

The Contribution of International and Supranational Courts to the Rule of Law

Edited by

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LEUVEN GLOBAL GOVERNANCE

2015

EE Edward Elgar
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

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6. The contribution of the International Tribunal for the Law of the Sea to the rule of law

Philippe Gautier*

I. INTRODUCTION: THE MECHANISM FOR THE SETTLEMENT OF DISPUTES UNDER PART XV OF THE UNITED NATIONS CONVENTION FOR THE LAW OF THE SEA

A distinct feature of public international law, in comparison with municipal law, is the lack of a compulsory judicial system. Recourse to international judges or arbitrators depends on the consent of the parties to the dispute. In the absence of consent, international courts or tribunals do not have jurisdiction to deal with alleged violations of international obligations. Certainly, States may accept, prior to the existence of a dispute, the jurisdiction of an international court or tribunal. Several mechanisms do exist to that effect, through general, regional, or bilateral treaties, or optional declarations under Article 36 of the Statute of the International Court of Justice (the ICJ), and with respect to a narrow, specialized or broad scope of disputes. It must be acknowledged, however, that, in practice, these mechanisms are inserted in a only limited number of treaties.¹ In this context, a major achievement of the United Nations Convention for the Law of the Sea (the Convention) is to

* The opinions contained in this article are expressed by the author in his personal capacity and do not reflect the views of the Tribunal.

¹ See eg, Revised General Act for the Pacific Settlement of International Disputes, 28 April 1949; American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948; European Convention for the Peaceful Settlement of Disputes, 29 April 1957; or the mechanisms established under the European Convention on Human Rights and the Dispute Settlement Understanding of the WTO.

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include in its Part XV a mechanism for largely compulsory settlement of disputes arising out of the interpretation or application of its provisions. Actually, since 1982, no other major multilateral treaty has been adopted which would provide for such a robust and comprehensive judicial mechanism.² It is therefore against this background that the system for the settlement of disputes in law of the sea matters, as contained in Part XV of the Convention, should be analysed.

Part XV of the Convention contains three sections. Section 1 repeats the general obligation to settle disputes by peaceful means and reserves the right of the parties to a dispute to have recourse to the diplomatic means referred to in Article 33 of the UN Charter. Where no settlement has been reached through Section 1, Section 2 (Compulsory procedures entailing binding decisions) comes into play. On that basis, any dispute concerning the interpretation or application of the Convention may be submitted, at the request of any party to the dispute, to the court or tribunal having jurisdiction under the Convention.

Section 2 of Part XV combines two principles: the obligation to submit disputes arising out of the Convention to a compulsory procedure entailing binding decisions and the freedom of States to select their preferred means. In this connection, the following procedures are available to States Parties pursuant to Article 287: the International Tribunal for the Law of the Sea (the Statute of which is contained in Annex VI to the Convention), the International Court of Justice, arbitration under Annex VII to the Convention and special arbitration under Annex VIII to the Convention.³ Pursuant to Article 287 of the Convention, States Parties may select the forum to which they wish to submit their disputes by virtue of declarations submitted to the Secretary-General of the United Nations, the depositary of the Convention. In the absence of declarations made by the parties to a dispute or if the declarations do not select the same forum, the dispute will be submitted to arbitration under Annex VII, except if otherwise agreed by the parties. Declarations under Article 287 may be made at any time. Withdrawal or modification of declarations does not affect pending proceedings and a declaration 'shall remain in

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² With the exception of the Dispute Settlement Understanding of the WTO, to the extent that it might be characterized as a 'judicial' mechanism.

³ Article 1 of Annex VIII provides that special arbitration is available to States Parties to the Convention for disputes relating to '(1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping'.

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⁵ Paragraph 1(b) c
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Declarations under Article 287 of the Convention do not represent the only way by which States Parties to the Convention may confer jurisdiction on the different fora referred to in Part XV. Cases involving law of the sea matters may also be instituted on the basis of a special agreement or provisions to that effect contained in other general, regional or bilateral agreements. In addition, as will be examined later, under the Convention the Tribunal has compulsory jurisdiction to deal with specific categories of disputes.

The compulsory mechanism under Part XV is subject to certain limitations and exceptions which are contained in Section 3. By virtue of Article 297, disputes relating to the sovereign rights (or their exercise) of the coastal State with respect to the living resources in its exclusive economic zone (Article 297, paragraph 3), and disputes relating to the exercise by the coastal State of its rights regarding marine scientific research in its exclusive economic zone (Article 297, paragraph 2) are excluded from the compulsory judicial mechanism provided for in Part XV, Section 2, of the Convention. Article 298 of the Convention provides for optional exceptions to the application of Part XV of the Convention whereby States may declare that they exclude from the mechanism disputes relating to the delimitation of maritime areas, military activities⁵ or disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter. These exceptions are activated by way of declarations deposited by States Parties with the Secretary-General of the United Nations. Disputes which are subject to the limitations covered by Article 297 or by declarations made under Article 298 may still be submitted to the Tribunal if the parties to the dispute so agree (Article 299, paragraph 1).

