

Proceedings before the International Tribunal for the Law of the Sea

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ABSTRACT

The proceedings of the International Tribunal for the Law of the Sea reflect the Tribunal multi-faceted jurisdiction contained in the Rules, which were adapted on 28 October 1997 after one year of deliberations. These Rules and other relevant instruments are kept under review in order to be able to introduce modifications suggested by the experience of their implementation. The proceedings set out in the Rules have so far proved to be very successful because they are not only expeditious but also cost-effective, i.e. the proceedings before the Tribunal are supposed to be conducted without unnecessary delay or expense as Rule 49 set out the policy.

Keywords: *Proceedings; Written Proceedings; Oral Proceedings; Merits; Submission Of Cases; Judicial Body; Pleadings; Deliberations; Judgments; Incidental Proceedings; Provisional Measures; Preliminary Proceedings; Preliminary Objections; Counter Claims; Intervention; Discontinuance; Prompt Release; Advisory Proceedings; Seabed Dispute Chamber*

INTRODUCTION

For permanent international courts such as the International Tribunal for the Law of the Sea (ITLOS), the law applicable to procedure follows the same principle as that governing the merits of a case. Although, to a great extent, the law is already set down, the Tribunal plays an important role in its establishment. The basis on which contentious proceedings are conducted before the Tribunal is essentially the Statute and Rules of the Tribunal.

The Rules of the International Tribunal for the Law of the Sea were adapted on 28 October after months of deliberations from October 1996. ITLOS had to take into account the UNCLOS provisions, especially Annex VI thereto, which is the Tribunal's Statute that empowers the body to adopt Rules of procedure i.e., in broad lines the organisation of the Tribunal and the procedure to be followed in cases submitted to it.

The Statute of the Tribunal develops a certain number of principles set out in Section 2 of Part XV of the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

It is an integral part of the Convention and forms Annex VI thereto. It can be amended only by the same procedure as amendment of the

Convention¹ and, since the Convention and the Statute are in existence, potential litigant parties have no further role to play in the establishment of rules governing their case.

However, these rules are still too general to cover every question that might arise as a case proceeds, and it is for that reason that judges require rules of application. Thus the Statute² of the Tribunal recognises the latter's power to establish a set of rules of procedure, the object of which is rightly to supplement the general rules laid down in the Convention and the

¹ Article 41 of the Statute provides: "1. Amendments to this Annex, other than amendments to section 4, may be adopted only in accordance with Article 313 (of the Convention) or by consensus at a conference convened in accordance with this Convention. - 2. Amendments to section 4 may be adopted only in accordance with Article 314. - 3. The Tribunal may propose such amendments to this Statute as it may consider necessary, by written communications to the States Parties for their consideration in conformity with paragraphs 1 and 2."

² Article 16 of the Statute provides: "The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure." Thus, the International Tribunal for the Law of the Sea drew up Rules and adopted them on 28 October 1997.

Statute and to specify in detail the measures to be taken in order to give effect to the rules imposed thereon. Therefore, the Rules may not contain provisions that are contrary to or contravene those set out in the Statute. The Tribunal cannot grant itself prerogatives not conferred by the Statute. In other words, owing to the different status of their authors, the Statute and the Rules do not have the same juridical value.

Indeed, although the Tribunal is bound by the Statute, which forms an integral part of the Convention, it may amend or modify the Rules, which the Tribunal itself established³. However, despite the difference between these two texts, the common objective of their authors is to ensure that parties to proceedings are treated equally.

The aim thereof is to enable the proceedings to reach their conclusion as a result of rules being properly applied and parties systematically presenting their claims and counter-claims so that the legal truth can be established.

³ On many occasions, the International Court of Justice has had to recall the intangible nature of the Statute. Indeed, following Albania's failure to attend in the third stage of the Corfu Channel Case in which the Court was to determine the amount of the compensation to be paid to the United Kingdom, Albania maintaining that the special agreement of 25 March 1948 did not confer jurisdiction on the Court to fix the amount of the compensation, the Court had to throw out the argument, recalling its judgment of 25 March 1948, by means of which competence was conferred on the Court, and stating "in accordance with the Statute (Article 60), which, for the settlement of the present dispute, is binding upon the Albanian Government"; see I.C.J. Reports 1949, p. 248. The Court also stated, in the Haya de la Torre Case, that it should not depart from the principle set out in Article 43, paragraph 1, of its Statute, whereby the procedure was divided into a written and an oral phase, in response to the parties which had suggested that the oral phase of the proceedings be dispensed with. It should be noted that, if this case had been dealt with by the International Tribunal for the Law of the Sea, the latter would have been able to follow the suggestion made by Colombia and Peru insofar as it is the Rules of the Tribunal (Article 44, paragraph 1) which set down the principle of two procedural phases. On the other hand, the court or tribunal may take whichever decisions it sees fit for the conduct of proceedings, provided they are compatible with the provisions of the Statute.

The proceedings are supposed to be conducted without unnecessary delay or expense. This affects the time-limits and other devices to meet the need for making the procedure expeditious. Transparency is also a basic principle followed by the Rules, as regard to the appearance before the Tribunal and the access for the public to the written pleadings of a case

To that end, the Tribunal applies the provisions of the Statute and of the Rules. Alongside these two texts, which set down in detail the modalities according to which a case should be conducted, procedure is governed by the Convention, the Resolution on the Internal Judicial Practice of the Tribunal, and by the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal⁴.

It is by applying this principle of equality between parties that the President of the Tribunal should, pursuant to Article 45 of the Rules, ascertain the views of the parties with regard to questions of procedure. It is this same principle which should predicate all decisions taken or to be taken with respect to the order in which pleadings should be submitted - the burden of proof, the hearing of the parties and their right to respond, the allotment of time for preparing files, and the time accorded to speakers. It is worth noting that generally when a case is brought by means of compulsory jurisdiction through a unilateral application, the competence of said jurisdiction and the admissibility of the request are often challenged. The subject of application or claims that may lead to non appearance are often highly political matters, relating to sovereignty, independence, or simply national prestige, which explains the defiant attitude of governments towards International Courts and Tribunals⁵. As concerns the sanctioning of rules of procedure, the nature of the sources has an effect on the

⁴ These texts can be accessed via the Tribunal's website. See also the Guide to Proceedings before the Tribunal at www.itlos.org

⁵ See TM Ndiaye, Non Appearance before the International Tribunal for the Law of the Sea, *Indian Journal of International Law*, Vol 53, N°4, Oct-Dec. 2013, pp. 545-564; Alexandrov "Non Appearance Before the ICJ", 11, *Columbia Journal of Transnational Law*, Vol. 33, 1995, pp. 41-72, DW Bowett "Contemporary development and Legal Techniques in the Settlement of Disputes", 11 *RCADI*, 180 (1983) pp. 169-235; Sir G. FITZMAURICE "The Problem of Non Appearing Defendant Government" *BYBIL*, Vol. 51 (1980) 89-120.

form which that sanction takes. No well-established practice appears to exist. Although there is a tendency for the failure to recognise procedural rules having their origin in an agreement between the parties being sanctioned with inadmissibility, on the other hand, the applicability of this same sanction when the author of the rule of procedure is the Tribunal is shrouded in uncertainty. It must be stated that the litigant parties are sovereign States, which consent to appear before International Courts. In the *Juno Trader* Case before the Tribunal, it will be recalled that Guinea-Bissau did not produce its statement in response, contrary to the request of Saint Vincent and the Grenadines. However, it did indeed attend the entire oral proceedings.

Should the provisions of the Rules⁶ be amended in order to deal with such a case of failure to observe due process? In light of the above, the successive stages of proceedings on the merits will be examined. (II) we will then study the incidental proceedings (III) and the prompt release proceedings (IV) before examining the advisory proceedings (V).

PROCEEDINGS ON THE MERITS

Submission of Cases to the Tribunal

Depending on the particular case, disputes are submitted to the Tribunal either by notification of a special agreement or by written application, addressed to the Registrar⁷. The method of submission selected by application or by notification of a special agreement - will be examined successively.

The choice of the method of submission

The method of submission selected follows the principle of freedom, the possibility of making several submissions and their consequences for the Tribunal's jurisdiction.

First, the parties are free to choose to submit their case to the Tribunal by written application or by special agreement.

This is the principle set down by the International Court of Justice (ICJ) in the *Corfu Channel* Case⁸.

In its concluding statement, the Albanian Government requested the Court: to place on record that the Albanian Government, in accepting the Security Council's recommendation, is obliged only to submit the above-mentioned dispute to the Court in accordance with the provisions of the Statute of the Court⁹; and to give judgment that the Application of May 13th last, addressed to the Court by the Government of the United Kingdom against the Government of the People's Republic of Albania, is inadmissible, the Government of the United Kingdom having submitted the said Application contrary to the provisions of Article 40, paragraph 1, and Article 36, paragraph 1, of the Statute of the Court.

The ICJ rejected these conclusions linking the method of submission to the optional or compulsory nature of the competence of the Court. According to the latter, whilst the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require this consent to be expressed in any particular form. Albania's argument that the application was inadmissible since it had been submitted contrary to the provisions of Article 40, paragraph 1, and of Article 36, paragraph 1, of the Statute of the Court is based essentially on the assumption that the application would fall only in the domain of compulsory jurisdiction, since a special agreement only would be possible outside this domain.

The Court stated that this was a mere assertion which had no basis in either of the texts cited. The Court specified that Article 32, paragraph 2, of the Rules, in requiring the application to mention, not as an absolute necessity but only "as far as possible", the provision on the basis of which the applicant claims to found the jurisdiction of the Court, does indeed appear to imply clearly, both in itself and by the reasons for its being drafted, that the application does not fall exclusively in the domain of compulsory jurisdiction¹⁰.

The possibility of more than one application being submitted simultaneously to the Tribunal can then be envisaged. In that case, the Tribunal

⁶ See Article 111, paragraph 4 of the Rules; see also "*Juno Trader*" case (St Vincent and the Grenadines V. Guinée-Bissau) prompt release, judgment of 18 December 2004.

⁷ Article 24 of the Statute.

⁸ *Corfu Channel* Case (Preliminary Objection), I.C.J. Reports, 1947-1948, Judgment of 25 March 1948, p. 15.

⁹ The first conclusion refers to the Resolution of 9 April 1947 in which the Security Council recommended "the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court".

¹⁰ *Corfu Channel* Case, note 9, pp. 25-27.

has to ascertain the parties' common intention, in order to determine the basis and extent of its competence. It will be recalled that, in the Corfu Channel Case, Albania and the United Kingdom reached a special agreement following the judgment of 25 March 1948. The text specified that :

“The Parties agree that the present Special Agreement shall be notified to the International Court of Justice immediately after the delivery on the 25th March of its judgment on the question of jurisdiction”¹¹

The Court's competence to hear and determine the dispute could have been based either on this special agreement or on the judgment rendered on 25 March. On 26 March 1948, the Court issued an order, whereby, observing that the agreement henceforth formed the basis on which the Court should hear the case and set out the questions submitted to it¹², the Court was to give preference to the common intent of the parties. According to the Court, "the main object both Parties had in mind when they concluded the Special Agreement was to establish a complete equality between them by replacing the original procedure based on a unilateral Application by a procedure based on a Special Agreement¹³."» This method of submission logically exempts the procedure from preliminary objections. It was also on the basis of the special agreement of 29 December 1950 that the ICJ considered itself seized of the *Minquiers and Ecrehous Case*, whilst France and the United Kingdom had both signed an optional clause conferring compulsory jurisdiction on the Court so that it could be seized of the case¹⁴.

¹¹ Special agreement concluded on 25 March 1948; see Judgment of 9/4/1949 (Merits), I.C.J. Reports, 1949, p. 6.

¹² I.C.J. Reports, 1947-1948, p. 53.

¹³ I.C.J. Reports, 1949 (Merits), p. 25.

¹⁴ When discussing the number of States which are signatory to the special agreements in the North Sea Continental Shelf Case, M. Bedjaoui writes: "It will be noted in passing that introducing a case by way of a special agreement has henceforth become the most common method of submitting cases to the Court. This is a welcome development which has largely made up for the disappointment felt at the system instigated to encourage States to accept the jurisdiction of the Court in advance in all disputes in which they had to appear before the latter, or in all those cases falling into specific categories. As we know, that system was not as successful as had been expected and has frequently been the source of controversy as regards the

Finally, although very different, the existence of a close link between the concepts of submission and competence can nevertheless be noted. Indeed, whilst competence is the basis upon which the Tribunal should hear and determine a case submitted to it - it is determined by the Tribunal itself¹⁵ - for the party submitting a claim, submission of a case is the right for a case to be heard on its merits as a result of its being brought before the Tribunal. For that purpose, a jurisdictional link has to be invoked.

The concepts of jurisdiction and submission are sometimes confused, for instance, when the sole fact of the Tribunal 's being seized of a case immediately establishes its competence. This is the case of submission by way of a special agreement when the Tribunal is notified thereof by the parties which have signed the said agreement. It is also the case when the Tribunal is seized of two applications simultaneously¹⁶ and when, seized by way of a written application, the declaration of compulsory jurisdiction endorsed by the defending State does not impede its competence. However, in all other cases, competence and submission remain distinct. In the case of submission by way of a written application, the respondent may always contest the Tribunal's competence in a compulsory jurisdiction system. Moreover, the objection is almost always accompanied by a question as to the admissibility of the application.

As concerns the case of optional jurisdiction, there are many examples of parties failing to appear before the ICJ¹⁷. The International Tribunal for the Law of the Sea has had the experience of a party in a case refusing to appear before it¹⁸. However, it should be

competence of the Court, whilst that competence cannot be placed in doubt when a case is submitted by means of a special agreement." Bedjaoui, "La 'fabrication ' des arrêts de la Cour Internationale de Justice," in *Melanges Michel Virally* (Pedone, Paris, 1991), p. 88

¹⁵ By virtue of Article 288, paragraph 4, of the United Nations Convention on the Law of the Sea.

¹⁶ In the Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Judgment of the I.C.J. of 18 November 1960), Nicaragua and Honduras submitted applications to the Court simultaneously.

¹⁷ See note N°5 supra

¹⁸ Article 53 of the Statute of the ICJ provides for cases in which the respondent does not appear before the Court, either because it contests its competence or for some other reason. In some

recalled that the Tribunal's jurisdiction still depends on the prior consent of the parties and that no sovereign State could be party to a case before an international tribunal if it had not consented thereto. It is this consent to bring a dispute before the Tribunal which determines the latter's competence with respect to the dispute¹⁹.

Submission by way of a written application

An application, which is unilateral in nature, is submitted by an applicant against a respondent. It may be filed when an agreement between the parties provides therefor, or when the parties to a dispute have accepted the Tribunal's jurisdiction as one of the means of settling disputes relating to the interpretation or application of the Convention, by way of a written declaration made in accordance with Article 287 of the Convention.

An application may also be filed when a case is brought before the Seabed Disputes Chamber.

