

ITLOS: The First Six Years

P. Chandrasekhara Rao

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I. Introduction

The United Nations Convention on the Law of the Sea (hereafter “the Convention” or “the Law of the Sea Convention”) entered into force on 16 November 1994. The Convention established the International Tribunal for the Law of the Sea (hereafter “the Tribunal”) as one of the means for the settlement of disputes concerning the interpretation or application of the Convention.¹ The first election to elect the judges of the Tribunal was held on 1 August 1996. The judges so elected met for the first time on 1 October 1996, to elect the President and the Vice-President of the Tribunal and to deal with other organizational matters. The inauguration of the Tribunal took place in the City Hall of Hamburg on 18 October 1996, in the presence of the Secretary-General of the United Nations and other distinguished guests. Six years in the life of any international organization, let alone an international judicial body, is too short a period to evaluate whether it is moving in the direction set out for it by its constituent instrument. However, insofar as the Tribunal is concerned, that period has not been uneventful. This article seeks to assess and place the developments at the Tribunal into perspective.

II. Organization

It is not proposed to deal with the organization of the Tribunal in all its aspects. However, the following aspects deserve attention.

¹ Article 287 of the Convention.

1. A World Court

The Tribunal is an international judicial body established for the settlement of disputes and for rendering advisory opinions concerning the interpretation or application of the Convention. In the scheme of the Convention, it is one of the means for dispute-settlement; nevertheless, it has a number of features in terms of competence and other related matters which distinguish it from the other means. This is fully demonstrated in Annex VI to the Convention, which constitutes the Statute of the Tribunal (hereafter “the Statute”).

The Tribunal is the largest international judicial body at present, since it is composed of 21 judges, each having a nine-year term. The question is often asked whether the Tribunal is too unwieldy to be able to act without unnecessary delay. Without it in any way being implied that a larger body is necessarily better than a smaller one, it is widely known that the Tribunal has dealt with cases with the greatest possible expedition. The Tribunal is fortunate that, in its formative years, almost all its judges were draftsmen of the Convention they are asked to interpret and apply. It has eschewed doctrinaire approaches in its expositions of the provisions of the Convention. In accordance with the high judicial traditions, judges of the Tribunal are prohibited from exercising any political or administrative function.² The Tribunal has itself adopted a confidential internal document on what constitute incompatible activities and is careful to ensure that the principles embodied therein are adhered to.

The ICJ is frequently referred to as “the World Court”, primarily because of its operation on the global plane.³ However, the ICJ is no longer the only institution that can be characterized as a world court. The Tribunal was conceived by the Convention, whose universal character is underlined by the United Nations General Assembly.⁴ The Statute constitutes an integral part of the Convention which means that states and other entities may not participate in the Statute independently of the Convention. Although the Convention is yet to achieve the goal

² See article 7 para. 1 of the Statute.

³ See generally M. Shahabuddeen, “The World Court at the Turn of the Century,” in: A.S. Muller et al. (eds), *The International Court of Justice: Its Future Role After Fifty Years*, 1997, 3 et seq.; G. Abi-Saab, “The International Court as a world court”, in: V. Lowe/ M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice*, 1996, 3 et seq.

⁴ See A/RES/56/12 of 28 November 2001.

of universal participation, it is not seriously disputed that the Convention, together with the Agreement relating to the Implementation of Part XI of the Convention of 1982, sets out the legal framework within which all activities in the oceans and seas must be carried out. The Convention and the Statute underline both the international character and the permanence of the Tribunal.⁵ They further emphasize that the Tribunal is to be a court of justice that applies the Convention and other rules of international law not incompatible with the Convention.⁶

As already mentioned the Tribunal consists of 21 independent members,⁷ elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. Further, in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution is assured.⁸ Judges are elected at a meeting of States Parties to the Convention. The persons elected to the Tribunal are those nominees of States Parties who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties.⁹

The jurisdiction of the Tribunal is not as broad as that of the ICJ;¹⁰ it is confined to matters provided for in the Convention.¹¹ However, un-

⁵ Part XV, section 2, read in conjunction with Annex VI to the Convention, provides for the establishment of the Tribunal as a standing body. The international character of the Tribunal is assured by the provisions of section 1 (arts 2 to 19) of the Statute.

⁶ See article 293 para. 1 of the Convention.

⁷ Subject to the requirement under the Statute (article 3 para. 2) that there shall be no fewer than three members from each geographical group as established by the United Nations General Assembly, it is the States Parties to the Convention which agree upon the actual geographical distribution at the elections. At the first election, the Meeting of States Parties decided that the 21 judges were to be elected as follows: (a) 5 judges from the African Group; (b) 5 judges from the Asian Group; (c) 4 judges from the Latin American and Caribbean Group; (d) 4 judges from the Western European and Other States Group; and (e) 3 judges from the Eastern European Group. At the second election held in 1999 and the third election in 2002 to elect on each occasion seven members of the Tribunal, the decision reached by the States Parties at the first election remained unchanged.

⁸ Article 2 of the Statute.

⁹ See article 4 para. 4 of the Statute.

¹⁰ See Article 36 of the Statute of the ICJ.

¹¹ See article 288 of the Convention and article 21 of the Statute.

like the ICJ,¹² the Tribunal is open to entities other than States,¹³ which contributes to the Tribunal's comprehensive character. The Tribunal's decisions,¹⁴ like the decisions of the ICJ,¹⁵ are final and are required to be complied with by all parties to the disputes. Thus, except in relation to its jurisdiction, which is limited because the Tribunal is intended to be a specialized judicial forum, in other respects the Tribunal enjoys a standing comparable to that of the ICJ.

To keep pace with increasing globalization, international law-makers have in recent years created, through multilateral treaties or other means, more than one specialized judicial forum to deal with special categories of disputes of transnational significance.¹⁶ These forums consist of judges who are specialists in the subject matter of interest to them. It has been suggested that those specialized courts ought to secure advisory opinions from the ICJ in the interests of preserving the integrity of international law. This view runs counter to what the law-makers had intended.¹⁷ Also it is wrong to assume that the importance of the ICJ will be diminished on account of judicial decentralization. The growing caseload of that body does not point in that direction. Rather than calling into question the wisdom of what has been assigned to each judicial forum, the more fruitful course is to find ways and means to make the working methods of each such forum responsive to the needs of the litigants.

¹² See Article 34 of the Statute of the ICJ.

¹³ See article 291 of the Convention and article 20 of the Statute.

¹⁴ See Arts 59 and 60 of the Statute of the ICJ.

¹⁵ See article 296 of the Convention and article 33 of the Statute.

¹⁶ See Judge R. Higgins, "Respecting Sovereign States and Running a Tight Courtroom," *ICLQ* 50 (2001), 121 et seq.

¹⁷ Disagreeing with the successive Presidents of the ICJ, who at the United Nations General Assembly have called for the ICJ to provide advisory opinions to other tribunals on points of international law, Judge Rosalyn Higgins observed: "This seeks to re-establish the old order of things and ignores the very reasons that have occasioned the new decentralisation", see note 16, 122.

2. Chambers and Committees

a. Chambers

The Statute makes provision for the establishment of the Seabed Disputes Chamber¹⁸ and special chambers¹⁹ for dealing with particular categories of disputes or particular disputes. The Seabed Disputes Chamber, a standing body, was established on 20 February 1997 during the second session of the Tribunal.²⁰ The members of the Chamber are selected every three years and may be selected for what the Statute calls a “second term”,²¹ thereby suggesting a consecutive second term and ineligibility for a third consecutive term. The Rules of the Tribunal (hereafter “the Rules”) provide that the term of office of members selected at triennial elections expires on 30 September every three years thereafter.²² During the eighth session, on 4 October 1999, the Tribunal selected the members of the Chamber.²³

As in the Tribunal, so also in the Seabed Disputes Chamber, it is a requirement of the Statute that the representation of the principal legal systems of the world and equitable geographical distribution are assured.²⁴ The Statute further gives discretionary power to the Assembly of the International Seabed Authority to adopt recommendations of a general nature relating to such representation and distribution.²⁵ The Assembly has not made any recommendations on the subject so far. It is, however, for the Tribunal to ensure that the requirement of the Statute referred to above is complied with, giving due weight to recommendations, if any, of the Assembly. It is the President who makes pro-

¹⁸ See article 14 of the Statute.

¹⁹ See article 15 of the Statute.

²⁰ The composition of the Chamber was as follows: Judge Akl, President; Judges Zhao, Marotta Rangel, Bamela Engo, Nelson, Chandrasekhara Rao, Anderson, Vukas, Warioba, Treves and Ndiaye, members.

²¹ See article 35 para. 3 of the Statute.

²² Article 23 of the Rules. It further provides that the term of office of members selected at the first selection shall expire on 30 September 1999.

²³ The composition of the Chamber is as follows: Judge Treves, President; Judges Zhao, Marotta Rangel, Yamamoto, Kolodkin, Park, Bamela Engo, Vukas, Wolfrum, Laing and Marsit, members. At its twelfth session, the Tribunal selected Judges Caminos and Xu to fill the vacancies created by the deaths of Judges Zhao and Laing.

²⁴ See article 35 para. 2 of the Statute.

²⁵ *Ibid.*

posals to the Tribunal, after undertaking due consultations with the judges, in the matter of selection of the members of the Chamber. The Chamber elects its President from among its members.²⁶ According to the practice hitherto followed, while the President of the Tribunal convenes the meeting of the Chamber for the purposes of electing its president, he does not participate in any meeting of the Chamber. The senior member of the Chamber sits in the chair to conduct the election of the President of the Chamber.²⁷ The Statute empowers the Seabed Disputes Chamber to form an *ad hoc* chamber for dealing with a particular dispute, whose composition shall be determined with the approval of the parties.²⁸ There has been no occasion so far to form such a chamber.

Though the Seabed Disputes Chamber has not had any cases to date, it has met several times, especially during the last three years, to examine the Rules applicable to the Chamber with a view to ensuring that the Chamber could handle problems of an organizational and procedural nature which might arise if a case, whether of a contentious or advisory nature, were to be submitted to it.

The special chambers of the Tribunal take their inspiration from similar chambers of the ICJ.²⁹ Of these chambers, the Chamber of Summary Procedure is formed by the Tribunal every year.³⁰ It is composed of the President and Vice-President, acting *ex officio*, and three other members of the Tribunal.³¹ Two more members of the Tribunal are also selected as alternates for the purpose of replacing members who

²⁶ See article 35 para. 4 of the Statute.

²⁷ At the first meeting of the Seabed Disputes Chamber, held on 20 February 1997, when the Chamber found it difficult to select its President through voting, the senior member presiding over the meeting invited the President of the Tribunal to be present in the meeting as an observer. When the vote was subsequently taken and failed to produce a decision, the senior member and the President invited the candidates contesting the election for informal consultations outside the room where the Chamber was meeting. This later helped the Chamber in arriving at a decision.

²⁸ See article 36 of the Statute. This chamber is similar to the *ad hoc* chamber under article 15 para. 2 of the Statute.

²⁹ See Arts 26, 27 and 29 of the Statute of the ICJ. On the chambers of the ICJ, see generally R. Ostrihansky, "Chambers of the International Court of Justice", *ICLQ* 37 (1988), 30 et seq.; E. Valencia-Ospina, "The Use of Chambers of the International Court of Justice" in: Lowe/ Fitzmaurice, see note 3, 503.

³⁰ See article 15 para. 3 of the Statute.

³¹ See article 28 para. 1 of the Rules.

are unable to participate in a particular proceeding.³² The members and alternates of the Chamber are selected by the Tribunal upon the proposal of the President of the Tribunal.³³ The selection is made as soon as possible after 1 October in each year.³⁴

The Chamber of Summary Procedure is also assigned an important function in respect of provisional measures. If the President of the Tribunal ascertains that, at the date fixed for the hearing on a request for the prescription of provisional measures, a sufficient number of judges will not be available to constitute a quorum, the Chamber of Summary Procedure is required to be convened to carry out the functions of the Tribunal with respect to the prescription of provisional measures.³⁵ Notwithstanding article 15, para. 4, of the Statute, such provisional measures may be adopted at the request of any party to the dispute; they are, however, subject to review and revision by the Tribunal.³⁶

The Chamber of Summary Procedure has never met, since no case has been brought before it;³⁷ nor has any contingency arisen in which it could prescribe provisional measures.

The Rules provide that an application for the release of a vessel or its crew from detention under article 292 of the Convention is required to be dealt with by the Chamber of Summary Procedure if the applicant has so requested in the application, provided that, within five days of the receipt of notice of the application, the detaining State notifies the Tribunal that it concurs with the request.³⁸ This provision has been invoked unsuccessfully on two occasions. In the *M/V "Saiga" Case (Saint Vincent and the Grenadines v. Guinea)*, *Prompt Release*, the very first case before the Tribunal. The Application of Saint Vincent and the Grenadines under article 292 of the Convention included a request for the submission of the case to the Chamber of Summary Procedure. Since Guinea did not notify the Tribunal of its concurrence with the re-

³² Ibid. See also article 15 para. 3 of the Statute.

³³ See article 28 para. 2 of the Rules.

³⁴ See article 28 para. 3 of the Rules.

³⁵ See article 25 of the Statute, read in conjunction with article 91 of the Rules.

³⁶ Ibid.

³⁷ In the history of the PCIJ and the ICJ, the Chamber of Summary Procedure settled only one dispute – *Interpretation of the Treaty of Neuilly* – delivering a judgment on the merits in 1924 and a judgment on interpretation a year later. See M. O. Hudson, *The Permanent Court of International Justice 1920-1942. A Treatise*, 1943, 346; Ostrihansky, see note 29, 32.

³⁸ See article 112 para. 2 of the Rules.

quest within the time-limit provided for in the Rules, the case was dealt with by the Tribunal itself.³⁹ Again, on behalf of Panama, an application under article 292 of the Convention was filed on 3 July 2001 against Yemen which contained a request that the case be dealt with by the Chamber of Summary Procedure. The Application was for the release of the *Chaisiri Reefer 2*, a fishing vessel flying the flag of Panama, its cargo and crew. The Application was entered in the List of cases as Case No. 9 and named "*Chaisiri Reefer 2*" Case. Yemen did not accept Panama's request. Following an agreement between the two parties, the President of the Tribunal, by Order dated 13 July 2001, directed the removal of the case from the List of cases.

While the Rules make it clear that the Chamber of Summary Procedure could, with the agreement of the parties, deal with prompt release cases under article 292 of the Convention, the Statute and Rules do not specify what other types of dispute could be handled by this Chamber. The Statute, however, makes it clear that this Chamber is formed "with a view to the speedy dispatch of business" and that it has to hear and determine disputes by "summary procedure",⁴⁰ expressions which in the context of the Chamber of Summary Procedure of the ICJ and of the Permanent Court of International Justice (PCIJ) were taken to mean that the Chamber could deal with "cases of a secondary importance in the sense that they lend themselves to ready solution"⁴¹ or "disputes not requiring particularly intricate and detailed interpretation of law."⁴²

The Statute confers discretionary powers on the Tribunal to form special chambers as standing bodies for dealing with "particular categories of disputes", each chamber to consist of three or more elected members of the Tribunal.⁴³ When the Tribunal decides to form a special chamber, the Rules enable it to determine, among other things, the particular category of disputes for which it is formed, the number of its members, and the period for which they will serve.

On 14 February 1997, during its second session, the Tribunal formed two such chambers: the Chamber for Fisheries Disputes and the

³⁹ See para. 5 of the judgment of the Tribunal delivered on 4 December 1997 in the *M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*, *Prompt Release, ITLOS Reports 1997*, 16 et seq., (18).

⁴⁰ See article 15 para. 3 of the Statute.

⁴¹ See Hudson, see note 37, 346.

⁴² See Ostrihansky, see note 29, 32.

⁴³ See article 15 para. 1 of the Statute.

Chamber for Marine Environment Disputes, each to consist of seven members of the Tribunal. The term of office of the members of each Chamber began on 20 February 1997 and ended on 30 September 1999. By separate resolutions adopted on 28 April 1997,⁴⁴ the Chamber for Fisheries Disputes was declared competent to deal with disputes relating to the interpretation or application of any provision of (a) the Convention concerning the conservation and management of marine living resources, and (b) any other agreement relating to the conservation and management of marine living resources which confers jurisdiction on the Tribunal, and the Chamber for Marine Environment Disputes was empowered to deal with disputes relating to the interpretation or application of any provision of (a) the Convention concerning the protection and preservation of the marine environment, (b) special conventions and agreements relating to the protection and preservation of the marine environment referred to in article 237 of the Convention, and (c) any agreement relating to the protection and preservation of the marine environment which confers jurisdiction on the Tribunal. By separate resolutions adopted on 8 October 1999, the Tribunal constituted these Chambers again for a three-year period with the same terms of reference.⁴⁵ In an application for prompt release of a vessel under article 292 of the Convention, it was proposed that the case be heard by the Chamber for Fisheries Disputes. The Registry turned this application down on several grounds, one of which was that this Chamber could not deal with a “prompt release” case since such cases did not fall within its terms of reference.

The members of each Chamber are selected by the Tribunal upon the proposal of the President from among the members of the Tribunal, having regard to what is referred to in the Rules as “any special knowledge, expertise or previous experience which any of the members may have in relation to the category of disputes the chamber deals with.”⁴⁶ While there is no strict rule in this regard, the claims of judges coming from different geographical regions and representing different legal systems are also respected as far as possible in relation to the composition of the special chambers formed under article 15, paras 1 and 3, of the Statute and of the committees and also in the selection of presiding

⁴⁴ For the text of the resolutions, see Tribunal’s *Yearbook 1996-1997*, Vol. 1, Annexes IV and V.

⁴⁵ For the text of the resolutions, see Tribunal’s *Yearbook 1999*, Vol. 3, Annexes IV and V.

⁴⁶ See article 29 para. 2 of the Rules.

judges. The President, on whose proposals members of chambers are selected by the Tribunal, carries a special responsibility in this regard. He also has to take due note of personal preferences of judges. It is not, however, a requirement of the Statute that, in the selection of the members of special chambers, the representation of the principal legal systems of the world and equitable geographical distribution should be assured.

Each Chamber elects its own President at a meeting convened especially for this purpose by the President of the Tribunal; such a meeting is presided over by the senior member of the Chamber. These Chambers have yet to be used, despite the fact that the full Tribunal has dealt with cases in the areas with which they are concerned.

Article 15, para. 2, of the Statute provides for the formation of a special chamber for dealing with "a particular dispute" submitted to it, if the parties so request; such a request must be made within two months from the date of the institution of proceedings.⁴⁷ The President of the Tribunal must then ascertain whether the other party assents.⁴⁸

The Rules provide that, when the parties have agreed to have a special chamber, the President of the Tribunal must ascertain the views of the parties regarding the composition of the chamber and must report to the Tribunal accordingly;⁴⁹ the Tribunal must also determine, with the approval of the parties, the members who are to constitute the chamber.⁵⁰ This enables the Tribunal to act upon the agreement of the parties while formally preserving its power to constitute the chamber. This new system of chambers was introduced first within the ICJ to help parties pick and choose from among judges of that court whom they want to sit in their case.⁵¹

If the special chamber does not have a member of the nationality of one of the parties, that party may choose a person to participate as a member of the special chamber, even if the full Tribunal (as distinct from the special chamber) has on the bench a member of the nationality of the party, for the provisions of article 17, para. 4, of the Statute apply

⁴⁷ See article 30 para. 1 of the Rules.

⁴⁸ *Ibid.*

⁴⁹ See article 30 para. 2 of the Rules.

⁵⁰ See article 30 para. 3 of the Rules.

⁵¹ See Article 26 para. 2 of the Statute of the ICJ, read in conjunction with Article 17 para. 2 of the Rules of the ICJ. See also *Abi-Saab*, see note 3, 9.

only in respect of standing chambers and not an *ad hoc* chamber.⁵² The only *ad hoc* chamber formed by the Tribunal so far was in a case between Chile and the European Community; since the European Community had chosen a judge of the Tribunal who is of the nationality of a Member State of that international organization to participate as a member of the Chamber, Chile chose a judge *ad hoc* to participate as a member of the chamber.⁵³

An *ad hoc* chamber should be of particular interest to parties who are considering arbitration. As in arbitration, in respect of an *ad hoc* chamber the parties are given substantial freedom to choose the judges of the Tribunal who are to sit in such a chamber. A judgment given by any of the special chambers is considered to have been rendered by the full Tribunal.⁵⁴ In the *ad hoc* chamber system, the parties can enjoy all the benefits of ordinary arbitration, without having to bear the expenses of the chamber.⁵⁵ The parties get the benefit of the Rules; they may even propose modifications to the Tribunal's rules of procedure which a chamber may apply.⁵⁶ Even if members of an *ad hoc* chamber are re-

⁵² See P. Chandrasekhara Rao, "International Tribunal for the Law of the Sea: An Overview", in: P. Chandrasekhara Rao/ R. Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice*, 2001, 3.

⁵³ See article 22 para. 3 of the Rules; Order of 20 December 2000 of the Tribunal in the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*. The composition of the Chamber is as follows: President Chandrasekhara Rao, President; Judges Caminos, Yankov and Wolfrum and Judge *ad hoc* Orrego Vicuña, members.

⁵⁴ See article 15 para. 5 of the Statute.

⁵⁵ By virtue of article 19 of the Statute, the expenses of the Tribunal are borne by the States Parties and by the International Seabed Authority on such terms and in such a manner as shall be decided at meetings of the States Parties. The States Parties take these decisions at their annual meetings, which are held to consider, among other things, the budget of the Tribunal. Article 19 further provides that when an entity other than a State Party or the International Seabed Authority is a party to a case submitted to it, the Tribunal shall fix the amount which that party is to contribute towards the expenses of the Tribunal. The Tribunal is engaged in the task of evolving general criteria which could help in fixing the amount payable by an entity other than a State Party towards the expenses of the Tribunal when a case to which it is a party is submitted to the Tribunal.

⁵⁶ See article 48 of the Rules. In its Order of 20 December 2000, in the *Case concerning the Conservation and Sustainable Exploitation of Swordfish*

placed following the expiration of their terms of office, they continue to sit in all phases of the case, whatever the stage it has then reached,⁵⁷ a provision that should prove to be of special interest to potential users of *ad hoc* chambers who would not want any change in the composition of such chambers once they are constituted. Further, the Statute provides that disputes may be “heard and determined” by the special chambers only “if the parties so request.”⁵⁸

The question is often asked whether the system of special chambers will prove successful. In the case of the ICJ, parties are not viewing them with favour; the *ad hoc* chambers were used in only four cases during the period 1982-1987.⁵⁹ There is no reason to believe that special chambers would invariably deliver their orders or judgments much more quickly or that they would entail significantly lower costs for the parties than the full Tribunal. What is more, parties may even consider that the judgment of a full Tribunal stands on a higher footing than the judgment of a chamber, though in the eye of the law they both have the same force. That said, special chambers may be of interest to parties if, under certain circumstances, their composition proves attractive to them. It is perhaps reasonable to assume that, of the special chambers, an *ad hoc* chamber may have greater appeal to the parties. Since the Convention makes provision for an *ad hoc* chamber and since such a chamber would consist of judges of the Tribunal elected by the States Parties, the character of the chamber “as a court of justice” is by no means compromised; nor can such a chamber be treated as an arbitral body.

Stocks in the South-Eastern Pacific Ocean (Chile/European Community), the Tribunal made modifications to its Rules as proposed by the parties.

⁵⁷ See article 30 para. 4 of the Rules. This provision is modelled on Article 17 para. 4 of the Rules of the ICJ. With regard to the position that obtains when a member of the Tribunal is replaced, see article 5 para. 3 of the Statute.

⁵⁸ See article 15 para. 4 of the Statute.

⁵⁹ See Valencia-Ospina, see note 29, 508-510. By a joint letter of 11 April 2002, filed on 3 May 2002 in the Registry of the ICJ, Benin and Niger notified the Court of a Special Agreement whereby they had agreed to submit their boundary dispute to a Chamber to be formed by the Court, pursuant to Article 26 para. 2 of the Statute of the Court. They had also agreed that each of them would choose a judge *ad hoc*. See ICJ Press Release 2002/13 of 3 May 2002.

b. Committees

At its second session, held in February 1997, the Tribunal established *ad hoc* working groups to deal with matters relating to the budget, staff and library and publications. Later, at its third session, held in April 1997, the Tribunal established four standing committees — the Committee on Budget and Finance, the Committee on Rules and Judicial Practice, the Committee on Staff and Administration and the Committee on Library and Publications — to replace the *ad hoc* working groups.⁶⁰ It decided that the term of office of the members of a committee would be one year, ending on 30 September every year thereafter.⁶¹ At its eighth session, on 4 October 1999, the Tribunal established a new standing committee — the Committee on Buildings and Electronic Systems.⁶²

Unlike the chambers, the Committees are not entrusted with cases. They deal with, among other things, the finances of the Tribunal, including budget proposals, administrative matters, the building requirements of the premises of the Tribunal, library facilities, publications, the website of the Tribunal, and the Rules.⁶³ Of the committees constituted by the Tribunal so far, the first two Presidents have presided over the Committee on Rules and Judicial Practice, a committee whose work has a close bearing on the judicial work of the Tribunal. There is, however, no hard-and-fast rule in this regard. The recommendations of the Committees are placed before the Tribunal and are generally accepted. In a body of 21 judges, the committee system has helped giving a subject the attention it deserves without encroaching on the authority or dignity of a larger deliberative forum.

⁶⁰ See the Tribunal's *Yearbook 1996-1997*, Vol. 1, 80.

⁶¹ An exception was made in the case of members of committees selected in April 1997; their term ended on 30 September 1998. Though each committee is reconstituted every year, the Tribunal has, in practice, allowed the members to continue their respective terms for three successive years; minor changes in membership were, however, made following the election of new members to fill the vacancies in the membership of the Tribunal.

⁶² This replaced the Working Group on Buildings and Electronic Systems set up at the seventh session of the Tribunal on 16 April 1999.

⁶³ For the terms of reference of the Committees, see SPLOS/27, paras 27-40, and SPLOS/50, paras 36 and 37.

3. The President

The President and Vice-President are elected by the Tribunal for three years; they may be re-elected.⁶⁴ The election takes place by secret ballot. No nominations are permitted for the office of the President. The ballot papers contain the names of all judges; the judges are invited to tick off the name of the judge whom they wish to support as President of the Tribunal. The support of a majority of the judges of the Tribunal composing it at the time of the election, is required for a judge to be elected as President.⁶⁵ If no judge obtains the required support in the first ballot, the process is repeated until such time as the necessary support is received. The same procedure is followed in respect of the election of the Vice-President.⁶⁶

The election of the President (and Vice-President) should take place on 1 October or shortly thereafter of the year in which a triennial election of one third of the judges of the Tribunal occurs.⁶⁷ Whatever the date of election, the term of office of the President begins on 1 October and ends when the new President is elected.⁶⁸ The outgoing President, if he is still a judge on the date of election, conducts the election of the new President.⁶⁹ The new President conducts the election of the Vice-President either at the same time or at the following meeting.⁷⁰

The conception of the office of the President of the Tribunal in the Statute, the Rules, the Resolution on the Internal Judicial Practice of the Tribunal (hereafter “the Resolution”) and the decisions of the Tribunal on the role of the President is fundamentally the same as that of the office of the President of the ICJ.⁷¹ The President occupies a pivotal posi-

⁶⁴ See article 12 para. 1 of the Statute. It is too early to talk about the practice of the Tribunal in the matter of re-election. The first and second Presidents of the Tribunal did not seek re-election.

⁶⁵ See article 11 para. 2 of the Rules.

⁶⁶ See article 11 para. 3 of the Rules.

⁶⁷ See article 10 para. 2 of the Rules.

⁶⁸ Ibid.

⁶⁹ See article 11 para. 1 of the Rules.

⁷⁰ See article 11 para. 3 of the Rules. The first President and Vice-President were elected on 5 October 1996. The current President was elected on 1 October 1999 and the current Vice-President was elected on 4 October 1999.

