

20

International Tribunal for
the Law of the Sea



Tribunal international du
droit de la mer

ITLOS AT 20:
LOOKING INTO THE
FUTURE

SYMPOSIUM, 18 MARCH 2017

LES 20 ANS DU TIDM :
REGARD SUR L'AVENIR

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Introduction

On 18 March 2017, the International Tribunal for the Law of the Sea held a symposium entitled “ITLOS at 20: Looking into the future”. This symposium concluded the series of events on the occasion of the Tribunal’s 20th Anniversary.

The programme of the symposium was as follows:

Session I

Judge Vladimir Golitsyn, President:

The potential role of the Tribunal in light of its experience after 20 years’ judicial activity

Mr Michael Lodge, Secretary-General, International Seabed Authority:

The Tribunal and the International Seabed Authority: the future of the advisory and contentious jurisdiction of the Tribunal

Ms Gabriele Goettsche-Wanli, Director, Division for Ocean Affairs and the Law of the Sea, United Nations:

The Tribunal and the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

Question and answer session

Session II

Mr Esa Paasivirta, Legal Service, European Commission:

Management of Fisheries: Challenges and resolution of disputes

Comments: Judge Tomas Heidar

Ms Yukari Takamura, Professor, Nagoya University:

Climate change and the law of the sea: a new role for the Tribunal?

Question and answer session

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Session III

Round-table: “A user-friendly Tribunal in the service of the international community”,
presided by Judge Shunji Yanai, with the participation of Judge José Luis Jesus and the Registrar, Mr Philippe Gautier

Question and answer session

Closing statement by President Golitsyn

This volume reproduces the statements presented during the symposium and the question and answer sessions in the order in which they were delivered and in their original language.

The symposium was organized with the financial support of the Government of Japan.

Philippe Gautier
Registrar

Introduction

Le 18 mars 2017, le Tribunal international du droit de la mer a organisé un colloque intitulé « Les 20 ans du TIDM : Regard sur l'avenir ». Ce colloque a clôturé les événements qui ont marqué la 20^e anniversaire du Tribunal.

Le programme du colloque était le suivant :

Session I

M. Vladimir Golitsyn, Président :

Le rôle potentiel du Tribunal à la lumière de son expérience après 20 ans d'activités judiciaires

M. Michael Lodge, Secrétaire général, Autorité internationale des fonds marins :

Le Tribunal et l'Autorité internationale des fonds marins : un rôle pour la compétence contentieuse et consultative du Tribunal

Mme Gabriele Goettsche-Wanli, Directeur, Division des affaires maritimes et du droit de la mer de l'Organisation des Nations Unies :

Le Tribunal et la conservation et l'exploitation durable de la diversité biologique marine dans les zones au-delà de la juridiction nationale

Séance de questions-réponses

Session II

M. Esa Paasivirta, Service juridique, Commission européenne :

Gestion de la pêche : enjeux et règlements des différends

Commentaires : M. le juge Tomas Heidar

Mme Yukari Takamura, Professeur, Université de Nagoya

Changements climatiques et droit de la mer : un nouveau rôle pour le Tribunal ?

Séance de questions-réponses

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Session III

Table ronde : « Un Tribunal proche du justiciable et au service de la communauté internationale »,
présidée par M. le juge Shunji Yanai, avec la participation de M. le juge José Luis Jesus et du Greffier, M. Philippe Gautier

Séance de questions-réponses

Allocution de clôture du Président Golitsyn

Le volume reproduit les exposés présentés au cours du colloque et les séances de questions-réponses dans l'ordre dans lequel ils ont été faits et dans leur langue originale.

Le colloque a été organisé avec le soutien financier du Gouvernement du Japon.

Le Greffier
Philippe Gautier

The potential role of the Tribunal in light of its experience after 20 years' judicial activity

*Judge Vladimir Vladimirovich Golitsyn,
President of the International Tribunal for the Law of the Sea*

Distinguished guests, on behalf of the International Tribunal for the Law of the Sea, I would like to welcome you to today's symposium, convened as the final event organized on the occasion of the 20th anniversary of the Tribunal.

