

**Sensitization Seminar on the Work of the International Seabed Authority  
28-30 March 2011**

**The International Tribunal for the Law of the Sea  
Judge Dolliver Nelson**

**1. Introduction**

The Convention on the Law of the Sea<sup>1</sup> has established three institutions – the International Seabed Authority, the Commission on the Limits of the Continental Shelf and the International Tribunal for the Law of the Sea. This institutionalization of the law of the sea is the outstanding feature of the new international maritime legal order.<sup>2</sup>

The Tribunal held its first session in October 1996 and thus has been functioning as a judicial institution for almost 15 years. During the first year, the Tribunal developed its rules of procedure, the guidelines concerning the preparation and presentation of cases before the Tribunal and the resolution on its internal practice.

**2. Membership**

The Tribunal is composed of 21 members enjoying, in the words of its Statute, “the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea”. (Statute, article 3, paragraph 2). The composition of the Tribunal ensures the representation of the principal legal systems of the world and equitable geographical distribution. The present allocation of seats in the Tribunal is as follows:

Five members from the Group of African States;

Five members from the Group of Asian States;

Three members from the Group of Eastern European States;

Four members from the Group of Latin American and Caribbean States;

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The views expressed are personal.

<sup>1</sup> The Convention has received 161 ratifications or accessions.

<sup>2</sup> Felipe H. Paolillo, ‘The Institutional Arrangements for the International Sea-Bed and their Impact on the Evolution of International Organizations’, *Recueil des Cours*, vol. 188, pp.139-337 on p.147.

Three members from the Group of Western European and Other States and the remaining one member from among the Group of African States, the Group of Asian States and the Group of Western European and Other States.<sup>3</sup>

The application of the principal of equitable geographical distribution has resulted in the Tribunal having more judges from developing countries than is the case with the International Court of Justice in The Hague. As a consequence, the composition of the Tribunal is more representative of the international community as a whole and in a sense reflects the widespread participation of States in the Third United Nations Conference on the Law of the Sea.

### **3. Jurisdiction**

It is helpful to recall here the basic structure of the somewhat complex dispute settlement system embodied in the Convention. Part XV, entitled settlement of disputes, is, like Gaul, divided into three parts. The first section deals with voluntary procedures; the second concerns itself with compulsory procedures entailing a binding decision and the third sets out the limitations and optional exceptions to the compulsory procedures. The provisions for the settlement of deep seabed disputes are to be found in Part XI of the Convention. Annexes V, VII and VIII deal respectively with conciliation, arbitration and special arbitration. Annex VI contains the Statute of the Tribunal.

The Tribunal has jurisdiction over all disputes concerning the interpretation and application of the 1982 Convention on the Law of the Sea (article 286). It also has jurisdiction over any dispute concerning the interpretation and application of an international agreement related to the purposes of the Convention, which is submitted to it in accordance with the Agreement.<sup>4</sup> This competence is limited. It arises “where no

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<sup>3</sup> SPLOS/203, para.101-102

<sup>4</sup> Relevant international agreements include:

- Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas (1993);
- Agreement for the implementation of the provisions under 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);

settlement has been reached by recourse to section 1” and is subject to the limitations and exceptions contained in section 3, in particular articles 297 and 298. Disputes which are excluded from compulsory procedures are those concerning fisheries and marine scientific research in the exclusive economic zone (article 297). An important cluster of disputes may also be excluded, namely (a) maritime boundary disputes; (b) disputes concerning military activities<sup>5</sup> and (c) disputes in respect of which the Security Council is seized (article 298). The Seabed Disputes Chamber has mandatory jurisdiction over all disputes with respect to activities in the Area, that is to say, the international seabed area.

#### 4. Choice of Procedures

The Convention offers a plurality of dispute settlement procedures. It provides that when signing, ratifying or acceding to the Convention or at any time thereafter, a State may choose, by a written declaration, any one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

- a) the International Tribunal for the Law of the Sea
- b) the International Court of Justice
- c) an arbitral tribunal
- d) a special arbitral tribunal for disputes relating to (i) fisheries, (ii) protection and preservation of the marine environment, (iii) marine scientific research, or (iv) navigation, including pollution from vessels and from dumping.