⁷¹ See, generally on the office of President of the ICJ, P. Spender, “The Office of President of the International Court of Justice”, *Australian Yearbook of*

tion in relation to the work of the Tribunal and its administration. On account of this position, he takes precedence over the other members.⁷²

The President directs the work of the Tribunal,⁷³ supervises the administration of the Tribunal⁷⁴ and presides at all meetings of the Tribunal.⁷⁵ He has a casting vote in the event of an equality of votes by judges present on questions before them.⁷⁶ In practice, so far the President has not had to exercise his casting vote. On one occasion, when there was an equality of votes in indicative voting, the President indicated that he would vote a second time in much the same way as his first vote; the matter was subsequently taken as having been settled without proceeding to a formal vote. However, over the last three years, on each occasion when there was an equality of votes, the voting process was suspended. The President contributed to further elucidation of the issue, both through formal debate and informal consultation. When the vote was subsequently taken, the matter was resolved without the need for the President's casting vote. Of course, if the disagreement among judges reaches an impasse, the President's casting vote may become unavoidable.⁷⁷

The President convenes the Tribunal at any time in the event of urgency;⁷⁸ controls the hearing in a case;⁷⁹ presides over any special chamber of which he is a member;⁸⁰ chairs meetings of a drafting committee set up for a case if he shares the majority opinion as it appears at

International Law 1 (1965), 9 et seq.; Muhammad Zafrulla Khan, "The Appointment of Arbitrators by the President of the International Court of Justice", XIV *Comunicazioni e Studi: Il Processo Internazionale, Studi in onore de Gaetano Morello*, 1975, 1021; S. Rosenne, "The President of the International Court of Justice", in: Lowe/ Fitzmaurice, see note 3, 406 et seq.

⁷² See article 4 para. 4 of the Rules.

⁷³ See article 12 para. 1 of the Rules.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ See article 29 para. 2 of the Statute.

⁷⁷ For the practice of the PCIJ and ICJ in this regard, see Rosenne, see note 71, 410-411.

⁷⁸ See article 41 para. 6 of the Rules.

⁷⁹ See article 26 para. 1 of the Statute.

⁸⁰ See article 31 para. 1 of the Rules.

the time of the formation of such committee;⁸¹ and signs the judgments and advisory opinions and reads them at public sittings of the Tribunal.⁸² He ascertains the views of the parties with regard to questions of procedure in every case submitted to the Tribunal.⁸³

The President represents the Tribunal in its relations with States and other entities.⁸⁴ The President and the Registrar represent the Tribunal at the Meetings of States Parties to the Convention. The President presents at these meetings the annual reports of the Tribunal (giving an account of the activities of the Tribunal covering the period from 1 January to 31 December of the relevant year), the budget proposals and any other proposals regarding regulations and rules of the Tribunal. He is also called upon at the meetings to give such other information as States Parties consider appropriate.⁸⁵ The President represents the Tribunal at the plenary meetings of the United Nations General Assembly dealing with the item "Oceans and the law of the sea" and makes a statement on the activities of the Tribunal. He is invited by the German Federal Government and the City of Hamburg to all important functions. He is also invited to meetings and seminars to speak on the activities of the Tribunal. He approves appointments to such posts as the Tribunal determines.⁸⁶

The President of the Tribunal exercises certain powers of the Tribunal when the Tribunal is not sitting. The delegated powers of the President include the following: determination of the number and order of filing of pleadings and the time-limits within which they must be filed;⁸⁷ making copies of the pleadings and documents annexed thereto accessible to the public;⁸⁸ fixing the date for the opening of the oral proceedings or postponing the opening or continuance of such pro-

⁸¹ See article 6 of the Resolution. Except in the *M/V "Saiga" Case (Saint Vincent and the Grenadines v. Guinea)*, *Prompt Release*, in all other cases decided so far, the President was the Chairman of the Drafting Committee.

⁸² See article 30 para. 4 of the Statute; arts 124, 125, 135 and 137 of the Rules.

⁸³ See article 45 of the Rules.

⁸⁴ See article 12 para. 2 of the Rules.

⁸⁵ See rule 37 of the Rules of Procedure for Meetings of States Parties (SPLOS/2/Rev. 3 of 26 July 1995).

⁸⁶ See article 35 para. 1 of the Rules.

⁸⁷ See article 59 of the Rules. This is without prejudice to any subsequent decision of the Tribunal.

⁸⁸ See article 67 paras 2 and 3 of the Rules.

ceedings;⁸⁹ fixing the earliest possible date for a hearing over a request for the prescription of provisional measures;⁹⁰ fixing the date for a hearing in respect of an application for the release of vessels and crews in accordance with article 292 of the Convention;⁹¹ fixing time-limits for the presentation of observations and submissions in regard to a preliminary objection⁹² or the respondent's request for a determination concerning preliminary proceedings under article 294 of the Convention;⁹³ making an order regarding the discontinuance of proceedings if the parties have agreed to such discontinuance.⁹⁴

When a request for provisional measures is submitted, pending the meeting of the Tribunal, the President may call upon the parties to act in such a way as will enable any order the Tribunal may make on the request to have its appropriate effects.⁹⁵ There has been no occasion to invoke this power so far. Orders of the Tribunal also authorize the President to request from each party such reports and information as he may consider appropriate upon the steps it has taken or proposes to take in order to ensure prompt compliance with the provisional measures the Tribunal has prescribed.⁹⁶

The Rules envisage certain situations in which the functions of the presidency "shall be exercised" by the Vice-President of the Tribunal or, failing that, by the Senior Member: (i) vacancy in the presidency, arising on account of the resignation of the President or of the death of the

⁸⁹ See article 69 para. 3 of the Rules.

⁹⁰ See article 90 para. 2 of the Rules.

⁹¹ See article 112 para. 3 of the Rules.

⁹² See article 97 para. 3 of the Rules

⁹³ See article 96 para. 5 of the Rules.

⁹⁴ See article 105 para. 3 of the Rules.

⁹⁵ See article 90 para. 4 of the Rules. On precedents of the PCIJ and the ICJ in this regard, see Spender, see note 71, 17-18.

⁹⁶ See article 95 of the Rules and Orders of the Tribunal in the *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, *Provisional Measures, Order of 11 March 1998 ITLOS Reports 1998*, 24 et seq., (40); *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures, Order of 27 August 1999*, para. 90(2); the *MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures, Order of 3 December 2001*, para. 89 (2).

President, and (ii) inability of the President to exercise the functions of the presidency.⁹⁷

There may also be situations in which the President is precluded from sitting or presiding in a case.⁹⁸ In such an event, he shall continue to exercise the functions of the presidency for all purposes save in respect of that case.⁹⁹

The President has to take the measures necessary to ensure the continuous exercise of the functions of the presidency at the seat of the Tribunal.¹⁰⁰ In the event of his absence, he may, so far as is compatible with the Statute and the Rules, arrange for those functions to be exercised by the Vice-President of the Tribunal or, failing that, by the Senior Member.¹⁰¹ In practice, the President would not make arrangements for the discharge of his functions on all his absences from the seat of the Tribunal. Such arrangements are made when the President goes on vacation; he invites the Vice-President to exercise the functions of the Presidency during his absence. It is understood that the person exercising the functions of the President generally attends to matters which deserve immediate attention (in consultation with the President, where possible). There has so far been no occasion when the President's functions in respect of judicial work have been exercised by any other person.

The draft agenda for all meetings of the Tribunal is prepared with the approval of the President.¹⁰² The President also approves records of such meetings prepared by the Registrar.

The press releases, yearbooks and other publications of the Tribunal are prepared and issued by the Registry; they do not involve the responsibility of the Tribunal. Nevertheless, the President is consulted before they are issued.

⁹⁷ See article 13 of the Rules. This inability may arise on account of physical or mental disabilities. It should be ascertained on objective criteria and not be lightly inferred.

⁹⁸ See article 8 para. 1 of the Statute; article 16 para. 1 of the Rules.

⁹⁹ See article 13 para. 2 of the Rules.

¹⁰⁰ See article 13 para. 3 of the Rules.

¹⁰¹ *Ibid.*

¹⁰² See article 4 para. 3 of the Instructions for the Registry as adopted by the Tribunal on 17 March 2000.

4. The Registrar and the Registry

It is widely known that in more than one international court the relations between the Registrar and the other staff members of the Registry, especially the Deputy Registrar, as well as the relations between the Registrar and the President and other judges of the court have not always been free from tension.¹⁰³ This does not appear to be due to a lack of rules and regulations defining such relations. The relevant provisions governing the Registry of the Tribunal may be recalled here.

The Registry of the Tribunal¹⁰⁴ is modelled on the Registry of the ICJ,¹⁰⁵ which in turn took its inspiration from the Registry of the PCIJ.¹⁰⁶ It is designed to play an important role in the functioning of the Tribunal. With respect to the Tribunal, the Registrar is the head of the Registry.¹⁰⁷ The Deputy Registrar is required to assist the Registrar, act as Registrar in the latter's absence and, in the event of the office of the Registrar becoming vacant, exercise the functions of the Registrar until the office has been filled.¹⁰⁸ Further, in dividing the work between the Registrar and the Deputy Registrar, the Registrar is called upon to ensure that "both of them are constantly in touch with the work of the Tribunal and of the Registry."¹⁰⁹ The object underlying this division of work is twofold: to promote efficiency through decentralization of work and ensure a smooth take over of functions in the event of the Registrar's absence or the office of the Registrar becoming vacant.

The Registrar has manifold duties entrusted to him by the Rules, the Staff Regulations of the Tribunal, the Resolution, the Guidelines con-

¹⁰³ Report of the Office of Internal Oversight Services on the audit and investigation of the International Criminal Tribunal for Rwanda (Doc. A/51/789 of 6 February 1997) and the action taken by the United Nations Secretary-General (UN Press Release SG/SM/6172 of 26 February 1997); Report of the Joint Inspection Unit entitled "Review of management and administration in the Registry of the International Court of Justice" (Doc. A/55/834 of 13 December 2000) and the comments of the ICJ and those of the United Nations Secretary-General (Doc. A/55/834/Add.1 of 14 March 2001).

¹⁰⁴ See articles 32 to 39 of the Rules.

¹⁰⁵ See Articles 22 to 29 of the Rules of the ICJ.

¹⁰⁶ See Articles 14 to 23 of the Rules of the PCIJ.

¹⁰⁷ See article 1 para. 2 of the Instructions for the Registry.

¹⁰⁸ See article 37 of the Rules.

¹⁰⁹ See article 30 of the Instructions for the Registry.

cerning the Preparation and Presentation of Cases before the Tribunal (hereafter “the Guidelines”), the Instructions for the Registry (hereafter “the Instructions”), the Financial Regulations of the Tribunal, the decisions of the Tribunal and the Rules of Procedure for Meetings of States Parties to the Convention. The main functions of the Registrar are specified in article 36 of the Rules. In sum, he is responsible for handling the administrative work and finances of the Tribunal; he should be present in person or be represented at meetings of the Tribunal and of the Chambers; he is responsible for preparing records of such meetings; and he is the regular channel of communications to and from the Tribunal and deals with inquiries concerning the Tribunal and its work. The staff of the Registry are appointed by the Tribunal on proposals submitted by the Registrar.¹¹⁰ Appointments may be made by the Registrar, with the approval of the President, to posts specified by the Tribunal.¹¹¹ Like the judges, the Registrar too enjoys diplomatic privileges, immunities and facilities.¹¹²

The Tribunal elects its Registrar and Deputy Registrar by secret ballot from among candidates nominated by its members. The Registrar has a rank equivalent to an Assistant Secretary-General of the United Nations and the Deputy Registrar the rank of a Director (D-2). In the discharge of his functions, the Registrar is responsible to the Tribunal.¹¹³ He may be removed from office only if, in the opinion of two-thirds of the members, he has either committed “a serious breach of his duties or become permanently incapacitated from exercising his functions.”¹¹⁴

The President directs “the work and supervise[s] the administration of the Tribunal.”¹¹⁵ This is a normal provision in respect of any court, national or international. The relevant legal instruments of any court generally vest in the head of a court the administrative powers to be exercised on behalf of the court and require him to be accountable to it on

¹¹⁰ See article 35 para. 1 of the Rules. See also article IV of the Staff Regulations of the Tribunal.

¹¹¹ *Ibid.*

¹¹² See the German Ordinance promulgated on 10 October 1996 on the Privileges and Immunities of the Tribunal and arts 13 and 14 of the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea.

¹¹³ See article 36 para. 3 of the Rules.

¹¹⁴ See article 39 para. 2 of the Rules.

¹¹⁵ See article 12 para. 1 of the Rules; article 1 para. 1 of the Instructions.

that account. This is done for reasons of convenience and effectiveness. Accordingly, when the President of the Tribunal exercises any supervisory powers in relation to the administration of the Tribunal, he does so on behalf of the Tribunal as a whole. The relationship between the President and Registrar of the Tribunal may be illustrated by comparing it with the relationship between the political and civilian heads of a ministry within a national jurisdiction having a parliamentary system of government. What can the President do in exercising such supervisory powers? He cannot ask the administration to act in disregard of the applicable legal provisions. Supervisory powers are intended to be used for securing due compliance with the Statute, the Rules, the Regulations, the decisions and the other legal instruments of the Tribunal and also for giving directions in areas not covered by such instruments, at least until such time as the Tribunal has had occasion to deal with them.

What is significant is that, though the Tribunal has entrusted the President with supervisory responsibility, there is today a greater appreciation than before that the judges cannot avoid playing a management role altogether. Judges have come to play a more active role in the work of different standing or *ad hoc* committees, especially those involved with budgetary and administrative matters. It appears that, generally speaking, the authorities of international institutions have yet to reach the level of supervision of and control over administration accomplished at the national level in well-established democracies.

On 21 October 1996, the Tribunal elected Mr. Gritakumar Chitty of Sri Lanka as the first Registrar of the Tribunal. On 27 April 2001, he informed the Tribunal that he would resign from the office of Registrar with effect from 1 July 2001. Following this announcement, the Tribunal proceeded to elect a new Registrar. Though the Registrar is to be elected from among candidates nominated by members of the Tribunal, with the approval of the Tribunal, the President gave notice of the vacancy through various channels, including the public media, so that members could nominate candidates from (a) the list of persons responding to the notice or (b) any other person whom they knew. Though this procedure is not envisaged in the Rules, it is certainly not incompatible with them. Before the new Registrar was elected, the Tribunal deliberated on the Registrar's term of office (keeping in view, among other things, the recommendation made by the Joint Inspection Unit with regard to the term of office of the Registrar of the ICJ¹¹⁶ as

¹¹⁶ The recommendation was that the term of office of the Registrar of the ICJ be reduced from seven to three years, since it would make it possible to

well as the position that obtains in other international courts) and reduced, with effect from 21 September 2001, the term of office of both the Registrar and the Deputy Registrar from seven to five years.¹¹⁷ Immediately thereafter, the Tribunal elected Mr. Philippe Gautier from Belgium, the then Deputy Registrar, as the Registrar for a term of five years. Following the same procedure as in the case of the election of the Registrar, the Tribunal elected, on 12 March 2002, Mr. Doo-young Kim of the Republic of Korea as its Deputy Registrar.

5. Internal Functioning

The internal functioning of the Tribunal is governed by arts 40 to 42 of the Rules.¹¹⁸ This includes the internal judicial practice of the Tribunal, which is governed by any resolutions on the subject adopted by the Tribunal. The only resolution adopted so far on the subject is that entitled “Resolution on the Internal Judicial Practice of the Tribunal.” The articles referred to above and the Resolution cover such matters as the quorum for meetings of the Tribunal, the Seabed Disputes Chamber and special chambers; availability of judges and judges *ad hoc* at meetings; judicial vacations; public holidays; secrecy of the Tribunal’s deliberations; the Tribunal’s deliberations before, during and after oral proceedings; the Drafting Committee and its deliberations; and voting on judgments.

limit the damage that might result for the Court if the choice of incumbent proved to be an unfortunate one. Though the Court thought that this suggestion was not “without its merit”, it felt that the search for a qualified candidate would be made even more difficult if the term of office were to be shortened and that the length of the term of office was justified historically by the need to guarantee the independence of the incumbent (Doc. A/55/834/Add.1). On the underlying object of similar provisions in the Statute of the PCIJ and the ICJ, see also M. O. Hudson, see note 37, 303, and S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. 1, 432, respectively. It is difficult to see how a term of less than seven years would affect the independence of the incumbent. At present, the ICJ is the only international court whose Registrar has a seven-year term.

¹¹⁷ By amending article 32 para. 1 of the Rules.

¹¹⁸ These articles are modelled on Arts 19 to 21 of the Rules of the ICJ.

A quorum of 11 elected judges is required to constitute the Tribunal at all its meetings.¹¹⁹ A quorum of seven judges selected by the Tribunal is required to constitute the Seabed Disputes Chamber at all its meetings.¹²⁰ The quorum for meetings of the Chamber of Summary Procedure is three judges.¹²¹ The quorum for meetings of the Chamber for Fisheries Disputes and of the Chamber for Marine Environment Disputes is five judges.¹²² Judges *ad hoc* are not to be taken into account for the calculation of the quorum.¹²³

The Tribunal is a standing court; its judges are required to hold themselves “permanently available to exercise their functions” and attend all meetings of the Tribunal, unless they are absent on leave during judicial vacations, if any, or are prevented from attending by illness or for other serious reasons duly explained to the President.¹²⁴ The President is required to inform the Tribunal about the reasons that prevented a judge from attending the Tribunal’s meetings.¹²⁵ The record of attendance of judges at meetings so far has been generally good. In some cases, the real difficulties with reference to attendance of a few judges arose on account of illness; in some cases, judges had other interests which precluded them from attending a meeting or two. The task of the President in trying to persuade a judge not to miss a meeting is a delicate one. What is said of an elected judge in relation to his attendance applies to a judge *ad hoc* with equal force in the case in which he is participating.¹²⁶

The Rules deal with judicial vacations of the Tribunal. They declare that the Tribunal “shall fix the dates and duration of the judicial vacations and the periods and conditions of leave to be accorded to individual Members, having regard in both cases to the state of the List of cases and to the requirements of its current work.”¹²⁷ Though the provision is drafted in what appears to be mandatory language, it is apparent that the need to prescribe judicial vacations arises only when, in the opinion

¹¹⁹ See article 41 para. 1 of the Rules.

¹²⁰ Ibid.

¹²¹ See article 28 para. 6 of the Rules.

¹²² This is specified in the resolutions forming the chambers. See Tribunal’s *Yearbook 1999*, Vol. 3, 117-119.

¹²³ See article 41 para. 3 of the Rules.

¹²⁴ See article 41 para. 2 of the Rules.

¹²⁵ Ibid.

¹²⁶ See article 41 para. of the Rules.

¹²⁷ See article 41 para. 4 of the Rules.

of the Tribunal, the requirements of the cases and the work of the Tribunal otherwise so demand. The workload of the Tribunal is still light; in view of this, judges return to their respective places of residence as soon as the meetings and sessions of the Tribunal are concluded. Bearing factors such as these in mind, the Tribunal has not yet found it convenient to declare "judicial vacations." Even if a judicial vacation is declared, in case of urgency the President is empowered to convene the Tribunal "at any time."¹²⁸

The deliberations of the Tribunal take place in private and remain secret.¹²⁹ However, in respect of its deliberations on "other than judicial matters," the Tribunal is given discretion to publish or allow publication of any part of them.¹³⁰ There is thus a strict embargo on judicial deliberations being made public. The Registry is further enjoined to ensure that the records of the Tribunal's judicial deliberations do not contain any details of the discussions or the views expressed, provided, however, that any judge is entitled to require that a statement made by him be inserted in the records.¹³¹ Only the judges and experts appointed in accordance with article 289 of the Convention "take part in the Tribunal's judicial deliberations."¹³² The Rules require that the Registrar, or his Deputy, and any other members of the staff of the Registry as may be needed are present.¹³³ In practice, the Registrar, his Deputy and other staff members as may be required by the Registrar are present at meetings. Other persons may be present by permission of the Tribunal.¹³⁴

The principle of secrecy, which is a characteristic feature of any true court, whether municipal or international, is designed to subserve the independence of the judicial mind and violation of this principle could

¹²⁸ See article 41 para. 6 of the Rules. For examples of cases of urgency, see article 90 para. 2 and article 112 para. 3 of the Rules.

¹²⁹ See article 42 para. 1 of the Rules.

¹³⁰ *Ibid.*

¹³¹ See article 42 para. 3 of the Rules. No judge has so far requested that his statement be inserted in the records.

¹³² See article 42 para. 2 of the Rules. No expert has been appointed so far in accordance with article 289.

¹³³ *Ibid.*

¹³⁴ *Ibid.* The Secretary-General of the International Seabed Authority, a cartographer and the authorities in charge of construction of the permanent premises have been invited on different occasions to be present at meetings of the Tribunal.

compromise the integrity of the judicial process.¹³⁵ Though there is no express provision to that effect in the Rules, it appears that the Tribunal's power to expunge the portion of an opinion of a judge that breaches the secrecy clause flows from the mandatory secrecy provision.

III. Competence

Section 2 of the Statute deals with the competence of the Tribunal as comprising access to the Tribunal (jurisdiction *ratione personae*), jurisdiction (*ratione materiae*) and applicable law. Article 20 of the Statute, on access to the Tribunal, provides in para. 1 that the Tribunal is open to "States Parties", a term defined in article 1, para. 2, of the Convention. Article 20, para. 2, of the Statute provides that the Tribunal is open to entities other than States Parties (a) in any case expressly provided for in Part XI of the Convention or (b) in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by "all the parties to that case". Entities other than States Parties may include States which are not Parties to the Convention, the entities mentioned in article 305 which have not become Parties to the Convention, international intergovernmental organizations (in addition to those referred to in article 305, para. 1 (f) and Annex IX), the International Seabed Authority, State enterprises, and national juridical persons.¹³⁶ The declaration that the Tribunal is open to non-State entities as provided for in Part XI should be understood as referring to access to the Seabed Disputes Chamber of the Tribunal, as provided for in section 5 of Part XI, rather than to the full Tribunal. As noted earlier, the Tribunal is also open to entities other than States Parties in any case pursuant to "any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case", indicating that even entities other than States Parties have to accept the agreement in ques-

¹³⁵ See Sir Robert Jennings's decision in relation to an opinion delivered by a Finnish third party judge on a decision given by the Iran-U.S. Claims Tribunal in case A/28 on 19 December 2000, as set out in "Contemporary Practice of the United States", *AJIL* 95 (2001), 895 et seq.; see also ICJ *Yearbook 1973-1974*, 128.

¹³⁶ See *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, edited by M.H. Nordquist/ S. Rosenne/ L.B. Sohn (hereafter "Virginia Commentary"), 375.

tion and cannot be forced to be parties to cases without having done so. The agreement conferring jurisdiction may be one concluded either before or after the submission of a case; it may open the Tribunal to a case in which all the parties are entities other than States Parties or some of which are States Parties and other entities which are not States Parties.

Adverting now to the jurisdiction of the Tribunal *ratione materiae*, article 21 of the Statute provides, in its opening part, that it comprises “all disputes and all applications”¹³⁷ submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.¹³⁸ The disputes that could be submitted in accordance with the Convention are specified in Part XV of the Convention. The parties may at any time jointly agree to submit a dispute to the Tribunal. The jurisdiction of the Tribunal becomes compulsory if the parties have accepted it in their “choice of procedure” declarations under article 287 of the Convention. Unless the parties otherwise agree, the Tribunal has a compulsory residual jurisdiction in the matter of prompt release of vessels and crews under article 292 of the Convention and of provisional measures under article 290, para. 5 of the Convention — matters that require immediate action.

¹³⁷ The use of the expression “application” is significant. It is also used in article 13 para. 3, and article 23, of the Statute. It appears that the expression is intended to cover situations specified in such provisions as article 292 para. 2 of the Convention, which provides for its invocation by an “application for release.” The opening part of article 21 parallels article 288 para. 1 of the Convention.

¹³⁸ Examples of such agreements are the following: 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972); Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on High Seas (1993); 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 (1995); Agreement for the Conservation of Fishery Resources in the High Seas of the South-East Pacific (2000); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000); article 31 of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000); Convention on the Protection of the Underwater Cultural Heritage (2001); article 24 of the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (2001).

The Seabed Disputes Chamber also has compulsory jurisdiction to the extent and in the manner provided for in Part XI, section 5, of the Convention. If the parties to the dispute so request, a special chamber of the Tribunal would have jurisdiction to decide disputes between States Parties concerning the interpretation or application of Part XI of the Convention and the Annexes relating thereto.¹³⁹ Such disputes could also be decided at the request of any party to the dispute by an *ad hoc* chamber of the Seabed Disputes Chamber.¹⁴⁰ Article 22 of the Statute further provides that, if all the parties to a treaty or convention already in force and concerning the subject-matter covered by the Convention so agree, any disputes concerning the interpretation of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal;¹⁴¹ this points to the need to enter into a supplementary agreement conferring jurisdiction on the Tribunal. There has been no such agreement so far.

In the event of a dispute as to whether the Tribunal has jurisdiction, the matter is settled by decision of the Tribunal.¹⁴² Similarly, in the event of dispute as to the meaning of its decision, the Tribunal is competent to construe it upon the request of any party.¹⁴³ When an application is made in respect of a dispute referred to in article 297 of the Convention, the Tribunal has jurisdiction to decide whether the claim constitutes an abuse of legal process or is *prima facie* unfounded.¹⁴⁴

The Convention expressly authorizes the Seabed Disputes Chamber to give advisory opinions at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities.¹⁴⁵ The question arises as to whether the Tribunal itself could render advisory opinions. Article 21 of the Statute is not limited to contentious jurisdiction; it extends to advisory jurisdiction as well, for it provides that the Tribunal's jurisdiction includes "all matters specifically provided for in any other agreement which

¹³⁹ See article 188 para. 1(a) of the Convention.

¹⁴⁰ See article 188 para. 1(b) and article 288 para. 3 of the Convention.

¹⁴¹ See article 22 of the Statute.

¹⁴² See article 288 para. 4 of the Convention and article 58 of the Rules of the Tribunal.

¹⁴³ See article 33 para. 3 of the Statute.

¹⁴⁴ See article 294 of the Convention.

¹⁴⁵ See article 191 of the Convention.

confers jurisdiction on the Tribunal.”¹⁴⁶ Further to this provision, article 138 of the Rules lays down the procedure to be followed in the exercise of the Tribunal’s functions relating to advisory opinions. It provides that the Tribunal may give an advisory opinion on a legal question “if an international agreement related to the purposes of the Convention” specifically provides for the submission to the Tribunal of a request for such an opinion and that a request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal. It does not appear to exhaust the several ways by which advisory jurisdiction of the Tribunal or even of its special chambers may be attracted by virtue of article 21 of the Statute.

The Convention does not provide, in express terms, for the Tribunal to give advisory opinions on legal questions arising under the Convention. The question arises as to whether a Meeting of States Parties could seek advisory opinions of the Tribunal on legal questions arising under the Convention. It may be recalled that the Council of the League of Nations made requests for advisory opinions on behalf of other international agencies and States, though neither the League Covenant expressly authorized the Council or Assembly of the League to request such opinions, nor did the constitutions of others expressly authorize them to ask the League to request advisory opinions.¹⁴⁷ On the basis of this practice, it may be argued that even a “treaty organ” like the Meeting of States Parties might, if it so decides, request advisory opinions of the Tribunal. How else could it (and through it the Commission on the Limits of the Continental Shelf set up under Annex II to the Convention) obtain independent advice on legal questions arising within the scope of their activities under the Convention, especially when they concern the interpretation or application of the Convention? When the need arose, the States Parties postponed in 1995 the election of judges to the Tribunal, clearly deviating from the mandatory provisions of article 4, para. 3 of the Statute.¹⁴⁸ Similarly, the eleventh Meeting of States Parties made a change in respect of the date of commencement of the

¹⁴⁶ See also S. Rosenne, “International Tribunal for the Law of the Sea: 1996-97 Survey” *International Journal of Marine and Coastal Law* 13 (1998), 487 et seq., (507).

¹⁴⁷ See address to the Plen. Sess. of the United Nations General Assembly delivered on 26 October 1999 by Judge S.M. Schwebel, the then President of the ICJ.

¹⁴⁸ See the Tribunal’s *Yearbook 1996-1997*, Vol. 1, 6.

ten-year period for making submissions to the Commission on the Limits of the Continental Shelf, clearly deviating from the provisions of article 4 of Annex II to the Convention.¹⁴⁹ In the scheme of the Convention and the Statute, there is thus warrant for the Meeting of States Parties to seek advisory opinions of the Tribunal should the need arise.

IV. “Choice of Procedure” Declarations

Part XV of the Convention deals with settlement of “disputes”; it does not deal with advisory opinions. Section 1 (arts 279-285) contains general provisions on the subject; section 2 (arts 286-296) deals with compulsory procedures entailing binding decisions; and section 3 (arts 297-299) sets out limitations and exceptions to the applicability of section 2.