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⁴ Article 287, para 6, of the Convention.
⁵ Paragraph 1(b) of Article 298 covers disputes concerning military activities and disputes 'concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3'.

II. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS): AN OVERVIEW

The International Tribunal for the Law of the Sea (the Tribunal) was created by the 1982 United Nations Convention on the Law of the Sea.⁶ Pursuant to Article 1 of the Statute of the Tribunal (the Statute), its seat is in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany.

The Tribunal is composed of 21 members elected⁷ by the States Parties to the Convention 'from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea' (Statute, Article 2). They serve for a term of nine years and may be re-elected. Elections take place on a triennial basis. The composition of the Tribunal has to ensure the representation of the principal legal systems of the world and equitable geographical distribution.

The Tribunal received its first case on 13 November 1997 (*The "SAIGA" Case*). So far, 22 cases have been submitted to the Tribunal. In its decisions, the Tribunal has dealt with legal issues regarding inter alia the protection of the marine environment and the importance of procedural rights relating thereto, the right of hot pursuit and the use of force at sea, liability, delimitation of maritime areas and prompt release of vessels and crews.

A. Jurisdiction of the Tribunal in Contentious Cases

1. Disputes arising out of the interpretation and application of the Convention

(i) *Jurisdiction ratione materiae* The core competence of the Tribunal is to deal with disputes arising out of the Convention. In other words, whenever a dispute relates to a provision of the Convention or whenever it is alleged that a State has not complied with a provision of the Convention, the Tribunal has jurisdiction to deal with such a case, subject to the limitations contained in Articles 297 and 298.

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(iii) *Compulsory jurisdic* to deal with certain cases any declaration or expres so-called 'compulsory jur ing categories of disputes

⁶ The Convention entered into force on 16 November 1994. As of 1 June 2014, 165 States and one international organization (European Union) are parties to it.

⁷ The first election took place on 1 August 1996.

⁸ See Article 1, para 2(1)

⁹ Article 20, para 2 of t

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(ii) *Jurisdiction ratione personae* With respect to disputes relating to the Convention, the Tribunal is open to States Parties to the Convention. The expression 'States Parties'⁸ refers to the 165 States which have ratified or acceded to the Convention as well as the European Union.

It is also possible for non-States Parties, such as the International Seabed Authority, a State enterprise or a natural or juridical person,⁹ to appear before a chamber of the Tribunal composed of 11 Judges – the Seabed Disputes Chamber – with respect to disputes relating to the exploration and exploitation of the Area ie, 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.¹⁰

According to Article 20, paragraph 2, of the Statute, 'the Tribunal shall be open to entities other than States Parties in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case'. The fact that this provision, only applicable to the Tribunal, refers to an 'agreement' – and not to an 'international agreement' as in the case of Article 288, paragraph 2, which applies to any 'court or tribunal referred to in Article 287' – has sometimes been interpreted as encompassing agreements which could be concluded with private entities, eg, an agreement between a flag State and an insurance company or a classification society. The Tribunal has not yet had the opportunity to pronounce itself on this question.

It should be added that, whenever an entity which is not party to the Convention (eg, a State or an international organization not party to the Convention) is party to a case before the Tribunal, such entity will have to contribute to the expenses of the Tribunal. In this respect, Article 19, paragraph 2, of the Statute of the Tribunal provides that, in such a situation, the Tribunal 'shall fix the amount which that party is to contribute towards the expenses of the Tribunal'.

(iii) *Compulsory jurisdiction of the Tribunal* The Tribunal is competent to deal with certain cases through unilateral applications independently of any declaration or expression of consent by the respondent State. This so-called 'compulsory jurisdiction' of the Tribunal applies to the following categories of disputes:

⁸ See Article 1, para 2(1) and (2), of the Convention.
⁹ Article 20, para 2 of the Statute; Articles 187 and 188 of the Convention.
¹⁰ Article 1, para 1(1) of the Convention.