This user-friendly, flexible mechanism – the embodiment of the so-called Montreux formula – is the distinctive feature of the dispute settlement system in the Convention. It reflects the trend of modern international law with its diversity and

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- 1996 Protocol to the Convention on the prevention of marine pollution by dumping of wastes and other matter (1972);
  - Framework agreement for the conservation of the living marine resources on the high seas of the Southern-Eastern Pacific (2000);
  - Convention on the conservation and management of fishery resources in the South-East Atlantic Ocean (2001);
  - Convention on the protection of the underwater cultural heritage (2001).

<sup>5</sup> The United States has declared “that its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were ‘military activities’ and that such determinations are not subject to review”. Committee on Foreign Relations, Report on the Convention on the Law of the Sea, December 19, 2007.

flexibility of response in terms of the peaceful settlement of disputes tailored to meet the needs of present-day international society.

When the parties to a dispute have accepted the same dispute settlement procedure, it may be submitted only to that procedure. When they have not accepted the same procedure, it may be submitted only to arbitration. In addition, a State party which is a party to a dispute not covered by a declaration in force shall be deemed to have accepted arbitration. Arbitration has therefore an important residual function.

As Adede has justly remarked: “Thus, neither the proposed Law of the Sea Tribunal, nor the International Court of Justice nor even the forum chosen by the defendant in the dispute would be automatically favoured as was done in the previous versions of the article. The arbitration tribunal emerged henceforth as the forum with the residual jurisdiction under the Montreux formula”.<sup>6</sup>

It may be noted that the dispute between Barbados and the Republic of Trinidad and Tobago and that between Guyana and Suriname relating to their maritime boundaries have been settled by an Annex VII arbitral tribunal. More recently the maritime boundary dispute between Bangladesh and India has been submitted to the same procedure. Given the residual compulsory role of arbitration in the dispute settlement system of the Convention, it is important that States parties should consider making declarations with regard to their choice of means for settlement of maritime disputes as has been recommended by General Assembly resolutions.

## **5. Prompt release of vessels and crew**

The Tribunal does have, what may be termed, a residual compulsory jurisdiction with respect to the prompt release of vessels (article 292) and the prescription of provisional measures under article 290, paragraph 5. It is not at all surprising that the

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<sup>6</sup> A. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, (1987), pp.125-136.

majority of disputes which have been submitted to the Tribunal fell under these two headings, the prompt release of vessels and the prescription of provisional measures.

A State party is entitled to submit to the Tribunal in certain specific circumstances the question of release from detention of a vessel flying its flag where the authorities of another State party have detained the vessel and “it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security” (article 292).

The Tribunal, to date, has had to interpret and apply the provisions on prompt release in nine cases: the M/V “Saiga” (1997), the “Camouco” (2000), the “Monte Confurco” (2000), the “Grand Prince” (2001), the “Chaisiri Reefer 2” (2001), the “Volga” (2002), the “Juno Trader” (2004), the “Hoshinmaru” (2007) and the “Tomimaru” (2007). In all these prompt release cases the Tribunal has been primarily engaged in clarifying and refining the notion of what is meant by a reasonable bond in the relevant provisions of the Convention. It is essentially a process related to the interpretation and application of the Convention on the Law of the Sea, which is of course the central task of this specialized international tribunal.

In these prompt release cases submitted to the Tribunal article 73 (enforcement of fishing laws and regulations in the exclusive economic zone) was the relevant provision for the application of article 292. Thus the Tribunal has not yet been required to answer the important question whether the unique procedure for prompt release contained in article 292 should be available in cases other than those specific provisions of the Convention providing for release upon the posting of a bond or other financial security. The Judgment in the M/V “Saiga” case on prompt release in an *obiter dictum* seems to support “a non-restrictive interpretation” of article 292 in the sense that “the applicability of article 292 to the arrest of a vessel in contravention of international law can also be argued, without reference to a specific provision of the Convention for the prompt release

of vessels or their crew”.<sup>7</sup> On the other hand the view has been put forward that article 292 applies only where the Convention contains specific provisions concerning the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security that is articles 73, 220 paragraph 7 and 226 paragraph 1(b).<sup>8</sup> It now seems generally accepted that article 292 is only applicable with respect to these specific provisions.