Article 286 sets out the conditions which need to be satisfied before the compulsory procedures are invoked. It reads as follows:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

By virtue of this article, the questions that arise first in relation to the applicability of a compulsory procedure for the settlement of disputes relate to section 3. Whether the “limitations” on the applicability of section 3 set out in article 297 are attracted to the dispute in question? Whether the disputant State has made a declaration that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the categories of disputes specified in article 298? Arts 297 and 298 do not, however, stand in the way of the States concerned arriving at an agreement for submitting their dispute to any of the compulsory procedures specified in section 2. A further requirement of article 286 is that compulsory procedures can be invoked only “where no settlement has been reached by recourse to section 1”, which implies, among other things, that parties are required to resort to other procedures previously agreed upon by them, whether general, regional or special (procedures which take precedence over those specified in section 2),¹⁵⁰ that parties are obliged to exchange views regarding set-

¹⁴⁹ See SPLOS/73, 11-13.

¹⁵⁰ See arts 280 to 282 of the Convention.

tlement of the dispute by negotiation or other peaceful means¹⁵¹ (thus discouraging immediate resort to section 2) and that a party could invite the other party first to submit the dispute to conciliation¹⁵² (unless the other party is not willing to accept conciliation or the parties do not agree upon the conciliation procedure to be applied). The other procedures previously agreed upon by the parties to fall within section 1 should provide for the settlement of disputes concerning the interpretation or application of the Convention.¹⁵³

Article 282 covers, among other things, an agreement to refer a dispute to the ICJ represented by acceptance of its jurisdiction by declarations made under the so-called “optional clause”, i.e., Article 36, para. 2, of the Statute of the ICJ.¹⁵⁴ As of 1 April 2002, 64 States had filed such declarations, of which 61 are members of the United Nations. How effective are these declarations in relation to law of the sea disputes? First, about two-thirds of United Nations members, including a number of important powers, have not accepted the jurisdiction of the ICJ under Article 36, para. 2, of its Statute. Second, even those States that have made declarations have subjected them to various types of conditions and reservations, with the result that the requirement of reciprocity laid down in Article 36, para. 2 of the Statute of the ICJ may not be easily met. For instance, the Australian declaration of 21 March 2002 states that it does not apply, *inter alia*, to “any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement.” Reservations of this type are contained in nearly half the declarations in force made under the optional clause. To quote again the Australian declaration, it does not apply to “any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.” About one-sixth of the declarations have similar reservations concerning important aspects of maritime zones. Declarations of a number of members of the Commonwealth of Nations preclude their being applied to any dispute with the Government of another

¹⁵¹ See article 283 of the Convention.

¹⁵² See article 284 of the Convention.

¹⁵³ See the Order of the Tribunal of 3 December 2001 in the *MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures*, on the meaning of article 282 of the Convention.

¹⁵⁴ Virginia Commentary, see note 136, 26-27.

member of the Commonwealth of Nations. There are other categories of reservations as well, all of which, arguably to a great extent, preclude the declarations made under Article 36, para. 2 of the Statute of the ICJ from standing in the way of the compulsory procedures specified in section 2 of Part XV of the Convention being invoked.

If limitations and exceptions to applicability of section 2 are not involved and if the requirements of section 1 are satisfied, under article 286, any dispute concerning the interpretation or application of the Convention “shall ... be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction” under section 2. Article 287 specifies which court or tribunal will have jurisdiction under the Convention.

Article 287 deals with “choice of procedure”, and, in para. 1 thereof, it provides that a State is free to choose *one or more* of the following four compulsory procedures entailing binding decisions for the settlement of disputes concerning the interpretation or application of the Convention: (a) the Tribunal; (b) the ICJ; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. The choice of procedure may be effected by means of a written declaration, when signing, ratifying or acceding to the Convention or “at any time thereafter.”¹⁵⁵ Such declarations do not, however, affect the jurisdiction of the Seabed Disputes Chamber of the Tribunal as provided for in Part XI, section 5, of the Convention.¹⁵⁶

As of 1 April 2002, of the twenty-nine States that have filed “choice of procedure” declarations, three have specified the Tribunal as their only choice;¹⁵⁷ ten have placed the Tribunal first in order of preference;¹⁵⁸ and four States have accepted the Tribunal with other procedures, with no one procedure enjoying preference over the others.¹⁵⁹ Six States have specified the ICJ as their only choice.¹⁶⁰ While giving the

¹⁵⁵ This gives states freedom to cancel or vary their declarations from time to time.

¹⁵⁶ See article 287 para. 2 of the Convention.

¹⁵⁷ Greece, United Republic of Tanzania and Uruguay.

¹⁵⁸ Argentina, Austria, Cape Verde, Chile, Croatia, Germany, Hungary, Oman, Portugal and Tunisia.

¹⁵⁹ Australia, Belgium, Finland and Italy.

¹⁶⁰ The Netherlands, Nicaragua, Norway, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland.

Tribunal as their first choice, seven States have specified the ICJ as their second or third choice.¹⁶¹ Four States have specified both the Tribunal and the ICJ, without indicating any order of preference.¹⁶² Of the States which specified both the Tribunal and the ICJ, none indicated that the ICJ has precedence over the Tribunal.

Whereas two States have specified the Annex VII arbitral tribunal as their only choice,¹⁶³ one State specified the Annex VII arbitral tribunal as its third choice (after the Tribunal and the ICJ);¹⁶⁴ one as its second choice (after the Tribunal),¹⁶⁵ and one as its first choice (the second being the Annex VIII special arbitral tribunal).¹⁶⁶ Whereas four States have specified the Annex VIII special arbitral tribunal as their second choice (the first being the Tribunal in the case of three States and the Annex VII arbitral tribunal in the case of one State),¹⁶⁷ one State gave the Annex VIII special tribunal as its third choice¹⁶⁸ and one as its fourth choice.¹⁶⁹

Article 287, para. 3, provides that a State Party which is a party to a dispute not covered by a declaration in force is deemed to have accepted arbitration in accordance with Annex VII. Article 287, para. 4, provides that if the parties to a dispute have accepted “the same procedure” for the settlement of the dispute, it may be submitted only to that procedure, unless the parties agree otherwise. Article 287, para. 5, provides that, if the parties to a dispute have not accepted “the same procedure”, it may be submitted only to arbitration in accordance with Annex VII, unless the parties agree otherwise.

The question arises as to what is meant by “the same procedure” in paras 4 and 5 of article 287. First, the “procedure” in this context obviously refers to the means for the settlement of disputes provided for in para. 1 of article 287. Second, it appears at first sight that the procedure should be the one chosen by means of a declaration under article 287 and not independently of it. Hence declarations made under Article 36, para. 2, of the Statute of the ICJ may not be counted when determining

¹⁶¹ Austria, Cape Verde, Croatia, Germany, Hungary, Oman and Portugal.

¹⁶² Australia, Belgium, Finland and Italy.

¹⁶³ Egypt and Slovenia.

¹⁶⁴ Portugal.

¹⁶⁵ Tunisia.

¹⁶⁶ Ukraine.

¹⁶⁷ Argentina, Austria, Chile and Ukraine.

¹⁶⁸ Hungary.

¹⁶⁹ Portugal.

whether the parties have accepted “the same procedure.” Third, since the consensual bond is the basis of any compulsory jurisdiction, the question arises as to whether declarations providing for different preferences, i.e., one placing the Tribunal first in order of preference and the other placing the Tribunal second in the order of preference, can be said to have accepted the same procedure for the settlement of the dispute. If both declarations chose the Tribunal, among other procedures, with no order of preference, one can argue that they have accepted the same procedure. Neither these nor other related questions have arisen for judicial determination so far.

The vast majority of States Parties to the Convention have not made any “choice of procedure” declaration. By virtue of paras 3 and 5 of article 287, these States are deemed to have accepted the Annex VII arbitral tribunal. Even in relation to States that have filed declarations, unless such declarations accept the same procedure for the settlement of disputes, they shall be regarded as having accepted the Annex VII arbitral tribunal. At present, the number of States for which the jurisdiction of the Annex VII arbitral tribunal is compulsory is no less than one hundred and fifteen. This state of affairs is perhaps not in line with what was expected of the Convention, given that the United Nations General Assembly keeps encouraging States Parties to consider making declarations choosing from the means set out in article 287 of the Convention.

V. The Rules

Necessarily, while drafting the Statute of the Tribunal, the founders of the Convention looked at the ICJ’s structure and procedures for inspiration. The Tribunal also modelled its Rules on the ICJ Rules, while departing from the latter, where appropriate, keeping in view the differences between its Statute and that of the ICJ in respect of their competences and also juridical writings seeking reforms in procedures for increasing the effectiveness of the ICJ.¹⁷⁰

¹⁷⁰ See T. Treves, “The Rules of the International Tribunal for the Law of the Sea”, in: Chandrasekhara Rao/ Khan, see note 52, 135-159; D.W. Bowett et al., *The International Court of Justice: Process, Practice and Procedure*, 1997; R. Jennings, “New Problems at the International Court of Justice”, in: *International Law in an Evolving World, Essays in Tribute to Eduardo Jiménez de Aréchaga*, 1974, Vol. II; K. Highet, “Problems in the Preparation and Presentation of a Case”, in: C. Peck/ R.S. Lee (eds), *Increasing the*

Consistent with the urging of article 49 of the Rules that the proceedings before the Tribunal be conducted “without unnecessary delay or expense”,¹⁷¹ the Tribunal introduced several features in the Rules and the Resolution which are not present in the corresponding documents of the ICJ. These new features may be seen in respect of, among other things, the fixing of time-limits for the submission of pleadings,¹⁷² filing of preliminary objections and presentation of submissions by the other party¹⁷³ and the fixing of the date for the opening of the oral proceedings.¹⁷⁴ Other new features include the introduction of the initial deliberations stage after the closure of the written proceedings and prior to the opening of the oral proceedings, to enable judges to exchange views on the written pleadings and the conduct of the case,¹⁷⁵ the procedural elaboration of the new concept of “preliminary proceedings” set out in the Convention,¹⁷⁶ the reporting obligation of parties as to their compliance with provisional measures “prescribed” by the Tribunal,¹⁷⁷ short time-limits for a hearing and rendering of judgment in proceedings involving prompt release of vessels and crews¹⁷⁸ and the introduction of elaborate rules of procedure concerning proceedings in contentious cases before the Seabed Disputes Chamber.¹⁷⁹

Effectiveness of the International Court of Justice, 1997, 127; M. Shaw, “The International Court of Justice: A Practical Perspective”, *ICLQ* 46 (1997), 831 et seq.

¹⁷¹ For the principle that the Tribunal “shall be cost-effective”, see also: section 1(2) of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea; the decision of the Meeting of States Parties taken in May 1995 that “the principles of cost-effectiveness would apply to all aspects of the work of the Tribunal” (SPLOS/4 of 26 July 1995, 7); and A/RES/52/26 of 26 November 1997.

¹⁷² See article 59 para. 1 of the Rules.

¹⁷³ See article 97 paras 1 and 3 of the Rules.

¹⁷⁴ See article 69 para. 1 of the Rules.

¹⁷⁵ See article 68 of the Rules and article 3 of the Resolution.

¹⁷⁶ See article 294. The ICJ has no similar proceedings.

¹⁷⁷ See article 95 of the Rules.

¹⁷⁸ See article 112 of the Rules.

¹⁷⁹ See arts 115 to 123 of the Rules.

VI. The Resolution

The Resolution¹⁸⁰ begins to operate after the closure of the written proceedings. Though it is primarily designed for cases to be decided on the merits, it also applies to urgent proceedings with appropriate adaptations.¹⁸¹ Judges are given a five-week period to prepare a brief note identifying (a) the principal issues arising from the written pleadings and (b) points which should be clarified during the oral proceedings.¹⁸² It is not obligatory for judges to prepare such notes. Copies of the notes are circulated to the other judges and are kept confidential. This arrangement is not applicable to urgent proceedings.

The President then prepares a working paper, on the basis of the written pleadings and bearing in mind the judges' notes, setting out a summary of the facts and the principal contentions of the parties, evidence or explanations to be requested from the parties, and issues which, in his opinion, should be discussed and decided by the Tribunal.¹⁸³ The preparation of the President's paper in urgent proceedings, especially in prompt release proceedings, has not been an easy task, since the President has only a couple of days to do this and not all the pleadings in both working languages are generally available within that time frame.

After the circulation of the working paper and before the date fixed for the opening of the oral proceedings, the Tribunal commences its judicial deliberations with a view to, among other things, exchanging views concerning the written pleadings and the conduct of the case.¹⁸⁴ These deliberations help in focusing attention on aspects of a case which need further clarification from the parties. While there is no hard-and-fast rule in this regard, the judges have generally reserved the questions to be put to parties until after the completion of the first round of oral proceedings;¹⁸⁵ after that round, the President invariably

¹⁸⁰ For analysis, see D.H. Anderson, "The Internal Judicial Practice of the International Tribunal for the Law of the Sea", in: Chandrasekhara Rao/Khan, see note 52, 197 et seq.

¹⁸¹ See article 11 para. 2 of the Resolution.

¹⁸² See article 2 para. 1 of the Resolution. This provision was put to use in the *M/V "Saiga" (No. 2) Case*.

¹⁸³ See article 2 para. 3 of the Resolution.

¹⁸⁴ See article 3 of the Resolution.

¹⁸⁵ In the *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, *Judgment*, and *Southern Bluefin Tuna Cases (New Zealand v. Ja-*

convenes a meeting of the Tribunal to enable judges to exchange views, especially with regard to possible questions which may be put.¹⁸⁶ Though each judge is given the right to put questions,¹⁸⁷ in the cases heard so far the judges have authorized the President to indicate, generally through the Registrar,¹⁸⁸ the questions on which the Tribunal wished to ask the parties for explanations either during the oral proceedings or immediately thereafter. Sometimes, the judgments or Orders of the Tribunal refer to questions which “Members of the Tribunal wished to put to the parties”;¹⁸⁹ at other times, they refer to points and issues which “the Tribunal would like the parties specially to address.”¹⁹⁰ Both formulations, however, mean the same; the questions or issues are generally agreed to by judges. The same questions are addressed to both parties, even if the answers to one or more questions lie within the special knowledge of one party. The answers given by each party in writing are invariably sent to the other party.

After the closure of the oral proceedings, the judges are given four working days in cases on the merits (and one day in urgent proceedings) in order to examine the verbatim transcripts of the oral arguments of the parties and to write out their tentative opinions in the form of “speaking notes.”¹⁹¹ This provision on speaking notes is a permissive one. Judges do not generally write such notes in urgent proceedings.

In the light of the oral proceedings, the President may circulate to the judges a revised list of issues. In urgent proceedings, it is only after the closure of the oral proceedings that the President circulates a list of issues for the first time. There is no strict rule about how this list should be prepared; each President has his own approach. Judges are at liberty

pan; Australia v. Japan), *Provisional Measures*, the questions were put before the commencement of the oral proceedings. This practice has changed since the “*Camouco*” Case (*Panama v. France*), *Prompt Release*.

¹⁸⁶ See article 4 of the Resolution.

¹⁸⁷ See article 76 para. 3 of the Rules.

¹⁸⁸ There is no strict practice in this regard. In the *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Provisional Measures, Order of 11 March 1998*, the President himself gave the questions to the Agents of the parties at a meeting he held with them on 20 February 1998 (see *ITLOS Reports 1998*, 24 et seq., (26)).

¹⁸⁹ See the “*Grand Prince*” Case (*Belize v. France*), Judgment of 20 April 2001, para. 26.

¹⁹⁰ See the “*Monte Confurco*” Case (*Seychelles v. France*), Judgment of 18 December 2000, para. 22.

¹⁹¹ See article 5 para. 1 of the Resolution.

to modify the list. In the list, attention is generally drawn to all relevant issues which need determination, with an indication, where appropriate, of the page numbers of both written and oral proceedings dealing with those issues. The issues are drafted in as objective a manner as possible; they cover such matters as jurisdiction, admissibility, analysis of the substantive legal provisions relied upon by the parties, the merits of issues arising out of the pleadings, the tenability of the relief sought in the final submissions of parties, and costs. After the finalization of the list of issues, each issue is discussed in the order in which it is arranged in the list. Judges are then invited to give their tentative opinions, with the reasons on which they are based. The President generally speaks on the issues after other judges have spoken. At times, he may interrupt an ongoing debate and draw attention to what he considers to be relevant considerations. The time allotted for initial deliberations after oral proceedings depends upon the type of proceeding before the Tribunal. While a two-day period is generally given for the consideration of issues in urgent proceedings, a longer period is given in other proceedings.

If the case presents complex questions and a majority opinion cannot easily be detected (no such case has arisen so far), the Tribunal may invite judges to write brief notes, circulate them to all judges and resume its deliberations on the basis of the written notes.¹⁹² In other cases, the President announces the majority opinion, where necessary on the basis of indicative voting.¹⁹³

Immediately following the establishment of a majority opinion, the Tribunal sets up a Drafting Committee of five judges who share the majority opinion "as it appears then to exist;"¹⁹⁴ there is here an indication that the majority opinion may change pending a final vote on the operative provisions of a judgment. If the President shares the majority opinion, he becomes a member *ex officio* of the Drafting Committee and also proposes to the Tribunal which judges should compose the Committee.¹⁹⁵ If the President disagrees with the majority opinion, the Vice-President takes over the responsibility.¹⁹⁶ If he too is ineligible, the members of the Drafting Committee are selected by the Tribunal di-

¹⁹² See article 5 para. 7 of the Resolution.

¹⁹³ See article 5 para. 6 of the Resolution.

¹⁹⁴ See article 6 para. 1 of the Resolution.

¹⁹⁵ Ibid.

¹⁹⁶ See article 6 para. 2 of the Resolution.

rectly;¹⁹⁷ unless the Tribunal or the members of the Drafting Committee decide otherwise, the judge who is senior in precedence among the members of the Committee acts as its Chairman.¹⁹⁸ This happened in the very first case heard by the Tribunal, and the Committee selected its own Chairman. In the remaining cases, the President shared the majority opinion and was thus the Chairman of the Drafting Committee set up in such cases.

While proposing the names of judges for inclusion in the Drafting Committee, the President takes into account, in a flexible manner, factors such as: the representation of different geographical regions and of both official languages of the Tribunal; giving the opportunity to serve on the Committee to as many new judges as possible who did not have earlier opportunities of serving as members of drafting committees; and the drafting skills of the members concerned. These factors are not, however, expressly provided for in the provision of the Resolution dealing with the establishment of a Drafting Committee.¹⁹⁹

While the Resolution fixes the composition of the Drafting Committee at five judges,²⁰⁰ in a few cases the Tribunal has selected as many as six judges to compose the Committee.²⁰¹ The Resolution stipulates that the members of the Drafting Committee be selected by the Tribunal by an absolute majority of the judges present;²⁰² in practice it has not been found necessary to vote in this regard because of the widespread consultations undertaken by the President before making his proposal. Immediately after its establishment, the Drafting Committee meets with a view to preparing a first draft of the judgment, normally within three weeks in a case on the merits.²⁰³

The mandate of the Drafting Committee is to prepare a draft judgment which serves a two-fold objective: to state the majority opinion and “also attract wider support within the Tribunal.”²⁰⁴ The effort of the Committee to attract wider support for the draft judgment should

¹⁹⁷ Ibid.

¹⁹⁸ See article 6 para. 3 of the Resolution.

¹⁹⁹ See article 6 of the Resolution.

²⁰⁰ See article 6 para. 1 of the Resolution.

²⁰¹ Under article 11 para. 1 of the Resolution, the Tribunal may decide to vary the procedures and arrangements set out in arts 1 to 10 of the Resolution in a particular case for reasons of urgency or if circumstances so justify.

²⁰² See article 6 para. 1 of the Resolution.

²⁰³ See article 7 para. 1 of the Resolution.

²⁰⁴ See article 7 para. 2 of the Resolution.

not be at the expense of the majority opinion as it appears then to exist but should focus on the manner of drafting or the reasons to be given in support of majority-supported propositions, with a view to accommodating as many concerns as possible. The Resolution does not authorize the Committee to prepare a compromise settlement that is at variance with the opinion of the majority.

Within three weeks of circulation of the first draft, judges may offer their amendments or comments to the Committee.²⁰⁵ After a second draft is prepared by the Committee, the first reading takes place within the Tribunal as soon as possible and in principle not later than three months after the closure of the oral proceedings.²⁰⁶ Judges may propose amendments to the draft.²⁰⁷ Those wishing to write dissenting or separate opinions give outlines of their opinions and also make available the texts of such opinions before the second reading of the draft judgment.²⁰⁸ Such opinions are taken into account by the Drafting Committee while preparing a revised draft judgment, giving an opportunity to the authors of dissenting and separate opinions to reconsider whether their points of view are accommodated in the revised draft.²⁰⁹ Judges of the Tribunal may make further amendments to the revised draft during its second reading.²¹⁰

In urgent proceedings, a much more simplified procedure is followed. In a prompt release case, the Tribunal is required to deliver the judgment not later than fourteen days after the closure of the hearing.²¹¹ Generally speaking, the judges are given a day to go through the transcripts of the oral proceedings; two days to discuss the list of issues circulated by the President to arrive at conclusions thereon and to establish the Drafting Committee; and two days for the Committee to prepare and make available to all judges the first draft of the judgment. The Tribunal has a day to discuss the draft and offer comments on, and modifications to, the draft judgment for consideration of the Committee. The Committee and the Tribunal then hold short meetings spread over six more days to prepare and discuss second and third revised draft

²⁰⁵ See article 7 para. 3 of the Resolution.

²⁰⁶ See article 8 para. 1 of the Resolution.

²⁰⁷ See article 8 para. 3 of the Resolution.

²⁰⁸ See article 8 para. 4 of the Resolution.

²⁰⁹ See article 8 para. 6 of the Resolution.

²¹⁰ See article 8 para. 5 of the Resolution.

²¹¹ See article 112 para. 4 of the Rules.

judgments and adopt the judgment. A similar simplified procedure is followed with regard to proceedings involving provisional measures.

Basically two approaches have been followed for drafting a judgment: (i) all or some members of the Drafting Committee are assigned different issues for the submission of drafts, which are then brought together for integration into a basic draft; (ii) the President or any other member is assigned the task of preparing the basic draft. With both approaches, other members of the Committee may submit their own comments for consideration by the main draftsman. While there is no rule in this regard, in more recent years, the second approach referred to above has been followed.

The Registry staff play a useful role in the drafting of a judgment. They prepare the basic draft of the introductory part of the judgment containing a brief history of the case up until the presentation of the final submissions of the parties; they further verify the factual accuracy of what is contained in the judgment. Furthermore, at the request of the draftsman, they present research materials.

After the Tribunal has completed consideration of the final draft of the judgment, the President takes a vote on each operative provision in the judgment.²¹² Any judge may request a separate vote on any issue which is separable.²¹³ There being no scope for abstention, each judge votes either affirmatively or negatively in person and in inverse order of seniority.²¹⁴

A judge is also allowed to vote other than in person, by appropriate means of communication, in exceptional circumstances accepted by the Tribunal.²¹⁵ This is obviously the case where a judge, having fully participated in the deliberations (and thus being qualified to participate in the final vote), is unable to vote in person for reasons which, in the opinion of the Tribunal, are beyond his control. In such an event, the Tribunal may permit him to vote by any other means other than in person. In circumstances accepted by it, the Tribunal allowed two judges — Judge Mensah in the “*Grand Prince*” Case and Judge Vukas in the *MOX Plant Case* — to vote by facsimile from places other than Ham-

²¹² See article 9 para. 1 of the Resolution.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ See article 9 para. 1 of the Resolution. This provision draws its inspiration from article 9 (ii) of the Resolution concerning the Internal Judicial Practice of the ICJ.

burg; in both cases, the Tribunal found that each judge was present at the public sittings held in the case concerned²¹⁶ and had also participated in the deliberations of the Tribunal up to a point at which it had reached the substance of its decision in that case.²¹⁷ Judge Mensah could not be present at the time when the judgment in the “*Grand Prince*” Case was read.

A case may also arise where a judge is absent, because of illness or other reason duly explained to the President, from some part of the hearing or the deliberations. In such a case, the judge is permitted to vote if the Tribunal considers that he has taken a sufficient part in the hearing and the deliberations to be able to reach a judicial determination of all issues of fact and law material to the decision to be given in the case.²¹⁸ Though Judge Kolodkin was absent from a part of the hearing and also of the deliberations in connection with the *M/V “Saiga” (No. 2) Case* on the merits, he was allowed to vote on the operative provisions of the judgment. He then had to leave Hamburg before the judgment was delivered. The judgment stated that he was among the judges “Present”.

Article 124 of the Rules draws a distinction between the adoption of a judgment by the Tribunal and its subsequent reading on a date notified by the Tribunal. Article 125 requires that the judgment should contain, among other things, “the names of the judges participating in it.” When a judgment sets out at the outset the names of judges “Present”, it refers to the judges who participated in it and not the judges present at the time when the judgment is read.

For implementing the time-limits provided for in the Rules and the Resolution, judges maintain punishing time-schedules.

VII. The Guidelines

One of the main features of the Rules is their directive that the proceedings before the Tribunal shall be conducted without unnecessary

²¹⁶ Judges’ presences and absences at public hearings are recorded in the verbatim records of cases.

²¹⁷ The decision of the Tribunal with regard to Judge Mensah was read out at a public sitting held on 20 April 2001 for the reading of the judgment.

²¹⁸ See article 9 para. 2 of the Resolution.

delay or expense.²¹⁹ For implementing this directive, the Rules enable the Tribunal to issue, among other things, guidelines consistent therewith concerning any aspect of its proceedings.²²⁰ The Tribunal issued the Guidelines on 28 October 1997. These Guidelines go beyond what is contained in the corresponding ICJ documents;²²¹ they bring to bear new features with regard to the length, format and presentation of written and oral proceedings and the use of electronic means of communication.²²²

It is widely known that proceedings in international courts are generally lax when compared with the control that domestic courts exercise over judicial proceedings. The reluctance of international courts to do anything more in this regard is partly attributed to the respect that is to be shown to States which appear as litigants before them. Keenly desirous of promoting expeditious settlement of disputes, when drafting the Guidelines, the Tribunal derived helpful ideas from the writings of practitioners of the ICJ and the rules of national judicial institutions. The Guidelines are now supplemented by the Registry's Rules for the Preparation of Typed and Printed Texts issued by the Registry on 27 September 2001.

The Guidelines, as their title indicates, deal with the "preparation and presentation of cases before the Tribunal." They are spread over 19 paras and divided into three parts, the first part dealing with written proceedings, the second with oral proceedings and the third with advisory proceedings. It is not proposed to go into a detailed analysis of these Guidelines.²²³ There are however, a few points that may be underlined. The Guidelines state that a pleading should be as short as possible²²⁴ and this is generally respected by the parties in cases before the

²¹⁹ See article 49 of the Rules.

²²⁰ See article 50 of the Rules.

²²¹ See the ICJ's "Note for the parties concerning printing of pleadings" and "Rules for the preparation of typed and printed texts".

²²² See P. Chandrasekhara Rao, "The ITLOS and its Guidelines", in: Chandrasekhara Rao/ Khan, see note 52, 187 et seq.

²²³ For such analysis, see *ibid*.

²²⁴ See para. 2 of the Guidelines.

Tribunal.²²⁵ However, the experience in this regard has been based essentially on urgent proceedings. Parties have also often taken advantage of the guideline which permits them to send pleadings, documents and other communications by facsimile or electronic means; the guideline adds that the date on which the Tribunal receives them through facsimile or electronically will be regarded as the material date provided they are followed without unreasonable delay by the paper originals thereof.²²⁶ Deriving inspiration from municipal court systems, the Guidelines require the Registrar to ensure that a pleading or application or a declaration satisfies the formal requirements of the Rules and to return the same for rectification where it does not,²²⁷ a requirement that has served a practical need.²²⁸ The parties have not overstepped the time allotted by the President, in consultation with them, for the presentation of their oral statements.²²⁹ In the *M/V "Saiga" (No.2) Case*, which was heard on the merits, the Tribunal held as many as 18 public sittings. In the *Southern Bluefin Tuna Cases* involving requests for provisional measures, public sittings were held on three days. These cases involved the presentation of a number of maps, charts, tables, graphs and displays on computer monitors. In each of the remaining cases, which were urgent proceedings, public sittings were confined to two days. On the question of whether the Tribunal should sit in both the morning and the afternoon when hearing oral arguments, the relevant guideline

²²⁵ The total number of pages of written pleadings submitted by parties in cases before the Tribunal has been as follows:

Case	Pleadings	Annexes
M/V "Saiga" Case (Prompt Release)	15 pages	40 pages
M/V "Saiga" (No.2) Case (Provisional Measures)	46 pages	429 pages
M/V "Saiga" (No.2) Case	365 pages	1161 pages
Southern Bluefin Tuna Cases (Provisional Measures)	71 pages	1526 pages
"Camouco" Case (Prompt Release)	77 pages	123 pages
"Monte Confurco" Case	79 pages	186 pages
"Grand Prince" Case	22 pages	119 pages
"Chaisiri Reefer 2" Case	10 pages	36 pages
MOX Plant Case	155 pages	853 pages

²²⁶ See para. 10 of the Guidelines.