Furthermore, an application²⁰ may be submitted in the context of cases relating to requests for provisional measures whilst awaiting the establishment of an arbitral tribunal, pursuant to Article 290, paragraph 5, of the Convention, as well as in proceedings for the prompt release of vessels and crews, in accordance with Article 292 of the Convention.

cases, parties have failed to appear in all stages of a case: Fisheries Jurisdiction (Iceland); Nuclear Tests (France); Aegean Sea Continental Shelf (Turkey); and United States Diplomatic and Consular Staff in Tehran (Iran). In other cases, parties failed to appear in certain stages of the proceedings only: Corfu Channel Case, fixing of the amount of compensation (Albania); Anglo-Iranian Oil Co., Provisional Measures (Iran); Nottebohm, Preliminary Objection (Guatemala); and Military and Paramilitary Activities in and against Nicaragua, form and amount of compensation (United States).

¹⁹ Article 288, paragraph 1, provides that the Tribunal "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." Similarly, Article 21 of the Statute states: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

²⁰ Application in a case of Annex VII Tribunal, relating to ARBITRATION

Finally, an application may be filed in the context of preliminary proceedings²¹, a request to intervene²², a request for discontinuance²³, or for the purpose of interpretation or revision of a judgment of the Tribunal²⁴. The application comprises a certain number of indications, of which some are compulsory and others optional²⁵. The compulsory items are: the designation of the applicant party; the party against which the application is made; and the subject of the dispute.

It should be recalled that, in the Case concerning the Rights of Nationals of the United States of America in Morocco (France v. United States of America), submitted by an application of the Government of the French Republic against the United States, the American Government had to submit a preliminary objection, owing to the fact that the French application did not meet the formal conditions in that it did not specify whether France was acting on its own behalf or in its capacity as protecting power of Morocco. Following observations made by France in this regard, the United States withdrew its objection²⁶.

The application may "as far as possible" specify a certain amount of other information, which is then optional²⁷ and includes: the legal grounds on which the applicant intends to establish the jurisdiction of the Tribunal; the precise nature of the claim; and a succinct statement of the facts and grounds on which the claim is based. The original application is signed either by an agent of the party submitting it, by that party's diplomatic representative in the country in which the Tribunal has its seat, or by some other duly authorized person. If the application bears the signature of someone other than the diplomatic representative, the signature must be authenticated by the latter or by the competent governmental authority²⁸.

The Registrar immediately transmits a certified copy of the application to the respondent²⁹. If the applicant proposes to find the jurisdiction of

²¹ Article 294 of the Convention.

²² Articles 31 and 32 of the Statute. Article 106, paragraph 1, of the Rules 21.

²³ Article 106, paragraph 1, of the Rules.

²⁴ Articles 126 and 127 of the Rules

²⁵ Article 24, paragraph 1, of the Statute and Article 54, paragraph 1 of the Rules

²⁶ Judgment of 27 August 1952..

²⁷ Article 54, paragraph 2, of the Rules.

²⁸ Article 54, paragraph 3, of the Rules.

²⁹ Article 54, paragraph 4, of the Rules

the Tribunal upon consent thereto yet to be given or manifested by the party against which the application is made, the application should be transmitted to that party. However, it is not entered in the list of cases of the Tribunal and no action in the proceedings may be taken unless and until the party against which the application is made consents to the jurisdiction of the Tribunal for the purpose of the case³⁰.

Finally, it should be noted that the Registrar informs all interested parties and all States Parties of the application³¹. The instigation of a case is thus widely publicised and a press release is also issued. The date when the case is instigated, i.e. the date when the application is filed at the Registry, marks the opening of the proceedings before the Tribunal.

Submission by way of a special agreement

A special agreement within the context of contentious proceedings is an international agreement by means of which States Parties agree to submit to the Tribunal a dispute of a legal nature. It establishes the extent of the powers which the Tribunal is acknowledged to have. The special agreement should mention a certain amount of compulsory information concerning the subject of the dispute and the identity of the parties³². When proceedings are brought before the Tribunal by notification of a special agreement, the notification may be effected by the parties jointly or by any one or more of them. If the notification is not a joint one, the Registrar immediately sends a certified copy of it to all other parties involved³³.

The notification should always be accompanied by the original or by a certified copy of the special agreement. It should also specify the precise subject of the dispute and indicate the parties, provided that this is not already apparent from the agreement³⁴. All steps taken in the name of the parties once proceedings have been instituted are taken by agents, who must have an address for service at the seat of the Tribunal or in the capital of the country where the seat is located, to which all communications concerning the case are to be sent³⁵.

³⁰ Article 54, paragraph 5, of the Rules.

³¹ Article 24, paragraphs 2 and 3 of the Statute.

³² Article 24, paragraph 1, of the Statute

³³ Article 55, paragraph 1, of the Rules

³⁴ Article 55, paragraph 2, of the Rules

³⁵ Article 56, paragraph 1, of the Rules; except in the circumstances contemplated by Article Paragraph 5, of the Rules

The Judicial Body

Once a case has been submitted to the Tribunal, the composition of the judicial body and manner and form in which it will decide have to be determined, which is usually done in plenary. However, the Statute provides that the Tribunal may form chambers to hear cases brought before it.

The usual composition

All available members of the Tribunal sit, a quorum of eleven elected members being required in order to constitute the Tribunal³⁶. Therefore, judges ad hoc are not taken into account when the quorum is calculated since they are not elected.

Chambers

The Statute provides for two types of chambers: the Seabed Disputes Chamber and special chambers. The Seabed Disputes Chamber is established in accordance with section 4 of the Statute. Its competence, powers and functions are defined in section 5 of Part XI of the Convention. It may also create an ad hoc chamber³⁷.

The special chambers fall into three different categories.

First, if the Tribunal considers it necessary, it may establish chambers composed of three or more of its elected members, to hear particular categories of dispute³⁸. It was under such circumstances that the Tribunal established the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes. Each of these chambers is composed of seven judges.

In the second category, the Tribunal may establish a chamber to hear a specific dispute submitted to it if the parties so request. The composition of the chamber is resolved with the approval of the parties, who may also appoint a judge ad hoc if the chamber does not comprise a judge of the nationality of one of the parties.

It was on that basis that Chile and the European Community availed themselves of this option when, following the filing of a special agreement, the parties submitted the Case concerning the Conservation and Sustainable

³⁶ Article 14 and 15 of the Statute.

³⁷ Ibid

³⁸ Article 15, paragraph 1 of the Statute.

Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean³⁹.

Finally, in order to expedite cases, the Tribunal annually creates a chamber which is composed of five of its elected members and is called upon to hear and determine disputes by summary procedure. Two alternative members are also selected⁴⁰.

Any judgment rendered by one of these Chambers is considered to have been rendered by the Tribunal.

Procedure before the Chambers is regulated in accordance with the provisions concerning proceedings before the Tribunal, subject to any particular provisions, which the latter may adopt.

Conduct of the Case

This consists of the parties making representations and of a certain number of decisions, made in the form of orders, concerning the organisation of proceedings.

Representation of the parties

States Parties do not have permanent representation before the Tribunal. When they are involved in a case before the Tribunal, they arrange to be represented by an agent. The party filing a special agreement or application must designate its agent at the same time. The other party should designate its agent as soon as it receives the special agreement or application.

As representatives of the parties, the agents involve the latter by their written and spoken statements. They are assisted by counsel and advocates in preparing and presenting pleadings. It is during this latter stage that their role is more apparent. They do not necessarily have the nationality of the party which has chosen them. The agents, counsel and advocates enjoy the requisite privileges and immunities allowing them to exercise their functions independently.

Orders concerning matters of procedure

The Tribunal makes orders concerning the conduct of the case, decides the form and time in which each party must conclude its arguments, and makes all the arrangements connected with the taking of evidence⁴¹. In each case of which the Tribunal is seized, the

President ascertains the views of the parties with regard to questions of procedure. For that purpose, he may summon the agents of the parties to meet him as soon as they have been appointed and whenever necessary thereafter, or use other appropriate means of communication⁴².

Article 59 of the Rules states that, in the light of the views of the parties ascertained by the President, the Tribunal makes the necessary orders to determine, inter alia, the number and order of filing of the pleadings and the time-limits within which they must be filed.

These time-limits set a precise date for the various pleadings but may be extended if necessary.

The Two Stages of the Proceedings and the Deliberations

Pursuant to Article 44, paragraph 1, of the Rules, the proceedings consist of two parts, written and oral.

The Written Stage of the Proceedings

This stage is described as "the formulation in words of the respective claims and defences of the litigating parties."⁴³ The written proceedings comprise the communication to the Tribunal and to the parties of memorials, counter-memorials and, if the Tribunal so authorises, replies and rejoinders, as well as all documents in support⁴⁴.

The pleadings, communication thereof and purpose of the written proceedings will now be examined.

Pleadings

The memorial contains: a statement of the relevant facts; a statement of law; and the submissions⁴⁵. The ICJ has defined a submission as "a precise and direct statement of a claim"⁴⁶. Submissions may not be presented in the form of a question⁴⁷.

And the Court is competent to interpret these submissions, which, if it considers it necessary, allows it to not respond. On the other hand, the

³⁹ See Order of 20 December 2000, ITLOS Reports 2000, p. 148.

⁴⁰ Article 15, paragraph 3 of the Statutes.

⁴¹ Article 27 of the Statute.

⁴² Article 45 of the Rules.

⁴³ J.C. Witenberg, *La théorie des preuves devant les juridictions internationales*, RCADI, vol. 56(11) (1936), pp. 5-105, p. 9.

⁴⁴ Article 44, paragraph 2 of the Rules.

⁴⁵ Article 62, paragraph I, of the Rules Monetary Gold Case, I.C.J. Reports, 1954, p. 28.

⁴⁶ Fisheries Case, I.C.J. Reports, 1951, p. 126.

⁴⁷ Haya de la Torre Case ICJ reports, 1954, p. 48.

Court may not hear and determine a dispute *ultra petita* and grant parties more than what they request in their submissions⁴⁸.

The counter-memorial contains: an admission or denial of the facts; observations concerning the statement of law in the memorial; a statement of law in answer thereto; and the submissions⁴⁹. It should be recalled that the Tribunal may also authorise the submission of replies and rejoinders. Copies of relevant documents-adduced in support of the contentions contained in the pleadings are annexed to the original.

The original of every pleading is signed and dated by the agent and filed in the Registry. It should be accompanied by: a certified copy of the pleading; any document annexed thereto; any translations, for communication to the other party⁵⁰; a list of all documents annexed to a pleading⁵¹; a translation into one of the official languages of the Tribunal (English and French) of the pleading and of the documents in support thereof, certified as accurate by the party submitting it, if the pleading is in a language which is not one of the official languages of the Tribunal⁵²; and the number of additional copies of the pleading and supporting documents required by the Registry⁵³.

Submission of pleadings

The agent submits to the Registry the original and additional copies of all written pleadings. The Rules set out the order in which the documents should be filed, depending on the method according to which the case is submitted.

In a case instigated by way of an application, the pleadings consist of a memorial provided by the applicant and a counter-memorial provided by the respondent. If the parties are in agreement or if the Tribunal decides that they are necessary,

the applicant may submit a reply and the respondent a rejoinder.

In a case instigated by way of notification of a special agreement, the number of and order in which pleadings are submitted are those set out by the special agreement itself, unless the Tribunal, after consulting the parties, decides otherwise. In the absence of any relevant provisions or if, subsequently, the parties fail to reach agreement on the number of and order in which pleadings should be submitted, each of the parties submits a memorial and a counter-memorial within the same time-limits. The Tribunal authorises the presentation of replies and rejoinders only if it finds them necessary⁵⁴. It is certainly not ideal for pleadings to be presented simultaneously since it forces parties to speculate about issues of law which may not have been raised.

The Tribunal may itself request documents or explanations to be presented during the written proceedings⁵⁵.

Transmittal of pleadings

Upon receipt of a pleading presented by one party, the Registrar transmits a certified copy thereof and of any supporting document to the other party⁵⁶. If a pleading does not meet the formal conditions set out in the Rules, the Registrar returns it to the party concerned for correction.

Pleadings are transmitted from one party to the other and to the judges by way of the Registrar. Once all the pleadings have been presented, the case is ready to be argued, which opens an intermediate stage, between the end of the written proceedings and the beginning of the oral proceedings. This stage is known as the "initial deliberations."

Initial deliberations

Pursuant to the Rules of the Tribunal, after the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal meets in private to enable judges to exchange views concerning the written pleadings and the conduct of the case⁵⁷.

⁴⁸ Monetary Gold Case, I.C.J. Reports, 1954, p. 28.

⁴⁹ Asylum Case, (Merits, Judgment of 27 November 1950), I.C.J. Reports, 1950, page 402. Similarly, in the above mentioned Corfu Channel Case (third stage, compensation), the experts called by the Court assessed the total damages at a higher amount than that estimated by the United Kingdom. Pursuant to this rule, the Court awarded the damages on the basis of the United Kingdom's conclusions.

⁵⁰ Article 62, Paragraph 2, of the Rules.

⁵¹ Article 63, paragraph 1, and Article 65, paragraph 1, of the Rules.

⁵² Article 63, paragraph 3, of the Rules.

⁵³ Article 64, paragraphs I, 2 and 3, of the Rules

⁵⁴ Article 65, paragraph I, of the Rules; paragraph 9, of the Guidelines.

⁵⁵ Articles 60 and 61 of the Rules.

⁵⁶ See the above-mentioned Case concerning the Rights of Nationals of the United States of America in Morocco and the Monetary Gold Case.

⁵⁷ Article 66 of the Rules.

This will help the judges to take full cognizance of the substance of a case before the hearings start. It appeared useful to encourage judges to acquaint themselves with the substance of a case before the beginning of the oral proceedings and to exchange views about it.

At this juncture, the Tribunal considers the possibility of:

- Giving any indications or putting any questions to the parties;
- Calling upon the parties to produce any evidence or to give any explanations; and finally, considering the nature, scope and terms of the questions and issues which will have to be decided by the Tribunal⁵⁸.

Oral Phase of the Proceedings

The oral proceedings consist of the hearing by the Tribunal of agents, counsel, advocates, witnesses and experts⁵⁹.

The oral phase comprises its opening, conduct and conclusion.

Opening of the oral proceedings

The date for the opening of the oral proceedings, fixed by the Tribunal, falls within a period of six months from the closure of the written proceedings unless the Tribunal considers that there are grounds for deciding otherwise. The Tribunal may also decide, if necessary, that the opening or continuance of the oral proceedings be postponed⁶⁰.

When fixing the date for the opening of the oral proceedings, the Tribunal considers the need to hold hearings without undue delay; the priority prescribed for provisional measures and prompt release; special circumstances; and the views of the respective parties.