Many of you will have attended the symposium held in early October last year on the theme "The contribution of the Tribunal to the Rule of Law". During that event, the participants analysed the jurisprudence of the Tribunal and its contribution to the development of international law.

Today's event provides an opportunity to reflect on the future role of the Tribunal. I wish to discuss two aspects of this future role in my remarks. The first relates to new types of disputes that may come before the Tribunal in the years to come. The second relates to the evolving role of international dispute settlement mechanisms as tools designed to assist States in the peaceful resolution of their disputes and the challenges that may lie ahead for the Tribunal in this regard. I will try to be as provocative as I can on these subjects.

The 1982 Convention on the Law of the Sea has quite rightly been called a "constitution for the oceans" and is one of the most complex international treaties that have ever been negotiated. The Convention created a comprehensive regime for the governance of the oceans.

Since its entry into force, disputes concerning the interpretation or application of the Convention that have been submitted for settlement under Part XV, for the most part, concerned the delimitation of maritime boundaries, the prompt release of vessels and have touched on issues relating to shipping, fisheries activities, the protection of the marine environment and navigation in general. It may not be excluded that future cases will raise questions relating to other aspects of the regime established by the Convention.

The success of the Convention lies in the fact that it provides a flexible framework for the international governance of maritime activities. In future, the Tribunal is likely to be called upon to determine how this legal framework applies to certain new activities at sea.

One example of such new activities is the exploitation of gas hydrates, ice-like solids made up of methane and water, which are contained in permafrost on land in the Arctic. In the sea areas they are primarily found in the continental slope of the ocean floor, thus in areas within the national jurisdiction of coastal States. Gas hydrates have the potential to make a significant contribution to the energy needs of States. However, they are only stable under certain pressures and at low temperatures. The exploitation of gas hydrates has the potential to inflict significant harm on the marine environment and negatively affect the earth's climate. There is the risk of methane escape into the atmosphere, which could further intensify the greenhouse effect. This potential global impact raises the question of whether the regulation of the exploitation of gas hydrates should be solely a matter for the coastal State to regulate or whether it requires international regulation. The Tribunal may be faced with questions concerning the regulation of the exploitation of gas hydrates in future, for example in the context of compliance by coastal States concerned with general obligation of all States Parties to the Convention under article 192 "to protect and preserve the marine environment."

Another type of new activity is that of the harvesting of ocean energy. To date, the harvesting of renewable energy at sea has taken place in areas within national jurisdiction. Despite some uncertainties, the Convention provides guidance with regard to the governance of renewable ocean energy resources in such areas. In particular article 56 of the Convention provides that the sovereign rights of a coastal State in its exclusive economic zone are to be exercised with due regard to the rights and duties of other States and in a manner compatible with the Convention. As the harvesting of renewable energy at sea takes place within areas under national jurisdiction on an increasing scale, questions of the proper balance between the rights of coastal States and the rights of other States may arise.

Moreover, renewable energy technology is currently being developed for use in areas beyond national jurisdiction, and may make the harnessing of wind and wave energy on the high seas a real possibility in the future. Such activities raise questions about the balance to be struck between exercise of freedoms of high seas enumerated in article 87, paragraph 2 of the Convention. As is the case with the exploitation of gas hydrates, the Tribunal may be called upon to consider how the existing legal regime regulates the conduct of such high seas freedoms activities.

Finally, the commencement of deep seabed mining, heralded for so many years, may finally be in sight. Exploitation regulations are

currently under development by the Authority – no doubt you will hear more from the Secretary-General of the Authority, Mr Michael Lodge, about it. The move from the exploration to exploitation phase of deep seabed mining means that many new legal questions regarding the interpretation and application of the Convention may come to the fore, in particular with respect to the impact of the deep seabed mining on marine environment and the interaction between deep seabed mining activities and marine scientific research. Amongst other things, the Seabed Disputes Chamber may be asked to settle questions relating to mining contracts, the obligations of the Authority or the interaction between different actors involved in the deep seabed mining.