²²⁷ See para. 11 of the Guidelines.

²²⁸ See Chandrasekhara Rao, see note 52, 191.

²²⁹ See para. 16 of the Guidelines.

prefers the “long morning” approach, unless the Tribunal otherwise decides.²³⁰ In practice, the Tribunal met in the mornings or afternoons or both in the mornings and afternoons, as the requirements of the case demanded. Out of 29 days of public sittings to hear the oral arguments of the parties held so far, the Tribunal met on 18 days both in the mornings and in the afternoons.

The Guidelines apply to cases on the merits and other cases with equal facility. Though the record of their observance by parties has been satisfactory, there is still room for improvement. The Tribunal is keen to exercise firm control over the conduct of the proceedings in the interests of securing a certain degree of uniformity in the presentation of pleadings and of expeditious disposal of cases.

VIII. The Cases²³¹

The Registrar has recorded ten cases in which the documents instituting proceedings were received in the Registry.²³²

1. Cases Concerning Prompt Release of Vessels and Crews

Four cases decided by the Tribunal dealt with applications under article 292 of the Convention on prompt release of vessels and crews.²³³ The Convention permits a State Party to detain in situations specified therein a vessel flying the flag of another State Party. Article 292 applies when it is alleged that the detaining State 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.

²³⁰ See para. 17 of the Guidelines.

²³¹ The Tribunal’s Judgments, Orders and other case materials are available on the Tribunal’s website, whose address is: www.itlos.org.

²³² On the Registrar’s functions in this regard, see article 36 para. 1(b) of the Rules.

²³³ The *M/V “Saiga” (Saint Vincent and the Grenadines v. Guinea)*, *Prompt Release, Judgment of 4 December 1997*, *ITLOS Reports 1997*, 16; the “*Camouco*” Case (*Panama v. France*), *Prompt Release, Judgment of 7 February 2000*; the “*Monte Confurco*” Case (*Seychelles v. France*), *Prompt Release, Judgment of 18 December 2000*; the “*Grand Prince*” Case (*Belize v. France*), *Prompt Release, Judgment of 20 April 2001*.

The question arose as to whether this article applies to all cases of detention of vessels or 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. There does not appear to be any disagreement with the view that article 292 may be invoked in cases of non-compliance with the provisions of article 73, para. 2, article 220, paras 6 and 7 or article 226, para. 1(c).²³⁴ However, in the only case where the Tribunal has faced this question, it did not find it necessary to go into the matter of whether article 292 could be linked to provisions other than arts 73, 220 and 226 (the so-called non-restrictive interpretation of article 292) since, on the facts of the case, it found that the allegation fell within article 73 of the Convention.²³⁵ Article 73, para. 1, states that the coastal State may, in the exercise of its sovereign rights over the living resources of its exclusive economic zone (EEZ), take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

The question arose as to whether article 292 could be invoked on the basis of an “allegation” that is contrived to bring the case within the ambit of that article. The answer is obviously in the negative, for any other interpretation would frustrate the object of article 292. While dealing with this question, the Tribunal stated that according to article 113 of its Rules “the Tribunal shall in its judgment *determine* in each case in accordance with article 292 of the Convention *whether or not the allegation made by the applicant ... is well-founded.*”²³⁶ When can it be stated that the allegation is well-founded? The Judgment in the *M/V Saiga Case* relied upon 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;”²³⁷ nine Judges dissented from this approach. They argued that article 292 refers to “the decision of the court or tribunal,” that admittedly proceedings under that article are not preliminary or incidental but conclude, in accordance with the Rules of the Tribunal, with a

²³⁴ See also the Judgment of the Tribunal of 4 December 1997 in the *M/V “Saiga” Case, Prompt Release*, para. 52. In the same case, see the Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, paras 23-25.

²³⁵ Judgment of 4 December 1997, para. 73.

²³⁶ Emphasis added.

²³⁷ Judgment of 4 December 1997, para. 51.

judgment, and that, consequently, the burden is on the Applicant to establish that there is a direct or genuine connection between the allegation and the actions of the coastal State in the application of article 73. There is no doubt that the Tribunal will have opportunities in the future to revisit the approach concerning the standard of proof. Once an allegation is made, the detaining State has 10 days from the date of detention to arrange for the release of the vessel or its crew or to agree with the flag State on any court or tribunal to which the question of release from detention may be submitted. If the 10-day period is allowed to expire without any such agreement being reached, the question of release may be submitted (a) to any court or tribunal accepted by the detaining State under article 287 or (b) to the Tribunal, unless the parties otherwise agree. The applications made so far under article 292 have been made to the Tribunal and to no other court or tribunal.

Which entity is competent to make an application for release under article 292? It is obvious from this article that it is the flag State of the vessel that is given the *locus standi* to make such an application. Article 292, para. 2 of the Convention speaks in terms of the application being made “only by or on behalf of the flag State of the vessel.” Any other entity may make an application only on behalf of the flag State of the vessel. The initial burden of establishing that the Applicant is the flag State is on the Applicant itself.²³⁸ In the “*Grand Prince*” Case, the Tribunal clearly specified that the Applicant should be the flag State “when the Application was made.”²³⁹ This language clearly points to one flag State, namely the flag State of the vessel at the time of filing of the application. In the scheme of article 292, paras 1 and 2, it appears that such flag State would necessarily be the flag State making the allegation under article 292, para. 1. Even if the vessel were to change its registration after the allegation was made, the new flag State would still have to make the allegation, for there is no succession from the old flag State to the new flag State in this respect. There is thus a necessary link between

²³⁸ Judgment of the Tribunal of 20 April 2001 in the “*Grand Prince*” Case, *Prompt Release*, para. 67.

²³⁹ *Ibid.* In the “*Camouco*” Case (Judgment, para. 46) and in the “*Monte Confurco*” Case (Judgment, para. 58), the Tribunal observed that the Applicants were the flag States of the vessels in question “both at the time of the incident in question and now” before it found that it had jurisdiction to entertain the Applications. As pointed out by Judge Treves in his Separate Opinion in the “*Grand Prince*” Case, these were statements of fact which cannot be read as expressions of the position of the Tribunal on the legal question of the relevant time.

paras 1 and 2 of article 292. In any event, what interest would a State which is not a flag State at the time when the application is made have in securing the prompt release of a vessel or its crew, since that is the only issue that a court or tribunal can deal with in proceedings under article 292.²⁴⁰

The Tribunal would have no jurisdiction to hear an application under article 292 if the vessel had no right to fly the flag of the Applicant at the relevant time. The insistence of article 292 on the need for the Applicant to be the flag State is on account of article 91 of the Convention, by virtue of which, among other things, ships have the nationality of the State whose flag they are entitled to fly and every State is required to issue to ships to which it has granted the right to fly its flag documents to that effect. On the international plane, therefore, there must be sufficient evidence to establish that the vessel has the right to fly the flag of the State concerned before a court or tribunal declares that it has jurisdiction to entertain the case. The Tribunal possesses the “right to deal with all aspects of the question of jurisdiction, whether or not they have been expressly raised by the parties.”²⁴¹ Consequently, even where the parties have not called into question the status of the Applicant as the flag State of the vessel, the Tribunal will on its own examine the question, if the documents placed before it give rise to “reasonable doubt as to the status of the vessel when the Application was made.”²⁴² There is here a clear warning that, even where a vessel’s nationality is not contested by the Respondent, the Applicant is well-advised to place on record clear evidence of such nationality.

Article 292 does not prescribe a time-limit within which, after the expiry of the 10-day period referred to therein, an application may be made thereunder.²⁴³ Since the whole focus of article 292 is on “prompt release” and since this article requires that the application be dealt with “without delay,” there is an expectation here that the flag State would pursue its article 292 remedy without undue delay. At any rate, not doing so would harm only the interest of the flag State. However, it re-

²⁴⁰ See the Dissenting Opinion of Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson and Jesus in the “*Grand Prince*” Case, in which they questioned the wisdom of the majority approach in this regard (para. 15).

²⁴¹ See the Judgment in the “*Grand Prince*” Case, para. 79.

²⁴² *Ibid.*, para. 76.

²⁴³ See the “*Camouco*” Case, Judgment, para. 54. See, however, the Dissenting Opinion of Judge Vukas in the same case.

mains to be seen whether the Tribunal would view with favour unreasonable delay or negligence in pursuing the remedy under article 292 after the cause of action has arisen.

What could the application deal with? It can deal “only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew.”²⁴⁴ That the application can deal only with the question of release is also made clear in the heading of article 292 and in all of its four paragraphs; this limited scope of the application by implication renders matters not connected with release inadmissible in prompt release proceedings.²⁴⁵ The release may be sought from any form of “detention.”²⁴⁶ Generally speaking, that expression refers to the act or fact of holding a person in custody by reason of a legal proceeding or as the result of a court proceeding;²⁴⁷ to be meaningful, it should cover any restriction on freedom to leave the territory of the detaining State. If in substance the elements of “detention” are satisfied, it matters not for the Tribunal whether the laws of the detaining State describe the then prevailing situation as “detention” or not.²⁴⁸

The question arose as to whether local remedies under article 295 should be exhausted before proceedings under article 292 are instituted. As noted earlier, article 292 permits the making of an application within a short period from the date of detention. It could not have been framed on the assumption that local remedies could be exhausted in such a short period. Accordingly, it is illogical to subject article 292 to the local remedies rule.²⁴⁹

Article 292 cannot be read in isolation from other relevant articles such as article 73, para. 2 of which provides that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable

²⁴⁴ See article 292 para. 3 of the Convention.

²⁴⁵ See the “*Camouco*” Case, Judgment, paras 59-60; the “*Monte Confurco*” Case, Judgment, paras 61-63.

²⁴⁶ See article 292 para. 1 of the Convention.

²⁴⁷ See *Stroud’s Judicial Dictionary of Words and Phrases*, Sixth Edition, 662.

²⁴⁸ In the “*Camouco*” Case, the fact that the Master of the vessel was at the time under court supervision, that his passport had been taken away from him by the French authorities and that, consequently, he was not in a position to leave Réunion, constituted adequate basis for the Tribunal to treat the Master as being under detention and to order his release in accordance with article 292 para. 1.

²⁴⁹ See the “*Camouco*” Case, Judgment, paras 57-58.

bond or other security". Irrespective of which affected person or entity activates this provision in the appropriate domestic forum, the Convention expects that, once "reasonable bond or other security" is posted, the detaining State should promptly release the arrested vessel and its crew. It does not give a free hand to the detaining State in the matter of fixing the bond or other security; the bond or other security is required to be "reasonable", which, being a requirement of the Convention, has an international setting in the sense that, if the reasonableness of the bond or other security is contested, the issue must be decided not by either of the parties, but by an impartial authority.²⁵⁰ Hence, the need for article 292. States Parties are under an obligation to ensure that their laws and regulations relative to article 73, para. 2, provide for a standard of reasonableness enshrined in the Convention.

The posting of a bond or other security is not necessarily a condition precedent to filing an application under article 292. As pointed out by the Tribunal:

There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable.²⁵¹

The question of release is not dependent on the question of whether the detention is legal, for that pertains to the merits of the case. The prohibition on the application being the basis for going into the merits of the case does not mean that there is a bar against a court or tribunal examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the allegation referred to in article 292, para. 1;²⁵² the domestic forums are not, however, bound by any findings of fact or law that a tribunal or court may have made in order to reach its conclusions.²⁵³

The question had arisen in the "*Grand Prince*" Case as to whether an application under article 292 would lie after the competent domestic

²⁵⁰ See also the Separate Opinion of Judge Nelson in the "*Camouco*" Case on how to determine what is reasonable, relying upon the *North Atlantic Coast Fisheries Case, Great Britain v. United States, Award of 7 December 1910, Reports of International Arbitral Awards, Vol. XI, 189.*

²⁵¹ See the *M/V "Saiga" Case, Judgment, para. 77.*

²⁵² See the "*Monte Confurco*" Case, Judgment, para. 74.

²⁵³ See the *M/V "Saiga" Case, Judgment, para. 49.*

forum had delivered its judgment on the merits ordering the confiscation of the vessel; it may not make any difference to the answer even if the judgment did not order confiscation but imposed a monetary penalty. The Tribunal was not called upon to decide this question, since it determined the case on the ground that the evidence before it failed to establish that the Applicant was the flag State of the vessel when the application was made. But the question itself is important for more than one reason. It was argued on behalf of the Applicant in the "*Grand Prince*" Case that the release of the vessel by virtue of article 73, para. 2, read in conjunction with article 292, is a remedy available notwithstanding the judgment of a competent municipal court on the merits of the case under article 292 para. 3.

Article 73, para. 2, deals with the case of a vessel and its crew in detention following arrest. If a vessel is confiscated or otherwise finally dealt with pursuant to a judgment of a competent domestic forum, is it still possible to contend that the vessel and its crew are still in detention? Is it open to the Tribunal in article 292 proceedings to sustain an argument that a judgment on the merits by a domestic forum, either after another local court has fixed a bond for release of the vessel or even before a court has had the opportunity to fix a bond, is in violation of the obligation under article 73, para. 2, of the Convention? These and related questions do not admit of an easy reply.²⁵⁴ The Tribunal has not had occasion to consider whether it would be appropriate to hold back its judgment in the face of clear information that the competent domestic forum is scheduled to deliver its judgment on the merits before the date set for delivery of the Tribunal's judgment or even immediately thereafter. It is important to bear in mind that the article 292 remedy is exceptional in character, for it was crafted in derogation of the general principle that the detaining State's domestic forums are competent to deal with violations of its laws and regulations.

The application under article 292 is admissible when the allegation made therein is well-founded, which brings one to the question of whether the bond or other financial security imposed by the domestic forum in the detaining State is reasonable for the purposes of prompt release proceedings. This has not been an easy matter for the Tribunal to determine, especially when the domestic forums have not given a full

²⁵⁴ For an examination of the issues from different standpoints, see the Separate Opinions of Judges Anderson, Laing and Cot in the "*Grand Prince*" Case. See also B.H. Oxman/ V.P. Bantz, "The Grand Prince", *AJIL* 96 (2002), 219 et seq.

account of the considerations or the evidence on which they based themselves while fixing the amount of the bond, although they have on occasion declared that the bond is intended to secure the appearance of the master of the arrested vessel, the payment of damage caused by the violations and of sums due in restitution, and the payment of fines.²⁵⁵

When determining under article 292 whether the assessment made by the detaining State in fixing the bond is reasonable, the Tribunal does not act as an appellate forum against a decision of a national court;²⁵⁶ its determination is required to be based on the Convention and other rules of international law not incompatible with the Convention.²⁵⁷ It is the balance of interests, i.e., the interests of the coastal State and of the flag State, emerging from arts 73 and 292 that provides the guiding criterion for the court or tribunal under article 292 in an assessment of the reasonableness of the bond or other financial security.²⁵⁸ The Tribunal defined the criterion of reasonableness as follows:

In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.²⁵⁹

Without intending to lay down rigid rules as to the exact weight to be attached to each factor, the Tribunal specified the factors relevant to an assessment of the reasonableness of bonds or other financial security as follows:

The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.²⁶⁰

The Tribunal examines the application of the various factors on the facts of each case, based on the submissions of the parties, and outlines clearly the extent to which it accepts these submissions in relation to

²⁵⁵ See, for instance, the “*Monte Confurco*” Case, Judgment, para. 39.

²⁵⁶ *Ibid.*, para. 72.

²⁵⁷ See article 293 of the Convention.

²⁵⁸ See the “*Monte Confurco*” Case, Judgment, paras 69-80.

²⁵⁹ See the *M/V “Saiga” Case*, Judgment, para. 82.

²⁶⁰ See the “*Camouco*” Case, Judgment, para. 67; the “*Monte Confurco*” Case, Judgment, para. 76.

each factor before going on to determine whether the bond imposed by a domestic court is reasonable.²⁶¹ And if it comes to the conclusion that the bond is unreasonable, it undertakes the task of determining the amount, nature and form of the bond or other financial security to be posted for the release of the vessel or the crew, as laid down in article 114, para. 2, of the Rules. The weight given to each factor (including the amounts mentioned by the parties with regard to the value of the vessel, the value of the fish and of the fishing gear seized, etc.) is spelt out by the Tribunal in its Judgment. The overall amount of the bond or other security determined by the Tribunal flows logically from this process; it is very far from being an exercise of discretion.

The Tribunal's task in this regard is unenviable, for it is generally faced with mostly unsubstantiated claims of the parties. Domestic forums appear to base the amount of the bond on claims made by the administrative authorities of the detaining State. In doing so, they do not appear to take into account what the Tribunal called "the balance of interests emerging from articles 73 and 292 of the Convention" as providing the guiding criterion for fixing a "reasonable bond or security" referred to in article 73, para. 2 of the Convention. Where no hard evidence is produced for arriving at a conclusion on a scientific basis, which is generally the case, the Tribunal will make use of such material as is placed before it and of inferences that may be drawn from it to accept or not accept the submissions of the parties or the assumptions made by a domestic court while fixing the amount of the bond; the Tribunal does not thereby get itself involved in the merits of a case or engage in criticism of a domestic forum. The Tribunal also prefers the bond to be in the form of a bank guarantee; it has not favoured rulings of domestic forums that the bond be paid in cash, by certified cheque or banker's draft. In view of the large sums involved, a bank guarantee is easy to provide and does not prejudice the position of either side.²⁶²

Article 292 does not perhaps offer a welcome prospect for coastal States. From their perspective, the Tribunal should take note of the fact that unlawful fishing is on the rise, that vessels engaged in unlawful fishing take advantage of the difficulties encountered by a coastal State in policing the exclusive economic zone, that unlawful, unregulated fishing constitutes a threat to future resources and that orders of domestic forums fixing bonds or other financial security should not be interfered with by the Tribunal. As noted earlier, in article 292 pro-

²⁶¹ See, for instance, the "*Monte Confurco*" Case, Judgment, paras 77-91.

²⁶² See the "*Monte Confurco*" Case, Judgment, paras 93-95.

ceedings the Tribunal is not concerned with the merits of the case; it is under a duty to see that a coastal State keeps its part of the bargain negotiated at the Third United Nations Conference on the Law of the Sea and reflected in article 73, para. 2, and article 292.

The operative provisions of the Judgments in prompt release proceedings have not always been expressed in the same terms. In the *M/V "Saiga" Case* and the *"Camouco" Case* the operative provisions gave findings on the Tribunal's jurisdiction and the admissibility of the Application and then proceeded to deal with release and consequential matters. It was thought then that the question of admissibility covered within its scope all requirements set out in article 292 of the Convention other than the question of jurisdiction.²⁶³ The body of the Judgments in both cases, however, contained a clear finding that the allegations made against the Respondent were "well founded for the purposes of these proceedings."²⁶⁴ In the *"Monte Confurco" Case*, the operative provisions drew a distinction between questions of jurisdiction, admissibility and merits, and thus aligned themselves with the actual findings in the body of the Judgment. The question of whether the Application related to an allegation of non-compliance with article 73, para. 2, of the Convention was answered in terms of the admissibility of the Application. And the question as to whether the allegation was well-founded was considered to appertain to the merits of the Application. This new arrangement also appears to be in consonance with the requirements of article 113 of the Rules.

2. Cases Concerning Provisional Measures

The Tribunal has prescribed provisional measures in four cases, one under article 290, para. 1 of the Convention and the other three under article 290, para. 5 of the Convention. The *M/V "Saiga" (No. 2) Case, Provisional Measures*, was not registered as a separate case, being an incidental proceeding under article 290, para. 1 of the Convention; it formed part of the *M/V "Saiga" (No. 2) Case* on the merits.

²⁶³ See the *M/V "Saiga" Case*, Judgment, para. 46.

²⁶⁴ See the *"Camouco" Case*, Judgment, para. 72; the *M/V "Saiga" Case*, Judgment, para. 73.

a. The M/V “Saiga” (No. 2) Case, Provisional Measures

The *M/V “Saiga” Case* was dealt with by the Tribunal in two phases, provisional measures and merits. Guinea did not immediately comply with the Tribunal’s Judgment of 4 December 1997 in the matter of prompt release of the *M/V Saiga* and its crew. On 13 January 1998, Saint Vincent and the Grenadines filed with the Tribunal a Request for the prescription of provisional measures in accordance with article 290, para. 5 of the Convention. Later, by exchange of letters of 20 February 1998, Saint Vincent and the Grenadines and Guinea agreed to transfer to the Tribunal the arbitration proceedings instituted by Saint Vincent and the Grenadines by notification of 22 December 1997. On the same date, the Tribunal stated that the Notification of 22 December 1997 “shall be deemed to have been duly submitted to the Tribunal on that date” and that the Request for the prescription of provisional measures, the Response, Reply, Rejoinder, all communications and other documentation relating to the Request for the prescription of provisional measures, were to be considered as having been duly submitted to the Tribunal under article 290, para. 1 of the Convention and article 89, para. 1 of the Rules. In the List of cases, the case was recorded as the *M/V “Saiga” (No. 2) Case*. Public sittings were held on 23 and 24 February 1998.

The Tribunal gave its Order on provisional measures on 11 March 1998 under article 290, para. 1 of the Convention.²⁶⁵ This is the only case so far in which the Tribunal has prescribed provisional measures in incidental proceedings under article 290, para. 1 of the Convention. The Order of the Tribunal is composed basically in the same style as that used by the ICJ; in fact, the Tribunal has followed this style in its Orders prescribing provisional measures even under article 290, para. 5 of the Convention. Whereas the ICJ introduces the recitals of its Orders with “Whereas”,²⁶⁶ the Tribunal (for no apparent reason, it seems) introduces the recitals of its Orders partly with “Whereas” and partly with “Considering.” It may be worthwhile to consider whether substitution of this style by simple prose would not be more user-friendly.

After the closure of the written proceedings and prior to the oral proceedings, the Tribunal held its initial deliberations on 18 and 19 Feb-

²⁶⁵ See also article 25 para. 1 of the Statute.

²⁶⁶ See for example, *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996*, ICJ Reports 1996, 13 et seq.

ruary 1998, in accordance with article 68 of the Rules, and the parties were informed on 20 February 1998 of the points and issues which the Tribunal wished the parties especially to address. One such issue where further clarification was sought was whether the release of the M/V "Saiga" and its crew was being requested as a measure to implement the Tribunal's judgment of 4 December 1977 or as a "provisional measure."²⁶⁷ Responding to this question at the public sitting held on 23 February 1998, Saint Vincent and the Grenadines pointed out that the provisional measures it was seeking were not intended to implement the Tribunal's judgment of 4 December but intended to preserve the rights of the parties pending final judgment on the merits and that, to dispel any doubts, this position would be made clear in its final submissions.²⁶⁸ Accordingly, in its final submissions presented at the public sitting held on 24 February 1998, Saint Vincent and the Grenadines omitted references to compliance with the judgment of 4 December 1997. Guinea objected to this modification.

The recitals of the Order stated that "a modification of the submissions of a party is permissible provided that it does not prejudice the right of the other party to respond" and that "in the present case the right of Guinea to respond has not been prejudiced because it had been given sufficient notice of the modification."²⁶⁹ This statement has led to the criticism that it was an "unexplained departure" from the practice of the ICJ, since the Tribunal did not make any statement on the question of whether the modification in the submission changed the nature of the case; the ICJ will not permit a change in the nature of the case through modification of the submissions, the reason being that each change could prejudice the rights of third States Parties to the litigation.²⁷⁰ It does not appear that the Tribunal intended to depart from the practice of the ICJ, which is also in consonance with article 31 of the Statute of the Tribunal.²⁷¹ On the facts of the case, it appears that the

²⁶⁷ The chapeau in para. 1 of the Reply of 13 February 1998 filed by Saint Vincent and the Grenadines spoke in terms of measures necessary to "comply with the Judgment" of the Tribunal of 4 December 1997.

²⁶⁸ See ITLOS Doc. PV 98/1 of 23 February 1998, 57.

²⁶⁹ See Order of 11 March 1998, paras 32-34.

²⁷⁰ See S. Rosenne, "International Tribunal for the Law of the Sea: 1998 Survey", *International Journal of Marine and Coastal Law* 14 (1999), 453 et seq., (461), citing *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, ICJ Reports 1992, 240 et seq., (264).

²⁷¹ Like Article 62 of the Statute of the ICJ, article 31 para. 1 of the Statute of the Tribunal provides that should a State Party consider that it has an inter-

modifications made by Saint Vincent and the Grenadines in its final submissions did not change the nature of the case, but the Tribunal's Order could have made this clear.

The parties disagreed as to whether the Tribunal had jurisdiction. Whereas Saint Vincent and the Grenadines argued that the Tribunal had jurisdiction under article 297, para. 1 of the Convention, Guinea maintained that the Tribunal did not have jurisdiction since the dispute in question was covered by article 297, para. 3(a) of the Convention. In the Exchange of Letters of 20 February 1998, the parties agreed to submit the dispute to the Tribunal and also agreed that the written and oral proceedings before the Tribunal "shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection to jurisdiction raised in the Government of Guinea's Statement of response." The Tribunal considered that these agreements between the parties did not provide sufficient basis for its jurisdiction to prescribe provisional measures so long as the objection to jurisdiction was maintained.²⁷² Hence, the Tribunal's Order, following the wording of article 290, para. 1 of the Convention, declared that "before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded."²⁷³

After the Tribunal began its deliberations on its Order in this case, it was informed that the vessel and its crew had been released in execution of the Tribunal's Judgment of 4 December 1997. In its Order, the Tribunal observed that, following the release of the vessel and its crew, the prescription of a provisional measure for their release would serve "no purpose."²⁷⁴ The Tribunal, however, prescribed a provisional measure

est of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene.

²⁷² S. Rosenne, however, considers that the agreement of the parties to submit the dispute to the Tribunal was sufficient to confer jurisdiction on the Tribunal and that this made it unnecessary for the Tribunal to look for any other basis for its jurisdiction to prescribe provisional measures. See Rosenne, see note 270, 461.

²⁷³ See Order of 11 March 1998, para. 29. In this respect, article 290 para. 1 of the Convention is based on the jurisprudence of the ICJ. See *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996*, ICJ Reports 1996, 13 et seq., (21, para. 30).

²⁷⁴ See para. 40 of the Order of 11 March 1998.

specifying that “Guinea shall 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 incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master.” The question is whether there was any justification for this measure, since the vessel and its crew were free and away from Guinea and the need for provisional measures other than the release of the vessel and its crew could be justified only if there was urgency.²⁷⁵

There is no doubt that the measure prescribed by the Tribunal was different in part from those requested by Saint Vincent and the Grenadines, especially in so far as it related to the owners or operators of the vessel. While the power of the Tribunal to prescribe measures different from those requested is provided for in the Rules,²⁷⁶ it is obvious that this power should be exercised with caution and circumspection. In the present case, Saint Vincent and the Grenadines expressed the fear, especially during the oral proceedings, that its vessels and their operators were at risk of being attacked.²⁷⁷ It appears that, while prescribing the measure, the Tribunal felt the urgent need — though some might say without adequate justification — to allay this fear.²⁷⁸

The Tribunal also recommended that the parties “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

²⁷⁵ Though article 290 para. 1 of the Convention does not expressly refer to the requirement of urgency, that requirement is to be read into the provision. The stipulation that provisional measures may be prescribed “pending the final decision” clearly suggests that such measures are justified only if action prejudicial to the rights of either party is likely to be taken before such final decision is given. See *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991*, ICJ Reports 1991, 12 et seq., (17, para. 23); *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996*, ICJ Reports 1996, 13 et seq., (22, para. 35).