Conduct of the oral proceedings

The general rules applicable are that debates are carried out under the guidance of the President of the Tribunal or, if he is absent, by the Vice-President or, if the latter is unavailable, by the most senior judge. The President may put any pertinent question to the witnesses, experts, counsel and advocates, as may any of the judges, having first made such intention known to the President. The hearings are public, unless the Tribunal decides otherwise or both parties

request that the public be not admitted to the hearings. Minutes of the hearing are produced by the Registry and signed by the President and by the Registrar. Measures are taken for evidence to be produced which are governed by the obligation for parties to collaborate in establishing evidence by proving their allegations as concerns the facts and by the Tribunal's principle of liberty in its assessment of evidence submitted to it by parties⁶¹. It is for

⁶¹ Written evidence is provided by documents likely to establish an alleged fact: treaties, correspondence, laws, rules, orders, decrees, judicial or administrative acts, etc. In the Case of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, the Court stated (page 34, paragraph 57) that: "In accordance with its practice, the Court will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed." In paragraph 58, it continues: "These findings of fact necessarily entail an assessment of the evidence. The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts. The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts. The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings. The Parties were also authorized by the Court to produce new documents at a later stage. In the event, these contained important items. There has also been reference, in both the written and the oral pleadings, to material not annexed to the written pleadings but which the Court has treated as "part of a publication readily available" under Article 56 paragraph 4, of its Rules of Court. Those, too, have been examined by the Court for purposes of its determination of the relevant facts"; and the Court concluded its considerations of the methods employed, in paragraph 59: "As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration (see *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, LC.J. Reports 1986, p. 50, pars 85; see equally the practice followed in the case concerning *United States Diplomatic vs Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 3)."

⁵⁸ Article 68 of the Rules.

⁵⁹ See Article 3 of the Resolution on the Internal Judicial Practice of the Tribunal.

⁶⁰ Article 69, paragraph 1, of the Rules

that reason that, prior to the opening of the oral proceedings, each party should communicate to the Registry information regarding any evidence which it intends to produce or which it intends to request the Tribunal to obtain. This communication concerns witnesses and experts who are to be heard⁶².

The Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal may consider necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose. The Tribunal may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings⁶³. Before giving any evidence, such witness or expert should make the appropriate solemn declaration as provided in Article 79 of the Rules.

Under the authority of the President of the Tribunal, the witnesses and experts are questioned by the agents, counsel and advocates of the parties, starting with the party which has requested to hear them. Questions may also be put to them by the President of the Tribunal and the judges. Before giving evidence, the witnesses and experts should remain outside the courtroom⁶⁴. If the Tribunal considers it

necessary to arrange for an inquiry or an expert opinion, it should, after hearing the parties, issue an order to that effect, defining the subject of the inquiry or expert opinion, stating the number and mode of appointment of the persons to hold the inquiry or of the experts and laying down the procedure to be followed.

Where appropriate, the Tribunal requires persons appointed to carry out an inquiry or to give an expert opinion to make a solemn declaration. Every report or record of an inquiry and every expert opinion is to be communicated to the parties, who are given the opportunity to comment thereon⁶⁵. Witnesses and experts who appear at the instance of the Tribunal and persons appointed by the Tribunal to carry out an inquiry or to give an expert opinion are paid out of the latter's funds⁶⁶.

Unless the Tribunal decides otherwise, all pleadings, declarations or depositions made during the hearings in one of the official languages of the Tribunal should be interpreted into the other official language. If they are made in another language, they are interpreted into both official languages of the Tribunal.

Whenever a language other than an official language is used, the necessary arrangements for interpretation into one of the official languages should be made by the party concerned. The Registrar makes arrangements for the verification of the interpretation provided by a party at the expense of that party. In the case of witnesses or experts who appear at the instance of the Tribunal, arrangements for interpretation are made by the Registry.

A party on behalf of which speeches or statements are to be made or evidence is to be given in a language which is not one of the official languages of the Tribunal so notifies, the Registrar in sufficient time for the necessary

⁶² Article 72 of the Rules. Prior to the opening of the oral proceedings, each party should submit to the Tribunal a brief note on the points which in its opinion constitute the issues that divide the parties; a brief outline of the arguments that it wishes to make in its oral statement and a list of relevant texts proposed to be relied upon in its oral statement (see: Guideline Concerning the Preparation and Presentation of Cases before the Tribunal, paragraph 14).

⁶³ Article 72 of the Rules

⁶⁴ With the exception of scientific and technical experts selected by the Tribunal pursuant in Article 289 of the United Nations Convention on the Law of the Sea. It is the practice of the Tribunal for testimonial evidence to be presented orally when the witness appears in person the latter is questioned by agents of the party who presented the witness, followed by cross-examination or counter-questioning by the other party's agents. Generally, further questioning follows by the former, with replies to any questions put by the President and the judges. Questioning may be carried out in a language other than the official languages of the Tribunal ([Wolof in the "Saiga" Case]; see *M/V "Saiga" (No. 2) (St Vincent and the Grenadines v. Guinea)*, ITLOS judgment, Report 1999, p.10 para. 22 ff.; The "Southern Bluefin Tuna" case (*New Zealand v. Japan and Australia v.*

Japan), order of 3 August 1999, ITLOS Reports 1999, p. 268 paras 24 ff.; The "Camouco" Case (*Panama v. France*) judgment of 7 February 2000, paras 18 ff.; the "Monte Confroco" Case (*Seychelles v. France*), prompt release case, judgment of 20 April 2001, para. 25 ff.; Land Reclamation case (*Malaysia v. Singapore*) provisional measures, order of 8 October 2003, para. 20 and 21; the "Juno Trader" case (*Saint Vincent and the Grenadines v. Bissau Guinea*, prompt release case, judgment of 18 December 2004, para. 26.

⁶⁵ Article 82 of the Rules.

⁶⁶ Article 83 of the Rules.

arrangements to be made, including verification⁶⁷.

Conclusion of the oral proceedings

Pursuant to Article 88 of the Rules, under the authority of the Tribunal, when the agents, counsel and advocates have completed their presentation of the case, the President of the Tribunal declares the oral proceedings closed. The agents remain at the disposal of the Tribunal. When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law⁶⁸. As soon as the oral proceedings have been declared closed, the "deliberations" stage opens. This stage ends with the pronouncement of the Tribunal's judgment.

The Deliberations

Deliberations following the Oral Proceedings

The judges have four working days after the closure of the oral proceedings in order to study the arguments presented to the Tribunal in that case. During that time, judges may also summarize their tentative opinions in writing in the form of speaking notes. If the President considers it appropriate in the light of the oral proceedings, a revised list of issues for examination is circulated. During its initial deliberations after the closure of the oral proceedings, the Tribunal reaches conclusions as to the issues which need to be decided and then hears the tentative opinions of the judges on those issues, as well as on the correct disposal of the case. Judges are called upon in the order in which they signal their wish to speak. The President may seek to establish a majority opinion as it appears then to exist. The Tribunal may also decide that every judge should prepare a brief written note for

circulation to the other judges before a specified date. The Tribunal resumes its deliberations as soon as possible based on the written notes⁶⁹.

Drafting Committee

As soon as possible during the deliberations, the Tribunal sets up a Drafting Committee, composed of five judges belonging to the majority as it appears then to exist. The members of the Committee must be selected from among the judges who, from their statements, clearly support the opinion of the majority as it appears then to exist. The President is a member ex officio of the Drafting Committee, unless he does not share the opinion of the majority as it appears then to exist, in which case the Vice-President acts instead. If the Vice-President is ineligible for the same reason, all the members of the Committee are selected by the Tribunal. The judge who is senior in precedence among the members of the Committee then acts as its chairman⁷⁰.

The Drafting Committee meets immediately after its establishment in order to prepare a first draft of the judgment, for completion normally within three weeks. To that end, any member of the Committee may send written proposals for its consideration and inclusion in the draft.

The Drafting Committee should prepare a draft judgment which not only states the opinion of the majority but which may also attract wider support within the Tribunal. The first draft of the judgment is distributed to all the judges in the case. Any judge who wishes to offer amendments or comments submits them in writing to the Committee within three weeks from the date of circulation.

After the members of the Committee have received the comments, they will normally meet in order to revise the draft. When the members of the Committee have completed the second draft of the judgment, the Registrar circulates copies to all judges. If the President of the Tribunal is not a member of the Committee, its chairman keeps the President informed of the work on the draft judgment, as well as its terms⁷¹.

⁶⁷ Article 85 of the Rules.

⁶⁸ Article 28 of the Statute. It will be recalled that Albania declined to present submissions in the final stage of the Corfu Channel Case, giving as its reason that it contested the competence of the Court to determine damages. The Court awarded damages to the United Kingdom; see the judgment of 15 December 1949, ICJ Reports, p.244

⁶⁹ Article 5 of the Resolution on the Internal Judicial Practice of the Tribunal

⁷⁰ Article 6 of the Resolution on the Internal Judicial Practice of the Tribunal

⁷¹ Article 7 of the Resolution on the Internal Judicial Practice of the Tribunal

Deliberations on the Draft Judgment

These deliberations take place as soon as possible after circulation of the draft judgment and in principle not later than three months after the closure of the oral proceedings. The chairman of the Drafting Committee introduces the draft, which is examined by the Tribunal at its first reading; a judge wishing to modify the draft proposes amendments in writing. At this stage, a judge who wishes to deliver a separate or dissenting opinion so informs the other judges and puts forward at least an outline of the opinion, making the text available before the second reading. Such a judge continues to participate in the examination of the draft judgment and cognisance is taken by the Tribunal of such opinions. The Drafting Committee circulates a revised draft judgment for consideration at a second reading, at which time the President asks if the judges wish to propose new amendments.

Separate or dissenting opinions, which may be individual or collective, should be submitted within a time-limit fixed by the Tribunal. They should take account of any changes made to the draft judgment and should concentrate on the remaining points of difference with the judgment⁷².

Voting

After the Tribunal has completed its second reading of the draft judgment, the President takes the vote in order to adopt the draft⁷³. A separate vote is normally taken on each operative provision in the judgment. Any judge may request a separate vote on issues which are separable. Each judge votes by means solely of an affirmative or a negative vote, cast in person and in inverse order of seniority, provided that in exceptional circumstances accepted by the Tribunal an absent judge may vote by appropriate means of communication.

A judge who has been absent, owing to illness or for some other reason duly explained to the President, from any part of the hearing or the deliberations may vote, provided the Tribunal accepts that the judge has taken 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 case⁷⁴.

It should be noted that the Tribunal may, in a given case, decide to vary the procedures and arrangements set out above for reasons of urgency or if circumstances so justify, pursuant to article 11 of the Resolution on the Internal Judicial Practice of the Tribunal.

The Judgment

When the Tribunal has completed its deliberations and adopted its judgment, the parties are notified of the date on which it will be read. The judgment is read at a public sitting of the Tribunal and becomes binding on the parties on the day of the reading⁷⁵.

The decision of the Tribunal is final and is to be complied with by all the parties in the dispute⁷⁶. The decision has no binding force except between the parties in respect of that particular dispute⁷⁷. In the event of a dispute as to the meaning or scope of the decision, the Tribunal should construe it upon the request of any party⁷⁸.

A party may request revision of a judgment only when the request is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal and also the party requesting revision, provided that such ignorance was not due to negligence. Such request must be made at the latest within six months of the discovery of the new fact and before the lapse of ten years from the date of the judgment.

The proceedings for revision are opened by a decision of the Tribunal in the form of a judgment expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground⁷⁹.

⁷² Article 8 of the Resolution on the Internal Judicial Practice of the Tribunal.

⁷³ Pursuant to Article 29 of the Statute, relating to the majority required for a decision.

⁷⁴ Article 9 of the Resolution on the Internal Judicial Practice of the Tribunal.

⁷⁵ Article 124 of the Rules

⁷⁶ Article 33, paragraph 1 of the Statute

⁷⁷ Ibid, paragraph 2

⁷⁸ Ibid, paragraph 3

⁷⁹ Six types of incidental proceedings may be mentioned within the context of contentious cases on the merits. They are: provisional measures; preliminary proceedings; preliminary objections; counter-claims; requests to intervene; and requests for discontinuance. The relevant provisions

The procedure described above is the normal procedure which takes place before the Tribunal. It should be supplemented with a study of incidental proceedings which alter the conduct of cases.

INCIDENTAL PROCEEDINGS

As stated by the International Court of Justice:

*“Incidental proceedings by definition must be those, which are incidental to a case, which is already before the Court or Chamber. An incidental proceeding cannot be one, which transforms that case into a different case with different parties”*⁸⁰.

These proceedings do not initiate a new proceeding but do affect its ordinary course. They can be a means found to have the proceedings declared inadmissible and to have its course suspended or terminated.

Incidental proceedings could be considered either as incidents relating to the modification of

governing these instances are: Articles 290 and 294 of the United Nations Convention on the Law of the Sea; Articles 25, 31 and 32 of the Statute of the Tribunal; and Articles 89 to 106 of the Rules of the Tribunal. Finally, the special procedure concerning the prompt release of vessels and crews should be noted. This procedure is governed by Article 292 of the Convention and Articles 110 to 114 of the Rule of the Tribunal.

⁸⁰ Case concerning the land, island and maritime frontier dispute, (El Salvador v. Honduras), Judgment of 13 September 1990, Request for Intervention by Nicaragua, ICJ Reports 1990, p 134, paragraph 98. Speaking of the intervention, the Court (97) explains that the purpose of an intervention based on Article 62 of the Statute is to protect an "interest of a legal nature, of a State likely to be affected by a decision, in a pending case between other States, namely the parties to this case. Its purpose is not to put the intervening State in a position to graft a new case on the preceding, to become a new party and have the Court pronounce on its pretensions. An affair with a new party and new applications to be decided would be a new affair. The difference between the intervention, under section 62, and the constitution of a new party to a case is not only a difference of degree; it's a difference of nature. As the Court pointed out in 1984; "Nothing in Article 62 indicates that this text was as another mean to bring an additional dispute before the Court - a matter falling under Article 40 of the Statute - or as a mean to assert the rights of a State not party to the case (Continental Shelf (Libyan Arab Jamahiriya v. Malta) Request to intervene, ICJ Reports 1984, page 23, paragraph 37)

elements of the legal links of the proceedings, or as incidents of proceedings. They lead to an interlocutory judgment that will allow the Tribunal to render an order, which, although having an immediate effect, shall not be definitive. It could also result in a definitive judgment benefiting both parties, whether the Tribunal has no jurisdiction or whether it adjudicates on the merits.

We will examine the provisional measures (A), the preliminary proceedings (B), the preliminary objections (C), the counter-claims (D), the intervention (E) and the discontinuance (F).

Provisional Measures

Provisional measures, which parties to a dispute may request the Tribunal are « prescribed » and not « indicated » and the parties shall comply with any provisional measures prescribed. Thus, the measures are meant to be binding. The binding nature of the measures is echoed in the Tribunal Rules. Article 95 provides:

- “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.
- The Tribunal may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed”.

The Court or Tribunal may prescribe any provisional measures in any of these two cases: “When a dispute has been duly submitted to a court or tribunal under Article 290 paragraph 1 of the Convention; and pending the constitution of an arbitral tribunal under Article 290, paragraph 5 of the Convention”.