- Disputes relating to Part XI of the Convention (exploration and exploitation of deep seabed resources (see Convention, Article 187 and 188)). With the exception of disputes concerning the interpretation or application of a contract,¹¹ the Seabed Disputes Chamber of the Tribunal has exclusive jurisdiction over these disputes.
- Disputes submitted pursuant to Article 292 of the Convention (prompt release of vessels and crews). Under certain provisions of the Convention, a State which has detained a vessel on specific charges (eg, fishery offences) is required to release the vessel and/or its crew upon the posting of a reasonable bond.¹² Where the flag State of the detained vessel alleges that the detaining State has failed to comply with these provisions, the dispute relating to the release of the vessel and its crew may be submitted to the Tribunal if, after ten days from the date of detention, no agreement has been reached between the two parties to the dispute. The case may be brought by the flag State or on its behalf.
- Disputes submitted under Article 290, paragraph 5, of the Convention (prescription of provisional measures pending the constitution of an arbitral tribunal). When arbitral proceedings are instituted (eg, in the event that the parties have not made a declaration under Article 287 of the Convention), the constitution of the arbitral tribunal may take some months. During this period of time, any party to the dispute is entitled to request the Tribunal to prescribe provisional measures 'to preserve the respective rights of the parties or to prevent serious harm to the marine environment'.¹³ The Tribunal may prescribe provisional measures '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'.¹⁴

¹¹ See, however, Article 188, para 2, of the Convention which provides that disputes between parties to a contract ('being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons') concerning the interpretation or application of a contract or a plan of work 'shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree'. In this case, the 'commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of this Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling.'

¹² See, for instance, Article 73 of the Convention.

¹³ Article 290, para 1, of the Convention.

¹⁴ Article 290, para 5, of the Convention.

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B. Advisory Proceedings

The Convention provides for the Tribunal to address requests for advisory opinions. Further to a request submitted to the Authority, a first advisory opinion was issued on 1 February 2011 on questions relating to sponsoring activities in the Area.

Requests for advisory opinions pursuant to Article 138 of the Convention. The Tribunal 'may give an advisory opinion on any international agreement or matter specifically provides for such an opinion'.

¹⁵ See eg, the 1996 *ITLOS Advisory Opinion on the Request for an Advisory Opinion on the Implementation of the Law of the Sea of the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (1996 ITLOS Advisory Opinion No. 1). The Tribunal's decision on the request for an advisory opinion on the implementation of the Law of the Sea of the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1996 ITLOS Advisory Opinion No. 1) is a landmark decision in the history of the Tribunal. It is the first advisory opinion issued by the Tribunal and the first advisory opinion issued by an international tribunal. The Tribunal's decision on the request for an advisory opinion on the implementation of the Law of the Sea of the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1996 ITLOS Advisory Opinion No. 1) is a landmark decision in the history of the Tribunal. It is the first advisory opinion issued by the Tribunal and the first advisory opinion issued by an international tribunal.

¹⁶ See the advisory opinion on the request for an advisory opinion on the implementation of the Law of the Sea of the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1996 ITLOS Advisory Opinion No. 1) issued on 1 February 2011, ITLOS.

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2. Disputes arising out of agreements other than the Convention

The jurisdiction of the Tribunal is not limited to disputes arising out of the Convention. In accordance with Article 21 of the Statute, the jurisdiction of the Tribunal comprises all matters provided for in any other agreement which confers jurisdiction on the Tribunal. A number of agreements have been concluded which contain provisions stipulating that disputes arising out of the interpretation or application of these agreements could be submitted to the Tribunal.¹⁵

B. Advisory Proceedings

The Convention provides that the International Seabed Authority may address requests for advisory opinions to the Seabed Disputes Chamber. Further to a request submitted by the Council of the International Seabed Authority, a first advisory opinion was delivered by the Chamber on 1 February 2011 on questions relating to the responsibility of States sponsoring activities in the Area.¹⁶

Requests for advisory opinions may also be submitted to the Tribunal pursuant to Article 138 of the Rules of the Tribunal which states that the Tribunal 'may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'.

¹⁵ See eg, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; 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; the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas; the UNESCO Convention on the Protection of the Underwater Cultural Heritage; the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean; the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean.

¹⁶ See the advisory opinion delivered on 1 February 2011: *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10.

III. THE JURISPRUDENCE OF THE TRIBUNAL AND ITS CONTRIBUTION TO THE RULE OF LAW

A. The Role of Part XV of the Convention

Before addressing specific aspects which illustrate the contribution of the Tribunal to the rule of law, it is appropriate to highlight the role of Part XV of the Convention in the promotion of justice. As already mentioned, treaties containing a compulsory mechanism for the settlement of disputes are not numerous in international law and the very fact that such a mechanism is set up in Part XV is already remarkable. In addition, Part XV not only exists on paper; it also functions in a successful way. As an illustration, we may compare the number of cases relating the law of the sea which were brought to an international court during a similar period of time (18 years) before (1977–94) and after (1995–2012) the entry into force of the Convention on 16 November 1994. This shows a sharp increase (from 12¹⁷ to 37¹⁸) in the number of cases brought to a judicial

¹⁷ 1994: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, 303; 1991: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, 40; *Passage through the Great Belt (Finland v Denmark)*, Order of 10 September 1992, ICJ Reports 1992, 348; 1989: *Case concerning the Delimitation of Maritime Areas between Canada and France*, Decision of 10 June 1992, ILM, Vol. 31 (1992), 1145; 1988: *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, ICJ Reports 1993, 38; 1986: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992, 351; 1985: *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal*, Arbitral Award of 31 July 1989, 1990, ILR 83, 1; *Dispute concerning Filletting within the Gulf of St. Lawrence between Canada and France*, Decision of 17 July 1986, ILR 82 (1990), 591.

