many different types of disputes, and it may address issues that fall within different regimes. The ITLOS may be called on to exercise different types of judicial functions. It may be asked to order the release of a detained vessel, which is a function often assigned to admiralty courts in national legal systems. At other times, the ITLOS, or one of its chambers, may serve as a quasi-legislature, as a public forum for the airing of interstate grievances, as a court of equity, or as a court charged with reviewing the legality of an international institution's actions. In each situation, the ITLOS must be sensitive to what it can contribute to the relationships among different entities.

The flexibility in choice of fora incorporated in the design of the Law of the Sea Convention gives rise to concerns about inconsistent jurisprudence. Such concerns should be evaluated in light of the jurisdictional and functional analyses discussed in Parts I and II of this Article. When only one forum is able to hear certain types of cases, concerns over inconsistent rulings in those cases are minimal. For example, the fact that the ITLOS has residual compulsory jurisdiction in Article 292 prompt release cases, combined with the ITLOS's efforts to decide such cases quickly, suggest that it will not face competition in such cases. Similarly, the ITLOS's Sea-Bed Disputes Chamber or its chambers, rather than arbitral tribunals, will decide sea-bed mining disputes that involve interpretation of Part XI of the Convention.

The risk of inconsistent jurisprudence is also low if the various courts and tribunals decide few cases. Many of the disputes that the ITLOS could hear are interstate disputes. States are often reluctant to pursue formal actions against other states for political reasons. Disincentives to interstate adjudication (e.g., concern that litigation may prove ineffective, or states' desire to retain control over sensitive disputes) suggest that the new ITLOS may decide few interstate cases.³⁸⁸ On the other hand, those international courts and tribunals that boast a significant volume of cases often allow individual access. Some private parties may appear before the ITLOS because states may elect to allow individuals to pursue Article 292 prompt release claims, and because individuals and corporations have access to the

388. It seems unlikely that the ITLOS's interstate caseload will rival that of the WTO's Dispute Settlement Body, which since 1994 has rendered dozens of binding decisions in international trade disputes. The WTO, unlike the Law of the Sea Convention, does not allow states a choice among formal dispute settlement mechanisms. Years of experimentation with less formal GATT dispute settlement mechanisms, coupled with a perceived need to resolve urgent trade disputes quickly, may also contribute to states' willingness to use the new WTO dispute settlement system. See MERRILLS, *supra* note 45, at 287; John E. Noyes, *Law of the Sea Dispute Settlement: Past, Present, and Future*, 5 ILSA J. INT'L & COMP. L. (forthcoming 1999).

ITLOS's Sea-Bed Disputes Chamber in sea-bed mining disputes. If the ITLOS were to accept jurisdiction in matters provided for in agreements involving private parties that confer jurisdiction on the Tribunal,³⁸⁹ the Tribunal's caseload could expand significantly.

In any event, the promotion of stable international legal norms is only one of several important judicial roles. International courts can also fulfill other functions important to the operation of international relationships. If the ITLOS is able to help states or individuals to settle their disputes, or is able to engage national courts in a dialogue about the integration of international standards on the release of vessels into national legal systems, or is able to work cooperatively with the Sea-Bed Authority to promote a stable legal environment for the deep sea-bed, its contributions to a range of ongoing relationships may be significant. The prospects for such contributions are real, and they likely outweigh the risk of inconsistent rulings among the ITLOS and other courts and tribunals.

389. See *supra* notes 125-31 and accompanying text.