Prior referral to the Tribunal

If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision⁸¹.

⁸¹ Article 290, paragraph 1 of the Convention

A party may submit a request for the prescription of provisional measures any time during the course of the proceedings in a dispute submitted to the Tribunal⁸². The request must be in writing and must specify the measures requested, the reasons therefor, 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 environment⁸³.

The Tribunal may also prescribe provisional measures to prevent damage to fish stocks in accordance with article 31, paragraph 2, 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 Stocks⁸⁴.

In the *Saiga* case, Saint Vincent and the Grenadines submitted a request for the prescription of provisional measures. Following the exchange of letters of 20 February 1998, constituting an agreement between Guinea and Saint Vincent and the Grenadines to institute proceedings before the Tribunal concerning the *Saiga* vessel, the Tribunal had to give an order, which will consider the request for prescription of provisional measures as duly presented before the Tribunal, in accordance with article 290, paragraph 1 of the Convention⁸⁵. It must be noted that after the introduction of an application by Saint Vincent and the Grenadines for a prompt release of the *Saiga* and its crew, in accordance with article 292 of the Convention, the Tribunal gave its judgment on 4 December 1997. The pending procedure between the two states was related to the merits of the dispute, at that time⁸⁶.

⁸² Article 89, paragraph 1 of the Rules

⁸³ Article 82, paragraph 3 of the Rules

⁸⁴ Agreement for the application of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 on the Conservation and Management of Fish Stocks Movements Both Within and Within beyond exclusive economic zones (overlapping stocks) and highly migratory fish stocks, adopted on 4 August 1995; see the Tribunal's website: www.tidm.org

⁸⁵ The «*Saiga*» case, St. Vincent and the Grenadines vs. Guinea). Request for the prescription of provisional measures, Order of 11 March 1998.

⁸⁶ This will be the subject of the judgment of 1 July 1999, see Case of the "*Saiga*" vessel (No. 2) (Saint Vincent and the Grenadines Vs Guinea) (merits) Judgment, ITLOS, 1999 Reports, p. 10

Provisional measures may also be prescribed when a dispute on the merits is submitted pending the constitution of an arbitral tribunal.

Pending the constitution of an arbitral tribunal

Prescription of measures

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or confirm those provisional measures, acting in conformity with paragraphs 1 to 4⁸⁷.

Provisional measures may be prescribed, only at the request of a party to the dispute and after the parties have been given an opportunity to be heard⁸⁸.

A request may be submitted at any time after two weeks from the notification to the other party of a request for provisional measures if the parties have not agreed that such measures may be prescribed by another court or tribunal⁸⁹.

If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, the provisional measures shall be prescribed by the chamber of summary procedure formed under article 15, paragraph 3, of the Statute. Notwithstanding article 15, paragraph 4, of the Statute, such provisional measures may be adopted at the request of any party to the dispute. They shall be subject to review and revision by the Tribunal. The Tribunal shall review or revise provisional measures at the written request of a party within 15 days of the prescription of the measures. The Tribunal may also at any time decide *proprio motu* to review or revise the measures⁹⁰. This is an exception to the rule that

⁸⁷ Article 290, paragraph 5 of the Convention

⁸⁸ Article 290, paragraph 3 of the Convention

⁸⁹ Article 89, paragraph 2 of the Rules

⁹⁰ Article 25, paragraph 2 of the Statute. Article 15, paragraph 5 of the statute provides: "A judgment

the judicial body can only adjudicate within the limits of the Parties's request.

Provisional measures may be prescribed even if the Court or Tribunal is denied jurisdiction. This occurred in the «Southern bluefin Tuna»⁹¹ case. New Zealand and Australia requested the Tribunal to prescribe provisional measures while Japan contested the jurisdiction of the judicial body. According to Japan:

Australia and New Zealand must satisfy two conditions before a tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute such that this Tribunal may entertain a request for provisional measures pursuant to Article 290(5) of UNCLOS pending constitution of such an Annex VII tribunal.

First, the Annex VII tribunal must have prima facie jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part X{ Section 1. Since Australia and New Zealand have satisfied neither condition, an Annex VII tribunal would not have prima facie jurisdiction and accordingly this Tribunal is without authority to prescribe any provisional measures⁹².

Considering that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows: “A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention, which is submitted, to it in accordance with this Part”⁹³.

In the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a

basis on which the jurisdiction of the arbitral tribunal might be founded⁹⁴;

Considering that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment; Considering that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern⁹⁵; based on these grounds, the Tribunal found the provisional measures appropriate, in this regard.

Provisional measures have also been prescribed in the Land reclamation case⁹⁶ by the Tribunal, even if its jurisdiction and the admissibility of the application have been disputed.

In this case, “Singapore believes that, on the merits, Malaysia’s request for provisional measures should be dismissed, but I hope to show that ITLOS should not reach that question but should, instead, reject at the very threshold of the dispute Malaysia’s request for provisional measures on the grounds of lack of jurisdiction and inadmissibility as well as because of exploitation and violation by Malaysia of fundamental prescribed procedures⁹⁷. Singapore contends that Malaysia’s Request (for the prescription of provisional measures) is inadmissible because it “does not specify . . . the possible consequences . . . for the preservation of the respective rights of the parties or for the [prevention] of serious harm to the marine environment’, as required by Article 89(3) of the ITLOS Rules”; and further that the Request does not identify “‘the urgency of the situation’ as required by Article 89(4) of the ITLOS Rules”⁹⁸;

The Tribunal concluded, considering that, given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation

given by any of the chambers provided for in this article and in article 14 of this Annex shall be considered as rendered by the Tribunal”.

⁹¹ Article 91, paragraph 2 of the Rules

⁹² The Southern Bluefin Tuna case (New Zealand vs Japan; Australia Vs Japan) provisional measures, order of 27 August 1999, ITLOS, Reports 1999, p.280.

⁹³ *Ibid.* pp. 289-290

⁹⁴ *Ibid.* p 293, paragraph 40; see also paragraphs 41-44.

⁹⁵ *Ibid.* p 294, paragraph 52

⁹⁶ *Ibid.* p 295, paragraph 40; see also paragraphs 70-71.

⁹⁷ Land Reclamation case by Singapore In and Around the Strait of Johor (Malaysia vs Singapore), provisional measures, and case N ° 12, Order of 8 October 2003.

⁹⁸ Pleadings of PR REISMAN, hearings of 26/09/2003 (am), ITLOS/pv 03/03 of 26 September 2003, p.24.

works and devising ways to deal with them in the areas concerned⁹⁹.

The application

Pending the constitution of an arbitral tribunal, the submission of a request for the prescription of provisional measures must be made in two phases. First, an arbitral proceeding is initiated by a written notification addressed to the other party. The notification must be accompanied by a statement of claim and the grounds upon which it is based. Second, the request must be notified to the other party. It can be jointly presented with the notice of arbitration.

The application may be submitted to the Tribunal after two weeks from the notification of the request¹⁰⁰.

The request shall be in writing and specify the measures requested, the reasons therefor 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. It shall also indicate the legal grounds upon which the arbitral tribunal which is to be constituted would have jurisdiction and the urgency of the situation¹⁰¹. A certified copy of the notification or of any other document instituting the proceedings before the arbitral tribunal shall be annexed to the request¹⁰².

Upon receiving the request the Registrar shall transmit a certified copy to the respondent all steps on behalf of the parties after proceedings have been instituted shall be taken by agents. Agents shall have an address for service at the seat of the Tribunal or in the capital of the country where the seat is located, to which all communications concerning the case are to be sent¹⁰³. The respondent, upon receipt of the certified copy of the application, or as soon as possible thereafter, shall inform the Tribunal of the name of its agent¹⁰⁴. The President is informed of proceeding questions before giving the appropriate orders.

The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date for a hearing. The Tribunal shall take into account

any observations that may be presented to it by a party before the closure of the hearing¹⁰⁵. In general, the respondents present their conclusions to the Tribunal before the opening of hearing.

The oral proceedings shall consist of the hearing by the Tribunal of agents, counsel, advocates, witnesses and experts¹⁰⁶. The hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted¹⁰⁷. A request for the prescription of provisional measures has priority over all other proceedings before the Tribunal¹⁰⁸. For these urgent proceedings, the hearings shall commence 2 or 3 weeks after submission of the request to the Tribunal. These will generally last 2 or 3 days by case. Each party can have its experts and witnesses heard.

They shall communicate to the Registrar a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications of the point or points to which their evidence will be directed. A certified copy of the communication shall also be furnished for transmission to the other party¹⁰⁹.

The order and its effects

In the Tribunal's practice developed so far, there is approximately one month between the submission of the request for provisional measures and the rendering of the order. The order shall be read in a public hearing of the Tribunal. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties if it considers it appropriate¹¹⁰.

When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or to comply with each measure¹¹¹. As indeed in the judgments, judges that do not vote with the majority of their colleagues may submit their dissent opinions or their

⁹⁹ See the abovementioned Order (note 96), paragraph 60

¹⁰⁰ Ibid. paragraph 99

¹⁰¹ Article 89, paragraph 2 of the Rules

¹⁰² Article 89, paragraphs 3 and 4 of the Rules

¹⁰³ Article 63, paragraph 1 of the Rules

¹⁰⁴ Article 56, paragraph 1 of the Rules

¹⁰⁵ Article 90, paragraphs 2 and 3 of the Rules

¹⁰⁶ Article 44, paragraph 3 of the Rules

¹⁰⁷ Article 26, paragraph 2 of the Statute

¹⁰⁸ Article 90, paragraph 1 of the Rules; without prejudice to Article 112, paragraph 1 of the Rules regarding the application for prompt release of vessel and crew.

¹⁰⁹ Article 72 of the Rules

¹¹⁰ Article 290, paragraph 4 of the Convention

¹¹¹ Article 89, paragraph 5 of the Rules

individual opinions. They may also make declarations.

Each party to the dispute shall comply promptly with any provisional measures prescribed under article 290 of the Convention¹¹². The compulsory nature conferred to the orders by the convention makes its application without delay compulsory for parties to the dispute. Article 290 of the Convention provides that the Tribunal “ may prescribe ... provisional measures ... ”.

The form of the prescription of provisional measures had cast doubts on the binding nature of these measures, due to the practice of the ICJ, which “indicates” these measures under article 41 of its Statute¹¹³, which has been the subject of controversy.

It must be recalled that the decisions relating to the provisional measures are interlocutory judgments that allows the Tribunal to give an order, although having immediate effect that is not definitive. The binding nature stems, not only from the form but also its content. Moreover, the preparatory works to the convention clearly settle the question. The State-Parties, by choosing the expression “ prescription of provisional measures” intended to confer these legal decisions a binding character.

The Tribunal recalled in the Southern Bluefin Tuna case “ the binding character of the prescribed measures and the provision set in article 290, paragraph 6 of the convention that one has to comply with these measures without delay¹¹⁴”. That is why, each party must inform the Tribunal, as soon as possible, of the measures taken to implement the provisional measures prescribed by the Tribunal.

In particular, each party shall submit an initial report on the provisions taken or that it proposes to take to immediately comply with the prescribed measures¹¹⁵. Furthermore, the Tribunal can ask for further information concerning questions relating to the implementation of the prescribed measures¹¹⁶.

¹¹² Article 290, paragraph 4 of the Convention

¹¹³ In its judgment on the merits of 27 June 2001 in the “La Grand” case, the ICJ did not hesitate to assert the binding nature of its orders

¹¹⁴ The Southern Bluefin Tuna case, op. cit. note 91, p.297, paragraph 87.

¹¹⁵ Article 95, paragraph 1 of the Rules

¹¹⁶ Article 95, paragraph 2 of the Rules

Preliminary Proceedings

This incidental proceedings is aimed at implementing Article 294 of the LOSC. This provision is linked to the compromise concerning the limitations to compulsory jurisdiction set out in Article 297 of the Convention.

A Court or Tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.

Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination.

The Tribunal may also decide, within two months from the date of an application, to exercise proprio motu its power under article 294, paragraph 1, of the Convention¹¹⁷.

The request by the respondent for a determination under article 294 of the Convention shall be in writing and shall indicate the grounds for a determination by the Tribunal that the application is made in respect of a dispute referred to in article 297 of the Convention; and the claim constitutes an abuse of legal process or is prima facie unfounded¹¹⁸.

Upon receipt of such a request or proprio motu, the Tribunal, or the President if the Tribunal is not sitting, shall fix a time-limit not exceeding 60 days within which the parties may present their written observations and submissions. The proceedings on the merits shall be suspended¹¹⁹. Unless the Tribunal decides otherwise, the further proceedings shall be oral¹²⁰.

The written observations and submissions and the statements and evidence presented at the hearings shall be confined to those matters which are relevant to the determination of whether the claim constitutes an abuse of legal process or is prima facie unfounded, and of

¹¹⁷ Article 96, paragraph 3 of the Rules

¹¹⁸ Article 96, paragraph 4 of the Rules

¹¹⁹ Article 96, paragraph 5 of the Rules

¹²⁰ Article 96, paragraph 6 of the Rules

whether the application is made in respect of a dispute referred to in article 297 of the Convention. The Tribunal may, however, request the parties to argue all questions of law and fact, and to adduce all evidence, bearing on the issue¹²¹. The Tribunal shall make its determination in the form of a judgment¹²².

We shall stress the rare cases of preliminary procedures. However, the question had been raised in the “Camuco” case between Panama and France¹²³ concerning the admissibility of the request.

France representative, M. Dobbelle stated that:

I should now like to look into questions concerning the admissibility of the application. First, the admissibility of the application, at least in part, might first be invoked on the grounds that it is similar to an abuse of legal process. I stress abuse of legal process and not an abuse of right as was alleged this morning. France is, of course, not aware that the preliminary proceedings laid down in article 294 of the Convention are not applicable in principle. Moreover, they would be difficult to apply in practice in the context of their case relating to a question of prompt release as covered by article 292.

However, the notion of the abuse of process to which the procedures laid down in article 294 are intended to serve as a response is not entirely alien to the present case.

In alleging that France has violated the provisions of article 58 of the Convention, the Panamanian application purely and simply alleged that the coastal state has acted in contravention of the provisions of the Convention with respect to the freedoms and rights of navigation as laid down in article 297¹²⁴.

However, even though it has been shown that this allegation does not fall within the jurisdiction of the Tribunal in the proceedings forming the object of the present case, the fact nevertheless remains that Panama appears to be submitting an application in respect of a dispute referred to

in article 297 according to the terms of article 294. This would entitle France to regard the application making such a request as an abuse of process. I shall limit myself to raising this question as it is up to the Tribunal to judge.

The Tribunal did not follow this argument, in this regard.

The Preliminary Objections

The Tribunal was inspired by the need for expeditious proceedings when it adopted the provisions concerning preliminary objections. To that end, the time-limits is shortened to 90 days.

Preliminary objections is a “mean invoked during the first phase of the proceedings, so that the Tribunal may rule on a preliminary question before going into the merits of the case”¹²⁵.