¹⁸ ITLOS: Prompt release: *M/V "SAIGA" (Saint Vincent and the Grenadines v Guinea)*, Prompt Release, Judgment, ITLOS Reports 1997, 16; *"Camouco" (Panama v France)*, Order of 17 January 2000, ITLOS Reports 2000, 4; *"Monte Confurco" (Seychelles v France)*, Prompt Release, Judgment, ITLOS Reports 2000, 86; *"Grand Prince" (Belize v France)*, Prompt Release, Judgment, ITLOS Reports 2001, 17; *"Chaisiri Reefer 2" (Panama v Yemen)*, Order of 13 July 2001, ITLOS Reports 2001, 82; *"Volga" (Russian Federation v Australia)*, Prompt Release, Judgment, ITLOS Reports 2002, 10; *"Juno Trader" (Saint Vincent and the Grenadines v Guinea-Bissau)*, Prompt Release, Judgment, ITLOS Reports 2004, 17; *"Hoshinmaru" (Japan v Russian Federation)*, Prompt Release, Judgment, ITLOS Reports 2005–2007, 18; *"Tomimaru" (Japan v Russian Federation)*, Prompt Release, Judgment, ITLOS Reports 2005–2007, 74;

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body after the Convention came into force. It may be added that a majority of these cases were submitted to a judicial process on the basis of the compulsory mechanism provided for in the Convention.

At the time of the entry into force of the Convention, concerns were expressed vis-à-vis the risk of conflicting decisions which could be pronounced by the different courts and tribunals provided for by Part XV. In light of the judicial practice generated by Part XV of the Convention, it may be stated that this risk did not materialize. On the contrary, it

Provisional measures: *Southern Bluefin Tuna* (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280; *MOX Plant* (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, 95; *Land Reclamation in and around the Straits of Johor* (Malaysia v Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, 10; "ARA Libertad" (Argentina v Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, 332; Merits: *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v Guinea), Judgment, ITLOS Reports 1999, 10; *Conservation and Sustainable Exploitation of Swordfish Stocks* (Chile/European Union), Order of 16 December 2009, ITLOS Reports 2008–2010, 13; *Delimitation of the maritime boundary in the Bay of Bengal* (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, 4; *M/V "Louisa"* (Saint Vincent and the Grenadines v Kingdom of Spain), Judgment, ITLOS Reports 2013, to be published; *M/V "Virginia G"* (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, to be published; **ICJ**: 1995: *Fisheries Jurisdiction* (Spain v Canada), Order of 2 May 1995, ICJ Reports 1995, 87; 1999: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v Honduras), Judgment, ICJ Reports 2007, 659; 2001: *Territorial and Maritime Dispute* (Nicaragua v Colombia), Judgment, ICJ Reports 2012, 624; 2003: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment, ICJ Reports 2008, 12; 2004: *Maritime Delimitation in the Black Sea* (Romania v Ukraine), Judgment, ICJ Reports 2009, 61; 2008: *Maritime Dispute* (Peru v Chile), Judgment of 27 January 2014; 2010: *Whaling in the Antarctic* (Australia v Japan: New Zealand intervening), Judgment of 31 March 2014; **Arbitration**: 1996: Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation (Eritrea/Yemen), 17 December 1999; 2004: Award of the Arbitral Tribunal (Barbados v Trinidad and Tobago), 11 April 2006; 2009: Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India; 1999: *Southern Bluefin Tuna* (New Zealand – Japan, Australia – Japan), Decision of 4 August 2000, RIAA, Vol XXIII, 1; 2001: *Ireland v United Kingdom* ("MOX Plant Case") (2008); Final Award, *Ireland v United Kingdom* ("OSPAR" Arbitration) (2 July 2003); 2003: Award on Agreed Terms (*Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore), (1 September 2005); 2009: *Arbitration Between the Republic of Croatia and the Republic of Slovenia*; 2010: *The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*; 2012: *The ARA Libertad Arbitration* (Argentina v Ghana) (2013).

seems that the arbitral and judicial bodies which have been dealing with issues concerning the law of the sea were particularly keen in taking into account the existing international jurisprudence. As an illustration of this development, reference may be made to the recent statements delivered by Judge Yanai, President of the Tribunal, and Judge Greenwood, of the ICJ, on the occasion of the celebration of the 30th anniversary of the opening for signature of the Convention in New York on 10 December 2012. With respect to the freedom of choice given to States Parties under Article 287 of the Convention, President Yanai stated:

This option given to States to choose one or more international courts or tribunals has sometimes given rise to fears of a fragmentation of international law and of conflicting judgments being delivered by different international courts and tribunals. This concern has proved to be unfounded. The Tribunal has regularly referred to judgments of the International Court of Justice and its predecessor, the Permanent Court of International Justice, and to decisions by other courts and tribunals, both on substantive issues and on procedural points.¹⁹

This assessment was largely shared by Judge Greenwood who, in his intervention, noted that:

when the Convention was adopted, a number of commentators expressed concern that the choice of different methods of dispute settlement in Article 287 ... might lead to a fragmentation of this area of international law and even to competing lines of jurisprudence from different courts and tribunals. In fact, there has been a remarkable harmony between the pronouncements of the [ICJ], the [ITLOS] and the Annex VII arbitration tribunals.²⁰

Incidentally, it may be added that the options offered by Article 287 – a provision sometimes seen as promoting a form of ‘forum shopping’ – remain largely theoretical. Out of 166 States Parties – as of 1 June 2014 – 49 States made a declaration under Article 287 of the Convention. This

¹⁹ Statement of the President of the Tribunal on the occasion of the commemoration of the thirtieth anniversary of the opening for signature of the 1982 United Nations Convention on the Law of the Sea, New York, 10 December 2012, text available on the website of the Tribunal at: http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/yanai/GA_Statement_30th_anniversary_101212.E_FINALE.pdf.

²⁰ Judge C Greenwood, Address to the United Nations General Assembly at the commemoration of the Thirtieth Anniversary of the opening for signature of the 1982 United Nations Convention on the Law of the Sea, text available on the website of the ICJ at: <http://www.icj-cij.org/presscom/files/9/17229.pdf>.

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B. ‘Justice Delay

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C. Flag State and Flag

In its jurispruden application of rule brought by States In the *M/V “SAI”* situation where dif owner of the cargo the *Saiga*, a ship f the authorities of Guinea, raised obj

²¹ Article 49 of 1

²² Article 46 of 1

means that in the majority of disputes between the 166 States Parties, when no declaration was made by a party to the dispute or when the declarations do not select the same forum, there will simply be no choice: arbitration will be the only compulsory mechanism available under the Convention.

B. 'Justice Delayed, Justice Denied'

Access to international justice is not sufficient to ensure an efficient application of the rule of law. It is also necessary that a decision be rendered within a reasonable period of time. In this respect, the Tribunal has demonstrated its ability to deal swiftly with cases submitted to it. The importance that the Tribunal attaches to this point is reflected in provisions of its Rules requiring that proceedings be 'conducted without unnecessary delay or expense'²¹ and that time-limits prescribed for the completion of procedural steps (for example, the date for the filing of written pleadings) should be 'as short as the character of the case permits'.²² The attention paid by the Tribunal to the need to deal promptly with cases is particularly noticeable in its Rules and its practice regarding urgent proceedings (ie, request for prompt release of vessels and crews under Article 292 of the Convention and request for the prescription of provisional measures pending the constitution of an arbitral tribunal under Article 290, paragraph 5, of the Convention). Indeed, the period of time required to deal with these urgent proceedings amounts to approximately one month, from the day of the filing of the application until the delivery of the judgment or the order.

C. Flag State and the Functional Protection of the Vessels Flying its Flag

In its jurisprudence, the Tribunal had the opportunity to revisit the application of rules relating to the admissibility of international claims brought by States in connection with damage caused to private persons. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal was faced with a situation where different persons – crew members, the shipowner and the owner of the cargo – suffered damage due to the arrest and detention of the *Saiga*, a ship flying the flag of Saint Vincent and the Grenadines, by the authorities of Guinea. During the proceedings, the respondent, Guinea, raised objections to the admissibility of the claims, arguing that

²¹ Article 49 of the Rules.

²² Article 46 of the Rules.

the rule of exhaustion of local remedies had not been complied with. In its view, the persons whose rights were prejudiced as a result of alleged violations of international law by Guinea should have first exhausted legal remedies before Guinean Courts. In addition, it referred to the principle of diplomatic protection according to which a State can only claim reparation for its nationals. The application of the nationality of claims' rule would then have prevented the Tribunal from dealing with the issue of damages caused to the persons on board of the vessel, who were nationals of Ukraine and Senegal, as well as the shipowner of the vessel (Tabona Shipping Company Ltd. of Nicosia, Cyprus²³) and the owner of the cargo (Addax BV of Geneva, Switzerland²⁴).