²⁷⁶ See article 89 para. 5 of the Rules, which is modelled on Article 75 para. 2 of the Rules of the ICJ. See also Judge *ad hoc* Shearer’s Separate Opinion in the *Southern Bluefin Tuna Cases*, in which he observed that provisional measures may not be prescribed without a request for such measures by a party.

²⁷⁷ See ITLOS Doc. PV.98/1 of 23 February 1998, 37 et seq.

²⁷⁸ See para. 41 of the Order of 11 March 1998. For the comment that the Order dealt with “hypothetical eventualities”, see Rosenne, see note 270, 463.

authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal.”²⁷⁹ The non-aggravation provision²⁸⁰ in this measure is an aspect of the main power conferred under article 290, para. 1 of the Convention “to preserve the respective rights of the parties to the dispute ... pending the final decision.” Or, in the alternative article 290, para. 1, of the Convention may be said to apply as an implied term what the PCIJ described as “the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.”²⁸¹

Whereas the Order states that the provisional measure in operative clause 1 of the Order was prescribed under article 290, para. 1 of the Convention, there has been no indication of the basis on which the recommendation in operative clause 2 of the order was made. Nevertheless, the recommendation is a provisional measure, for there can be no other measure in a provisional measures Order. It is not inherent to a provisional measure that it should be *ordered*. The power to prescribe a provisional measure includes the power to *recommend*, since the power to do what is greater should include the power to do what is less.²⁸²

The ICJ has recently held that it “has reached the conclusion that orders on provisional measures under Article 41 have binding effect.”²⁸³ What is clear from this statement is that the power to *indicate* under Article 41 of the Statute of the ICJ should be read as the power to *prescribe* in the sense in which that expression is understood in article 290, para. 1 of the Convention. Does it also suggest that every measure indi-

²⁷⁹ See para. 52(2) of the Order of 11 March 1998.

²⁸⁰ Measures designed to avoid aggravating or extending disputes have frequently been indicated by the ICJ. See the *LaGrand Case, Judgment of 27 June 2001*, para. 103.

²⁸¹ See *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, PCIJ, Series A/B, No. 79*, 199. This principle was quoted with approval by the ICJ in the *LaGrand Case (Germany v. United States of America)*, see note 280, para. 103. See also H.W.A. Thirlway, “The Indication of Provisional Measures by the International Court of Justice”, in: R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, 1994, 13.

²⁸² See also Rosenne, see note 270, 464.

²⁸³ See the *LaGrand Case*, see note 280, para. 109.

cated in an order on provisional measures has binding effect, especially when the measure in question uses non-mandatory language?²⁸⁴ In the *LaGrand Case*, the relevant provisional measure used the word “should” (in English legal drafting, the word does not indicate a legal obligation),²⁸⁵ a word consistently employed in the provisional measures generally indicated by the ICJ. Or does the binding nature of a measure depend upon the intention of the court as conveyed through its wording?

In the *Southern Bluefin Tuna Cases*, the Tribunal too *prescribed* provisional measures, some of which used the word “shall”²⁸⁶ and others used the word “should.”²⁸⁷ If all the measures were to have binding legal effect, why were some worded in mandatory language and not the others? By deciding that each party shall submit the initial report referred to in article 95, para. 1 of the Rules, upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures *prescribed*, the Order leaves no doubt that all the measures are required to be complied with as provided for in article 290, para. 6 of the Convention. In the more recent *MOX Plant Case*, the Order prescribing provisional measures included a paragraph in the non-operative part designed to avoid aggravating or extending the dispute submitted to the Annex VII arbitral tribunal. This non-aggravation clause conveys a recommendation which, like any other recommendation of a judicial body, the parties are under a good faith obligation to take seriously into account, though they are not under any obligation to report on the steps they have taken pursuant to it.

In both paras 1 and 5 of article 290, of the Convention, the Tribunal is given the power to “prescribe” provisional measures. The word “prescribe” was used by the draftsmen of the Convention to underline what the Tribunal’s Order called “the binding force of the measures pre-

²⁸⁴ See generally Sir R. Jennings, “The LaGrand Case”, *The Law and Practice of International Courts and Tribunals* 1 (2002), 13 et seq., (53-54).

²⁸⁵ Order of 3 March 1999. The measure states that “[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order”.

²⁸⁶ See the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, para. 90 (1)(a) to (d).

²⁸⁷ *Ibid.*, para. 90 (1)(e) and (f).

scribed.”²⁸⁸ The binding nature of provisional measures in the present context is a matter of treaty law, for, as article 290, para. 6 of the Convention declares: “The parties to a dispute shall comply promptly with any provisional measures prescribed under this article.” While under article 290, para. 1 of the Convention, the provisional measures may remain in force pending the final decision of the Tribunal, under article 290, para. 5 the measures may remain in force until a decision in this regard is taken by the Annex VII arbitral tribunal, which may modify, revoke or affirm those measures. It is not the constitution of an arbitral tribunal which is critical but a decision by that body on the measures prescribed by the Tribunal.²⁸⁹ Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.²⁹⁰ The Tribunal may not on its own initiate proceedings for prescribing, modifying or revoking provisional measures; such proceedings may be initiated only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.²⁹¹

The obligation of the parties to comply with provisional measures provided for in article 290, para. 6 of the Convention was further elaborated on in procedural terms in article 95 of the Rules, which provides:

1. Each party shall inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party shall submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed.
2. The Tribunal may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed.

This provision elaborates on Article 78 of the ICJ’s Rules, which provides that the Court may request information from the parties on any

²⁸⁸ See para. 48 of the Tribunal’s Order of 11 March 1998. See also *Virginia Commentary*, Vol. 5, see note 136, 53-55.

²⁸⁹ The Order in the *MOX Plant Case* prescribes the provisional measures “pending a decision by the Annex VII arbitral tribunal.” Likewise the Order in the *Southern Bluefin Tuna Cases* prescribes the measures “pending a decision of the arbitral tribunal.”

²⁹⁰ See article 290 para. 2 of the Convention.

²⁹¹ See article 290 para. 3 of the Convention.

matter “connected with the implementation of any provisional measures it has indicated.”²⁹²

The Orders made so far in the proceedings involving provisional measures have required each party to submit the initial report referred to in article 95, para. 1 of the Rules within a specified period and also authorized the President of the Tribunal to request such further reports and information as he might consider appropriate after that date. All parties barring one have complied with such directions. In no cases has the President asked for further reports and information.

The question may arise as to the purpose of seeking such reports and information from the parties. The Tribunal is not empowered to enforce compliance with its orders. Nor can it initiate proceedings with regard to provisional measures except at the request of an aggrieved party. This does not mean that there is a diminution in the legal obligation of the parties to abide by the order or to render a proper account of how this obligation is being discharged. Such rendering of reports has a twofold objective. First, the party will be required to justify in its reports to the Tribunal whether its actions are in conformity with the provisional measures prescribed by the Tribunal. Second, the reports may help in establishing a breach, if any, of obligations arising under provisional measures prescribed by the Tribunal in the final decision on the merits, whether of the Tribunal or of the arbitral tribunal. A State which suffers damage as a result of a breach of such obligations is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act.²⁹³ In the *LaGrand Case*, the ICJ found that the United States of America had breached the obligation incumbent upon it under the Order indicating provisional measures issued by it on 3 March 1999.²⁹⁴ Reparation may take other forms depending on

²⁹² For a recent case invoking this rule, see the *Case concerning the Vienna Convention on Consular Relations (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of 3 March 1999, para. 29.

²⁹³ See *Factory at Chorzow, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17*, 14.

²⁹⁴ See Judgment, see note 280, para. 128(5). The Court noted that Germany requested it to adjudge and declare “only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation”. See Judgment, para. 116.

the circumstances of the case.²⁹⁵ The legal position may not be so simple in all cases. The following questions arise:

[I]f one accepts that the Order indicating provisional measures is binding, what happens if it is breached before the end of the case, but judgment is given for the Respondent? Is it open to the Court simultaneously to find that the Applicant has not made out the rights it claims, and to give judgment against the Applicant, but at the same time to find that the Order made to protect those rights has not been complied with, and that the Respondent is therefore condemned for not having complied with those measures? Can the Respondent be ordered to pay reparation for breach of a right which the Court in the same breath says does not exist?²⁹⁶

The answers to these questions are also questions: What is the meaning of the declaration in article 290, para. 6 of the Convention that the parties to the dispute shall comply with any provisional measures prescribed under that article? Is it not arguable that the obligation to implement provisional measures is an independent one and failure to discharge it could give rise to international responsibility. There are as yet no clear judicial decisions clarifying the legal position in this regard.

b. The Southern Bluefin Tuna Cases

The *Southern Bluefin Tuna Cases* and the *MOX Plant Case* are cases submitted to the Tribunal for the prescription of provisional measures under article 290, para. 5 of the Convention. Under this paragraph, pending the constitution of an arbitral tribunal to which a dispute is being submitted under section 2 of Part XV, when the Tribunal²⁹⁷ is presented with a request for the prescription of provisional measures, it may prescribe, modify or revoke provisional measures in accordance with article 290 "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 arbitral tribunal to which the dispute has been submitted may modify, revoke or affirm the provisional measures, acting in conformity with paras 1 to 4 of article 290. The main difference between paras 1 and 5 of article 290 is that, whereas

²⁹⁵ See generally the *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, paras 170-171.

²⁹⁶ See Thirlway, see note 281, 31.

²⁹⁷ The Seabed Disputes Chamber with respect to activities in the international seabed area.

under para. 1 the Tribunal could prescribe provisional measures if it considers that *prima facie* it has jurisdiction under Part XI or Part XV of the Convention, under para. 5 the Tribunal could prescribe such measures if it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction under Part XI or Part XV of the Convention.²⁹⁸

Article 89, para. 3 of the Rules requires that the party requesting provisional measures should specify, among other things, the possible consequences if the request is not granted for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment. This applies whether the request is made under article 290, para. 1 or para. 5. Article 89, para. 4 of the Rules provides that, when a request is made under article 290, para. 5 it must indicate the legal grounds upon which the arbitral tribunal would have jurisdiction and the urgency of the situation. Though not explicitly stated, this applies with equal force to a request made under article 290, para. 1 of the Convention.

Pending the meeting of the Tribunal, the President of the Tribunal is authorized to call upon the parties to act in such a way as will enable any order the Tribunal may make on the request for provisional measures to have "its appropriate effects."²⁹⁹ The President may exercise this power where the urgency of the situation demands action which cannot wait until the Tribunal meets. There has been no occasion so far to invoke this provision.

aa. Background to the Disputes

It may be useful to indicate, in brief, the background to the disputes. Southern bluefin tuna or "SBT" (*Thunnus maccoyii*), is a highly migratory species of pelagic fish and is included in the list of highly migratory species in Annex I to the Convention. This species occurs widely across the high seas regions of the southern hemisphere and also traverses the EEZs and territorial seas of some States, including Australia, New Zealand and South Africa but not Japan. SBT spawns in the waters south of Indonesia. Approximately 90 per cent of the global catch of SBT is sold on the Japanese market.

²⁹⁸ Arts 89 to 95 of the Rules deal with the procedural aspects of provisional measures.

²⁹⁹ See article 90 para. 4 of the Rules. This provision corresponds to Article 74 para. 4 of the Rules of the ICJ.

Significant commercial harvesting of SBT began in the early 1950s, and in 1961 the global SBT catch peaked at over 81,000 tonnes. By 1980, estimates of the parental stock had declined to 25-30 per cent of its 1960 level. In 1985 Australia, New Zealand and Japan entered into a trilateral agreement which established a global total allowable catch (hereafter, "TAC") for SBT and national allocations. In 1989, a TAC of 11,750 tonnes was agreed, with national allocations of 6,065 tonnes, 5,265 tonnes and 420 tonnes for Japan, Australia and New Zealand, respectively. The SBT stock continued to decline. In 1997, it was estimated to be in the order of 7-15 per cent of its 1960 level. In 1998, the recruitment of SBT stock was estimated to be around one third of the 1960 level. The effectiveness of TAC restrictions was also affected by the entry of fishermen engaged in fishing for SBT, notably from the Republic of Korea, Taiwan and Indonesia.

In 1993 Australia, New Zealand and Japan concluded the Convention for the Conservation of Southern Bluefin Tuna (hereafter "the 1993 Convention"), whose objective is to ensure, through appropriate management, the conservation and optimum utilization of SBT. This Convention noted the adoption of the United Nations Convention on the Law of the Sea, 1982. It established the Commission for the Conservation of SBT (hereafter "the Commission") and empowered it to decide upon a total allowable catch and its allocation among the parties. In May 1994, the Commission set a TAC of 11,750 tonnes, with national allocations of 6,065 tonnes, 5,265 tonnes and 420 tonnes for Japan, Australia and New Zealand, respectively. Since then, there has been no agreement to change the TAC level or national allocations from that level. Since 1998, the Commission has not been able to agree upon any TAC. The parties, however, discussed the concept of an experimental fishing programme (EFP) under the Commission as a means of reducing uncertainty as to the state of the stock. In 1996, the Commission also approved a set of objectives and principles for the design and implementation of an EFP. It was, however, unable to agree upon the size of the catch that would be allowed under the EFP or on the modalities for implementing the programme. The Commission, however, agreed on the objective of restoring the parental stock to its 1980 level by the year 2020, thereby indicating that it assumed that the stock would be self-sustaining at the 1980 SBT spawning stock biomass.

In February 1998, Japan stated that, in addition to its previous quota for commercial SBT fishing, it would commence a unilateral, three-year EFP starting in the summer of 1998. Despite protests by Australia and New Zealand, Japan conducted a pilot programme with an estimated

catch of 1,464 tonnes of SBT in the summer of 1998. At the request of Australia and New Zealand, consultations and negotiations took place within the framework of article 16(1) of the 1993 Convention. Article 16 reads as follows:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in para. 1 above.
3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

The consultations failed to promote agreement. Again in May 1999, Japan announced that, unless Australia and New Zealand accepted a 1999 joint EFP, it would recommence unilateral experimental fishing on 1 June 1999. Since Australia and New Zealand considered that the design and analysis of Japan's EFP were fundamentally flawed, they informed Japan that, if it went ahead with its experimental fishing on 1 June 1999 or thereafter, such action would be treated as a termination by Japan of negotiations under article 16(1) of the 1993 Convention. Japan resumed its EFP on 1 June 1999; it maintained that the EFP would continue until the end of August 1999, during which time the experimental vessels would catch approximately 2,000 tonnes of SBT. Though Japan was willing to have the dispute resolved by mediation or arbitration under article 16 of the 1993 Convention, neither procedure was followed in view of Japan's unwillingness to cease its unilateral experimental fishing pending the resolution of the dispute as insisted by Australia and New Zealand.

Japan also contended that there was no urgency to the prescription of provisional measures in the circumstances of this case, since there was no irreparable damage that would occur between then and when the Annex VII arbitral tribunal might act provisionally. If Japan's ex-

perimental fishing had caused adverse effects, they could be fully compensated by future reductions in Japan's catch. Japan further stated that the precautionary principle relied upon by Australia and New Zealand was neither incorporated in the Convention, nor had attained the status of a rule of customary international law.

The major difference between Japan on the one hand and Australia and New Zealand on the other centred on the future of the SBT stock and a scientific programme which would best contribute to reducing the uncertainties regarding the stock.

On 15 July 1999, New Zealand and Australia notified Japan of the institution of arbitral proceedings against Japan under Annex VII to the Convention. Pending the constitution of the arbitral tribunal, on 30 July 1999 New Zealand and Australia filed with the Tribunal separate but identical Requests for the prescription of provisional measures under article 290, para. 5 of the Convention. Since the Tribunal did not include upon the bench a judge of the nationality of Australia or New Zealand, as parties in the same interest, they jointly appointed Professor Shearer of Australia as judge *ad hoc* in both cases. Japan filed a single statement in response to both the Requests. By its Order dated 16 August 1999, the Tribunal joined the proceedings instituted by the Requests of New Zealand and Australia.³⁰⁰ The cases were argued at the public sittings held on 18, 19 and 20 August 1999. The Tribunal gave its Order on 27 August 1999, within 27 days of the filing of the Requests and seven days after the presentation of the oral statements, in which it found that the arbitral tribunal would *prima facie* have jurisdiction and prescribed certain provisional measures.

bb. Prima facie Jurisdiction

New Zealand and Australia alleged that Japan, by unilaterally designing and undertaking an experimental fishing programme, had failed to comply with obligations under arts 64 and 116 to 119 of the Law of the Sea Convention, with provisions of the 1993 Convention and with rules of customary international law. They had invoked, as the basis for the jurisdiction of the arbitral tribunal, article 288, para. 1 of the Law of the Sea Convention, which provides that a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of the Convention which is submitted to it in accordance with Part XV of the Law of the Sea Convention.

³⁰⁰ See article 17 para. 5 of the Statute and article 47 of the Rules.

Japan argued that there was no basis for the Tribunal to satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction. It denied having failed to comply with any of the provisions of the Law of the Sea Convention. According to it, the dispute concerned the interpretation or application of the 1993 Convention; it did not concern the interpretation or application of the Law of the Sea Convention. It was further stated that Australia and New Zealand had not identified any provisions of the Law of the Sea Convention Japan was alleged to have violated (or how it had violated them) until June 1999, shortly before initiating arbitral proceedings under the Law of the Sea Convention. Japan maintained that recourse to the arbitral tribunal was excluded because the 1993 Convention provided for a dispute settlement procedure of its own. It further contended that Australia and New Zealand had failed to exhaust the procedures for amicable dispute settlement under Part XV, section 1, of the Law of the Sea Convention, in particular article 283, through negotiations or other peaceful means, before submitting the disputes to a compulsory procedure under Part XV, section 2, of the Law of the Sea Convention. Japan also argued that article 281 of the Law of the Sea Convention stood in the way of invocation of arbitration under article 287 and the application of provisional measures under article 290, in view of article 16 of the 1993 Convention, under which the parties agreed to continue negotiating among themselves until they had either resolved the substance of the dispute or agreed upon a mechanism for third-party intervention to help resolve it. It was also stated that the disputes were scientific rather than legal.

The Tribunal found the arguments of Japan unpersuasive. The records showed that the negotiations and consultations that had taken place between the parties were considered by Australia and New Zealand to come under both the 1993 Convention and the Law of the Sea Convention, that New Zealand and Australia also had invoked the provisions of the Law of the Sea Convention in diplomatic notes addressed to Japan in respect of those negotiations, and that the provisions of the Law of the Sea Convention invoked by New Zealand and Australia (arts 64 and 116 to 119) as having been breached by Japan had a direct bearing on the dispute in question, and that, accordingly, the dispute concerned points of law which called for the interpretation or application of the Law of the Sea Convention in respect of the conservation and management of southern bluefin tuna. The Tribunal declared that a State Party was not obliged to pursue procedures for amicable dispute settlement under Part XV, section 1, of the Law of the Sea Convention when it concluded that the possibilities of settlement had been ex-

hausted. This conclusion became inevitable from the consultations and negotiations that had taken place between the parties with no prospect of reaching an agreement. While under section 1 of Part XV of the Law of the Sea Convention there is an obligation to exchange views so long as there is a likelihood of settling a dispute, there is no requirement that negotiations should be pursued for the sake of negotiations.

The 1993 Convention, especially article 16 thereof, does not provide for the settlement of disputes concerning the interpretation or application of the Law of the Sea Convention. Article 16 of the 1993 Convention deals with disputes between parties to it concerning the interpretation or implementation of "this Convention." Nor does it appear that the 1993 Convention was taken by the parties as containing a compromissory clause of their own choice to settle disputes concerning the interpretation or application of the Law of the Sea Convention. The Tribunal considered that the fact that the 1993 Convention applied between the parties did not exclude their right to invoke arts 64 and 116 to 119 of the Law of the Sea Convention in respect of the conservation and management of southern bluefin tuna. The logic of this premise was subsequently elaborated upon in the *MOX Plant Case*, as will be seen later in this paper. Article 16 of the 1993 Convention does not provide for compulsory binding adjudication or arbitration; the procedure outlined therein is "essentially circular, since if the parties are not agreed on reference to arbitration or judicial settlement the process of negotiation goes around and around, potentially without end."³⁰¹ If the parties to the 1993 Convention intended to exclude the application of the Part XV procedures, that intention is not made explicit in article 16, nor should exclusion of Part XV of the Law of the Sea Convention be read into article 16 by necessary implication, for that could block recourse to compulsory dispute settlement procedures altogether. Such a position would not be consistent with the underlying objective of Part XV, section 2, of the Law of the Sea Convention and should not be accepted lightly, unless the parties made it explicit in their agreement that they intended to exclude Part XV of the Law of the Sea Convention. The Tribunal found that the requirements for invoking the procedures under Part XV, section 2, of the Law of the Sea Convention had been fulfilled, that the provisions of the Law of the Sea Convention invoked by Australia and New Zealand appeared to afford a basis on which the ju-

³⁰¹ See Separate Opinion of Judge *ad hoc* Shearer in the *Southern Bluefin Tuna Cases*.

jurisdiction of the arbitral tribunal might be founded, and that the arbitral tribunal would *prima facie* have jurisdiction over the disputes.³⁰²

cc. Urgency

Japan also contended that there was no urgency to the prescription of provisional measures in the circumstances of this case, since no irreparable damage would occur during the intervening period before the Annex VII arbitral tribunal might act provisionally.³⁰³ If Japan's experimental fishing had caused adverse effects, they could be fully compensated by future reductions in Japan's catch. Japan further stated that the precautionary principle relied upon by Australia and New Zealand was neither incorporated in the Convention, nor had it attained the status of a rule of customary international law.

The Tribunal noted that Japan's experimental fishing consisted of three annual programmes in 1999, 2000 and 2001, that Japan had made a commitment that the 1999 experimental fishing programme would end by 31 August 1999, and that Japan had made no commitment regarding any experimental fishing programmes after 1999.³⁰⁴ The Tribunal was also told by the parties that commercial fishing for SBT was expected to continue throughout the remainder of 1999 and beyond and that the

³⁰² See the Order of 27 August 1999 in the *Southern Bluefin Tuna Cases*, paras 52, 61 and 62. The Annex VII Arbitral Tribunal, in its Award of 4 August 2000, held, by vote of 4 to 1, that it was without jurisdiction to rule on the merits of the dispute. For the Award, *ILM* 39 (2000), 1359 et seq. For a critical comment, see B.H. Oxman, "Complementary Agreements and Compulsory Jurisdiction", *AJIL* 95 (2001), 277 et seq.; P. Sands, "ITLOS: An International Lawyer's Perspective", in: M.H. Nordquist/ J. Norton Moore (eds), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, 2001, 141 et seq., (149-153); M.D. Evans, "The Southern Bluefin Tuna Arbitration", *ICLQ* 50 (2001), 447 et seq.; B. Kwiatkowska, "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", *International Journal of Marine and Coastal Law* 16 (2001), 239 et seq.

³⁰³ The Annex VII Arbitral Tribunal held its hearing on jurisdiction from 7 to 11 May 2000.

³⁰⁴ See the Order of 27 August 1999 in the *Southern Bluefin Tuna Cases*, paras 82 to 84.

catches of non-parties to the 1993 Convention had increased considerably since 1996.³⁰⁵

It was common ground between the parties that the stock of SBT was severely depleted and at its historically lowest level and that this was a cause for serious biological concern.³⁰⁶ The Tribunal also noted that there was scientific uncertainty regarding measures to be taken to conserve the stock of SBT and that there was no agreement among the parties as to whether the conservation measures taken until then had led to the improvement in the stock of SBT.³⁰⁷ Unable to assess conclusively the scientific evidence presented by the parties, the Tribunal considered that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures [were] taken to prevent serious harm to the stock of southern bluefin tuna.”³⁰⁸ This approach became all the more warranted by the Tribunal’s declaration that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”³⁰⁹ It is not, however, necessarily linked to the marine environment. The Law of the Sea Convention makes it apparent that the conservation of the living resources of the high seas is an objective that transcends the immediate interests of the parties; it is an objective in whose pursuit the international community as a whole is interested. That the “prudence and caution” the Tribunal referred to may or may not have derived their inspiration from a precautionary approach is beside the point: the competence of a tribunal empowered to prescribe provisional measures to call upon the parties to act with prudence and caution should be taken as universally well-established. Taking this view, the Tribunal did not find that the “pay back” principle advanced by Japan would satisfy the requirements of the situation. The Tribunal, therefore, found that provisional measures should be taken as a matter of urgency to “avert further deterioration” of the SBT stock,³¹⁰ which it saw as impinging on both the preservation of the rights of the parties and the prevention of harm to the marine environment.

³⁰⁵ *Ibid.*, paras 75 and 76.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*, para. 77.

³⁰⁹ *Ibid.*, para. 70.

³¹⁰ *Ibid.*, para. 80.

dd. Provisional Measures

Accordingly, the Tribunal prescribed the following measures, among others:

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

...

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subpara. (c);

...

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

...

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.

The measure regarding making further efforts to reach agreement with non-parties to the 1993 Convention was not directly brought before the Tribunal by the parties; but it was essential, in the view of the Tribunal, to avert further deterioration of the SBT stock.³¹¹ The Tribunal made an effort to present a holistic solution for removing the underlying difficulties in ensuring effective conservation measures. That the Order of the Tribunal has helped the parties in making progress in settling their

³¹¹ In prescribing this measure, the Tribunal relied upon article 89 para. 5 of the Rules, by virtue of which it may prescribe measures different in whole or in part from those requested.

dispute and in encouraging them also to make progress on the issue of third-party fishing is documented elsewhere.³¹²

c. The MOX Plant Case

On 9 November 2001, a Request for the prescription of provisional measures (hereafter “the Request”) under article 290, para. 5 of the Convention, pending the constitution of an arbitral tribunal to be established under Annex VII of the Convention, was submitted to the Tribunal by Ireland against the United Kingdom “in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea.” The dispute, according to the Request, arose out of the planned commissioning of the MOX plant in Sellafield on the west coast of England on 20 December 2001. The plant is designed to reprocess spent nuclear fuel into a new fuel, which combines reprocessed plutonium with uranium. The new fuel is known as mixed oxide (MOX) fuel. The United Kingdom and Ireland lie on opposite sides of the Irish Sea. The site at Sellafield is some 112 miles from the Irish coast at its closest point. The Irish Request was accompanied by a copy of a document dated 25 October 2001, instituting arbitral proceedings against the United Kingdom. The Request was entered in the List of Cases as Case No. 10 and named the *MOX Plant Case*. The United Kingdom filed its Written Response on 15 November 2001. Ireland had chosen, pursuant to article 17, para. 2 of the Statute, Mr. Alberto Székely, of Mexican nationality, to sit as judge *ad hoc*. Oral statements were presented at four public sittings, held on 19 and 20 November 2001.

Ireland, in its final submissions at the public sitting held on 20 November 2001, requested the prescription by the Tribunal of the following provisional measures:

- (1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October, 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;
- (2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sover-

³¹² See, for example, the Award of the Arbitral Tribunal in the *Southern Bluefin Tuna Cases*, paras 67-69; B. Mansfield, “The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska’s Article”, *International Journal of Marine and Coastal Law* 16 (2001), 361 et seq.

eignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;

- (3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and
- (4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom).

In its final submissions, the United Kingdom requested the Tribunal to reject Ireland's request for provisional measures and also order Ireland to bear the United Kingdom's costs in the proceedings.

In support of its case, Ireland contended that the Irish Sea was amongst the most radioactively polluted seas in the world³¹³ and that the overwhelming majority of that pollution came from the Sellafield site, where the MOX plant was due to be brought into operation.³¹⁴ It pointed out that, if commissioned, the MOX plant would contribute to the further contamination of the Irish Sea. The manufacture of the MOX fuel would inevitably lead to some discharges of radioactive substances into the marine environment, via direct discharges and through the atmosphere.³¹⁵ It was underlined that the Irish Sea is a semi-enclosed sea, from which pollution was less readily swept away than it would be from an open ocean coast.³¹⁶ It was further stated that the MOX plant would expose Ireland to the risks of accidents, from the plant and from nuclear transports, and to the even greater risk arising out of terrorist-type attacks, especially in the aftermath of events in New York and Washington on 11 September 2001.³¹⁷ It was noted that each shipment of the MOX fuel prepared at Sellafield would pass close

³¹³ See the Request, para. 10.

³¹⁴ See the statement of the Attorney General of Ireland in Doc. ITLOS/PV.01/06/Rev.1, 8.

³¹⁵ See the Request, para. 28.

³¹⁶ See the statement of Fitzsimons in Doc. ITLOS/PV.01/06/Rev.1, 15.