The rules of the Tribunal characterise the preliminary objections by the effect of its invocation during the course of proceedings. When a means has the effect to terminate proceedings on the merits, it is a preliminary objection of inadmissibility. When, in contrary, it has the effect to suspend the proceedings on the merits until some conditions are met, it is an admissibility objection of the request, as for instance, in the case of exhaustion of domestic remedies.

In each case, the Tribunal has to rule because “in any objection to the jurisdiction of the Tribunal, the Tribunal has to decide”¹²⁶.

The procedure to follow is define in article 97 of the Rules of the Tribunal. Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings¹²⁷.

The preliminary objection shall set out the facts and the law on which the objection is based, as well as the submissions¹²⁸.

¹²¹ Article 96, paragraph 7 of the Rules

¹²² Article 96, paragraph 8 of the Rules

¹²³ The “Camouco” case (Panama vs France), prompt release, ITLOS memorials, transcripts and documents, 2000, Vol 5, pp. 228-229

¹²⁴ Ibid, Hearings of the 27 January 2000, (pm)

¹²⁵ J. BASDEVANT, *Dictionnaire de la Terminologie du Droit International*

¹²⁶ Article 288, paragraph 4 of the Convention. See also Article 58 of the Rules

¹²⁷ Article 97, paragraph 1 of the Rules

¹²⁸ Article 97, paragraph 2 of the Rules

Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Tribunal, or the President if the Tribunal is not sitting, shall fix a time-limit not exceeding 60 days within which the other party may present its written observations and submissions. It shall fix a further time-limit not exceeding 60 days from the receipt of such observations and submissions within which the objecting party may present its written observations and submissions in reply. Copies of documents in support shall be annexed to such statements and evidence, which it is proposed to produce, shall be mentioned¹²⁹. Unless the Tribunal decides otherwise, the further proceedings shall be oral¹³⁰.

The written observations and submissions referred to in paragraph 3, and the statements and evidence presented at the hearings contemplated by paragraph 4, shall be confined to those matters which are relevant to the objection. Whenever necessary, however, the Tribunal may request the parties to argue all questions of law and fact and to adduce all evidence bearing on the issue¹³¹. After that, starts the deliberation phase.

The Tribunal shall give its decision in the form of a judgment, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings¹³².

Finally, The Tribunal shall give effect to any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits¹³³.

The Joinder of preliminary objection to the merits has been applied by the Tribunal in the “Saiga” case (N°2) on the basis of the 20 february 1998 Agreement between Guinée and saint Vincent. Article 2 provides:

“The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with

all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea’s, Statement of Response dated 30 January 1998”¹³⁴.

Preliminary objections are often raised by the respondent when proceedings are instituted by mean of an application. This was indeed the case before this tribunal, particularly in matters it executes a compulsory jurisdiction.

Counter-Claims

A counter claim is an “incidental claim through which a party to the proceedings seek to obtain, on top of the dismissal of the request initiated against it, the satisfaction by the adverse party of a claim having connection with the subject matter of the request of that party¹³⁵.

Under article 98 of ITLOS Rules, three conditions have to be met, for a counter-claim to be admissible.

First, a party may present a counter-claim provided that it is directly connected with the subject-matter of the claim of the other party

Then, the counter claim shall come within the jurisdiction of the Tribunal. And finally, it shall be made in the counter-memorial of the party presenting it and shall appear as part of the submissions of that party¹³⁶.

This latter condition shows that the proceedings must be introduced by a mean of an application, putting the parties in a defendant/respondent relationship.

It remains very difficult to formulate a counter-claim during the course of a procedure initiated by a special agreement, where there is neither defender, nor respondent and where the presentation of pleadings can be simultaneous¹³⁷.

In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Tribunal shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings¹³⁸.

¹²⁹ Article 97, paragraph 3 of the Rules
¹³⁰ Article 97, paragraph 4 of the Rules
¹³¹ Article 97, paragraph 5 of the Rules
¹³² Article 97, paragraph 6 of the Rules
¹³³ Article 97, paragraph 7 of the Rules

¹³⁴ The “Saiga” case, op. cit (Note 85), page 15
¹³⁵ Dictionnaire de Droit International Public, (J. SALMON) p.316
¹³⁶ Article 98, paragraph 1 and 2 of the Rules
¹³⁷ Article 61, paragraph 3 of the Rules
¹³⁸ Article 98, paragraph 3 of the Rules

Given that a counter-claim is an incidental claim, the Tribunal may adjudicate in the same terms as the original one. Thus, the fate of the two types of claim appears to be connected.

In the Southern Bluefin Tuna case, Japan presented a counter claim¹³⁹ but the Tribunal did not decide on this plea.

Intervention

A modification of the constituent of the legal links of the procedure characterised by the respective claims of the Parties, determining the subject-matter of the dispute, established by the legal act initiating the proceedings and the conclusions, may occur.

The intrusion of a third party in the course of a proceeding is called an intervention¹⁴⁰.

Two types of intervention are envisaged in the ITLOS Statute. The so-called optional intervention triggered by a request upon which it shall be for the Tribunal to decide and the intervention “as of right” to which a State is entitled when the construction of a Convention to which it is a party, is in question. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State-Party.

There must be a distinction between the request to intervene¹⁴¹ and the right to intervene regarding interpretation or application issues¹⁴².

In the first case, should a State Party consider that it has an interest 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. It shall be for the Tribunal to decide upon this request. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.

The intervening party must show evidence it has interest to intervene.

In the second case, whenever the interpretation or application of this Convention is in question,

the Registrar shall notify all States Parties forthwith.

Whenever pursuant to article 31 or 32 of LOSC Annex VI¹⁴³ the interpretation or application of an international agreement is in question, the Registrar shall notify all the parties to the agreement.

Every party has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.

The request to intervene and the right to intervene procedures are defined in the Rules of Tribunal.

An application for permission to intervene under the terms of article 31 of the Statute shall be filed not later than 30 days after the counter-memorial becomes available under article 67, paragraph 1, of these Rules. In exceptional circumstances, an application submitted at a later stage may however be admitted.

The application shall be signed, and state the name and address of an agent. It shall specify the case to which it relates and shall set out: (a) the interest of a legal nature which the State Party applying to intervene considers may be affected by the decision in that case; (b) the precise object of the intervention.

Permission to intervene under the terms of article 31 of the Statute may be granted irrespective of the choice made by the applicant under article 287 of the Convention. The application shall contain a list of the documents in support, copies of which documents shall be annexed¹⁴⁴.

A State Party or an entity other than a State Party referred to in article 32, of the Statute which desires to avail itself of the right of intervention shall file a declaration to that effect. The declaration shall be filed not later than 30 days after the counter-memorial becomes available under article 67, paragraph 1, of these Rules. In exceptional circumstances, a declaration submitted at a later stage may, however, be admitted.

The declaration shall be signed by the agent and state his name and address. It shall specify the case to which it relates and shall: (a) identify the particular provisions of the Convention or of the international agreement the interpretation or

¹³⁹ The “Southern Bluefin Tuna” case, op. cit. (note 86)

¹⁴⁰ Article 31 of the Statute

¹⁴¹ Article 32 of the Statute

¹⁴² The article 20 of the Statute is related to “access” to the tribunal, whereas Article 21 deals with its jurisdiction

¹⁴³ Article 99 of the Rules

¹⁴⁴ Article 100 of the Rules

application of which the declaring party considers to be in question; (b) set out the interpretation or application of those provisions for which it contends; (c) list the documents in support, copies of which documents shall be annexed¹⁴⁵.

Certified copies of the application for permission to intervene under article 31 of the Statute, or of the declaration of intervention under article 32 of the Statute, shall be communicated forthwith to the parties to the case, which shall be invited to furnish their written observations within a time-limit to be fixed by the Tribunal or by the President if the Tribunal is not sitting.

The Registrar shall also transmit copies to States Parties; any other parties which have to be notified under article 32, paragraph 2, of the Statute; the Secretary-General of the United Nations; the Secretary-General of the Authority when the proceedings are before the Seabed Disputes Chamber¹⁴⁶.

The Tribunal shall decide whether an application for permission to intervene under article 31 of the Statute should be granted or whether an intervention under article 32 of the Statute is admissible as a matter of priority unless in view of the circumstances of the case the Tribunal determines otherwise.

If, within the time-limit fixed under article 101, an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Tribunal shall hear the State Party or entity other than a State Party seeking to intervene and the parties before deciding¹⁴⁷.

If an application for permission to intervene under article 31 of the Statute is granted, the intervening State Party shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Tribunal. A further time-limit shall be fixed within which the parties may, if they so desire, furnish their written observations on that statement prior to the oral proceedings. If the Tribunal is not sitting, these time-limits shall be fixed by the President.

The time-limits shall, so far as possible, coincide with those already fixed for the pleadings in the case.

The intervening State Party shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.

The intervening State Party shall not be entitled to choose a judge ad hoc or to object to an agreement to discontinue the proceedings¹⁴⁸.

Regarding the right to intervene, the procedure set by article 104 of the Rules of the tribunal is the same.

It is to be noted that the Tribunal has not yet examined an intervention case.

Discontinuance

If at any time before the final judgment on the merits has been delivered the parties, either jointly or separately, notify the Tribunal in writing that they have agreed to discontinue the proceedings, the Tribunal shall make an order recording the discontinuance and directing the Registrar to remove the case from the List of cases or docket.

If the parties have agreed to discontinue the proceedings in consequence of having reached a settlement of the dispute and if they so desire, the Tribunal shall record this fact in the order for the removal of the case from the List, or indicate in, or annex to, the order the terms of the settlement.

If the Tribunal is not sitting, any order under this article may be made by the President¹⁴⁹.

These provisions have been applied by the Tribunal in the “Chaisiri Reefer 2” case between Panama and Yemen. The Tribunal said:

“Whereas the Agent of Panama addressed to the Acting Registrar of the Tribunal a letter dated 12 July 2001 which reads as follows:

I have the honour to inform you that

- In accordance with article 105 para 2 of the Rules of the Tribunal:
- The parties have agreed to discontinue the proceedings

¹⁴⁵ Article 101 of the Rules

¹⁴⁶ Article 102 of the Rules

¹⁴⁷ Article 105, paragraph 2 of the Rules

¹⁴⁸ Article 105, paragraph 3 of the Rules

¹⁴⁹ Article 105, paragraph 3 of the Rules

- In consequence of having reached a settlement of the dispute concerning the arrest of "CH AISIRI REEFER 2" as follows:

Places on record the discontinuance, by agreement of the Parties, of the proceedings initiated on 3 July 2001 on behalf of Panama against Yemen; and Orders that the case be removed from the List of cases¹⁵⁰"

If, in the course of proceedings instituted by means of an application, the applicant informs the Tribunal in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Tribunal shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the List of cases. A copy of this order shall be sent by the Registrar to the respondent.

If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Tribunal shall fix a time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Tribunal shall make an order recording the discontinuance of the proceedings and directing the Registrar to remove the case from the List of cases. If objection is made, the proceedings shall continue¹⁵¹. If the Tribunal is not sitting, its powers under this article may be exercised by the President.

PROMPT RELEASE OF VESSELS AND CREWS

This is another urgent procedure – with the provisional measures – set out in Article 292 of the LOSC. Certain conditions must be satisfied for the Tribunal to have jurisdiction:

The detaining State has not complied with provisions of the Convention for the prompt release upon the posting of a reasonable bond and once the bond or financial security have been posted, the authorities of the detaining State shall comply promptly with the decision of the Tribunal concerning the release of the vessel or its crew.

¹⁵⁰ The "Chaisiri Reefer 2" (Panama vs Yemen), Order of 13 July 2001, ITLOS, Recueil, 2001, p.82

¹⁵¹ Article 106 of the Rules

An application for the release of a vessel or its crew from detention may be made under the conditions set by the Convention.

First, where the authorities of a State Party have detained a vessel flying the flag of another State Party.

Then, 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, Finally, when the parties fail to reach an agreement within 10 days from the time of detention of the vessel or crew, to bring the issue of detention or arrest before an international Tribunal¹⁵².

In this special procedure, the Tribunal exercises a residual jurisdiction. It:

*"Shall deal without delay with the application for release and shall 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. The authorities of the detaining State remain competent to release the vessel or its crew at any time"*¹⁵³.

In this particular procedure, the Tribunal exercises a compulsory jurisdiction. We will examine the conditions of filing a request, the procedure and the judgment.

Conditions for the Filing of a Request

Initiation of proceedings

The procedure relating to the prompt release of the detention of a vessel or the liberation of its crew is introduced by a request addressed to the Registrar¹⁵⁴.

The application for release may be made only by or on behalf¹⁵⁵ of the flag State of the vessel. In this case, State Party may at any time notify the State authorities of the flag State¹⁵⁶

¹⁵² Article 292, paragraph 1 of the Convention

¹⁵³ Article 292, paragraph 3 of the Convention

¹⁵⁴ Article 24, paragraph 1 of the Statute, Article 292, paragraph 1 of the Convention, Article 110, paragraph 1 of the Rules.

¹⁵⁵ Article 292, paragraph 2 of the Convention, Article 110, paragraph 1 of the Rules.

¹⁵⁶ Article 110, paragraph 2 of the Rules stipulates that "A State Party may at any time notify the Tribunal of:(a) the State authorities competent to authorize persons to make applications on its behalf under article 292 of the Convention;(b) the name and address of any person who is authorized to

competent to authorize persons, as well as by documents stating that the person submitting the application is the person named in the authorization. The application shall contain a succinct statement of the facts and legal grounds upon which the application is based and supporting documents shall be annexed to the application¹⁵⁷.

Under article 111, paragraph 2 of the Rules, the statement of facts shall specify the time and place of detention of the vessel and the present location of the vessel and crew, if known.

It shall also contain relevant information concerning the vessel and crew including, where appropriate, the name, flag and the port or place of registration of the vessel and its tonnage, cargo capacity and data relevant to the determination of its value, the name and address of the vessel owner and operator and particulars regarding its crew.

It shall specify the amount, nature and terms of the bond or other financial security that may have been imposed by the detaining State and the extent to which such requirements have been complied with;

And finally, the statement of facts shall contain any further information the applicant considers relevant to the determination of the amount of a reasonable bond or other financial security and to any other issue in the proceedings.

A certified copy of the application shall forthwith be transmitted by the respondent and the President of the Tribunal shall consult the parties regarding procedure questions.

Statement in Response

A certified copy of the application shall forthwith be transmitted by the Registrar to the detaining State, which may submit a statement in response with supporting documents annexed, to be filed as soon as possible but not later than 96 hours before the hearing¹⁵⁸. The Tribunal may, at any time, require further information to be provided in a supplementary statement. The further proceedings relating to the application shall be oral.

make an application on its behalf;(c) the office designated to receive notice of an application for the release of a vessel or its crew and the most expeditious means for delivery of documents to that office;(d) any clarification, modification or withdrawal of such notification”.