In these prompt release cases the Tribunal has been engaged in clarifying the rule contained in article 292 of the Convention and developing its own jurisprudence especially with regard to the meaning of a reasonable bond. The *locus classicus* of the factors which the Tribunal believes are relevant in the assessment of a reasonable bond can be found in the “Camouco” case which states:

“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 imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form”.<sup>9</sup>

In the “Monte Confurco” case the Tribunal importantly went on to add that the list outlined above was not closed and further observed that it was not its intention to lay down rigid rules as to the exact weight to be given to any of those factors<sup>10</sup> which gives the Tribunal a certain discretion in assessing the reasonableness of the bond. This may create a certain measure of unpredictability. Nevertheless this flexibility leaves room for an evolutive approach to a provision which may yet have to adapt to changing situations. It is a curious fact that each of these prompt release cases threw up its own unique features which make it difficult to produce a formulaic solution applicable to all cases.<sup>11</sup>

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<sup>7</sup> M/V “Saiga” case (Saint Vincent and the Grenadines v. Guinea) Judgment, ITLOS Reports (1997), p.28, para.53.

<sup>8</sup> Ibid., Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, diss.op. para.62.

<sup>9</sup> The “Camouco” case (Panama v. France), Prompt Release (2000), p.31, para.67.

<sup>10</sup> The “Monte Confurco” case (Seychelles v. France), Prompt Release (2000), p.109, para.76.

<sup>11</sup> See Vaughan Lowe, ‘The International Tribunal for the Law of the Sea: Survey for 2000’, The International Journal of Marine and Coastal Law (2001), vol.16, no.4, p.570.

In the “Volga” case the Tribunal stated that: “In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case”.<sup>12</sup> In the “Juno Trader” case the Tribunal further declared that: “The assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties”.<sup>13</sup>

In the “Hoshinmaru” case the Tribunal held “that the amount of a bond should be proportionate to the gravity of the alleged offences. Article 292 of the Convention is designed to ensure that the coastal State, when fixing the bond, adheres to the requirement stipulated in article 73, paragraph 2, of the Convention, namely that the bond it fixes is reasonable in light of the assessment of relevant factors”.<sup>14</sup>

An important question which arises in some of these prompt release cases relates to the problem of illegal, uncontrolled and undeclared fishing (iuv) in the Southern Ocean – “Camouco”, “Monte Confurco”, “Grand Prince” and “Volga” – a matter which as the proceedings in the “Volga” case showed is of some international concern. Diplomatic notes were sent to Australia by, for instance, Chile, France, New Zealand and South Africa. To what extent must the Tribunal take this factual background into account in determining a reasonable bond? It will be recalled for instance that in the “Monte Confurco” case France stated that “among the circumstances constituting what one might call the ‘factual background’ of the present case, there is one whose importance is fundamental. That is the general context of unlawful fishing in the region concerned”. The Tribunal declared in response that it took note of this argument (paragraph 79).

In the “Volga” case Australia urged the Tribunal to take full account of the context of illegal, uncontrolled and undeclared fishing in the Southern Ocean and more especially in the Australian exclusive economic zone adjacent to the Territory of Heard Island and McDonald Island.

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<sup>12</sup> ITLOS Reports (2002), p.10, at p.32, para.65.

<sup>13</sup> ITLOS Reports (2004), p.17, at p.41, para.85.

<sup>14</sup> The “Hoshinmaru” case (2007), para.88.

The argument can be made that in the “Volga” case the Tribunal went somewhat further in this matter when it declared:

“The Tribunal understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem”.<sup>15</sup>

The Tribunal has to a certain extent qualified this observation when it went on to add that:

“The Tribunal must, however, emphasize that, in the present proceedings, it is called upon to assess whether the bond set by the Respondent is reasonable in terms of article 292 of the Convention. The purpose of the procedure provided for in article 292 of the Convention is to secure the prompt release of the vessel and crew upon the posting of a reasonable bond, pending completion of the judicial procedures before the courts of the detaining State”. (paragraph 69) (emphasis added)

The use of the word “however” in the above statement seems to suggest that the “problem of continuing illegal fishing in the Southern Ocean” is a factor which is somewhat alien to the object and purpose of article 292.<sup>16</sup> In my opinion it seems that illegal, uncontrolled and undeclared fishing should be taken into account in assessing the gravity of the offence – a factor accepted by the Tribunal for determining a reasonable bond.