³¹⁷ Ibid.

to Ireland. It was added that no nuclear reactor in the United Kingdom currently used MOX fuel and that the fuel produced by the MOX plant would be exported, primarily by sea. Ireland further stated that the MOX activities would also increase discharges into the Irish Sea from the Thermal Oxide Reprocessing Plant at Sellafield, commonly known as the THORP plant, which reprocessed spent or waste nuclear power reactor fuel elements on a commercial basis. It also stated that it was particularly concerned about its marine environment, not least since a significant proportion of its economy related to fisheries activities in the Irish Sea, including areas in close proximity to the Sellafield site and those in which international movements of plutonium and other radioactive substances would occur.³¹⁸

Ireland pointed out that it was gravely concerned about the MOX plant and its implications, either direct or indirect, for the Irish Sea, and had been expressing its concerns since 1993. In 1994, it submitted its comments on and objections to the 1993 Environmental Statement prepared by British Nuclear Fuels Limited (BNFL), the operator of the MOX plant, setting out the views of the Government of Ireland on the inadequacies of the 1993 Statement. The 1993 Statement was never updated. Between 1997 and 2001, Ireland stated that it had submitted comments on five occasions, addressing also its environmental concerns.³¹⁹ It further added that it had first raised its specific concerns with regard to the Convention in its letters of 30 July 1999 and 23 December 1999, but the United Kingdom had chosen not to respond to the concerns of Ireland. It was pointed out that the United Kingdom kept secrecy about the MOX plant and failed to provide Ireland with information on material matters, including the following: the number of shipments of spent fuel into the Irish Sea envisaged at the MOX plant; the quantity and types of discharges of radioactive wastes from the MOX plant into the Irish Sea; the number of years the MOX plant would operate for and the number of shipments transporting MOX fuel to Japan and to other countries; and the quantity of additional radioactive material that would be discharged into the Irish Sea from the THORP plant, as a consequence of the commissioning of the MOX plant.³²⁰

³¹⁸ See the Request, para. 5.

³¹⁹ *Ibid.*, para. 44.

³²⁰ See the statement of the Attorney General of Ireland, see note 314, 9, and the statement of Sands in Doc. ITLOS/PV.01/07/Rev.1, 5.

In a letter of 23 December 1999, Ireland requested the United Kingdom to carry out a new environmental impact assessment procedure, taking into account the requirements of the instruments referred to therein, including the Convention. It further requested that the MOX plant not be put into operation until the new assessment procedure had been carried out.³²¹ By its letter of 9 March 2000, the United Kingdom responded by stating that it was “still in the process of coming to a final decision on the full operation of the plant”, that it would publish a document setting out its final decision and the “reasons in full” and that it would send a copy to Ireland immediately after it had been published.³²² It was alleged that subsequently the United Kingdom simply announced, on 3 October 2001, that the operation of the MOX plant had been authorized.³²³ In a letter of 16 October 2001, Ireland stated that the decision of the United Kingdom to proceed with the authorization of the MOX plant was in violation of the provisions of various international instruments, including the Convention, that, accordingly, disputes had arisen between it and the United Kingdom in relation to each of these instruments, that the United Kingdom should suspend with immediate effect the authorization of the MOX plant, that the United Kingdom should take steps to comply with its obligations under arts 192 to 194 of the Convention, that, since “the United Kingdom appears strongly committed to the authorization and early operation of the MOX plant there would appear to be little point in proceeding to an exchange of views regarding the settlement of the dispute under UNCLOS by negotiation or by means envisaged by Article 283 of UNCLOS” and that “(n)evertheless, Ireland wishes to signal its availability to proceed to such an exchange if the United Kingdom considers that an exchange could be useful.”³²⁴ In its reply of 18 October 2001, the United Kingdom pointed out that it was anxious to exchange views on the points made in the Irish letter of 16 October 2001 but needed to understand why Ireland considered the United Kingdom to be in breach of provisions and principles identified therein.³²⁵ In a letter dated 23 October 2001, Ireland explained its position concerning the incompatibility of the MOX plant with the United Kingdom’s international obligations. It stated that if there was an indication that the

³²¹ For the text of this letter, see Annex 1 to the Request, 87.

³²² For the text of the letter, see Annex 2 to the Request, 11.

³²³ For the News Release on the subject, see Annex 1 to the Request, 107.

³²⁴ For the text of this letter, see Annex 1 to the Request, 30.

³²⁵ *Ibid.*, 257.

United Kingdom might suspend the authorization of the MOX plant, Ireland “would be pleased to offer to host an exchange of views in Dublin later this week.”³²⁶ In the absence of such indication, Ireland stated, it reserved its right to institute proceedings before appropriate international courts or tribunals without further notice. In a letter dated 24 October 2001, the United Kingdom stated again that Ireland’s position on the subject matter of the alleged dispute or disputes remained unclear to it and that “(i)t [was] in fact the case that the authorization procedure for the MOX plant [had] not yet been completed.”³²⁷ In a letter dated 25 October 2001, Ireland stated that it had learnt that BNFL intended to take irreversible steps in relation to the operation of the MOX plant on or around 23 November 2001, and that, unless the United Kingdom provided an immediate voluntary undertaking to delay the commissioning of the MOX plant, Ireland reserved its right to issue proceedings under the Convention without further notice.³²⁸ This constituted the background to the Request as explained by Ireland.

The question before the Tribunal was whether the Request for provisional measures had been made in accordance with the provisions of article 290, para. 5 of the Convention. At the outset, it was noted that Ireland had on 25 October 2001 notified the United Kingdom of the submission of the dispute to the Annex VII arbitral tribunal and of the Request for provisional measures and that, on 9 November 2001, after the expiry of the time-limit of two weeks provided for in article 290, para. 5 of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Ireland had submitted to the Tribunal a Request for provisional measures.

The next question which needed to be answered was whether the Tribunal considered that *prima facie* the Annex VII arbitral tribunal which was to be constituted would have jurisdiction. Ireland answered the question in the affirmative, arguing that it had submitted its dispute with the United Kingdom to the Annex VII arbitral tribunal in accordance with arts 286, 287 para. 5, and 288 para. 1, of the Convention. It pointed out that the dispute concerned the question as to whether the United Kingdom had fulfilled its duties under arts 192 to 194, 207, 211, 212 and 213 of the Convention to prevent, reduce and control deliberate and accidental pollution of the Irish Sea, and to assess the risk of terrorist attack on the MOX plant and on movements of radioactive mate-

³²⁶ Ibid., 259.

³²⁷ Ibid., 260.

³²⁸ Ibid., 261.

rial associated with it; its duties under arts 123 and 197 of the Convention to cooperate with Ireland in the protection of the marine environment of the Irish Sea; and its duties under article 206 of the Convention properly to assess the potential effects of the MOX plant and associated activities upon the marine environment of the Irish Sea.³²⁹ Ireland contended that it was entitled to submit the dispute to the Annex VII tribunal, no settlement having been reached by negotiation or other peaceful means as provided for in article 283, para. 1 of the Convention.³³⁰

The United Kingdom argued that *prima facie* the Annex VII arbitral tribunal would not have jurisdiction for more than one reason. The case in this regard rested on arts 282³³¹ and 283³³² of the Convention. It was argued that since the matters of which Ireland complained were governed by regional agreements providing for alternative and binding means of resolving disputes and had actually been submitted to such alternative tribunals, or were about to be so submitted, article 282 served as a barrier to the assumption of the jurisdiction by the Annex VII arbitral tribunal.³³³ Attention was drawn in this connection to the dispute submitted by Ireland to an arbitral tribunal under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (hereafter “the OSPAR Convention”) and to Ireland’s declaration of its intention of initiating separate proceedings in

³²⁹ See the Request, 55-56.

³³⁰ *Ibid.*

³³¹ Article 282 reads as follows:

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 this Part, unless the parties to the dispute otherwise agree.

³³² Article 283 reads as follows:

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

³³³ See the Written Response of the United Kingdom, 1-4.

respect of the United Kingdom's alleged breach of obligations arising under the Treaty establishing the European Community (hereafter "the EC Treaty") or the Treaty establishing the European Atomic Energy Community (hereafter "the Euratom Treaty") and the Directives issued thereunder.³³⁴ The United Kingdom stated that since each allegation made against it was to be determined by the compulsory dispute settlement procedures of the OSPAR Convention or the EC Treaty or the Euratom Treaty, the Annex VII arbitral tribunal would not have jurisdiction by virtue of article 282 of the Convention.³³⁵

In response to the objection based on article 282, Ireland pointed out that that article applied where there was a "dispute concerning the interpretation or application of this Convention," that is, the Law of the Sea Convention, and the parties had agreed to settle such a dispute by a procedure entailing a binding decision, and that the disputes submitted by it under other regional agreements concerned not the interpretation of the Convention but the interpretation or application of such regional agreements.³³⁶ It was further stated that, in principle, the rights and duties under the Law of the Sea Convention, the OSPAR Convention, the EC Treaty and the Euratom Treaty were cumulative, that Ireland, as a State Party, could rely on any or all of them as it chose, and that if an international tribunal had jurisdiction over a matter, a claimant was entitled to its remedy, even if there were other tribunals in which it might have chosen to pursue its case.³³⁷

The Tribunal found no difficulty in accepting the basic argument of Ireland and in declaring that, for the purpose of determining whether the Annex VII arbitral tribunal would have *prima facie* jurisdiction, article 282 of the Convention was not applicable to the dispute in question. It held that the dispute before the Annex VII arbitral tribunal concerned the interpretation or application of the Law of the Sea Convention and no other agreements, that, even if the regional agreements in question contained rights or obligations similar to or identical with the rights or obligations set out in the Law of the Sea Convention, the rights and obligations under these agreements had "a separate existence

³³⁴ Ibid., 59-62.

³³⁵ Ibid. See also the statement of the Attorney General of the United Kingdom made at a public sitting held on 19 November 2001 in Doc. ITLOS/PV.01/07/Rev.1, 21, 28. See also Plender's statement in Doc. ITLOS/PV.01/08/Rev.1, 20-26.

³³⁶ See the statement of Lowe in Doc. ITLOS/PV.01/07/Rev.1, 8-12.

³³⁷ Ibid.

from those under the Convention” and that the application of international law rules on interpretation of treaties to identical or similar provisions of different provisions “may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.”³³⁸

The United Kingdom also argued that the requirements of article 283 of the Convention had not been satisfied, since the correspondence between Ireland and the United Kingdom did not amount to an exchange of views within the meaning of that article on the dispute said to have arisen under the Convention.³³⁹ This was contested by Ireland. It appears that there was an air of artificiality in the United Kingdom’s position, expressed repeatedly in the letters exchanged with Ireland, that the United Kingdom was unable to understand why the Irish Government considered it to be in breach of its international obligations; the fact that the United Kingdom did not agree with the Irish contention was a different matter. On the basis of the correspondence exchanged between the parties, starting with Ireland’s letter of 23 December 1999, and having regard to Ireland’s assessment that the United Kingdom was unwilling to suspend the commissioning of the MOX plant pending an exchange of views and that consequently deadlock had been reached,³⁴⁰ the Tribunal declared that a State Party was not obliged to continue with an exchange of views when it concluded that “the possibilities of reaching agreement [had] been exhausted.”³⁴¹ This should not be interpreted to mean that the Tribunal would treat article 283 to be an empty formality, to be dispensed with at the whims of a disputant. Like any international obligation, the obligation arising under article 283 must also be discharged in good faith,³⁴² and it is the duty of the Tribunal to examine whether that is being done. The Tribunal considered that the provisions of the Convention invoked by Ireland appeared to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded. For the above reasons, the Tribunal found that

³³⁸ See paras 49 to 53 of the Order of 3 December 2001. The foundation for the logic of these statements was laid in the *Southern Bluefin Tuna Cases*, as may be seen from the Tribunal’s Order of 27 August 1999, paras 46-51.

³³⁹ See the Written Response of the United Kingdom, paras 5-7.

³⁴⁰ See the statement of Lowe in Doc. ITLOS/PV.01/09/Rev.1, 13-17.

³⁴¹ See para. 60 of the Order of 3 December 2001. For a similar declaration in the *Southern Bluefin Tuna Cases*, see the Order of 27 August 1999, para. 60.

³⁴² See also the statement of Lowe in Doc. ITLOS.PV.01/09/Rev.1, 16.

the arbitral tribunal would *prima facie* have jurisdiction over the dispute.

It is also a requirement of article 290, para. 5 of the Convention that provisional measures may not be prescribed unless “the urgency of the situation so requires;” the urgency must be such that the measures involved cannot wait until an arbitral tribunal has been constituted.³⁴³ Though not expressly stated in article 290, para. 5 of the Convention, it is also a requirement of that provision that provisional measures may only be prescribed if, as specified in article 290, para. 1 the court or tribunal considers them “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.”³⁴⁴ In the *MOX Plant Case*, the question was whether the commissioning of the MOX plant on or around 20 December 2001 would of itself constitute a critical event such as to warrant the prescription of provisional measures before the Annex VII arbitral tribunal could act.

At the outset, in response to the Irish contention that the commissioning of the plant was “in practical terms, itself a near-irreversible step” and that it would not be “possible to return to the position that existed before the commissioning of the MOX plant simply by ceasing to feed plutonium into the system,”³⁴⁵ the United Kingdom replied that neither the commissioning of the MOX plant nor the introduction of plutonium into the system was irreversible, although decommissioning would present the operator of the plant with technical and financial difficulties if Ireland were to be successful in its claim before the Annex VII arbitral tribunal.³⁴⁶ Similarly, in response to the Irish contention that the commissioning of the MOX plant would increase the transport

³⁴³ Article 89 of the Rules also provides that a request for the prescription of provisional measures under article 290 para. 5 of the Convention shall also indicate “the urgency of the situation.”

³⁴⁴ The legal position is made explicit in article 89 para. 3 of the Rules, which provides:

The request [for provisional measures] shall be in writing and specify the measures requested, the reasons therefore and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment.

³⁴⁵ See the Request, 61-62.

³⁴⁶ See the Written Response of the United Kingdom, 17. Due account of this reply was taken by the Tribunal in para. 74 of the Order of 3 December 2001. See also the statement of Plender in Doc. ITLOS/PV.01/08/Rev.1, 28.

by sea of radioactive materials to and from Sellafield³⁴⁷ unless the United Kingdom were to enter into an understanding with Ireland in relation to movements,³⁴⁸ the United Kingdom assured Ireland that “there [would] be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant,” that “there [would] be no export of MOX fuel from the plant until summer 2002” and that “there [was] to be no import to the THORP plant of spent nuclear fuel pursuant to contracts for conversion to the MOX plant within that period either” and clarified that the word “summer” should be read as “October.” The assurances given by the United Kingdom in this regard have been placed on record by the Tribunal.³⁴⁹ The Tribunal also noted the readiness of the United Kingdom to reach agreement with Ireland on the constitution of the Annex VII arbitral tribunal “within a short space of time.”³⁵⁰ The rival contentions of the parties will have to be appreciated in the light of the above.

In the main, the Irish contention was that that its rights fell into three categories: (1) the right to ensure that the Irish Sea would not be subject to additional radioactive pollution; (2) the right to have the United Kingdom cause to be prepared a proper and up-to-date and complete environmental impact assessment on the MOX plant and on associated international movements of nuclear material; and (3) the right to have the United Kingdom cooperate with Ireland on the protection of the semi-enclosed Irish Sea and to coordinate in the promotion of activities. It was stated that each of these rights would be fully engaged by the commissioning of the MOX plant and that, if the commissioning occurred, the exercise of each right would be “irretrievably prejudiced on Ireland’s behalf.”³⁵¹ Ireland pointed out that its first right arose under arts 192, 194, 207 and 212 of the Convention. It was stated that radionuclides would be deliberately discharged from the MOX plant into the Irish Sea and into the atmosphere and that they would reach the marine environment of the Irish Sea and Ireland; moreover,

³⁴⁷ For the exposition of this position, see the statement of Fitzsimons in Doc. ITLOS/PV.01/09/Rev.1, 7.

³⁴⁸ See the statement of Sands in Doc. ITLOS/PV.01/Rev.1, 12.

³⁴⁹ See the Order of 3 December 2001, paras 78 and 79. See also the statement of Plender in Doc. ITLOS/PV.01/09/Rev.1, 26.

³⁵⁰ See the Order of 3 December 2001, para. 77. See also the Written Response of the United Kingdom, 5.

³⁵¹ See the statement of Sands in Doc. ITLOS/PV.01/06/Rev.1, 26. See also the Request, 27.

additional discharges of radionuclides would also be made into the Irish Sea from the THORP plant as a direct result of the commissioning and operation of the MOX plant, though it was not known to Ireland in what quantities. It was also added that, beyond these two sources, there were *potentially* other releases from the MOX plant, firstly by reason of accident and, secondly, by reason of terrorist acts.³⁵² It was claimed that article 194 of the Convention required the United Kingdom not to authorize any new activities which would or could lead to any increase in concentrations of radionuclides into the Irish Sea, where the effects would be irreversible and could not be compensated monetarily.³⁵³ When dealing with ultra-hazardous substances, the precautionary principle, or prudence and caution, militated decisively in favour of provisional measures.³⁵⁴ And, if the possibility could not be excluded that the Annex VII arbitral tribunal might find in favour of Irish claims, there would be compelling grounds for prescribing provisional measures.³⁵⁵ Ireland also stated that the “European Parliament’s report” of 20 August 2001 furnished the evidence in relation to harm and damage and particularly in relation to the irreversible effects of the discharges into the Irish Sea warranting the prescription of provisional measures.³⁵⁶ It further asserted that provisional measures were prescribable if the Tribunal could not exclude the possibility that damage to Ireland might be shown to be caused by the deposition on Ireland’s territory of radioactive fall-out resulting from the operation of the MOX plant and to be irreparable.

Ireland stated that its *second* right arose under article 206 of the Convention, by which it was entitled to claim that the operation of the MOX plant should not be authorized until a revised environmental statement for the MOX plant had been issued, taking into account the current environmental standards, the risk of potential effects by terrorist acts and the potential effects of the operation of the MOX plant on the Irish Sea, including the additional discharges from THORP.³⁵⁷

Ireland claimed that its *third* right arose on the basis of arts 123 and 197 of the Convention, which dealt with cooperation between States bordering semi-enclosed seas and cooperation on a regional basis for

³⁵² See the statement of Sands, *ibid.*, 27.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, 30.

³⁵⁵ *Ibid.*, 29.

³⁵⁶ *Ibid.*, 30.

³⁵⁷ *Ibid.*, 31.

the protection and preservation of the marine environment.³⁵⁸ It maintained that the right of cooperation had the following three elements: first, the right to be notified about the essential details of the MOX plant; second, the right to have the United Kingdom respond in a timely and substantive fashion to the Irish request for information and assistance; and, third, the right to have the Irish rights and interests taken into account in any action the United Kingdom might take which might have adverse implications for the sea. It asserted that the United Kingdom had failed to fulfil its obligations under arts 123 and 197 and that Ireland's rights would not be satisfied once the MOX plant had become operational.³⁵⁹ Ireland asserted that if the trend towards the concentration of radioactive pollution in the Irish Sea was to be arrested, "the plant needs to be very carefully designed and operated, and we are far from sure that it is."³⁶⁰ It was argued that the imperative was not simply to prevent isolated acts of substantial pollution but to stop the trend towards the further degradation of the environment by adding to the 250 or more kilograms of plutonium from the Sellafied plant that had already been absorbed in the sediments of the Irish Sea. Paraphrasing the Separate Opinion of Judge Treves in the *Southern Bluefin Tuna Cases*,³⁶¹ it was pointed out that "[e]ach step in such deterioration [could] be seen as 'serious harm' because of its cumulative effect."³⁶²

The United Kingdom pointed out that before the Tribunal could exercise its discretion it must be shown that there was a risk of irreparable prejudice to Ireland's rights or of serious harm to the marine environment, as required by article 290, para. 1 of the Convention; the risk of harm occurring must be real and not hypothetical or remote.³⁶³ It was added that provisional measures were an exceptional form of relief, that the discretionary power of the Tribunal in this matter should rather be used with restraint and prudence, that it was incumbent on an applicant

³⁵⁸ Ibid.

³⁵⁹ Ibid., 35. See also the statement of Lowe in Doc. ITLOS/PV.01/07/Rev.1, 17-19.

³⁶⁰ See the statement of Lowe, *ibid.*

³⁶¹ Judge Treves stated: "The urgency concerns the stopping of a trend toward such collapse. The measures prescribed by the Tribunal aimed at stopping the deterioration in the southern bluefin tuna stock. Each step in such deterioration can be seen as 'serious harm' because of its cumulative effect towards the collapse of the stock."

³⁶² See the statement of Lowe in Doc. ITLOS/PV.01/07/Rev.1, 18.

³⁶³ See the statement of Bethlehem in Doc. ITLOS/PV.01/08/Rev.1, 13, 16, 20.

seeking such measures to adduce “at least a basic foundation of credible evidence of irreparable prejudice or serious harm.”³⁶⁴

The United Kingdom stated that the commissioning of the MOX plant would not of itself result in any prejudice to Ireland of any significant order, or at all, or set into motion a process that was in any way irreversible.³⁶⁵ It was pointed out that the radiation dose from the MOX plant was so small that it had to be measured in small fractions of microsieverts, i.e., fractions of a millionth of a sievert.³⁶⁶ In support of the argument that there was no risk of harm, reliance was placed on, among other things, the opinion of February 1997 of the European Commission,³⁶⁷ the 1999 Annual Report and Accounts of Ireland’s Radiological Protection Institute,³⁶⁸ the BNFL Environmental Statement of October 1993³⁶⁹ and the Environmental Agency’s Proposed Decision on the justification for the plutonium commissioning and full operation of the MOX plant of October 1998.³⁷⁰ It was stated that the process of manufacture of MOX fuel was a dry process and hence there was no question of radioactive liquids being discharged or seeping into the Irish Sea. It was claimed that the dose of radiation received by each member of the team appearing in the case on behalf of Ireland in flying to Hamburg from Dublin would be about 2500 times the dose received

³⁶⁴ See the Written Response of the United Kingdom, 80. See also the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 24.

³⁶⁵ See the statement of Bethlehem in Doc. ITLOS/PV.01/08/Rev.1, 16.

³⁶⁶ See the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 37.

³⁶⁷ For the text of this opinion, see Annex 3 to the Written Response of the United Kingdom. This opinion states, among other things:

In conclusion, the Commission is of the opinion that the implementation of the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield Mixed Oxide Fuel Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State.

³⁶⁸ For the text of this Report, see Annex 15 to the Written Response of the United Kingdom.

³⁶⁹ For the text of this Statement, see Annex 6 to the Written Response of the United Kingdom.

³⁷⁰ For the text of this Proposed Decision, see Annex 5 to the Written Response of the United Kingdom.

from the MOX plant by a member of the critical group in the course of a whole year.³⁷¹

It was stated that the European Parliament's report which was relied upon by Ireland as furnishing evidence of harm and damage was not, in fact, a report by the European Parliament; it was not specifically concerned with the MOX plant and had not been published by the European Parliament but had been leaked.³⁷² There was also nothing irreparable about the alleged violation of procedural rights invoked by Ireland. If the Tribunal were to order provisional measures along the lines requested by Ireland, it would cause the United Kingdom a potential loss of hundreds of millions of pounds and threaten the long-term viability of the MOX plant.³⁷³

It was argued that the question was not, as the Irish contended, whether the possibility of damage could be excluded, for that would require the United Kingdom to prove a negative. It was stated that, whereas it had adduced evidence to establish that the risk of pollution, if any, from the operation of the MOX plant would be infinitesimally small, there was nothing on Ireland's side of the equation.³⁷⁴ It was pointed out that the Tribunal's Order in the *Southern Bluefin Tuna Cases* was not relevant in this case, since there was no evidence of the MOX plant contributing to further contamination of the Irish Sea and that discharges from Sellafield had reduced very significantly indeed since the 1970s. Further, the precautionary principle, or prudence and caution, had no application since Ireland had failed even to adduce evi-

³⁷¹ See the statement of Plender in Doc. ITLOS/PV.01/08/Rev.1, 28.

³⁷² See the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 23; the statement of Plender in Doc. ITLOS/PV.01/08/Rev.1, 29. According to the press release of 30 October 2001 by the Chairman of the STOA Panel, the report was a study prepared by an external contractor in the context of the STOA Workplan 2000. The STOA Panel decided to request the opinion of independent experts after discussing the concerns expressed by some members of the European Parliament in relation to the possible lack of objectivity of the study. Even if the study had been published, such publication would not have meant endorsement of its contents either by members of the STOA Panel or the European Parliament. The Chairman of the STOA Panel stated that the contractor had broken the confidentiality clause in its contract with the European Parliament by making public parts of the study prior to publication.

³⁷³ See the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 22.

³⁷⁴ *Ibid.*, 17.

dence of uncertainty, let alone evidence of a real risk of imminent and serious harm.³⁷⁵

Based on the evidence placed on record by the parties and taking into account the assurances given by the United Kingdom, the Tribunal was apparently not satisfied that the manufacture of MOX would present significant risks for the Irish Sea or its marine environment in the short period before the constitution of the Annex VII arbitral tribunal, if the authorization of the MOX plant of 3 October 2001 was not immediately suspended. Accordingly, the Tribunal did not find that the urgency of the situation demanded the prescription of the “provisional measures requested by Ireland.”³⁷⁶ However, it considered that the duty to cooperate was a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arose therefrom which the Tribunal might consider appropriate to preserve under article 290 of the Convention. It further considered that “prudence and caution” required that both parties cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them³⁷⁷ and that Ireland and the United Kingdom “should” each ensure that no action was taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.³⁷⁸ The Tribunal prescribed, pending a decision by the Annex VII arbitral tribunal, the following provisional measure, under article 290, para. 5 of the Convention:

Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

- (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
- (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;
- (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

³⁷⁵ See the statement of Bethlehem in Doc. ITLOS/PV.01/08/Rev.1, 12.

³⁷⁶ See para. 81 of the Order of 3 December 2001.

³⁷⁷ See para. 84 of the Order of 3 December 2001.

³⁷⁸ See para. 85 of the Order of 3 December 2001.

There are certain unexplained but implicit premises in the Order. The Tribunal's refusal to prescribe provisional measures as requested by Ireland obviously related to the so-called *substantive* right invoked by Ireland to ensure that the Irish Sea would not be subject to additional radioactive pollution on account of the commissioning of the MOX plant. However, it appears that, in the opinion of the Tribunal, the requirement of urgency was satisfied in relation to the rights arising out of the duty to cooperate — the so-called *procedural* rights — which it sought to preserve, for there was no other basis for the prescription of provisional measures under article 290, para. 5 of the Convention. It may not be illogical to infer from the Order that the Tribunal did not consider that the provisional measure it prescribed would necessarily lead to the suspension of the authorization of the MOX plant.

The Order seems to be founded on the premise that the measures prescribed underlined a sense of urgency. The cooperation prior to the commissioning of the MOX plant and the cooperation afterwards may not be placed on the same footing; the former, for instance, may contribute to the promotion of several options, including temporary suspension of the commissioning of the plant; withdrawal of the case filed against the United Kingdom; and the enunciation of measures with the cooperation of Ireland that would minimize future risk, if any, from the operation of the plant. Though these options may still be available in future, in the field of protection and preservation of the marine environment, especially among States bordering a semi-enclosed sea, what needs to be done today should not be put off until tomorrow; otherwise, the potential of the right arising out of the duty to cooperate may never be attained and something is irretrievably lost. This then, it appears, constitutes the *raison d'être* of the Order of the Tribunal and the link between what was prescribed and the requirements for the prescription of provisional measures in article 290, para. 5 of the Convention.

3. The M/V “Saiga” (No.2) Case, Judgment

The case concerns the arrest on 28 October 1997 of the *Saiga*, an oil tanker flying the flag of Saint Vincent and the Grenadines, and its crew, by the customs authorities of Guinea outside its EEZ. The *Saiga* had been engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. On 27 October 1999, the *Saiga* supplied gas oil to three fishing vessels, two of which

were flying the flag of Senegal and one the flag of Greece, at a point approximately 22 nautical miles from Guinea's island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its EEZ. On 28 October 1997, at a point south of the southern limit of Guinea's EEZ, the *Saiga* was attacked by a Guinean patrol boat. Officers from that boat and another Guinean patrol boat subsequently boarded the *Saiga* and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its Master was detained. Between 10 and 12 November 1997, the cargo of gas oil on board the ship was discharged on the orders of the Guinean authorities. In the *M/V "Saiga" (No.2) Case*, the Tribunal delivered its first Judgment on the merits on 1 July 1999, thus bringing to a close a dispute that began with Guinea's arrest of the vessel, *M/V "Saiga"*, and its crew.