¹⁵⁷ Article 111, paragraphs 1 and 3 of the Rules

¹⁵⁸ Article 111, paragraph 4 of the Rules

Oral proceedings

The prompt release procedure is an urgent procedure as the one relating to the prescription of provisional measures. The Tribunal shall give priority to applications for release of vessels or crews over all other proceedings before the Tribunal.

However, if the Tribunal is seized of an application for release of a vessel or its crew and of a request for the prescription of provisional measures, it shall take the necessary measures to ensure that both the application and the request¹⁵⁹ are dealt with without delay. The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date, within a period of 15 days commencing with the first working day following the date on which the application is received, for a hearing at which each of the parties shall be accorded, unless otherwise decided, one day to present its evidence and arguments¹⁶⁰.

The Judgment

The jurisdiction of the Tribunal in this procedure is restricted. It only examines issues of prompt release. Also, The Tribunal shall in its judgment determine in each case whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded¹⁶¹.

In other words, the admissibility of an application, under article 292 of the convention, is subjected to evidence that the” detaining state did not comply with the provisions of the convention dealing with the prompt release of vessel and crew.

The provisions of the Convention regarding the prompt release are set by article 73, paragraph 2 of the Convention relating to the “implementation of the rules of the coastal State”.

It reads:

“Upon posting of a bond or financial security, it shall proceed without delay to the release of the vessel or the crew”.

¹⁵⁹ Article 112, paragraph 1 of the Rules

¹⁶⁰ Article 112, paragraph 3 of the Rules

¹⁶¹ Article 113, paragraph 1 of the Rules

Article 113, paragraph 2 of the Rules of the Tribunal provides that If the Tribunal decides that the allegation is well-founded, it shall determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew.

The Tribunal shall determine whether the bond or other financial security shall be posted with the Registrar or with the detaining State, If the bond or other financial security has been posted with the Registrar, the detaining State shall be promptly notified thereof¹⁶².

The decision of the Tribunal shall be in the form of a judgment. The judgment shall be adopted as soon as possible and shall be read at a public sitting of the Tribunal to be held not later than 14 days after the closure of the hearing. The parties shall be notified of the date of the sitting. There shall be no more than 4 weeks between the date on which the application is received and the judgment.

Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew¹⁶³.

To this day the Tribunal has entertained nine prompt release of vessels and crew cases¹⁶⁴.

Lastly, we have to flag proceedings before the seabed disputes Chamber. Disputes regarding “activities in the area” namely, the activities

concerning the exploration and exploitation of the resources of the seabed area beyond the limits of national jurisdiction are the subject-matter of another peculiar aspect of the jurisdiction of the Tribunal, vested in the eleven members Seabed Dispute Chamber. Article 187 of UNCLOS provides that:

“ The Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories:

- disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto;
- disputes between a State Party and the Authority concerning:
 - 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
 - acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;
- 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:
 - the interpretation or application of a relevant contract or a plan of work; or
 - 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;
- disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;
- disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22;

¹⁶² Article 113, paragraph 3 and Article 114 paragraph 1 of the Rules

¹⁶³ Article 292, paragraph 4 of the Convention

¹⁶⁴ The Saïga case (Saint Vincent and the Grenadines vs Guinea), prompt release, judgment of 4 december 1997, The “Camuco” case (Panama vs France, prompt release, judgment of 7 february 2000; the “Monte Confurco” case (Seychelles vs France), prompt release, judgment of 18 december 2000; the “Grand Prince” case (Belize vs France), prompt release, judgment of 20 april 2001; The “Chasiri Reefer 2” case, prompt release, discontinued (Panama vs Yemen), order of 13 july 2001; The “Volga” case (Russian Federation vs Australia) prompt release, judgment of 23 december 2002; The “Juno Trader” case, (Saint Vincent and the Grenadines vs Bissau Guinea), prompt release, judgment of 18 december 2004; The “Hoshinmaru” case (Japan vs Russian Federation), prompt release, judgment of 6 august 2007; The “Tomimaru” case (Japan vs Russian Federation), prompt release, judgment of 6 august 2007;

- any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention”.

THE ADVISORY PROCEEDINGS

The advisory function of the Tribunal is exercised by the Seabed Disputes Chamber within the terms of the Convention (Section I). The ITLOS full Court may however render an advisory opinion based on other international agreements (Section II).

The Seabed Disputes Chamber

As a rule, the advisory procedure is open to international organizations only. There are neither claims nor parties involved in this procedure. For this reason, the only way to access the Chamber for organs authorized to seek an advisory opinion on specific issues is by means of a request.

Organs directly authorized by the Convention

The Assembly

The Convention provides that¹⁶⁵ upon a written request addressed to the President by at least one-fourth of the members of the Authority for an advisory opinion on the conformity with the Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the ITLOS to give an advisory opinion thereon. Voting shall be deferred pending receipt of the advisory opinion of the Chamber. The Seabed Disputes Chamber also gives advisory opinions at the request of the Assembly on legal questions arising within the scope of its activities¹⁶⁶.

The Council

The other organ authorized to request an advisory opinion from the Seabed Disputes Chamber is the Council of the International Seabed Authority. It can request advisory opinion on legal questions arising within the scope of its activities¹⁶⁷.

Eligibility criteria

To ascertain whether it has jurisdiction to give an opinion on an issue, the Seabed Disputes Chamber must ensure that the request falls within the scope of activities—competence—of the organ submitting the request.

Powers and functions of the ISA General Assembly

Nature

The Assembly, as the sole organ of the Authority constituted of all the members, is the supreme organ of the Authority to which the other principal organs shall be accountable. It defines the general policy of the Authority¹⁶⁸, which is the organ through which States Parties organize and control activities conducted in the Area for the purposes of administering the resources of the latter¹⁶⁹.

Scope

As the plenary assembly of the Authority, the Assembly has broad powers and functions. It considers the key issues affecting the organization and the functioning of the International Seabed Authority.

These issues are of a political, legal or merely technical nature. At the political level, the Assembly elects the members of the Council, the Secretary General from among the candidates proposed by the Council and, upon the recommendation of the Council, the members of the Governing Board of the Enterprise as well as the Director General of the Enterprise¹⁷⁰. The Assembly establishes such subsidiary organs as it finds necessary for the exercise of its functions. In the composition of these subsidiary organs, due account shall be taken of the principle of equitable geographical distribution and of special interests and the need for members qualified and competent in the relevant technical questions dealt with by such organs¹⁷¹. With the establishment of subsidiary organs, the pursuit for efficiency in highly technical fields seems to override the achievement of equality among Member States despite the prescriptive measures. In general, persons whose expertise is well recognized in selected technical areas are elected in the subsidiary organs established for that purpose.

At the technical level, the Assembly assesses the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment. It considers and approves, upon the recommendation of the Council, the rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the

¹⁶⁵ UNCLOS, art. 159, para.10.

¹⁶⁶ UNCLOS, art. 191.

¹⁶⁷ Ibid.

¹⁶⁸ UNCLOS, art. 160, para.1.

¹⁶⁹ UNCLOS, art. 157, para.1.

¹⁷⁰ UNCLOS, art. 160, paras.2(a)–(c).

¹⁷¹ Ibid., para.2(d).

Area. The same applies to the rules and procedures with regard to prospecting, exploration and exploitation in the Area, the financial management and internal administration of the Authority and, upon the recommendation of the Governing Board of the Enterprise, the transfer of funds from the Enterprise to the Authority¹⁷².

At the juridical level, the Assembly initiates studies and makes recommendations for the purpose of promoting international cooperation concerning activities in the Area and encouraging the progressive development of international law relating thereto and its codification¹⁷³.

The Assembly also decides on the suspension of the exercise of rights and privileges of membership. The suspension is, however, subject to a Seabed Disputes Chamber finding that the provisions of Part XI have been grossly and persistently violated¹⁷⁴.

Finally, the Assembly discusses any question or matter within the competence of the Authority and decides as to which organ of the Authority shall deal with any such question or matter not specifically entrusted to a particular organ, consistent with the distribution of powers and functions among the organs of the Authority¹⁷⁵.

Powers and functions of the ISA Council

Nature

As stipulated in Article 162 of the Convention, the Council is the executive organ of the Authority. It has the power to establish, in conformity with the Convention and the general

policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

Scope

As the executive organ of the Authority, the Council has broad powers and functions enabling it to implement the general policies established by the Assembly¹⁷⁶. These powers have been greatly strengthened by the Agreement on the application of Part XI of the UNCLOS, adopted on 28 July 1994, in favour of Northern Hemisphere States. Decisions of the Assembly on any matter which is also within the competence of the Council or on any administrative, budgetary or financial issue are hence based on the recommendations of the Council. If the Assembly does not accept the recommendation of the Council on any matter, it refers it back to the Council for reconsideration¹⁷⁷. Similarly, each “chamber” holds veto power within the Council. Section 3 of the Agreement also confines the powers of the Assembly in favour of the Council¹⁷⁸.

Jurisdiction of the Seabed Disputes Chamber

Determination and exercise

The Convention provides that the International Seabed Authority Assembly may request from the Seabed Disputes Chamber an advisory opinion on the conformity with the Convention of a submitted proposal on any matter¹⁷⁹. Similarly, the Seabed Disputes Chamber gives advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities¹⁸⁰. Opinions are to be given as a matter of urgency.

In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall, to the extent to which it recognizes them to be applicable, be guided by the provisions of the Statute and of the Rules applicable in contentious cases¹⁸¹.

The Rules provide that the Chamber shall consider whether the request for an advisory opinion relates to a legal question pending

¹⁷² Ibid., paras.2(e), (f). It is also the Assembly that decides upon the equitable sharing of financial and other economic benefits derived from activities in the Area, consistent with this Convention and the rules, regulations and procedures of the Authority.

¹⁷³ Ibid., para.2(j).

¹⁷⁴ In application of art. 185 of the Convention, which stipulates:

Suspension of exercise of rights and privileges of membership

A State Party which has grossly and persistently violated the provisions of this Part may be suspended from the exercise of the rights and privileges of membership by the Assembly upon the recommendation of the Council.

No action may be taken under paragraph 1 until the Seabed Disputes Chamber has found that a State Party has grossly and persistently violated the provisions of this Part.

¹⁷⁵ UNCLOS, art. 160, para.2(n).

¹⁷⁶ See UNCLOS, art. 162, paras.2(a)–(z).

¹⁷⁷ Agreement relating to Part XI of the Convention, GA Res 48/263 (28 July 1994), Section 3, para.4.

¹⁷⁸ Of the four groups of States “Chambers” identified in the Agreement, see Section 3, paras.5 and 9.

¹⁷⁹ UNCLOS, art. 159, para.10.

¹⁸⁰ UNCLOS, art. 191.

¹⁸¹ ITLOS, Rules of the Tribunal, art. 130, para.1.

between two or more parties. If the Chamber so decides, Article 17 of the Statute shall be applied as well as the provisions for the application of this article¹⁸². These provisions suggest that an advisory opinion can be sought on a dispute since the Rules authorize the parties to choose a judge ad hoc when there is no member of their nationality on the bench. The Chamber must therefore consider, whenever necessary, if the conformity with the Convention of a submitted proposal on any matter or legal issue that arises within the scope of the activities of the Council or the Assembly concerns a dispute between two or more parties¹⁸³.

A kind of shift is noted that could eventually distort the advisory opinion mechanism in its principle as a non-binding judicial consultation. As observed by Charles de Visscher, the evolution of advisory opinions and, especially, the tendency to progressively liken the advisory procedure to the contentious procedure is an indication of the concern to exclude any possibility of quietly introducing compulsory jurisdiction in rendering advisory opinions and hence avoid a dispute between States being settled by an advisory opinion given to a question relating thereto¹⁸⁴ and “which may be a

key question of the dispute”¹⁸⁵. In practice, this concern is not always confirmed, particularly as the instruments stipulate that the Courts shall be guided by the provisions which apply in contentious cases to the extent they are applicable. For this reason, because of its status as a judicial organ, the Seabed Disputes Chamber shall apply the provisions of the Convention giving it the authority to decide on its own jurisdiction¹⁸⁶.

In this regard, the Chamber is entitled to refuse to give an advisory opinion to an organ that is not authorized to submit a request on a non-legal issue. The Chamber may also refuse to respond to a request for an advisory opinion when the legal issue does not fall within the scope of activities of the Assembly or the Council of the International Seabed Authority.

Conformity with the Convention and legal questions

Conformity with the Convention of a proposal on any matter

The Convention provides that upon a written request addressed to the President by at least one-fourth of the members of the Authority for an advisory opinion on the conformity with the Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the ITLOS to give an advisory opinion thereon¹⁸⁷.

The Seabed Disputes Chamber is hence acknowledged as a regulatory body for the activities of the International Seabed Authority Assembly and Council. In addition to contentious proceedings relating to activities in the Area, it adjudicates on the conformity with the Convention of proposals on any matter raised by the Assembly or the Council. It should therefore establish a procedure in this regard, by which the UNCLOS will take precedence over the rules and regulations that may arise from such proposals; in other words, a convention conformity review, prior to giving its opinion.

On 25 February 2010, the International Seabed Authority published a draft revised agenda of the 16th session of the Council¹⁸⁸, to include a

¹⁸² ITLOS, Rules of the Tribunal, art. 132, para.2. Art. 17 of the Statute relates to judges ad hoc.

¹⁸³ The PCIJ gave the following definition of a dispute: “a disagreement on a point of law or fact, a conflict of legal views or of interests between two States”. Case concerning *Du Lotus*, CPJI serie A, Judgment of 7 September 1927, 11–12. This involved a contentious proceeding. However, the Court has never given a definition of the word “dispute” within the framework of its advisory proceedings. A review of the advisory opinion rendered concerning the status of East Karelia suggests that the jurisdiction of the Court in advisory matters should be limited to points of law and not points of fact or interest between two States. The Court stated in fact that “under ordinary circumstances, it would certainly be useful that the facts upon which the opinion of the Court is sought remain constant. The Court should not be given the latitude to determine these. Opinion on East Karelia, PCIJ se’rie B, 5 (23 July 1923). The Court could not respond to a question which was construed so as to settle a case between Russia and Finland.

¹⁸⁴ Charles de Visscher, *Aspects re’cents du droit proce’dural de la Cour internationale de justice* (Pédone, Paris, 1966), 197.

¹⁸⁵ Dissenting Opinion of Judge Winiarski in the Case concerning the Interpretation of Peace Treaties, ICJ Reports 1950, 92.

¹⁸⁶ UNCLOS, art. 288, paras.3, 4.

¹⁸⁷ UNCLOS, art. 159, para.10.

¹⁸⁸ Provisional agenda of the Council, ISBA/16/C/L1/Rev.1 (25 February 2010).

statement from the Government of the Republic of Nauru, a member of the Authority. Item 7 of the new agenda is entitled: “Proposal to seek, pursuant to Article 191 of the United Nations Convention on the Law of the Sea, an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability [State companies, individuals or corporate bodies]”. A note verbale was also sent to Member States and observers of the Authority notifying them of the change¹⁸⁹. By its decision of 6 May 2010, the International Seabed Authority submitted said request to the Seabed Disputes Chamber. This is the first proceeding to have been submitted before the Chamber.