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<sup>15</sup> The “Volga” case (Russian Federation v. Australia), Prompt Release (2002), para.68.

<sup>16</sup> Cf these observations: “Illegal fishing is morally reprehensible and environmentally destructive but the Tribunal has made it clear that these conditions are not relevant to what amounts to a reasonable bond except for deciding the likely penalties for the alleged conduct that may be imposed by a domestic court”. White and Knight, ‘ITLOS and the Volga case: the Russian Federation v. Australia’, *The Maritime Law Association of Australia and New Zealand Journal* (2003), vol.17, pp.39-53 on p.52. “The ITLOS has, arguably, a particular obligation to the LOSC States Parties to hold to the balance struck in the 1982 Convention as a whole; and that surely requires that it keep an eye on the implications of all its decisions, including those in prompt release cases, for other rights and duties of States under the Convention”. Vaughan Lowe, ‘The International Tribunal for the Law of the Sea: Survey for 2000’, *The International Journal of Marine and Coastal Law* (2001), vol.16, no.4, p.561.

## 6. Provisional Measures

The Tribunal also has a special residual compulsory jurisdiction with respect to the prescription of provisional measures. It has the power, under certain circumstances to prescribe such measures “[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted . . . 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” (article 290, paragraph 5, of the Convention). Here the Tribunal is called upon to prescribe provisional measures pending the final decision to be given not by the Tribunal itself, but by an arbitral tribunal yet to be constituted to which a dispute has been duly submitted – where the merits and indeed questions of jurisdiction and admissibility may have to be decided. This procedure has been invoked in the Southern Bluefin Tuna cases, the MOX Plant case and the case Concerning Land Reclamation by Singapore in and Around the Straits of Johor. In the dispute concerning the detention of the M/V “Louisa”, St. Vincent and the Grenadines sought the prescription of provisional measures under article 290, paragraph 1, of the Convention.<sup>17</sup>

In these cases, which dealt primarily with the protection of the marine environment, the Tribunal laid emphasis on the duty to cooperate. “[T]he duty to cooperate”, it said, “is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.<sup>18</sup> It also stressed the importance of exercising “prudence and caution” when undertaking activities which may cause harmful effects. The emphasis laid by the Tribunal both on the duty to cooperate and the notion of “prudence and caution” seems to signify that these decisions go beyond the mere prescription of provisional measures and in fact may contribute to the development of international environmental law.

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<sup>17</sup> It might be noted that in this case the Tribunal held that it had *prima facie* jurisdiction over the dispute but that “the circumstances as they now present themselves to the Tribunal, are not such as to require the exercise of its power to prescribe provisional measures under article 290, paragraph 1, of the Convention”. The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain) Order of 23 December 2010, para.83.

<sup>18</sup> The MOX Plant case, Order of 3 December 2001, para. 82. This dispute between Ireland and the UK concerned “The MOX Plant, international movements of radioactive materials and the protection of the marine environment of the Irish Sea”.

In the prescription of these provisional measures, the Tribunal has taken fully into account the necessity to prescribe practical measures which would assist the parties to find a solution, utilizing its powers under the rules of procedure (article 89, paragraph 5) to prescribe measures other than those requested while preserving the rights of the parties pending the final decision.<sup>19</sup> With reference to the provisional measures prescribed by the Tribunal in the Southern Bluefin Tuna cases, for instance, Professor Crawford, who acted as counsel in the Southern Bluefin Tuna cases, had this to say:

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

The Southern Bluefin Arbitral Tribunal itself had adverted to this significant role of the provisional measures prescribed by the International Tribunal for the Law of the Sea when it declared that:

“However, revocation of the Order prescribing provisional measures does not mean that the Parties may disregard the effects of that Order or their own decisions made in conformity with it. The Order and those decisions – and the recourse to ITLOS that gave rise to them – as well as the consequential proceedings before this Tribunal, have had an impact not merely in the suspension of Japan’s unilateral experimental fishing program during the period that the Order was in force, but on the perspectives and actions of the Parties”. (paragraph 67).