The jurisdiction of the Tribunal to deal with the dispute was not contested by the parties in view of their 1998 Agreement transferring the dispute to the Tribunal. In response to a number of objections from Guinea to the admissibility of the claims advanced by Saint Vincent and the Grenadines, the latter contended that the former did not have the right to raise such objections, since Guinea reserved only its right under the 1998 Agreement to object to the jurisdiction of the Tribunal. The Tribunal observed that this Agreement did not deprive Guinea of its "general right to raise objections to admissibility" and that the time-limit in article 97, para. 1 of the Rules did not apply to objections to jurisdiction or admissibility which were not requested to be considered before any further proceedings on the merits.³⁷⁹

The Judgment then dealt with the objections to the admissibility of the claims of Saint Vincent and the Grenadines before entering into the merits of the case. The Tribunal rejected the objections to the admissibility of the claims of Saint Vincent and the Grenadines based on Guinea's contentions that the *Saiga* was not registered in Saint Vincent and the Grenadines at the time of its arrest, that there was no genuine link between Saint Vincent and the Grenadines and the *Saiga* at the time of its arrest, and that local remedies had not been exhausted.

On the question of whether the *Saiga* was registered at the time of its arrest, Guinea contended that the *Saiga* had been registered provi-

³⁷⁹ See paras 51 and 53 of the of judgment of 1 July 1999. Under the 1998 Agreement, the Parties agreed that proceedings before the Tribunal "shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction." For the text of the Agreement, see para. 4 of the Judgment.

sionally on 12 March 1997 as a Saint Vincent and Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines, that the Provisional Certificate of Registration issued to the *Saiga* on 14 April 1997 stated that it “expire[d] on 12 September 1997”, that the *Saiga* had been arrested by the Guinean officers on 28 October 1997, and that, consequently, Saint Vincent and the Grenadines, not being the flag State of the *Saiga* at the relevant time, was not competent to present its claims.³⁸⁰ Rejecting this argument, the Tribunal considered that the nationality of a ship was “a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties.”³⁸¹ In support of its holding that the registration of the *Saiga* had not been extinguished at the relevant time, the Tribunal relied upon three bases: (i) provisions of the Merchant Shipping Act of 1982, (ii) certain “indications of Vincentian nationality on the ship or carried on board”, and (iii) the consistent conduct of Saint Vincent and the Grenadines, which showed that it had at all times material to the dispute operated on the basis that the *Saiga* was a ship of its nationality, and the failure of Guinea to question the assertion of Saint Vincent and the Grenadines that it was the flag State of the *Saiga* when it had had every reasonable opportunity to do so and its other conduct in the case. It found, on the basis of the “evidence” before it, that Saint Vincent and the Grenadines had discharged “the initial burden” of establishing that the *Saiga* had Vincentian nationality at the time it was arrested by Guinea and that Guinea had failed to discharge the burden of proving its contention that the ship was not registered in or did not have the nationality of Saint Vincent and the Grenadines at the time of its arrest. The Tribunal also added that “in the particular circumstances of this case, it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute.”³⁸²

Judges Mensah, Wolfrum, Chandrasekhara Rao, Warioba and Ndiaye considered that the *Saiga* was not registered with Saint Vincent and the Grenadines at the time of its arrest. Their general line of reasoning ran as follows. Article 91 of the Convention provides:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag

³⁸⁰ See paras 57 and 58 of the Judgment.

³⁸¹ See para. 66 of the Judgment.

³⁸² See paras 67-73 of the Judgment.

they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

The Convention thus expressly provides that a State which has granted a ship the right to fly its flag is required to issue “documents to that effect.” The nature of these documents is generally specified in the laws and regulations of a State. To answer the question as to whether a ship is registered at any given time, one has to examine the documents, if any, issued to that ship.

If this is so, the Tribunal’s reliance on indications of Vincentian nationality on the ship or carried on board as constituting evidence of *Saiga*’s Vincentian nationality would appear to be misplaced. The reliance on the provisions of the Merchant Shipping Act would appear to be equally misplaced. Under this Act, a merchant ship acquires Vincentian nationality through registration and consequentially the right to fly the Vincentian flag. In the present case a document in the form of a provisional certificate of registration granting the right to fly the Vincentian flag had been issued under the Act but was not in force at the time the *Saiga* was arrested by Guinea and no further certificate had either been applied for or issued.

Judges Mensah, Wolfrum and Chandrasekhara Rao, in their Separate Opinions, while holding that Saint Vincent and the Grenadines was not the flag State at the relevant time, were not prepared to hold that on that account Saint Vincent and the Grenadines did not have the legal standing to bring the dispute to the Tribunal. Judge Mensah was of the opinion that it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute, having regard to the particular circumstances of the case. Judges Wolfrum and Chandrasekhara Rao held that, having failed to challenge the status of Saint Vincent and the Grenadines as the flag State of the *Saiga* at all material times when it ought to have done so to protect its rights, Guinea was precluded from doing so at that stage. Guinea did not raise the question of the ship’s lack of registration at the time when it seized the ship’s papers following the arrest of the *Saiga*. In the decisions of the judicial authorities of Guinea, Saint Vincent and the Grenadines was stated to be the flag State of the *Saiga*. Guinea also accepted the bank guarantee from Saint Vincent and the Grenadines for the release of the *Saiga*. Principles of fairness clearly demanded that a State not be allowed to act inconsistently, especially when it caused prejudice to others. Judges Warioba and Ndiaye wrote Dissenting Opinions on the ground that,

since the *Saiga* did not have the nationality of Saint Vincent and the Grenadines at the time of its arrest, they would uphold the Guinean objection to the admissibility of the claims of Saint Vincent and the Grenadines.

Addressing the Guinean contention that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines, and that, consequently, Guinea was not obliged to recognize the claims of Saint Vincent and the Grenadines in relation to the *Saiga*, the Tribunal concluded that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State was to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State might be challenged by other states.³⁸³ The Tribunal was therefore not strictly required to investigate the question as to whether there was a genuine link between the ship and Saint Vincent and the Grenadines. Nevertheless, it found that the evidence adduced by Guinea was not sufficient to justify its contention that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time.³⁸⁴ In general, there is much to be said in support of the principle that judicial bodies should not say more than what is strictly required for the disposal of a case.

The Tribunal then proceeded to deal with the Guinean objections to the admissibility of the Vincentian claim based on the non-exhaustion of local remedies. Guinea contended that Saint Vincent and the Grenadines was not competent to institute its claims, since the persons who were affected by Guinean actions had not exhausted the local remedies in Guinea, as required by article 295 of the Convention.³⁸⁵ The Tribunal found that the rights which Saint Vincent and the Grenadines claimed had been violated — the right to freedom of navigation, the right not to be subjected to the customs and contraband laws of Guinea, the right not to be subjected to unlawful hot pursuit, etc. — were all rights that belonged to Saint Vincent and the Grenadines under the Convention and could not be described as breaches of obligations concerning the

³⁸³ See para. 83 of the Judgment.

³⁸⁴ See para. 87 of the Judgment.

³⁸⁵ Article 295 provides:

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

treatment to be accorded to aliens.³⁸⁶ It added that damage to persons involved in the operation of the ship arose from those violations of the rights of Saint Vincent and the Grenadines. Accordingly, the Tribunal concluded that the claims in respect of such damage were not subject to the rule that local remedies must be exhausted.³⁸⁷ It further held that, even if it accepted Guinea's contention that some of the claims made by Saint Vincent and the Grenadines in respect of natural or juridical persons did not arise from direct violations of the rights of Saint Vincent and the Grenadines, the rule that local remedies must be exhausted did not apply in the present case, since there was no jurisdictional connection between the persons suffering damage in respect of whom Saint Vincent and the Grenadines had made claims and Guinea, i.e., the state responsible for the wrongful act which had caused the damage.³⁸⁸ The Judgment recorded that "(t)he parties agree" that a prerequisite for the application of the rule on local remedies was that there must be such a jurisdictional connection. A jurisdictional link was denied on the basis of the Tribunal's finding that, under the Convention, Guinea was not entitled to apply its customs laws in its customs radius which included parts of the exclusive economic zone.

The Tribunal's view that the case involved all direct violations of the rights of Saint Vincent and the Grenadines may be seen as diminishing the efficacy of article 295 of the Convention. The question of freedom of navigation was not directly at issue. The main question in the case was whether Guinea had stopped and arrested the *Saiga* on 28 October 1997 in circumstances which justified the exercise of the right of hot pursuit in accordance with the Convention. As will be seen later, the Tribunal answered this question in the negative. Para. 8 of article 111 of the Convention provides: "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, *it* shall be compensated for any loss or damage that may have been thereby sustained".³⁸⁹ The word "it" in this paragraph refers to the ship and not the flag State. It is not, therefore, open to a flag State to contend that every wrongful exercise of the right of hot pursuit involves direct violation of its rights rather than of those of the ship. This is in contrast, for instance, with article 106 of the Convention, which deals with liability for seizure of a ship or aircraft with-

³⁸⁶ See paras 97 and 98 of the Judgment.

³⁸⁷ *Ibid.*

³⁸⁸ See para. 100 of the Judgment.

³⁸⁹ Emphasis added.

out adequate grounds. The article provides that in such a case “the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.” Article 106, unlike article 111, thus provides that it is the flag State which is entitled to claim relief for any loss or damage caused by the wrongful seizure. When article 111, para. 8 states that it is the ship which is to be compensated, it appears that all interests directly affected by the wrongful arrest of a ship are entitled to be compensated for any loss or damage that may have been sustained by such arrest. It is also significant that the Judgment, while specifying the total amount of compensation to be paid to Saint Vincent and the Grenadines, nevertheless found it necessary to indicate the sums, out of that total amount, payable to the owner of the ship, its charterer and members of the crew; no compensation was awarded to Saint Vincent and the Grenadines directly.³⁹⁰ Since this is a case involving a ship’s entitlement to compensation in principle, it would have been appropriate to hold that local remedies in Guinea were in principle required to be exhausted by the persons affected by the arrest of the *Saiga* before Saint Vincent and the Grenadines could bring their claims to this Tribunal.³⁹¹ However, in the present case, no connection appeared to exist between such persons and the territory or jurisdiction of Guinea.³⁹² In this view of the matter, the Guinean objection based on local remedies appears to have been rightly rejected by the Tribunal.

Guinea also contended that certain claims of Saint Vincent and the Grenadines could not be entertained by the Tribunal because they related to violations of the rights of persons who were not nationals of Saint Vincent and the Grenadines.³⁹³ While rejecting this objection based on the nationality of claims, the Tribunal relied upon the provisions of the Convention concerning the duties of flag States regarding ships flying their flag,³⁹⁴ which make no distinction between nationals and non-nationals of a flag State but consider a ship as a unit, as regards

³⁹⁰ See para. 183(12), read together with para. 175 of the Judgment.

³⁹¹ See also the Separate Opinions of Judges Chandrasekhara Rao and Wolfrum and the Dissenting Opinions of Judges Warioba and Ndiaye.

³⁹² On the need for such connection, see generally C.F. Amerasinghe, *Local Remedies in International Law*, 1990, 138-149; I. Brownlie, *Principles of Public International Law*, 5th edition 1998, 500-501.

³⁹³ See para. 103 of the Judgment.

³⁹⁴ The following articles of the Convention were cited: arts 94; 106; 110, para. 3; 111, para. 8; and 217.

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 ships by acts of other states and to institute proceedings under article 292 of the Convention. The Tribunal added: "(T)he 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."³⁹⁵

Having upheld the legal standing of Saint Vincent and the Grenadines to bring claims in connection with the measures taken by Guinea against the *Saiga*, the Tribunal examined the main charge against the *Saiga*, which was that it had violated Guinean law by importing gas oil into the customs radius of Guinea. According to Guinea, the fact that the *Saiga* had violated the laws of Guinea had been authoritatively decided by its Court of Appeal and the Tribunal was not competent to consider the question of whether the internal legislation of Guinea had been properly applied by the Guinean authorities or courts. The Tribunal noted that from the standpoint of international law, there was nothing to prevent it from considering the question of whether or not, in applying its laws to the *Saiga* in the present case, Guinea had been acting in conformity with its obligations towards Saint Vincent and the Grenadines.³⁹⁶ Besides, in exercising their rights and fulfilling their obligations in the EEZ, States are required to have due regard to the rights and duties of the coastal State and to comply with "the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part [Part V],"³⁹⁷ a requirement of the Convention that empowers the Tribunal to determine the compatibility of such laws and regulations with the Convention.

The Tribunal found no evidence in support of the Guinean contention that the laws relied upon by it provided a basis for the action taken against the *Saiga* beyond the assertion that it reflected the consistent practice of its authorities as supported by its courts. The Tribunal further added that, even if it were to be conceded that the Guinean contention was valid, Guinea had acted contrary to the Convention by extending its customs laws in the EEZ within a customs radius extending

³⁹⁵ See para. 106 of the Judgment.

³⁹⁶ In support, the Tribunal cited the Judgment of the PCIJ in *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, PCIJ Series A, No.7, 19.*

³⁹⁷ Article 58 para. 3 of the Convention.

to a distance of 250 kilometres from the coast.³⁹⁸ In the view of the Tribunal, except in respect of artificial islands, installations and structures,³⁹⁹ the Convention did not empower a coastal State to apply its customs laws in respect of any other parts of the EEZ. The Tribunal also rejected Guinea's justification for its actions based on its public interest, as being incompatible with the provisions of arts 58 para. 3 and 59 of the Convention.⁴⁰⁰ Similarly, it rejected the defence based on the so-called "state of necessity", since Guinea had failed to demonstrate to the satisfaction of the Tribunal that the only means of safeguarding its essential interests was to extend its customs laws to parts of the EEZ.⁴⁰¹ The Tribunal avoided addressing the broader question of the rights of the coastal States and other States with regard to bunkering in the EEZ.⁴⁰²

The Tribunal then proceeded to hold that, since no laws of Guinea applicable in accordance with the Convention had been violated by the *Saiga*, no legal basis existed for the exercise of the right of hot pursuit by Guinea in this case. It further found that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention were cumulative and that several of these conditions had not been fulfilled in this case. No visual or auditory signals to stop had been given to the *Saiga* prior to the commencement of the alleged pursuit, as required by article 111, para. 4 of the Convention and the alleged pursuit had not been uninterrupted, as required by article 111, para. 1 of the Convention.

Adverting to the question of force used by Guinea in the arrest of the *Saiga*, the Tribunal, while noting that the Convention did not contain express provisions on this matter, observed that international law, applicable by virtue of article 293 of the Convention, required the use of force to be avoided as far as possible and, where force was unavoidable, it must not go beyond what was reasonable and necessary in the circumstances and considerations of humanity must apply in the law of

³⁹⁸ See paras 127-136 of the Judgment.

³⁹⁹ See article 60 para. 2 of the Convention.

⁴⁰⁰ See paras 128-131 of the Judgment.

⁴⁰¹ See paras 133-135 of the Judgment. The Tribunal placed reliance upon the Judgment of the ICJ in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 3 et seq., (40, paras 51 and 52).

⁴⁰² See Separate Opinions of Judges Zhao, Anderson, Vukas and Laing and Dissenting Opinion of Judge Warioba for their views on offshore bunkering.

the sea, as they did in other areas of international law.⁴⁰³ It further observed that these principles had been followed over the years in law enforcement operations at sea.⁴⁰⁴ The Tribunal found that Guinea had used excessive force and endangered human life before and after boarding the *Saiga*. Accordingly, when awarding compensation, the Tribunal took due account of injury, pain, disability, and psychological damage caused to officers on board the ship.

Though each party requested the Tribunal to award legal and other costs to it, the Tribunal saw no need to depart from the general rule that each party should bear its own costs,⁴⁰⁵ following in this respect the well-established practice of the ICJ. In the great majority of cases involving inter-State litigation, adjudication of rights and wrongs and declaration of law may by themselves meet the ends of justice. This may not be the case, for instance, in contractual disputes with respect to activities in the international seabed area involving mainly commercial considerations.

It is worth noting that, whereas in the *Saiga* prompt release case the Tribunal was deeply divided, in the *Saiga* merits case, a substantial majority of judges had no difficulty in being on the same side. Some may consider that the manifest illegality of the Guinean action on merits had influenced the minds of some of the judges in taking a lenient view on the question of the registration of the *Saiga*. This may not, however, be interpreted to mean that the Tribunal treats the question of registration as a technicality or would be lax in insisting on compliance with the requirements of the Convention with regard to nationality of ships, as is borne out by the “*Grand Prince*” Case.

⁴⁰³ See generally paras 155-159 of the Judgment.

⁴⁰⁴ The Judgment referred to: the *S.S. “I’m Alone”* case (Canada v. United States, 1935), U.N.R.I.A.A., Vol. III, 1609; *The Red Crusader* case (Commission of Enquiry, Denmark – United Kingdom, 1962), ILR Vol. 35, 485; and article 22, para. 1(f), of the 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.

⁴⁰⁵ Article 34 of the Statute provides that “Unless otherwise decided by the Tribunal, each party shall bear its own costs.” Disagreeing with the Tribunal’s position on the question of costs, Judges Caminos, Yankov, Akl, Anderson, Vukas, Treves and Eiriksson made a joint declaration in which they observed that the Tribunal should have awarded costs to Saint Vincent and the Grenadines, as the generally successful party.

4. The Swordfish Case

By way of background to Case No. 7 — *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)* — it may be recalled that, since the parties did not accept the same procedure for the settlement of their dispute, submission of it to arbitration in accordance with Annex VII to the Convention became compulsory, unless the parties otherwise agreed.⁴⁰⁶ When the President of the Tribunal held consultations with the parties upon a request received from Chile for the appointment of a member of the arbitral tribunal in accordance with article 3, subpara. (e) of Annex VII to the Convention, it was agreed between the parties, following the said consultations, that the dispute be not submitted to the arbitral tribunal but be referred to a special chamber of the Tribunal to be formed in accordance with article 15, para. 2 of the Statute on the terms agreed between the two of them. Throughout all the aforesaid consultations, at the request of the parties, the President used his good offices to promote an understanding in this regard.⁴⁰⁷ The parties had also conveyed their views regarding the composition of the special chamber of the Tribunal, which the President reported to the Tribunal.⁴⁰⁸

Having thus received the joint request of the parties to have a special chamber formed for dealing with their dispute and their views regarding the composition of such a chamber, the Tribunal, by its Order of 20 December 2000, acceded to the request of the parties, determined the composition of the Special Chamber and declared that the Special Chamber as composed in the Order was duly constituted.⁴⁰⁹ By the said Order, the Tribunal decided, among other things, that the quorum re-

⁴⁰⁶ See article 287 paras 3 and 5 of the Convention.

⁴⁰⁷ See letter dated 18 December 2000 from Chile addressed to the Registrar of the Tribunal, which is recorded by the Tribunal in its Order of 20 December 2000.

⁴⁰⁸ See article 30 para. 2 of the Rules.

⁴⁰⁹ See in this regard article 15 para. 2 of the Statute and article 30 para. 3 of the Rules. The basic framework for the Tribunal's Order was provided by Orders of the ICJ on the constitution of a special chamber under Article 26, para. 2 of the Statute of the ICJ. See, for example, *Frontier Dispute, Constitution of Chamber, Order of 3 April 1985*, ICJ Reports 1985, 6 et seq.; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Constitution of Chamber, Order of 8 May 1987*, ICJ Reports 1987, 10 et seq.

quired for meetings of the Special Chamber was to be three members of the Special Chamber,⁴¹⁰ made provision for making preliminary objections and for the filing of a Memorial and a Counter-Memorial by each of the parties, decided that the Special Chamber could authorize the presentation of a Reply and Rejoinder if it found them necessary and reserved the subsequent procedure for further decision by the Special Chamber.

As a general rule, by virtue of section D (arts 107 to 109) of Part III of the Rules, proceedings before the special chambers are, subject to the provisions of the Convention, the Statute and the Rules relating specifically to the special chambers, to be governed by the Rules applicable in contentious cases before the Tribunal.⁴¹¹ The parties, however, requested that the proceedings of the special chamber be governed by the provisions contained in Part III, sections A, B and C, of the Rules and that, in particular, any preliminary objection should be dealt with by the Special Chamber in accordance with the provisions of article 97, paras 1 to 6 of the Rules; the parties thus wanted section D and article 97, para. 7 of the Rules not to apply.⁴¹² The Rules permit the parties to jointly propose modifications or additions to the Rules contained in Part III dealing with procedure, which may be applied by the Tribunal or by a chamber if the Tribunal or the chamber considers them appropriate in the circumstances of the case. Since the Tribunal agreed to the modifications sought by the parties, it made provision for certain aspects of procedure in line with the agreement of the parties.⁴¹³

By separate letters dated 9 March 2001, the parties informed the President of the Special Chamber that they had reached a provisional arrangement concerning the dispute and requested that the proceedings before the Chamber be suspended. In their letters, each party reserved its right to revive the proceedings at any time. There is, however, no provision in the Rules providing for suspension of the proceedings. Further to the request of the parties, the President of the Special Cham-

⁴¹⁰ See article 30 para. 3 of the Rules.

⁴¹¹ See article 107 of the Rules.

⁴¹² Article 97 para. 7 of the Rules provides that the Tribunal shall give effect to any agreement between the parties that an objection submitted under para. 1 of article 97 of the Rules be heard and determined within the framework of the merits. Thus, the parties wanted the preliminary objections to be heard and determined before proceeding to the merits of the case.

⁴¹³ See article 48 of the Rules. The Tribunal's Order of 20 December 2000 expressly relied upon article 48 of the Rules.

ber, by Order dated 15 March 2001, extended the time-limit for making preliminary objections. Under the Order, the time-limit of 90 days for the making of preliminary objections would commence on 1 January 2004 and each party would have the right to request that the time-limit should begin to apply from any date prior to 1 January 2004. The Order serves the same object as that underlying the request for suspension by granting to the parties further time for taking the steps required of them under the Tribunal's Order of 20 December 2002, thus enabling the parties to reach a final settlement of the dispute within the extended period. Since the judicial settlement of international disputes is simply an alternative to the direct and friendly settlement of such disputes between the parties, the Tribunal is under a duty to facilitate, so far as is compatible with its Statute and the instruments emanating from it, such direct and friendly settlement.⁴¹⁴

Though the case was submitted by virtue of the agreement of the parties, the parties were unable to present an agreed list of issues to be decided by the Special Chamber; each party's issues were presented separately to the Special Chamber. Swordfish is a highly migratory species listed in Annex 1 to the Convention. Article 64 of the Convention calls for cooperation between the coastal State and other States whose nationals fish in the region for the highly migratory species with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. It appears that the dispute between Chile and the European Community had remained unresolved for more than ten years. The main issues presented on behalf of Chile were whether the European Community had complied with its obligations under the Convention, especially arts 116 to 119 thereof (conservation and management of the living resources of the high seas), to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its member States in the high seas adjacent to Chile's exclusive economic zone and whether the European Community had complied with its obligations under the Convention, in particular article 64 thereof. On behalf of the European Community, the main issue raised was whether Chilean Decree 598, which purported to apply Chile's unilateral conservation measures relating to swordfish on the high seas, was in breach of, *inter alia*, arts 87 (freedom of the high seas), 89 (invalidity of claims of sovereignty over the high seas) and 116 to 119

⁴¹⁴ See *Free Zones of Upper Savoy and the District of Gex*, Order of 19 August 1929, *PCIJ Series A*, No. 22, 5 et seq., (13).

of the Convention. A further main issue submitted by the European Community was whether “the Galapagos Agreement” of 2000 was in consonance with, *inter alia*, arts 64 and 116 to 119 of the Convention. The issues involved thus seek authoritative interpretation of the fundamental provisions of the Convention concerning highly migratory species and conservation and management of the living resources of the high seas.

While Chile took the initiative to bring the dispute to the Tribunal, the European Community had taken up the matter regarding the prohibition on unloading swordfish in Chilean ports with the WTO Dispute Settlement Body and requested consultations with Chile;⁴¹⁵ such consultations having failed to furnish a satisfactory resolution of the matter, the European Community requested on 6 November 2000 the establishment of a panel pursuant to article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) regarding the prohibition on unloading of swordfish in Chilean ports established on the basis of article 165 of the Chilean Fishery Law, as consolidated by Presidential Supreme Decree 430 of 28 September 1991 and measures of conservation and management adopted pursuant thereto, in force on the date of adoption of Decree 598 of 15 October 1999 and extended by that Decree to the population of swordfish in areas of the high seas.⁴¹⁶ The European Community maintained that Community fishing vessels operating in the South-East Pacific were not allowed to unload their fish in Chilean ports either to land them for warehousing or to tranship them onto other vessels, that Chile made transit through its ports impossible for swordfish and that the above-mentioned measures were inconsistent with arts V and XI of GATT 1994. Later, in a communication of 23 March 2001 addressed to the Chairman of the Disputes Settlement Body, the European Community stated that it had come to a provisional arrangement with Chile concerning its dispute with Chile by virtue of which they had agreed to “suspend the process for the constitution of the Panel” and that, however, the European Community maintained the right to revive the proceedings at any time.⁴¹⁷

When the Tribunal was seized of the Swordfish Case, the prospect of two dispute settlement procedures running in parallel, one under the

⁴¹⁵ See WTO Doc. WT/DS 193/1 of 26 April 2000.

⁴¹⁶ See WTO Doc. WT/DS 193/2 of 7 November 2002.

⁴¹⁷ See WTO Doc. WT/DS 193/3 of 6 April 2001.

WTO, the other under the Convention, in respect of what some commentators consider to be “the same dispute”, raised the question: can tribunals really confine themselves in practice to the specific aspects of a dispute by virtue of which they have jurisdiction over it, without their proceedings and judgments encroaching upon the proper preserve of other tribunals concerned with different aspects of the same case?⁴¹⁸ These and other related issues may not be answered in the immediate future, since the parties have suspended further judicial proceedings before the Special Chamber of the Tribunal and the WTO Dispute Settlement Body.

5. The “Chaisiri Reefer 2” Case

On 3 July 2001, an application under article 292 of the Convention was filed on behalf of Panama against Yemen for the prompt release of the *Chaisiri Reefer 2* (a vessel flying the flag of Panama), its cargo and crew. The application was entered in the List of cases as Case No. 9 and named the *Chaisiri Reefer 2 Case*. Since the Tribunal was not sitting at the time, in accordance with article 112, para. 3 of the Rules the President, by his Order of 6 July 2001, fixed 18 and 19 July as the dates for the hearing in the case. Arrangements were also made to bring the judges in time to meet in Hamburg. On 12 July 2001, the parties informed the Tribunal that the vessel, its cargo and crew had been released by Yemen that very day, and that, in consequence of having reached a settlement, the parties had agreed to discontinue the proceedings in accordance with the provisions of article 105, para. 2 of the Rules; pursuant to the same provisions, the parties further requested the Tribunal to append to its order for the removal of the case the notes exchanged between the parties setting out the terms of the settlement. The President’s Order of 13 July 2001 was made in accordance with the request of the parties and the case was accordingly removed from the List of cases. This is a case in which, it would appear, the availability of relief by the Tribunal helped promote an out-of-court settlement.

⁴¹⁸ See V. Lowe, “The International Tribunal for the Law of the Sea: Survey for 2000”, *The International Journal of Marine and Coastal Law* 16 (2001), 569 et seq.

IX. Extra-Judicial Activities

The Convention requires the President of the Tribunal to assume an extra-judicial function (the function not being an exercise of jurisdiction) in connection with the constitution of an arbitral tribunal under Annex VII. Article 1 of Annex VII reads as follows:

Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

Article 3 of the Annex provides for the constitution of an arbitral tribunal. Subpara. (b) of this article calls upon the party instituting the proceedings to appoint one member of the arbitral tribunal and to include the appointment in the notification referred to in article 1 of the Annex. Subpara. (c) calls upon the other party to the dispute to appoint, within 30 days of receipt of the notification referred to in article 1 of the Annex, one member of the arbitral tribunal. If the appointment is not so made, the party instituting the proceedings is allowed, within two weeks after expiry of that period, to request that the appointment be made in accordance with subpara. (e) of article 3 of the Annex. Subpara. (e) authorizes the President of the Tribunal to make the appointment within a period of 30 days of the receipt of the request, in consultation with the parties.