Legal questions

In accordance with the Convention, the Seabed Disputes Chamber renders advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. These opinions are rendered as a matter of urgency¹⁹⁰.

The Chamber could gainfully follow the approach adopted by the ICJ in The Hague which made a liberal interpretation of the concept of a “legal question” by detaching it

from its previous and subsequent settings, and focusing on the essence of the question in order to determine its legal nature; thus avoiding the political implications that could have prompted it to refuse to render an opinion. Most of the time when a question is submitted, it considers it an abstract issue. It avoids considering the motives behind the request for advisory opinion and the arguments put forward by the political organs as well as the existence of a dispute between two or more parties relating to the issue for which an advisory opinion is sought. This attitude is more consistent with the nature of a Court and its true mission¹⁹¹.

It should, however, be noted that the jurisdiction of the Chamber has its limitations. Based on the Convention¹⁹², the Seabed Disputes Chamber does not have jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with Part XI; in no case shall it substitute its discretion for that of the Authority. Without prejudice to Article 191, the Seabed Disputes Chamber in the exercise of its jurisdiction as stipulated in Article 187 shall not decide on the question of whether a rule, regulation or procedure of the Authority is in conformity with the Convention and cannot declare this rule, regulation or procedure as void¹⁹³.

The Seabed Disputes Chamber will have to urgently define the scope of the discretionary powers of the Authority so as to make a clear distinction on proposals that could be submitted

¹⁸⁹ The proposal submitted by the Nauru delegation is contained in the document ISBA/16/C/ 6 of 1 March 2010, pages 1–12. See Decision of the Council of the International Seabed Authority, ISBA/16/C/13 (6 May 2010); See also the Tribunal’s press release of 14 May 2010. The Council of the International Seabed Authority requests the Seabed Dispute Chamber to render an advisory opinion on the following questions:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

¹⁹⁰ UNCLOS, art. 191.

¹⁹¹ See M. Dubisson, *La Cour internationale de justice* (LGDJ, Paris, 1964), 295–303.

¹⁹² UNCLOS, art. 189. On the rules of procedure applicable in contentious proceedings relating to seabeds and in particular the jurisdiction of the Seabed Disputes Chamber with regard to the activities of the Authority, see MbendaDiagne, *L’apport du Tribunal international du droit de la mer (TIDM) aux principes juridiques de gage sen droit de la mer* (doctora thesis in law, Université de Nice, 2010), 146–167.

¹⁹³ Art. 189 stipulates that its jurisdiction shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power and 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.

by the International Seabed Authority Assembly or Council for advisory opinion.

Procedure

The request for an advisory opinion is submitted to the Seabed Disputes Chamber by the relevant authorized organ, the International Seabed Authority General Assembly or Council. It shall specify the question to be submitted to the Chamber or the proposal whose conformity with the Convention is queried. The request for an advisory opinion is signed by the authorized representative of the Authority. It also states the name of the person who will be representing the Authority during the proceedings.

A request for an advisory opinion on legal questions arising within the scope of activities of the Assembly or the Council of the Authority shall contain a precise statement of the question. It shall be accompanied by all documents likely to throw light upon the question.

These documents shall be transmitted to the Chamber at the same time as the request or as soon as possible thereafter in the number of copies required by the Registry¹⁹⁴.

The procedure for drafting a request for an advisory opinion is not detailed in the Convention, Statute or Rules. The proposal whose conformity with the Convention is to be reviewed and the legal question to be submitted should be within reach. The practices of the UN and the system established within organs authorized to request an advisory opinion from the ICJ may have to be referred to.

In these various forums, the decision to request an advisory opinion is made during debate sessions. It can be assumed that the same applies to the Assembly and the Council of the Authority when proposals to request advisory opinions are submitted. The request for an advisory opinion is formally transmitted to the Seabed Disputes Chamber by the Secretary General of the Authority, of which the Assembly and the Council are the organs.

Article 130, paragraph 1 provides that in the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by

¹⁹⁴ ITLOS, Rules of the Tribunal, art. 131. One hundred and twenty-five copies of the documents shall be submitted. See ITLOS, Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, paras.9, 19.

the provisions of the Statute and of these Rules applicable in contentious cases¹⁹⁵. Thus, the Chamber makes orders concerning the conduct of the case, i.e. necessary orders to determine, inter alia, the number and order of filing of the pleadings—written and oral—and the time-limits within which they must be filed. It is this same principle which should predicate all decisions taken or to be taken with respect to the order in which should be submitted: the burden of proof, the hearing of the applicants and their right to respond, the allotment of time for preparing files and the time accorded to speakers.

Proceedings in advisory matters will comply with the rules applicable in contentious cases whenever possible. The Chamber will apply the rules for contentious proceedings after having determined whether the request for an advisory opinion concerns a legal question currently pending between two or more parties. If the Chamber so decides, Article 17 of the Statute shall be applied as well as the provisions for the application of this article¹⁹⁶. Judges will be

¹⁹⁵ Likewise, Art. 40, para.2 of the Statute of the Tribunal stipulates: “In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex [VI] relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.”

¹⁹⁶ ITLOS, Rules of the Tribunal, art. 130, para.2; art. 17 of the Statute of the Tribunal stipulates: Article 17 Nationality of members
Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members of the Tribunal.
If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal.
If the Tribunal, when hearing a dispute, does not include upon the bench a member of the nationality of the parties, each of those parties may choose a person to participate as a member of the Tribunal.

This article applies to the chambers referred to in articles 14 and 15 of this Annex. In such cases, the President, in consultation with the parties, shall request specified members of the Tribunal forming the chamber, as many as necessary, to give place to the members of the Tribunal of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the members specially chosen by the parties.

Should there be several parties in the same interest, they shall, for the purpose of the preceding

appointed ad hoc. We are hence drifting resolutely towards the dispute. It is true that the existence of a dispute between two or more parties does not preclude the Chamber from being asked for an advisory opinion on a legal question relating to the dispute.

As a rule, this procedure has its own *modus operandi* that should have ruled out the appointment of judges ad hoc. The absence of parties shall be noted. The debates are restricted, not by the findings, but rather by the provisions of the request for the advisory opinion. The Chamber sends its answer to the international organ authorized to seek an advisory opinion and not to a State. The recurring dilemma of reconciling the advisory function with the essentially judicial nature of international courts and tribunals is again observed.

provisions, be considered as one party only. Any doubt on this point shall be settled by the decision of the Tribunal.

Members chosen in accordance with paragraphs 2, 3 and 4 shall fulfill the conditions required by articles 2, 8 and 11 of this Annex. They shall participate in the decision on terms of complete equality with their colleagues.

Art. 22 of the Rules of the Tribunal, which governs the appointment of a judge ad hoc by an “entity other than a State”, reads:

Article 22

1. An entity other than a State may choose a judge ad hoc only if:
 - (a) one of the other parties is a State Party and there is upon the bench a judge of its nationality or, where such party is an international organization, there is upon the bench a judge of the nationality of one of its member States or the State Party has itself chosen a judge ad hoc; or
 - (b) there is upon the bench a judge of the nationality of the sponsoring State of one of the other parties.
2. However, an international organization or a natural or juridical person or state enterprise is not entitled to choose a judge ad hoc if there is upon the bench a judge of the nationality of one of the member States of the international organization or a judge of the nationality of the sponsoring State of such natural or juridical person or state enterprise.
3. Where an international organization is a party to a case and there is upon the bench a judge of the nationality of a member State of the organization, the other party may choose a judge ad hoc.
4. Where two or more judges on the bench are nationals of member States of the international organization concerned or of the sponsoring States of a party, the President may, after consulting the parties, request one or more of such judges to withdraw from the bench.

Moreover, the parties in question are either States or non-State entities: international organizations, natural or juridical persons, State enterprises. The nature of disputes that may arise between these different entities should also be reflected upon.

In principle¹⁹⁷, the advisory opinions of the Seabed Disputes Chamber have no binding effect. They have a moral authority. Legally, they do not have the authority of *res judicata*. Are they likely to assert themselves in Court? What would happen if the dispute submitted to the Chamber or the Tribunal concerns a legal question for which an advisory opinion has already been rendered? Will they be able to extricate themselves from the principles and solutions adopted in the advisory opinion? The ability to render an advisory opinion without taking a stance on a pending issue between two or more parties would be ideal.

The Registrar shall forthwith give notice of the request for an advisory opinion to all States Parties. The Chamber, or its President if the Chamber is not sitting, shall identify the inter-governmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations. States Parties and the organizations shall be invited to present written statements on the question within a time limit set by the Chamber. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber may set a further time limit within which such States Parties and organizations may present written statements on the statements made. The Chamber shall also decide whether oral proceedings shall be held and, if so, set the date for the opening of such proceedings. States Parties and the organizations shall be invited to make oral statements at the proceedings¹⁹⁸. Written statements and

¹⁹⁷ Charles de Visscher, above n.39, 195, explains that “the authority that upholds statements of law contained in an advisory opinion of the Court is unfamiliar with the statutory provisions relating to *res judicata*. This exercises a moral authority, notwithstanding the lack of a binding effect in the formal or procedural sense of the term. It largely depends on the prestige of the Court. . . and on the intrinsic value of opinions rendered. There is little distinction between judgments and opinions in terms of their doctrinal authority. Like judgments, advisory opinions contribute to the establishment of a coherent case law corpus”

¹⁹⁸ ITLOS, Rules of the Tribunal, art. 133.

accompanying documents shall be made available to the public as soon as possible after they have been presented to the Chamber¹⁹⁹.

When the Chamber has completed its deliberations and adopted its advisory opinion, the latter shall be read at a public sitting of the Chamber²⁰⁰. The advisory opinion shall contain: (a) the date on which it is delivered; (b) the names of the judges participating in it; (c) the question or questions on which the advisory opinion of the Chamber is requested; (d) a summary of the proceedings; (e) a statement of the facts; (f) the reasons of law on which it is based; (g) the reply to the question or questions put to the Chamber; (h) the number and names of the judges constituting the majority and those constituting the minority, on each question put to the Chamber; (i) a statement as to the text of the opinion which is authoritative²⁰¹.

A separate or dissenting opinion or a declaration may be attached to the advisory opinion of the Chamber²⁰². According to Article 136 of the Rules, the Registrar shall inform the Secretary General of the Authority as to the date and the hour set for the public sitting to be held for the reading of the opinion. He shall also inform the States Parties and the inter-governmental organizations directly concerned.

One copy of the advisory opinion shall be placed in the archives of the Tribunal, others shall be sent to the Secretary General of the Authority and to the Secretary General of the UN. Copies shall be sent to the States Parties and the inter-governmental organizations directly concerned.

Alongside the advisory opinions that the Assembly or the Council of the Authority may request under the UNCLOS, there are other advisory opinions based on other international agreements and which rather concern the full Court.

The Advisory Jurisdiction of the Itlos Full Court

Under the UN Convention on the Law of the Sea and the Statute of the Tribunal, the advisory function is exercised by the Seabed Disputes Chamber. These two instruments barely provide for an advisory jurisdiction of the full Court. There is no mention in the draft of the Preparatory Commission either. The Tribunal,

during the drafting of its rules in 1996, took the initiative and discussed the possibility for the full Court to render advisory opinions.

Therefore, it is interesting to note that the possibility of the ITLOS rendering advisory opinions is not expressly contemplated in UNCLOS or in the Statute of the Tribunal, but is rather provided in the Rules of the Tribunal.

It is for this reason that the jurisdiction clause is oddly introduced in the Rules. It is stipulated in Article 138 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.

The provisions of Article 288, paragraph 2 and those of Article 21 of the Statute of the Tribunal have been called upon to justify the advisory jurisdiction of the full Court²⁰³. Article 288, paragraph 2 of the Convention appears rather as a basis for a consensual jurisdiction of the Court in a like manner as the ICJ and other mechanisms provided for in Article 287 of the Convention. Moreover, it appears in the section dealing with compulsory procedures which entail binding decisions.

Whereas, an advisory opinion is non-binding legal advice which, as an individual statement, does not have legal force. Article 288 can therefore not be relied upon or interpreted as a basis for the advisory jurisdiction of the Tribunal. The same applies to Article 21 of the Statute of the Tribunal, which needs to be interpreted and clarified by the Tribunal.

¹⁹⁹ ITLOS, Rules of the Tribunal, art. 134.

²⁰⁰ ITLOS, Rules of the Tribunal, art. 135, para.1.

²⁰¹ Ibid., para.2.

²⁰² Ibid., para.3.

²⁰³ For a review of arguments presented, see Ki-Jun You, *Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited*, *Ocean Development and International Law*, 39 *Journal of Maritime Affairs* (2008), 360–371 (specifically pages 361–363). Art. 288, para.2 of the Convention stipulates: “A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.” Art. 21 of the Statute reads: “The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

However, it is possible for an organ with a judicial role such as the Tribunal to render an opinion on a point of law, because its Statute does not prohibit such. It shall be noted that an arbitral tribunal may sometimes issue an advisory opinion. The terminology may seem unusual, and it may be surprising that an arbitral tribunal is established to render an advisory opinion for it is part of the mission of an arbitral tribunal to issue mandatory judgments. The fact remains that the French–US²⁰⁴ and Italy–US²⁰⁵ air service agreements instituted arbitral tribunals entrusted with rendering advisory opinions. Article 10 of the French–US agreement provides that any dispute must be submitted “for an advisory opinion from a three-member tribunal” and according to Article 13 of the Italy–US agreement “any dispute will be submitted for advisory opinion to a tribunal composed of three arbitrators”.

Taking on the agreement path as a basis for conferring advisory jurisdiction to the Tribunal is a more effective route than seeking a legal basis that does not exist in the Convention or the Statute. Practices observed over time may help to thrust aside uncertainties relating to Article 138. The authorized organs will then be considered, as well as the questions for which advisory opinion may be sought and the requirements.

It is no coincidence that the first request for an advisory opinion submitted to the full Tribunal was made by an RFMO, and in this case, the Sub-Regional Fisheries Commission (SRFC)²⁰⁶. Article 138 of the Rules of the Tribunal sets out a number of conditions that must be met for an application for an advisory opinion on a legal

issue to be admissible. First, there must be an international agreement. Second, the agreement in question must relate to the purposes of the Convention. Further, the international agreement must expressly state that a request for such an opinion is to be submitted to the Tribunal and, finally, the advisory opinion must relate to a legal question. The preliminary legal question which has long occupied the Tribunal is that of its jurisdiction to render an advisory opinion²⁰⁷ and because this was the first case in which it had to do so, it was held in plenary session. The Tribunal will begin by recalling Articles 16 and 21 of the statutes and Article 138 of its Rules of procedure before examining the various arguments put forward by the participants in the proceedings²⁰⁸.