The provisional measures prescribed by the International Tribunal for the Law of the Sea in the case concerning Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore) offer a fine example of the use of this procedure. These measures seem to have provided the means of actually resolving the dispute between the parties. The Award on Agreed Terms 2005 which settled the dispute was based on the

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<sup>19</sup> See also L.D.M. Nelson, ‘The Jurisprudence of the International Tribunal for the Law of the Sea: Some Observations’ in Law of the Sea, Environmental Law and Settlement of Disputes, *Liber Amicorum* Judge Thomas A. Mensah, eds. T.M. Ndiaye and R. Wolfrum (2007), pp.967-988 on pp.981-982.

report of the Group of Experts which had been established according to the terms of the provisions prescribed by the Tribunal.<sup>20</sup>

Commenting on this development in the context of the Southern Bluefin Tuna case, Rosenne made these important observations:

“This indicates that carefully crafted provisional measures prescribed by ITLOS may have an implication for the future actions of the parties and lay the basis for the final solution of the dispute, even when the arbitral tribunal does not have jurisdiction over the dispute. There is no reason why this notion should not be given a wider application, in that way making the provisional measures proceedings an important element in the general procedures available to States for the pacific settlement of their international disputes”.<sup>21</sup>

## **7. Special Chamber – article 15, paragraph 2**

### The Swordfish Case

The dispute between Chile and the European Union concerning the conservation and sustainable exploitation of swordfish stocks in the south-eastern Pacific Ocean was submitted to a special chamber of the International Tribunal for the Law of the Sea in December 2000. This Special Chamber was established in accordance with article 15, paragraph 2, of the Statute and consisted of five members.

In March of the following year the parties informed the Special Chamber that they had reached a provisional arrangement and that the proceedings be suspended. The time-limits for the proceedings before the Special Chamber were postponed on several occasions – in 2001, 2003, 2005, 2007 and 2008. Finally in December 2009 the parties, having reached an Understanding, requested the Special Chamber to issue an order of discontinuance of the case and thus it was removed from the List of Cases.

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<sup>20</sup> For Award see [www.pca-cpa.org](http://www.pca-cpa.org).

<sup>21</sup> Shabtai Rosenne, *Provisional Measures in International Law* (2005), pp.157-158. Robin Churchill referred to this as “an imaginative use of provisional measures by the ITLOS”. *Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2005*, *The International Journal of Marine and Coastal Law* (2006) vol.21, no. 4, p.385.

The Swordfish case raised an interesting question. When the Tribunal became seized of the dispute, a dispute arising from similar facts had already been submitted to the WTO Dispute Settlement Body by the European Community,<sup>22</sup> raising the prospect of two dispute settlement procedures running in parallel.

In the Swordfish case the Special Chamber, as we have seen, was not given the opportunity to resolve this problem – a problem which has assumed some importance in the light of the multiplication of international courts and tribunals in recent years. In this regard it will be remembered that the Arbitral Tribunal in the MOX Plant case stressed that “considerations of mutual respect and comity . . . should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States”. Judicial restraint is all the more necessary in that “a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties”.<sup>23</sup>

## **8. The Seabed Disputes Chamber**

The Seabed Disputes Chamber is a separate, independent and permanent judicial body formed within the Tribunal and entrusted through its contentious and advisory function “with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations”.<sup>24</sup>

The Seabed Disputes Chamber is composed of 11 members, selected by a majority of the members of the Tribunal. In the selection of the members of the Chamber, the representation of the principal legal systems of the world and equitable geographical distribution were to be assured.<sup>25</sup> It is noteworthy that the Assembly of the Authority may make recommendations of a general nature relating to such representation

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<sup>22</sup> See Chandrasekhara Rao, 'ITLOS The First Six Years', Max Planck Yearbook of United Nations Law, (2002) vol.6, pp.183-300 on pp.280-284.