On 22 December 1997, the President was requested by Saint Vincent and the Grenadines to appoint an arbitrator pursuant to article 3, subparas (c) and (e), of Annex VII to the Convention. The arbitrator was to sit on the arbitral tribunal to be constituted to consider the case submitted by Saint Vincent and the Grenadines against Guinea in connection with the detention of the *Saiga* and its crew. The President held consultations with the parties and addressed letters to experts on the list maintained by the Secretary-General of the United Nations pursuant to Annex VII to the Convention, seeking to ascertain their availability to be considered for appointment as arbitrators. Action was discontinued following the agreement by the Government of Saint Vincent and the Grenadines and the Government of Guinea to submit the case to the Tribunal.⁴¹⁹

⁴¹⁹ See the Tribunal's *Yearbook 1998*, Vol. 2, 41.

On 23 August 2000, the President was requested by Chile to appoint an arbitrator pursuant to article 3 subparas (c) and (e) of Annex VII to the Convention. The arbitrator was to sit on the arbitral tribunal to be constituted to consider the dispute between Chile and the European Community concerning swordfish stocks in the South-Eastern Pacific Ocean. The President held consultations with the parties and addressed letters to experts on the list maintained by the Secretary-General of the United Nations pursuant to Annex VII of the Convention, seeking to ascertain their availability to be considered for appointment as arbitrators. However, following the agreement by the Government of Chile and the European Community to submit the case to a special chamber of the Tribunal, the President took no further action on the request made by Chile.⁴²⁰

There is one issue connected with the President's function under Annex VII that merits attention here. Difficulty arises when there is disagreement between the parties on the applicability of article 3, subparas (c) and (e) of Annex VII. Is it open to a party to argue that the President should not appoint a member of the arbitral tribunal, since, according to that party, the notification addressed to it by the party instituting the proceedings is not a "notification" within the meaning of article 1 of Annex VII or that the notification has not been accompanied by materials which, for the purposes of article 1, could be treated as a "statement of the claim and the grounds on which it is based"? Is it open to a party to contend that, since article 1 of Annex VII starts off with the words "Subject to the provisions of Part XV", submission of a dispute to the arbitral procedure would be premature until such time as the obligations established under Part XV, especially under such provisions as article 283 of the Convention, have been exhausted? Is it open to the party approaching the President with the request to argue that, once it is shown that he had given written notification of the submission of the dispute to the other party, the President has no choice but to make the appointment? This argument underlines the point that the object of article 3, subparas (c) and (e), should not be frustrated by a refusal of one party to cooperate in setting up the arbitral tribunal and that the merits of any arguments regarding non-compliance with the requirements of article 1 could be gone into only by the arbitral tribunal. These and related issues arose in the Chile-European Community Case, but a decision on them was not required since the parties decided not to proceed with arbitration.

⁴²⁰ See SPLOS/63 of 6 April 2001, 10.

Other international agreements also provide for requests to the Tribunal for the appointment of arbitrators for deciding disputes arising under the agreements in question. Under the Agreement on Free Transit through the Territory of Croatia to and from the Port of Ploče. Through the Territory of Bosnia and Herzegovina at Neum of 22 November 1998, a commission composed of seven members is to be established to supervise, monitor, interpret and arbitrate the implementation of the Agreement. Pursuant to the Agreement, the parties requested the Tribunal to nominate the seventh member of the commission to serve as president of the commission. The Tribunal nominated Judge Thomas A. Mensah, the then President of the Tribunal, to serve as the seventh member.⁴²¹

While the Convention imposes a duty on the President to exercise the extra-judicial function referred to above,⁴²² there is no such obligation in respect of extra-judicial functions conferred under other instruments and, in such cases, the Tribunal or its President may undertake such functions depending upon the circumstances of each case. It is obvious that requests received from States and international organizations will be treated with the respect due to them. In any event, the exercise of such functions should be “compatible with the standing” of the Tribunal or, as the case may be, of its President⁴²³ and be justified by “the general interest which it serves” and not involve any departure from the restrictions imposed on the Tribunal “by its judicial character.”⁴²⁴

Before leaving this topic, attention may be drawn to a practical problem arising out of the President’s function of appointing arbitrators under Annex VII to the Convention. It is a requirement that the President shall make the appointments from the list of arbitrators nominated by States Parties under article 2 of Annex VII.⁴²⁵ Further, the members

⁴²¹ See Tribunal’s *Yearbook 1998*, 41. See also article 14 (2)(b) of the Protocol on the Privileges and Immunities of the International Seabed Authority (1989); Annex II to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2002); article 48 of the Agreement between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority.

⁴²² Subpara. (e) of article 3 of Annex VII states that the President “shall make the necessary appointments.”

⁴²³ For a discussion of relevant considerations, see S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, 1688-1689.

⁴²⁴ See Hudson, see note 37, 434.

⁴²⁵ See article 3 subpara. (e).

so appointed should necessarily be of different nationalities and not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute. As of June 2002, eighteen States Parties had nominated arbitrators. Of these Parties, six are developing countries. From the list as at present constituted, the President of the Tribunal does not have a large pool from which to choose members of the arbitral tribunal. States Parties need to act promptly on the recommendation of the United Nations General Assembly to nominate arbitrators in accordance with Annex VII to the Convention.⁴²⁶

X. Relations with Others

1. The United Nations

The Tribunal was established by the Convention, adopted under the auspices of the United Nations. Speaking on the occasion of the inauguration of the Tribunal on 18 October 1996, Dr. Boutros Boutros-Ghali, the then Secretary-General of the United Nations, observed:

The Law of the Sea Tribunal will be part of the system for the peaceful settlement of disputes as laid down by the founders of the United Nations. Though not an Organ of the United Nations, the Tribunal finds its origin in efforts sponsored by the United Nations. As a sign of this excellent linkage a relationship agreement should soon be signed between the Tribunal and the United Nations.⁴²⁷

The Agreement on Cooperation and Relationship between the United Nations and the Tribunal (hereafter “the Relationship Agreement”), which underlined the international personality of the Tribunal, was signed on 18 December 1997 and approved by the Tribunal on 12 March 1998 at its fifth session and by the UN General Assembly on 8 September 1998.⁴²⁸ It notes that the Convention established the Tribunal “as an autonomous international judicial body.”⁴²⁹ The Agreement

⁴²⁶ See A/RES/56/12 of 28 November 2001.

⁴²⁷ For the text of this speech, see the Tribunal’s *Yearbook 1996-1997*, Vol. 1, 16-17.

⁴²⁸ See A/RES/52/251 of 8 September 1998. Pursuant to article 14 of the Agreement, the Agreement came to be applied provisionally as from 18 December 1997 and entered into force on 8 September 1998. For the text of the Agreement, see also the Tribunal’s *Yearbook 1996-1997*, Vol. 1, 176-182.

⁴²⁹ See article 1 of the Relationship Agreement.

requires both parties to “establish cooperative working relations” pursuant to its provisions. It makes provision for, among other things, representation of the Tribunal as observer at meetings and conferences convened under the auspices of the United Nations,⁴³⁰ exchange of information and documents,⁴³¹ cooperation in administrative matters of mutual interest,⁴³² and use of the *laissez-passer* of the United Nations by judges, the Registrar and entitled officials.⁴³³ It requires both parties to apply, as far as practicable, common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment.⁴³⁴ It further provides for cooperation in budgetary and financial matters.⁴³⁵ The Tribunal has agreed to conform, as far as practicable and appropriate, to standard practices and forms recommended by the United Nations in this regard. If requested by the Tribunal, the United Nations may provide advice on financial and fiscal questions of interest to the Tribunal with a view to achieving coordination and securing uniformity in such matters. Prior to this Agreement, on 17 December 1996 the General Assembly decided to invite the Tribunal to participate in the sessions and the work of the General Assembly in the capacity of observer.⁴³⁶

The Tribunal has been applying *mutatis mutandis* the Financial Regulations of the United Nations, following a decision to that effect taken by the fourth Meeting of States Parties, pending the approval by the Meeting of States Parties of the regulations for the financial management of the Tribunal.⁴³⁷ Having found that the conditions of service

⁴³⁰ See the Relationship Agreement, article 1.

⁴³¹ *Ibid.*, article 4.

⁴³² *Ibid.*, article 8.

⁴³³ *Ibid.*, article 9.

⁴³⁴ *Ibid.*, article 6.

⁴³⁵ *Ibid.*, article 10.

⁴³⁶ A/RES/51/204 of 17 December 1996. Acting upon this invitation, the President of the Tribunal has been presenting reports on the activities of the Tribunal to the General Assembly since its fifty-second session whenever the General Assembly has considered an agenda item on “oceans and the law of the sea”. For the text of the resolution, see also the Tribunal’s *Yearbook 1996-1997*, Vol. 1, 170.

⁴³⁷ SPLOS/8 of 10 April 1996, 4. The Tribunal has prepared its own Financial Regulations, based on the Financial Regulations of the United Nations, which are awaiting the approval of the Meeting of States Parties. A Working Group constituted by the twelfth Meeting of States Parties completed its work on the draft Financial Regulations and placed the matter before

of staff members of the Tribunal conform to those of the United Nations Common System, the General Assembly admitted the Tribunal to membership of the United Nations Joint Staff Pension Fund with effect from 1 January 1997.⁴³⁸ The United Nations and the Tribunal also entered into a special agreement in February 1998, extending the jurisdiction of the Administrative Tribunal of the United Nations to the Tribunal with respect to applications by its staff members alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund.⁴³⁹ More recently, by an exchange of letters dated 26 May 2000 and 12 June 2001, the United Nations and the Tribunal entered into a special agreement whereby the jurisdiction of the Administrative Tribunal of the United Nations has been extended to the staff members of the Tribunal.

The Staff Regulations of the Tribunal, approved by the Tribunal on 8 October 1998, are largely modelled on the United Nations Staff Regulations; where appropriate, the Staff Regulations of the ICJ were also relied upon.⁴⁴⁰ These Regulations are required to be compatible with those of the United Nations to the extent required by the United Nations Common System of Salaries, Allowances and Benefits. If the UN Staff Regulations are amended in such a way as to affect the Common System, the Registrar is required to promulgate such amendments to the Staff Regulations of the Tribunal as are required to ensure compatibility with that system, and such amendments apply provisionally pending a decision of the Tribunal.⁴⁴¹ The Staff Rules of the Tribunal, drawn up to implement the Tribunal's Staff Regulations, entered into full force and effect on 1 January 2001. Amendments made to the United Nations Staff Rules are required to be incorporated in the Tribunal's Staff Rules, with a view to ensuring compatibility between the

the plenary of the twelfth meeting, which decided to take a formal decision on the matter at its thirteenth Meeting.

⁴³⁸ A/RES/51/217 of 18 December 1996. See also the Agreement between the United Nations Staff Pension Board and the Tribunal as to the conditions governing the admission of the Tribunal to membership of the United Nations Joint Staff Pension Fund, signed on 30 June 1997.

⁴³⁹ This Agreement was signed by the Tribunal on 18 February 1998 and by the United Nations on 25 February 1998. See also the Tribunal's *Yearbook 1998*, Vol. 2, 45-46.

⁴⁴⁰ For the text of the Staff Regulations, see the Tribunal's *Yearbook 1998*, Vol. 2, 112-129.

⁴⁴¹ Regulation 12.6.

two in a manner consistent with the Tribunal's Staff Regulations.⁴⁴² Further, in applying the Staff Rules of the Tribunal, the Registrar is required to be guided by United Nations instructions, directives and practice to the extent they are implementing Staff Rules of the Tribunal similar to those provisions contained in the United Nations Staff Rules.⁴⁴³

The establishment of trust funds with a view to providing financial assistance to States for expenses incurred in connection with disputes before international adjudicatory forums is not a new concept.⁴⁴⁴ In particular, reference may be made here to the United Nations Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the ICJ, established in 1989. Since it was felt that the absence of a trust fund in respect of the Tribunal should not serve as an inhibiting factor for States in making the choices under article 287 of the Convention, at its fifty-fifth session the General Assembly, by A/RES/55/7 of 30 October 2000, called upon the Secretary-General of the United Nations to establish a voluntary trust fund to assist States in the settlement of disputes through the Tribunal and annexed the terms of reference of the Trust Fund to its resolution.⁴⁴⁵ The purpose of the Fund is to provide financial assistance to States Parties to the Convention for expenses incurred in connection with cases submitted, or to be submitted, to the Tribunal, including its Seabed Disputes Chamber and any other Chamber. The terms of reference declare that assistance "should only be provided in appropriate cases, principally those proceeding to the merits where jurisdiction is not an issue, but in exceptional circumstances may be provided for any phase of the proceedings."⁴⁴⁶ Therefore, as a normal rule, assistance may be given in cases involving agreed references.

⁴⁴² Rule 112.2 (bis).

⁴⁴³ Ibid.

⁴⁴⁴ See also D. Anderson, "Trust Funds in International Litigation", in: N. Ando/ E. McWhinney/ R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, Vol. II, 2002, 793.

⁴⁴⁵ The terms of reference state that the Trust Fund is established by the Secretary-General of the United Nations "in accordance with" A/RES/55/7 of 30 October 2000 and "pursuant to" the Agreement on Cooperation and Relationship between the United Nations and the Tribunal. The constitution of this Fund was originally proposed by the United Kingdom at the 10th Mtg. of States Parties to the Convention. See SPLOS/60 of 22 June 2000, 8.

⁴⁴⁶ See Annex I to A/RES/55/7 of 30 October 2000.

States, intergovernmental organizations, national institutions, non-governmental organizations, as well as natural and juridical persons, are invited to make financial contributions to the Fund. The Secretary-General will provide financial assistance from the Fund on the basis of the recommendations of the panel of experts. The monies in the Fund may be disbursed in order to defray the costs incurred in, among other things, preparing the application and the written pleadings, counsel's fees, travel and expenses of legal representation in Hamburg during the various phases of a case and execution of a judgment, such as marking a boundary in the territorial sea. The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations is the implementing office for this Fund and provides services for the operation of the Fund. As of 30 May 2002, the total amount in the Trust Fund stood at US\$ 24.865.⁴⁴⁷

It was the Secretary-General of the United Nations who was entrusted with the task of starting up the Tribunal. To that end, the United Nations lent its staff to the Tribunal to assure it a successful start. At the request of the judges, the Legal Counsel of the United Nations chaired the meetings of the Tribunal from 1 October 1996 until the Tribunal elected its President on 5 October 1996. On 18 October 1996, the then Secretary-General of the United Nations laid the foundation stone of the Tribunal's Headquarters building in Hamburg. Later, on 3 July 2000, the Secretary-General of the United Nations was present on the occasion of the official opening of the Headquarters building.⁴⁴⁸ The Division for Ocean Affairs and the Law of the Sea made its website available to the Tribunal, pending the establishment of the Tribunal's own website,⁴⁴⁹ and this enabled the Tribunal to place on the website of the United Nations, among other things, the records of the Tribunal, the verbatim transcripts of the hearings in the cases before it within hours of the close of each day's session, and the orders and judgments of the Tribunal as soon as they are delivered. When required, space and other facilities in the United Nations Headquarters building in New York are made available by the United Nations to the President, Registrar and other senior staff members of the Registry. Following the Relationship Agreement, it was agreed, on terms set out in let-

⁴⁴⁷ This amount represents the two contributions made by the Government of the United Kingdom.

⁴⁴⁸ See the Tribunal's *Yearbook 2000*, Vol. 4, 15.

⁴⁴⁹ With effect from 9 November 2001, the Tribunal has its own website (see footnote 231).

ters exchanged in March 2002, that the Division for Ocean Affairs and the Law of the Sea would provide all the administrative services of the Tribunal required in New York.

In connection with its annual consideration of the item "Oceans and the law of the sea", the General Assembly of the United Nations receives an annual report from the Secretary-General which contains a section dealing with the Tribunal's activities in the period under review. On the basis of this report and the statements of delegations made in the plenary meetings, the General Assembly reviews the role of the Tribunal within the framework of the Convention and makes recommendations to States which are of direct interest to the Tribunal. For instance, in resolution A/RES/56/12 of 28 November 2001, the General Assembly noted "the continued contribution" of the Tribunal to the peaceful settlement of disputes in accordance with the Convention, underlined the Tribunal's "important role and authority concerning the interpretation or application of the Convention" and encouraged States Parties to the Convention to consider making a written declaration choosing from the means set out in article 287 for the settlement of disputes concerning the interpretation or application of the Convention. For the effective functioning of the Tribunal, it made an appeal to all States Parties to the Convention to pay their assessed contributions to the Tribunal in full and on time and to consider ratifying or acceding to the Agreement on the Privileges and Immunities of the Tribunal; it invited States and other entities to make voluntary financial or other contributions to the Tribunal's Trust Fund.⁴⁵⁰

2. Meetings of States Parties

The cooperation between the Tribunal and the United Nations can be traced back mainly to the recommendations made by the annual Meetings of States Parties to the Convention convened for dealing with, among other things, matters concerning the organization and budget of

⁴⁵⁰ Reference may also be made to A/RES/52/26 of 26 November 1997, in which the United Nations General Assembly noted with appreciation the adoption of the Agreement on the Privileges and Immunities of the Tribunal and also the adoption by the Tribunal of the Rules of the Tribunal, the Resolution on the International Judicial Practice of the Tribunal and the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

the Tribunal. In relation to administrative, budgetary and financial matters, and election of the members of the Tribunal, the Meeting of States Parties (a standing body created by the Convention and financed and serviced by the United Nations Secretariat) is to the Tribunal what the General Assembly of the United Nations is to the ICJ.⁴⁵¹ Among the instruments adopted or approved by the Meetings of States Parties, reference may be made in particular to the Agreement on the Privileges and Immunities of the Tribunal,⁴⁵² the Pension Scheme Regulations for Members of the Tribunal⁴⁵³ and a decision on the remuneration of judges *ad hoc*.⁴⁵⁴ In some cases, the Meetings of States Parties take note of the documents submitted by the Tribunal.⁴⁵⁵

3. The International Seabed Authority

Following an inquiry from the Authority, the Tribunal agreed, at its meeting held on 30 June 1999, that the Staff Regulations of the Authority could provide for the President of the Tribunal, if so requested, to appoint a panel of qualified persons, including judges of the Tribunal, to constitute a tribunal to deal with proceedings instituted against staff members of the Authority under article 168, para. 3 of the Convention.⁴⁵⁶

⁴⁵¹ For the Rules of Procedure for Meetings of States Parties, see SPLOS/2/Rev.3 of 26 July 1995.

⁴⁵² On 23 May 1997, the 7th Mtg. of States Parties adopted the Agreement. In accordance with the provisions of article 30(1) of the Agreement, the Agreement entered into force on 30 December 2001. Article 31 of the Agreement provides that a State which intends to ratify or accede to the Agreement may at any time notify the depositary that it will apply the Agreement provisionally for a period not exceeding two years. For the text of the Agreement, see SPLOS/25 of 5 June 1997.

⁴⁵³ Approved by the 9th Mtg. of States Parties. For the text of the Pension Scheme Regulations, see the Tribunal's *Yearbook 1999*, Vol. 3, 119-123.

⁴⁵⁴ This decision was approved at the 11th Mtg. of States Parties.

⁴⁵⁵ For example, the 9th Mtg. of States Parties took note of the Staff Regulations approved by the Tribunal on 8 October 1998.

⁴⁵⁶ See SPLOS/50 of 11 April 2000, 10.

4. The Host Country

The seat of the Tribunal is in the Free and Hanseatic City of Hamburg in Germany.⁴⁵⁷ In keeping with international practice that has evolved in connection with the provision of premises for United Nations bodies by industrialized countries, Germany provided the Tribunal during its start-up phase with temporary premises located in the centre of Hamburg and later, in November 2000, with permanent premises in the district of Nienstedten, Hamburg, on a site overlooking the river Elbe and covering an area of 30.090 square metres.⁴⁵⁸ The premises include a modern building (constructed at a cost of € 63 million) with three courtrooms, each room being equipped with modern courtroom technology, enabling the parties to make presentations which appear on monitors in front of the judges, parties, witnesses and interpreters, as well as enabling a video-link to witnesses unable to travel to Hamburg. The premises are provided to the Tribunal free of rent.

Before the Tribunal moved into the new premises, the Agreement on the Occupancy and Use of the Premises was signed by the Tribunal and the Government of the Federal Republic of Germany on 18 October 2000. This Agreement establishes the terms and conditions under which the premises are made available to the Tribunal.

However, the Headquarters Agreement (providing the Tribunal, among other things, with the privileges and immunities to be accorded in the host country) has not yet been concluded, although, as directed by the fifth Meeting of States Parties, negotiations for this purpose have been in progress as a matter of priority ever since the Tribunal was set up.⁴⁵⁹ The differences between the two sides arise mainly on account of matters of taxation of income of Registry staff; the Tribunal wishes to be treated on a par with similar international institutions in other countries in this matter. Quite independently of this case, it appears that there is much to be said in favour of coming to an understanding with a

⁴⁵⁷ See article 1 of the Statute.

⁴⁵⁸ The official opening of the headquarters building took place on 3 July 2000 in the presence of several high dignitaries, including Mr. Kofi Annan, the Secretary-General of the United Nations. However, the actual transfer of the premises to the Tribunal took place on 6 November 2000.

⁴⁵⁹ Pending the conclusion of this Agreement, the German Government promulgated on 10 October 1996 the Ordinance on the Privileges and Immunities of the Tribunal. See the Tribunal's *Yearbook 1996-1997*, Vol. 1, 122.

host country on a headquarters agreement before an international agency is located in that country.

5. The International Court of Justice

There is no formal relationship between the Tribunal and the ICJ, except that under the Convention both constitute means for the settlement of disputes concerning its interpretation or application.⁴⁶⁰ Under the Agreement on Cooperation and Relationship between the United Nations and the Tribunal, the Registrar of the Tribunal is required to furnish to the United Nations, with the concurrence of the Tribunal and subject to its Statute and Rules, any information relating to the Tribunal's work requested by the ICJ.⁴⁶¹ The Secretary-General of the United Nations is also required to transmit to the Tribunal copies of any documents notified to the Secretary-General or otherwise communicated to the United Nations by the ICJ pursuant to its Statute and Rules of Court.⁴⁶² The ICJ has sent all its publications to the Tribunal's library "as a friendly gesture to a fellow judicial organ." In October-November 2001, the two organizations reached an agreement concerning the exchange of their respective publications.

6. The World Trade Organization

At a time when international judicial institutions are growing in number, the importance of promoting cooperation between them, especially in information sharing, needs to be underlined. To that end, in February 2002 the Registry of the Tribunal and the Appellate Body Secretariat of the World Trade Organization exchanged letters with a view to exchanging information on relevant legal and administrative matters, subject to the requirements of confidentiality of each institution. A similar arrangement was made in March 2002 between the Registry of the Tribunal and the Legal Affairs Division of the WTO Secretariat.

⁴⁶⁰ See article 287 of the Convention.

⁴⁶¹ See article 4 para. 1(b)(iii) of the Agreement.

⁴⁶² See article 4 para. 1(a)(ii) of the Agreement.

7. The International Hydrographic Organization

In February 2002, the Registry of the Tribunal and the International Hydrographic Organization exchanged letters whereby they agreed to cooperate on matters of mutual concern, subject to the requirements of confidentiality applicable to each institution. They agreed to have a regular exchange of each other's documents. It was further agreed that access to IHO nautical charts and chart data could be granted on a case-by-case basis, at the request of the Tribunal, and that expert advice and assistance on specific matters falling within the scope of the Convention could also be arranged.

8. The International Maritime Organization

Since September 1997, at the request of the then President of the Tribunal, the International Maritime Organization (IMO) has been sending copies of its publications to the Tribunal as well as extending invitations to attend the IMO meetings and conferences as an observer. Following the entry into force of the Convention, the Secretary-General of the IMO has informed the Tribunal that the IMO Council requested him to maintain close cooperation with the United Nations with a view to ensuring coordinated approach to the implementation of the Convention and that cooperation with the Tribunal has been considered as an extension of the cooperation with the United Nations. In his letter dated 13 June 2002, addressed to the Secretary-General of the IMO, the Registrar of the Tribunal proposed that cooperation take place at the level of the Tribunal's Registry and the IMO Secretariat with the view to exchanging documents, publications and other information as well as expert advice and assistance on specific matters falling within the scope of the Convention. By his letter dated 2 July 2002, the Secretary-General of the IMO agreed to this proposal.

9. Other Bodies

The Tribunal is also engaged in efforts to establish working contacts with international organizations whose activities in the area of the law of the sea are of direct interest to the Tribunal (e.g., FAO, ILO and the Intergovernmental Oceanographic Commission of UNESCO).

XI. Public Relations

The Tribunal is the only international organization whose seat is in Hamburg. The local contacts of the judges or Registry officials of the Tribunal are mainly confined to social functions organized by the authorities of the Free and Hanseatic City of Hamburg, the several consulates located in Hamburg, and organizations representing shipping, insurance and commerce. The President and the Registrar of the Tribunal are also invited to important national functions organized by the federal authorities in Berlin. Ambassadors of different countries posted at Berlin and Bonn have also attended functions of the Tribunal, such as its inauguration, the official opening of the headquarters building and, more recently, the reception to mark the completion of the first five years of the Tribunal's existence. High dignitaries of foreign governments also make occasional visits to the Tribunal.

The Tribunal makes efforts to cultivate relations with the public. On 9 March 2002, the Tribunal held an open day to give members of the general public an opportunity to visit its new headquarters building and to learn about the work of the Tribunal. More than three thousand four hundred people visited the Tribunal's premises that day. Judges were also present on that occasion. More such open days will be held in the future. The information officer of the Tribunal organizes tours of the building for interested groups. The general public is allowed to attend the public sittings of the Tribunal. Information about the activities of the Tribunal is conveyed to the public through brochures, press releases and the Tribunal's website. The information officer is also available to attend to enquiries from the press. The Registrar replies to enquiries received from States, international organizations and the public at large concerning the work of the Tribunal. Subject to the requirements of confidentiality, the Tribunal promotes openness in its work.

XII. Concluding Comments

The success of an international judicial body is generally gauged by the number of cases it has disposed of or has on its docket. This may not be the correct yardstick to judge a court which has been in existence for no more than a few years. It is perhaps natural for litigants — States, international organizations or other entities — to wait and see before they entrust their cases to any new court. In the six years or so of its existence, the Tribunal has dealt with ten cases, most of which came to be

referred to it on account of its compulsory residual jurisdiction. This record is not something from which the Tribunal may like to derive comfort.

It is generally acknowledged that the Tribunal has dispelled a widely shared belief that the disposal of cases in international judicial bodies is a time-consuming process. It has built within a short period a reputation for the swift and efficient management of cases and thereby established a new trend in international adjudication. If one looks at the speed with which the Tribunal delivers its judgments and orders, it can be seen that its size is no impediment. The Tribunal has made efforts to address the underlying concerns of the parties. Commentators have also noticed that the judges of the Tribunal have not adopted approaches that have promoted the interests of one group of States or another. The Tribunal has also developed its rules, regulations, internal judicial practice and guidelines in consonance with the demands of current perceptions of international adjudication.

There is, however, the criticism that the judgments and orders of the Tribunal are too brief and do not always explain the reasoning behind its findings of fact and of law. It is a requirement of law that a judgment or order should contain the reasons of law on which it is based. The Tribunal is aware of this criticism and constantly endeavours to reason out its conclusions as much as is practicable. It may be that more needs to be done. A judgment or order should nevertheless be as succinct as possible and eschew what is not necessary for the clarification of the law and disposal of the case on its facts.

It has been stated that the Tribunal's judges are often divided in their votes in respect of the key elements of its judgments and orders, creating the impression of a court not yet confident in its work. Is this criticism validly founded? It is not often noted that, of the nine cases dealt with by the Tribunal, only in two cases were the judgments delivered by narrow majorities; all others were decided either unanimously or by a substantial majority. Of course declarations, separate opinions and dissenting opinions have been appended in some cases, but there is nothing abnormal in this. They are part of any vibrant judicial body and help in making the judgments and orders transparent.

While the Tribunal's accomplishments in the course of the last six years have not been insignificant, it is obvious that the Tribunal has not been put to full use. The Tribunal will be able to live up to the expectations of the international community only when litigants make full use of it. It may be recalled that from time to time the United Nations General Assembly has noted with satisfaction "the contribution of the Tri-

bunal to the peaceful settlement of disputes in accordance with Part XV of the Convention” and underlined “its important role and authority concerning the interpretation or application of the Convention.”