Pursuant to Article 295 of the Convention, local remedies have to be exhausted 'where this is required by international law'. In other words, the rule is not applicable in all circumstances. In 1999, when the Tribunal dealt with the case, the ILC had adopted on first reading its Draft Articles on State Responsibility (the 'Draft'). Article 22 of the Draft specified that the rule that local remedies must be exhausted is applicable in cases where the alleged violation relates to 'an international obligation concerning the treatment to be accorded to aliens'. The rule is therefore not applicable to cases involving a direct violation of the rights of a State. On the basis of this approach, the Tribunal considered that the rule was not applicable to the case before it, since the claims brought by Saint Vincent and the Grenadines were made in relation to rights belonging to that State under the Convention. As an example, reference may be made to Article 90 of the Convention which expressly refers to the freedom of navigation as a right directly conferred upon the flag State.²⁵ That said, whenever the flag State brings an international action for violation of its own rights, it will then claim reparation for the whole damage resulting from the said violation and this may include the prejudice caused to private persons placed under its protection.²⁶

On the issue relating to the nationality of the claims, the Tribunal took a position centred on the need to ensure an efficient protection of the ship and those involved in its operation:

²³ *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, 10 at 27.

²⁴ *Ibid.*, at 28.

²⁵ 'Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.'

²⁶ See *M/V "SAIGA" (No. 2)*, above n23 at 46.

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²⁷ *Ibid.*, 48.

²⁸ *Reparation for Injuries to Nationals in the Event of a Breach of an International Obligation*, Advisory Opinion,

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the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States ... Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.²⁷

As a consequence, the flag State is entitled to claim reparation for the whole damage caused to the ship, regardless of the nationalities of the persons concerned.

The approach adopted by the Tribunal on these two issues (exhaustion of local remedies and nationality of claims) seems to be based on some form of functional protection offered by the flag State to the vessels flying its flag. Such functional protection is not identical to diplomatic protection since it is not based on the nationality of the persons involved. The flag State of the vessel then plays a pivotal role, which is reinforced by the principle of the unity of the ship. Incidentally, it may be observed that the notion of functional protection is not entirely new in international law; it had already been developed by the ICJ in the Reparation case where the Court referred to the United Nations' right of functional protection vis-à-vis its agents.²⁸

Another issue which arose in the *M/V "SAIGA" (No. 2) Case* relates to the compensation that Guinea had to pay to Saint Vincent and the Grenadines in respect of damages caused to private persons. In the context of diplomatic protection, the amount of compensation is paid to the national State of the victims and it is for that State to decide on how, and to what extent, this amount will be allocated among the persons who suffered damage. Nothing prevents, however, an international court from being more precise and from taking a decision as to the amount to which each person would be entitled as compensation for damage caused by violation of international law. That is what the Tribunal did in its judgment of 1999. Paragraph 175 of the judgment gives a precise list of the allocation of damages, including compensation for medical expenses and pain for the persons who were injured during the arrest of the vessel, as well as compensation for the detention of the captain and the members of the crew. The amount of damage for detention is further detailed in an annex to the judgment, which lists each person with the amount of compensation allocated to him.

Grenadines v Guinea),

the right to sail ships

²⁷ Ibid., 48.

²⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 at 185.

D. Protection of Procedural Rights in Environmental Cases²⁹

Over the past few years the number of international cases involving environmental legal issues has increased. This trend is also visible in the practice of the Tribunal relating to the prescription of provisional measures pending the constitution of an arbitral tribunal. The objective of this urgent procedure is to offer legal remedies to the parties to a dispute in a situation where arbitral proceedings have been instituted but the arbitral tribunal has not yet been constituted. Indeed, the constitution of the arbitral tribunal may take several months and, during this period of time, there is a need for legal protection. Then, under Article 290, paragraph 5, of the Convention, the Tribunal has compulsory competence to prescribe provisional measures 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment'. This is, however, subject to the condition that 'the urgency of the situation so requires', the urgency here being assessed in light of the relatively short period of time which will be needed to constitute the arbitral tribunal and enable it to deal with a request for interim measures of protection. Provisional measures under Article 290, paragraph 5, of the Convention are proceedings which may be particularly useful in the context of environmental cases where there is a need to act promptly to avoid further deterioration of the marine environment. This may explain that the four cases which were submitted to the Tribunal under this provision were all related to environmental matters.³⁰ In this context, an interesting aspect of the jurisprudence of the Tribunal concerns the protection of the procedural rights of the parties to the dispute. In environmental cases, the importance of procedural obligations (eg, the obligation to notify, to consult, to exchange information, to conduct an environmental impact assessment ...) should not be underestimated in comparison with substantive obligations (eg, the obligation to comply with specific standards for the emission of pollutants ...). Very often a dispute will arise due to the breach of a procedural obligation requiring eg, prior consultation or exchange of information. In its orders, the

²⁹ See eg, P Gautier 'Urgent proceedings before the International Tribunal for the Law of the Sea' (2009) 8(1) *Issues in Legal Scholarship*.

³⁰ *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280; *MOX Plant (Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, 95; *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, 10.