<sup>23</sup> MOX Plant case, Order no. 3, (2003), Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, para.28

<sup>24</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS, para.25, 1 February 2011, referred to hereinafter as the Obligations of Sponsoring States.

<sup>25</sup> Annex VI, article 35.

and distribution. It will be recalled that the Seabed Disputes Chamber was originally an organ of the Authority and it was the Assembly of the Authority which elected its members. The members of the Chamber are now “selected” by the Tribunal, although this specific link with the Authority is maintained.

#### Contentious Jurisdiction

The Chamber has a mandatory jurisdiction over all disputes with respect to activities in the Area (the international seabed area). This jurisdiction, it should be noted, is confined to disputes with respect to “activities in the Area”. The Chamber in its Advisory Opinion on the obligations of sponsoring States has sought to define this term. It has made a useful and comprehensive analysis of the meaning of the term.<sup>26</sup>

The Chamber has jurisdiction concerning disputes between States Parties concerning the interpretation or application of Part XI and the relevant annexes. Such disputes can be submitted at the request of the parties to the dispute to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17 (article 188, paragraph 1(a)) or at the request of any party to the dispute to an ad hoc chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, article 36 (article 188, paragraph 1(b)).

The Chamber also has jurisdiction over “disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests”.<sup>27</sup>

Disputes between the parties to an exploration or exploitation contract concerning its interpretation or application shall be submitted at the request of either party to binding

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<sup>26</sup> See Advisory Opinion on the Obligations of Sponsoring States, pp.82-97.

<sup>27</sup> Article 187, paras. (c)(i) and (ii).

commercial arbitration, unless the parties otherwise agree (article 188, paragraph 2(a)). But the Convention makes the important reservation that a commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. That question shall be referred to the Seabed Disputes Chamber for a ruling. If the arbitral tribunal determines, either at the request of a party or *proprio motu*, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer the question to the Chamber for such a ruling. This compromise procedure was designed to preserve the unity of interpretation of the provisions of Part XI.

The Chamber possesses jurisdiction over disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.<sup>28</sup>

#### Limitations on jurisdiction

The Convention imposes an important limitation on the jurisdiction of the Chamber. The Chamber has no jurisdiction over the exercise by the Authority “of its discretionary powers in accordance with Part XI (of the Convention); in no case shall it substitute its discretion for that of the Authority”. Nor can it pronounce itself on the question “of whether any rules, regulations and procedures of the Authority are in conformity with this Convention” nor declare them void. Its sole task is confined to “deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention”. (Article 189)

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<sup>28</sup> Article 187, paras. (b)(i) and (ii).

This provision has been much criticized. It has been correctly stated that “[a] pronouncement on the compatibility of a particular act carried out in pursuance of a regulation with the provisions of the Convention will normally entail a pronouncement on the compatibility of the regulation itself with the Convention”.<sup>29</sup> Caflisch referred to this as being contradictory and confusing.<sup>30</sup> This vagueness and ambiguity was the price to be paid for obtaining consensus where there was such significant divergence of opinion among the negotiators.

## **9. Advisory Jurisdiction**

The advisory jurisdiction of the Chamber is to be found in article 191 of the Convention which reads as follows: “The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency”.

In its advisory opinion relating to the obligation of sponsoring States, the Chamber threw some light on the operation of article 191 especially on matters relating to jurisdiction and admissibility.

With respect to questions of admissibility the Chamber thought it useful to note the difference between the wording of article 191 of the Convention and article 65 of the Statute of the International Court of Justice. Article 191 states that the Chamber “shall give an advisory opinion” – a mandatory injunction - whereas article 65, paragraph 1 of the Statute of the ICJ states that the Court “may give an advisory opinion” – which grants a discretionary power. However, the Chamber did not consider it necessary to pronounce on the consequences of that difference with respect to admissibility in this case.

(paragraph 48)

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<sup>29</sup> F. Paolillo, ‘Settlement of Law of the Sea Disputes Before and After the 1982 Convention’ in *The Law of the Sea with Emphasis on the Mediterranean Issues*, Thesaurus Acroasium, vol.XVII, 14<sup>th</sup> Session, September 1986 pp.203-259 on pp.241-242.