The main arguments put forward against the Tribunal’s advisory jurisdiction are that the Convention makes no explicit or implicit reference to advisory opinions of the Tribunal Full Court, and that if the Tribunal were to exercise advisory jurisdiction it would act *ultra vires* under the Convention.

Other participants expressed support for the Tribunal’s advisory jurisdiction. They argued that Article 21 of the Statute constitutes in itself a sufficient legal basis for the jurisdiction of the full Court to give effect to a request for an advisory opinion if it is expressly provided for in a relevant international agreement. There is no reason to assume that the phrase “all matters” does not cover the request for an advisory opinion. They added that the argument that the phrase “whenever” refers to “all disputes” as well as “the Tribunal” is limited by Article 288 (2) of the Convention cannot be upheld. They pointed out that article 288 was supplemented by the Statute, in particular by Article 21²⁰⁹.

After examining the various types of arguments, the Tribunal specified that the expression “whenever expressly provided for in any other agreement conferring jurisdiction on the tribunal” confers not an advisory jurisdiction on the Tribunal. It is rather the expression “other agreement” in article 21 of the statute which confers on it such competence. When the expression “other agreement” assigns an

²⁰⁴ The Franco–American Air Agreement, signed at Paris on 27 March 1946. For the Interpretation of the Agreement by the Arbitral Tribunal composed of Professor Roberto Ago (President), Professor Paul Reuter and Henri de Vries, see Award of 22 December 1963, 3 *Journal of Air Law and Commerce* (1964), 231–247.

²⁰⁵ The Air Transport Agreement between the USA and Italy, signed at Rome on 6 February 1948. For the Interpretation of the Agreement by the Arbitral Tribunal, see UN RIAA, Vol. XVI (17 July 1965), 75–108 (The Arbitrators were O. Riese, S.D. Metzger and R. Monaco).

²⁰⁶ Application submitted on 28 March 2013; See ITLOS / Press 190 of 28 March 2013. The CSRP, which is based in Dakar, Senegal, consists of seven member states: Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone.

²⁰⁷ See ITLOS Opinion of 2 April 2015 in Case No. 21, paragraph 37–79.

²⁰⁸ See paragraphs 40 to 47 for the arguments put forward against the Advisory Jurisdiction of the Tribunal of the Whole.

²⁰⁹ See paragraphs 48 to 57 for the arguments in favor of the Tribunal’s advisory jurisdiction.

advisory power to the Tribunal, the Tribunal may exercise that jurisdiction “whenever” expressly provided in this “other agreement”. Article 21 and the “other agreement” conferring jurisdiction on the Tribunal are related to each other and constitute the legal basis for the Tribunal’s advisory jurisdiction²¹⁰.

This decision establishes a precedent that could prove to be of great benefit to the States grouped within the RFMOs. This is all the more so since, in its opinion, the Tribunal indicated that the flag State is under an obligation to take the necessary measures, including enforcement measures, to ensure that vessels flying its flag comply with Laws and regulations of the member states of the SRFC²¹¹. This advisory opinion singularly gives teeth to the UNCLOS and lays the groundwork for future actions against flag States. It also opens up the prospect of submitting new questions to the Tribunal.

The Tribunal further held that the responsibility of the flag State resulted from a breach of its due diligence obligation for IUU fishing activities by vessels flying its flag in the EEZs of Member States of the SRFC²¹². This provides examples of significant advances that can significantly protect Member States from Regional Fisheries Management Bodies, which can now resort to the Tribunal to complain about the violation of measures taken in the management and conservation of the biological resources they administer.

While some participants have argued in favour of the jurisdiction of the Tribunal to entertain the Request, other participants have contended that the Tribunal is not competent to entertain the Request. The Tribunal will proceed to examine these arguments.

The main arguments against the advisory jurisdiction of the Tribunal are that the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal and that if the Tribunal were to exercise advisory jurisdiction, it would be acting *ultra vires* under the Convention.

At the outset, the Tribunal wishes to clarify the relationship between the Statute in Annex VI to the Convention and the Convention. As specified by article 318 of the Convention, Annexes “form an integral part of this

Convention”. As stated in article 1, paragraph 1, of the Statute, “The International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute.” It follows from the above that the Statute enjoys the same status as the Convention. Accordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention.

The Tribunal wishes to clarify that the expression “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the “other agreement” which confers such jurisdiction on the Tribunal. When the “other agreement” confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to “all matters” specifically provided for in the “other agreement”. Article 21 and the “other agreement” conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.

The argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal and that, being a procedural provision, article 138 cannot form a basis for the advisory jurisdiction of the Tribunal is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.

These prerequisites are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on “a legal question”²¹³.

²¹⁰ Paragraph 58 of the Advisory Opinion of 2 April 2015.

²¹¹ Reply to the first question of the SRFC.

²¹² See answer to the second question of a SRFC.

²¹³ See Advisory opinion of 2nd April 2015, spec. paras 39, 40, 52, 58, 59, and 60

Organs authorized to seek advisory opinions

There is, strictly speaking, no established authorization mechanism²¹⁴. A priori, any organ, appointed or acting pursuant to a duly signed international agreement, may apply for an advisory opinion. Because the advisory procedure is open to international organizations only for now, the organ in question must therefore be that of an international organization that has granted it authority to seek an advisory opinion from the Tribunal²¹⁵.

²¹⁴ As provided under art. 96 of the UN Charter with regard to the ICJ.

²¹⁵ Certain authors believe that the advisory procedure before the Tribunal should also be open to States. See José Luis Jesus, Article 138, in: Rao and Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), 394. Judge Wolfrum believes that the advisory function of the Tribunal could potentially be an “alternative to contentious proceedings”. Report of President Dolliver Nelson, above n.62, para.18. For Judge Rao, the meeting of States Parties should be able to seek advisory opinions of the Tribunal on legal issues under the Convention. Judge Rao wrote:

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. 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, paragraph 3, of the Statute. Similarly, the eleventh Meeting of States Parties made a change in respect of the date of commencement of the 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. In the scheme of the Convention and

These international organizations must meet the requirements of Article 138 of the Rules.

This does not mean that States will never be able to institute advisory proceedings before the Tribunal, but that they will have to find and use the appropriate procedure²¹⁶.

Questions on which advisory opinion may be sought and requirements

Questions

The advisory procedure is open when an international agreement²¹⁷ related to the purposes of the Convention makes provisions for such. The purposes of the Convention are many. These include: biological resources of the sea; general conservation; environment and ecosystem; marine scientific research; pollution; maritime navigation; piracy and maritime safety; maritime claims and responsibilities; shipping. There are many issues relating to these matters where advisory opinions may be sought as indicated during the different workshops of the Tribunal. A recurring question concerns the role of regional fisheries management bodies and illegal fishing.

the Statute, there is thus warrant for the Meeting of States Parties to seek advisory opinions of the Tribunal should the need arise.

P.C. Rao, *ITLOS: The First Six Years*, 6 Max Planck YUNL (2002), 183 (specifically pages 211–212; internal footnotes omitted). The legal status of the meeting of States Parties is uncertain Art. 319, para. 2(e) provides “In addition to being the depositary of this Convention, the Secretary General of the United Nations convenes necessary meetings of States Parties in accordance with this Convention. The Meeting of States Parties is therefore presented as a periodic international conference and not a permanent established organ.” Moreover, “all States

Parties are ipso facto members of the Authority” under art. 156, para.2 of the Convention. The Meeting of States Parties reminds of traditional diplomatic conferences, in terms of its operation, where delegates have to follow the instructions of their respective governments. Through them, States Parties have the power to act at the International Seabed Authority as at the UN. States can hence have the capacity to intervene with respect to the Tribunal for the Law of the Sea, the International Seabed Authority Assembly or the Council.

²¹⁶ See You, above n.58, 370 n.43.

²¹⁷ It is therefore a treaty within the meaning of art. 1, para.(A) of the Vienna Convention on the Law of Treaties of 23 May 1969.

Another important issue is that relating to marine scientific research. All States and competent international organizations have the right to conduct marine scientific research²¹⁸. This right is subject to the rights and duties of other States as provided for in the Convention. Determining the scope of the rights and obligations of one and another is an arduous task. This is fully reflected in discussions within groups of experts on the Law of the Sea²¹⁹.

Another sensitive issue is piracy and other acts of violence at sea. These acts are committed in areas under national jurisdiction: near the coast, in waters of straits, in outer harbours. They are, nowadays, also committed on the high seas. Acts of piracy and violence at sea are on the increase. The applicable judicial system in such cases is not easy to determine.

There is also the issue of pollution and preservation of the marine environment. According to the terms of the Convention, States are required to ensure the fulfilment of their international obligations regarding the protection and preservation of the marine environment. They shall be liable in accordance with international law. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. To this end, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes²²⁰.

These are very complex issues that may call for a request for an advisory opinion, whereas the latter is subject to a certain number of prerequisites.

Requirements

Article 138 of the Rules sets out a certain number of prerequisites for a request for an advisory opinion on a legal question to be

admissible. Firstly, there has to be an international agreement, in other words a treaty within the meaning of the 1969 Vienna Convention on the Law of Treaties.

Secondly, the agreement in question must relate to the goals of the Convention. A few significant goals of the Convention have been cited earlier. This condition is a logical requirement.

Then, the international agreement must specifically make provisions for submitting a request for an advisory opinion to the Tribunal. This condition is difficult to fulfil under the existing agreements since no international agreement has made provisions for it, either because the agreements existed prior to the establishment of the Rules of the Tribunal, or because States could not foresee that the advisory jurisdiction clause would be introduced by an organ they established. One merely has to refer to the dispute settlement as well as the jurisdiction clauses to realize this. This condition could possibly make Article 138 inapplicable²²¹.

Furthermore, the advisory opinion sought must be on a question of a legal nature. The spirit and the extremely political methods that prevail in international organizations raise the issue of reconciling the advisory function with the judicial nature of the Tribunal. Hence, strictly speaking, when a question is not of a purely legal nature, an advisory opinion cannot be given. One has to try to retain only the legal aspects per se of a question; and this is hardly an easy task. The circumstances surrounding the legal question should perhaps—be ignored. This raises the issue with regard to the freedom of the Tribunal in respect of the matter referred to it.

Finally, there is an implicit requirement related to the scope of the advisory jurisdiction. It relates to the international seabed regime and activities in the Area. In these areas, the Seabed Disputes Chamber has exclusive jurisdiction²²².

The procedure governing a request for an advisory opinion on a legal question—if an international agreement related to the purpose of UNCLOS specifically provides for the

²¹⁸ UNCLOS, Part XIII, art. 238.

²¹⁹ See debates of the group of experts of the International Oceanographic Commission of UNESCO (the ABELOS group) (www.unesco.org).

²²⁰ UNCLOS, art. 235.

²²¹ See provisions on the settlement of disputes concerning the law of the sea (www.un.org/DOALOS).

²²² UNCLOS, arts. 186, 187. ITLOS, Statute of the Tribunal, art. 14; ITLOS, Rules of the Tribunal, art. 130.

submission to the ITLOS of a request for such an opinion—will be that before the Seabed Disputes Chamber²²³ and eventually the one prescribed in said agreement. The rules of procedure of the Seabed Disputes Chamber's advisory proceedings apply *mutatis mutandis*²²⁴.

If the system of advisory proceedings before the Seabed Disputes Chamber is very clear, that of the full Court holds uncertainties which will undoubtedly be lifted as the Tribunal receives more requests for advisory opinions. At the first opportunity, the instruments must be fine-tuned in order to supplement the jurisdiction clause, established by paragraph 1 of Article 138 of the Rules, on a certain number of points.

Initially, the Meeting of States Parties will have to be given a legal status for it to play a role. Then, the Meeting of States Parties will create a mechanism for clearance or authorization, which will define its relations with the organs established by the Convention: the Commission on the Limits of the Continental Shelf and the ITLOS, but also other international organizations active in areas relevant to the purposes of the Convention²²⁵.

Afterwards, the relevant international organizations and particularly the regional fisheries management organizations will be identified as they may prove to be potential clients in the advisory proceedings before the Tribunal. Finally, questions on which an advisory opinion as stipulated in Article 138 of the Rules shall be rendered will be gradually clarified, indicating the general rules concerning the decision-making process and the consideration of the “legal question”²²⁶.

For permanent international Courts such as the International Tribunal for the Law of the Sea, the law applicable to procedure follows the same principle as that governing the merits of a case. UNCLOS, Part XV is the basis on which proceedings are conducted before the Tribunal

for disputes settlement by setting out prerequisites for activating the relevant regime and the core compulsory disputes settlement provision. And by providing mandatory and optional exclusions from the part XV system, as well. ITLOS appears as the central institution dedicated to settling law of the sea disputes. It has been performing professionally in generating jurisprudence on important issues of urgent proceedings like the prompt release or provisional measures where it has residual compulsory jurisdiction.

Up to now, it was essentially the urgent procedures that served as the basis for referral to the Tribunal in important fields, like environmental disputes.

First, the provisional measures contain two scenarios. On the one hand, if a dispute has been duly submitted and if it considers *prima facie*, that it has jurisdiction, ITLOS may prescribe any provisional measures, which it considers appropriate under the circumstances to preserve the respective rights of the Parties to the dispute or to prevent serious harm to the marine environment, pending the final decision. On the other hand, pending the constitution of the Annex VII Tribunal, ITLOS may prescribe, modify or revoke provisional measures if it considers that *prima facie*, the Tribunal which is to be constituted, would have jurisdiction and that the urgency of the situation so requires. Next, the prompt release procedure is designed to preserve the balance between coastal States and flag States and particularly in the field of navigation; in order to avoid exorbitant economic damage to ship owners and operators. These two procedures are supposed to last about two months.

After that, we have the request for advisory opinions. Under UNCLOS and the Statute of the Tribunal, the advisory function is exercised by the Chamber for the Settlement of Seabed Disputes. These two instruments did not contemplate the advisory jurisdiction of the Tribunal full court. This is a creation of the Tribunal in the development of its rules of procedure in 1996-1997. The possibility was then raised for the full court to give advisory opinions. For this reason, the jurisdiction clause is contained on the Rules of the Tribunal, in its article 138, which provides that the Tribunal may give an advisory opinion on a legal question as far as an international agreement, relating to the purpose on the Convention,

²²³ ITLOS, Rules of the Tribunal, arts. 130–137.

²²⁴ ITLOS, Rules of the Tribunal, art. 138, para.3.

²²⁵ These specialized organs could help in the determination of a scientific status. As far as the boundary delimitation is concerned, see the proposal relating to the interlocutory referral by judge TM NDIAYE in his separate opinion in case 16 (Bangladesh vs Myanmar), ITLOS reports, paras 104-120.

²²⁶ The “legal question” is framed in a very imprecise manner compared with art. 96, para.2 of the UN Charter.

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expressly provides for a request of such an opinion; and that shall be submitted to the Tribunal. It is clear ITLOS proceedings reflect the Tribunal multi-faceted jurisdiction contained

in the Rules. They have so far proved to be very successful in that they are not only expeditious but also cost-effective.

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