Tribunal took the tool to ensure the in the *MOX Plant* to exchanging information plant and monitor *Reclamation* case. parties to cooperate establish a group of

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³¹ *MOX Plant*, at

³² *Land Reclamation*

³³ See operative I

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³⁴ In the *Arbitration between Nicaragua and Costa Rica*, the arbitral tribunal maritime boundary of 2006, RIAA, Vol XX *Dispute between Nicaragua and Honduras*, the ICJ stated miles must be in accordance Commission on the Limits of the Continental Shelf (Judgment, ICJ Report 2001, 10) the ICJ dealt with a request for 12 miles in the *Territorial Sea* Judgment of 19 November 2001.

Nicaragua submitted which, by its own information on the which 'shall be subject to accordance with paragraph 1 and took the view that:

which arose in the dispute concerning *Delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*,³⁵ related to the delimitation of the outer continental shelf ie, the continental shelf beyond 200 nautical miles (from the baselines from which the breadth of the territorial sea is measured). More precisely, the Tribunal had to decide whether it should exercise its jurisdiction in order to delimit the outer continental shelf between Bangladesh and Myanmar in the absence of recommendations of the Commission on the Limits of the Continental Shelf (CLCS). Pursuant to Article 76, paragraph 8, of the Convention, States have to establish the limits of their continental shelf beyond 200 nautical miles on the basis of the recommendations of the CLCS. However, in the circumstances of this case, due to the existing dispute between the two States, the Commission was prevented from considering their entitlements to an outer continental shelf. Faced with this situation, the Tribunal observed that it had a role to play since the Convention expressly provides for recourse to judicial means for the delimitation of the continental shelf in the absence of an agreement between the States concerned. It also noted that some States had in practice concluded agreements on the delimitation of their outer continental shelf even prior to any recommendations made by the CLCS on the delineation of their outer continental shelf. Therefore it would be difficult to consider that the Tribunal would be prevented from settling, through a judgment, a matter on which States could agree through a treaty. The Tribunal then came to the conclusion that 'it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal ... would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.'³⁶ As a consequence of its decision, the Tribunal had to verify that the entitlements of both States were not hypothetical. On the basis of a legal interpretation of Article 76 of the Convention, and in particular as regards the terms 'natural prolongation' and 'outer edge of the continental margin', it concluded

since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it. (para 129)

³⁵ *Delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, 4.

³⁶ Judgment of 14 March 2012, para 392.

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³⁷ Ibid., para 446.

³⁸ Ibid., para 446.

³⁹ Ibid., para 443.

⁴⁰ See eg, P Gauti for the Law of the Sea Zhang (eds), *Technica* (Beijing, Science Pres

⁴¹ Article 21, entit Tribunal comprises all with this Convention agreement which conf

⁴² See also Article matter', in the case o tious and advisory jur

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that the two States were entitled to a shelf beyond 200 miles. At the same time, the Tribunal made it clear that this approach was made possible due to 'uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings'³⁷ showing that 'there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm'.³⁸ In other words, the Tribunal would not necessarily adopt the same approach in other circumstances. It even made it clear that it 'would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question'.³⁹

F. Advisory Opinions Before the Tribunal⁴⁰

Contrary to the advisory jurisdiction of the Seabed Disputes Chamber which is contemplated in Article 191 of the Convention, the possibility of submitting a request for a legal opinion to the Tribunal is not expressly addressed in any provision of the Convention. The advisory jurisdiction of the Tribunal is nevertheless based on an interpretation of a particular provision thereof ie, Article 21 of the statute of the Tribunal. Article 21 first refers to the contentious jurisdiction of the Tribunal, with respect to 'all disputes and all applications submitted to it in accordance with this Convention', but this provision immediately goes on and adds 'and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal'.⁴¹ Obviously, the expression 'all matters' is broader than the term 'dispute'⁴² and may be understood as comprising requests for a legal opinion, on the condition that such possibility is provided for in an international agreement related to the purposes of the

³⁷ Ibid., para 446.

³⁸ Ibid., para 446.

³⁹ Ibid., para 443.

⁴⁰ See eg, P Gautier, 'Advisory Proceedings before the International Tribunal for the Law of the Sea' in Haisheng Zhang, Jiabiao Li, Zhiguo Gao and Haiwen Zhang (eds), *Technical and Legal Aspects of the Continental Shelf and the Area* (Beijing, Science Press, 2012,) 129–43.

⁴¹ Article 21, entitled 'Jurisdiction', reads as follows: 'The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.'

⁴² See also Article 288, para 3, of the Convention where the expression 'any matter', in the case of the Seabed Disputes Chambers clearly refers to contentious and advisory jurisdictions of the Chamber.

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Convention. Advisory proceedings before the Tribunal are regulated by Article 138 of the Rules and this provision was recently activated: on 28 March 2013, the Tribunal received its first request for an advisory opinion based on Article 138 of its Rules.