<sup>30</sup> Lucius C. Caflisch, ‘The Settlement of Disputes Relating to Activities in the International Seabed Area’, In: C.L. Rozakis and C.A. Stephanou (eds), *The New Law of the Sea* (1983), pp.303-344, on p.315.

In this case three questions relating to the obligations of sponsoring States were put to the Chamber. It is not proposed here to discuss the substance of the case. However the comments of the Chamber in responding to the three questions are worthy of note. It observed that “The Chamber is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention’s regime” (paragraph 30). This observation certainly highlights the cardinal role which the Seabed Disputes Chamber is designed to play in the deep seabed mining regime.

## 10. The Applicable Law

The law which the Tribunal is authorized to apply is contained in article 293, paragraph 1, of the Convention which reads as follows: “A court or tribunal having jurisdiction under this section (i.e. section 2 of Part XV relating to compulsory procedures entailing binding decisions) shall apply this Convention and other rules of international law not incompatible with this Convention”.

It may be remarked that in the M/V “Saiga” No.2 case the Tribunal interpreted article 293 as giving it competence to apply not only the provisions of the Convention but also the norms of customary international law (including those relating to the use of force). It stated that “*Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law*”. (emphasis added)<sup>31</sup> This finding was followed by the Annex VII Guyana/Suriname Arbitration.<sup>32</sup>

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<sup>31</sup> M/V “Saiga” (No.2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports (1999), p.7, at para.155.

<sup>32</sup> Guyana/Suriname Arbitration, para.405.

The law to be applied by the Seabed Disputes Chamber is likewise contained in article 293, paragraph 1 – to which is added, naturally enough, certain related instruments. Article 38 of the Statute reads: “In addition to the provisions of article 293, the Chamber shall apply: (a) the rules, regulations and procedures of the Authority adopted in accordance with this Convention; and (b) the terms of contracts concerning activities in the Area in matters relating to those contracts”.

## **11. The role of the Tribunal**

The criticism is sometimes made that the multiplication of international tribunals particularly with the establishment of the International Tribunal for the Law of the Sea pose a real risk to the unity of international law, the so-called fragmentation of international law. At the 20<sup>th</sup> anniversary of the Convention the then President of the Tribunal by way of response stated that “the Tribunal for its part has not shown any disinclination to be guided by the decisions of the International Court of Justice. In fact, even in this short period of six years, decisions of the ICJ have been cited both in judgments of the Tribunal and in the separate and dissenting opinions of members of the Tribunal”.<sup>33</sup> In the intervening years the Tribunal has continued to be guided by the jurisprudence of the ICJ while yet making its own contribution to the development of international law and in particular the international law of the sea.

## **12. Concluding observations**

The Tribunal has now established itself in the pantheon of international courts and tribunals. It has been carrying out its work effectively and expeditiously. This year, as we have already seen, the Seabed Disputes Chamber has given its first advisory opinion<sup>34</sup> which seems to have been well-received by the international community particularly by experts in international environmental law.

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<sup>33</sup> Statement by the President of the International Tribunal for the Law of the Sea on the Commemoration of the 20<sup>th</sup> Anniversary of the Opening for Signature of the 1982 United Nations Convention on the Law of the Sea. Fifty-Seventh Session of the United Nations General Assembly, 9 December 2002.

<sup>34</sup> Advisory Opinion on the Obligations of Sponsoring States.

The Tribunal now has in its docket two cases: case concerning the detention of the ship M/V “Louisa” and the case between Bangladesh and Myanmar relating to the dispute concerning the maritime boundary. The latter case is particularly important in that it raises a number of significant issues – boundary-making in the outer continental shelf in the seabed area beyond 200 nautical miles; the interpretation of article 76 (that is the definition of the continental shelf); and the relationship between the Commission on the Limits of the Continental Shelf and the Tribunal. It can be said that this case to a certain extent is a ground-breaking one.

It is very encouraging that the Tribunal has manifestly begun to play its rightful judicial role in the settlement of maritime disputes.