It could be argued that the role of an international court is to adjudicate disputes and not to render non-binding legal opinions. However, it should be recognized that the difference between contentious and advisory proceedings is not always crystal clear: in the *North Sea Continental Shelf Cases*, the ICJ was requested to determine the principles and rules of international law applicable to the delimitation of the continental shelf in the North Sea,⁴³ and it may be stated that a similar result could have been achieved through a legal opinion. Likewise, States have developed, through agreements, the practice of requesting the ICJ to give advisory opinions in order to settle disputes between States and international organizations and those opinions are accepted by the parties to the dispute as legally binding. It may be acknowledged that such a 'binding advisory opinion' – a form of oxymoron – looks very close to a judgment.

On this matter, it should be recalled that States, pursuant to Part XV of the Convention and the UN Charter, have the duty to settle peacefully their disputes. In this context, it is difficult to understand the reasons which would prevent States from jointly requesting an advisory opinion on a legal question which, if properly addressed, could help them in settling a pending issue between them. What really matters is to assess whether advisory proceedings serve the needs of the international community and constitute a useful tool in the administration of international justice.

That said, this should not imply in any way that advisory proceedings could be a suitable substitute for contentious proceedings. Indeed, while it is well recognized in the practice of the ICJ that advisory proceedings

may relate to legal aspects even be nominated in advance keep in mind the basic principle requiring that no dispute shall be referred to the Tribunal without the consent of the States concerned. The Tribunal will certainly provide some guidance on the scope of legal questions which are referred to it under Article 138 of the Rules.

IV. CONCLUSION

Through this overview of the Tribunal, the objective of contributing to the development of questions highlighted above the access to the Tribunal is clear. The frame for handling cases is the protection of the flag State to administer justice promptly damages caused not only under their protection. A decision commented on the notion of justice through the protecting procedural rights settlement of a complex issue to the delimitation of the

⁴³ Article 1 of the special agreement was drafted as follows:

- (1) The International Court of Justice is requested to decide the following question: What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 1 December 1964?
- (2) The Governments of the Federal Republic of Germany and of the Kingdom of the Netherlands shall delimit the continental shelf of the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice

North Sea Continental Shelf, Judgment, ICJ Reports 1969, 6–7.

⁴⁴ For example, in the *Interpretation of the Agreement of 1948 between the Swiss Confederation and the State of Bulgaria* (Advisory Opinion), the ICJ, in the context of the protection of human rights, stated that the Treaties concluded by the State of Bulgaria and the State of Bulgaria entered into force on 1 December 1948. The ICJ was concerned that the issue relating to the interpretation of the Agreement thus could not be subject of the

⁴⁵ 'It is well established that a State, once it has given its consent, be compelled to submit to arbitration, or to any other method of settlement of disputes, such as the *Carelia*, Advisory Opinion,

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may relate to legal aspects of an existing dispute⁴⁴ – judges ad hoc may even be nominated in advisory proceedings – it is equally important to keep in mind the basic principle applicable to all international cases requiring that no dispute should be settled by a judicial body without the consent of the States concerned.⁴⁵ In dealing with advisory proceedings, the Tribunal will certainly have to give to States Parties to the Convention some guidance on the scope of its advisory jurisdiction and on the kind of legal questions which may be submitted to it on the basis of Article 138 of the Rules.

IV. CONCLUSION

Through this overview of some issues addressed in the jurisprudence of the Tribunal, the objective was to illustrate the role of the Tribunal in contributing to the development of the rule of law. In the selection of the questions highlighted above, the focus was placed on issues relating to the access to the Tribunal, its functioning (compulsory mechanism, time frame for handling cases) and the admissibility of claims (functional protection of the flag State). These issues are closely related to the need to administer justice promptly and efficiently and to ensure reparation of damages caused not only to States but also to private persons who are under their protection. A similar approach may be found in the other decisions commented on above, which contribute to a sound administration of justice through the adoption of concrete measures with a view to protecting procedural rights in environmental matters and through the settlement of a complex maritime dispute involving a new issue relating to the delimitation of the outer continental shelf. Likewise, in drafting

⁴⁴ For example, in the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (Advisory Opinion, 1925, PCIJ, Series B, No. 12), several States accused Bulgaria, Hungary and Romania of violating the provisions for the protection of human rights and fundamental freedoms contained in the Peace Treaties concluded by these countries. The Permanent Court of International Justice entertained the request despite the objection raised by the three States concerned that the issue related to a legal question pending between States and thus could not be subject of judicial proceedings without their consent.

⁴⁵ 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.' *Status of Eastern Carelia*, Advisory Opinion, 1923, PCIJ, Series B, No. 5, 27-8.

Article 138 of its Rules, the Tribunal developed a tool which might assist States in the fulfilment of one of their basic obligations under international law ie, to settle their disputes peacefully.

PART III

Regional courts