As well as determining how the existing framework applies to new activities at sea, the Tribunal may also have a role in the settlement of disputes arising under new legal regimes. While the conclusion of the Convention undoubtedly constituted a remarkable achievement, the regime for the governance of oceans still has gaps which need to be addressed. Efforts are currently underway to fill some of these gaps and to develop new legal regimes to regulate issues such as impact of climate change, marine biodiversity and marine genetic resources.

Next week the preparatory committee established by General Assembly resolution 69/292 for the development of an international legally binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction will meet for its third session. Among the many questions to be settled by the preparatory committee is the question of a mechanism for the settlement of disputes. Hopefully the establishment of this new regime will take place with due regard for the existing system of compulsory dispute settlement under the Convention and the role of the Tribunal under this system will receive due recognition.

Having identified some of the new questions that the Tribunal may be called on to answer in future, I now wish to reflect more generally on the role of the Tribunal as a dispute settlement mechanism. In this context, I will discuss several noteworthy global trends.

First, one can discern a subtle shift in attitudes towards the concept of compulsory dispute settlement. The negotiation of the Convention in the 1970s and early 1980s took place in a prevailing spirit of appreciation of international law and cooperation between States. The inclusion of compulsory dispute settlement procedures entailing binding decisions was a major achievement of the Convention. Even the former socialist countries, who had never previously consented to compulsory dispute settlement in other areas,

made an exception for the law of the sea. They recognized that the preservation of order in the oceans would be impossible without a mechanism to ensure compliance.

To date, 38 States have made declarations in accordance with article 298 of the Convention, excluding certain categories of disputes from compulsory procedures entailing binding decisions, including two declarations made so far this year. In accordance with paragraph 1(a)(i) of article 298 of the Convention, States have the possibility to exclude disputes concerning maritime boundary delimitation from compulsory settlement procedures. As a result of these declarations, the possibility of compulsory judicial or arbitral settlement of several contentious disputes around the world has been excluded.

In general, there have been several recent examples of States pulling back from previously made commitments to binding international dispute settlement under long-established regimes. International institutions, for example the International Criminal Court, have been faced with unrest to a varying degree amongst their constituent States. It is too early to tell if this is evidence of an emerging trend in international relations, and whether it will have any implications for the settlement of disputes under Part XV of the Convention. To say that the fundamental norms underlying the international rule of law can no longer be taken for granted would be to go too far. But the international law ship, so to speak, may be entering into uncharted waters.

Second, in the development of some new international legal regimes, there seems to be a move away from judicial settlement of disputes and a greater emphasis on encouragement, reporting and mitigation. In the field of international environmental law, we have seen the emergence of new mechanisms to encourage compliance, beginning with the non-compliance procedure of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which led to the establishment of an Implementation Committee in 1990. Article 15 of the 2015 Paris Agreement, which establishes a mechanism to facilitate implementation of, and promote compliance with, the provisions of that Agreement, is the most recent example.

The dispute settlement mechanism set out in the 1992 United Nations Framework Convention on Climate Change, which applies *mutatis mutandis* to the Kyoto Protocol and the Paris Agreement, is conciliation. A conciliation commission established in accordance with the Framework Convention renders a recommendatory award, which the parties are required to “consider in good faith”. States must opt-in

to reciprocal compulsory settlement of disputes arising under the Framework Convention, and to date, only one State has done so. The Compliance Committee established under the Kyoto Protocol consists of a facilitative branch, which aims to provide advice and assistance to Parties in order to promote compliance, and an enforcement branch, which has the responsibility to determine consequences for Parties not meeting their commitments. Article 15, paragraph 2 of the Paris Agreement provides that the compliance committee established under that Agreement “shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.”

This raises the question of whether a new trend is emerging in international law, away from binding judicial settlement of disputes and towards non-adversarial compliance mechanisms.

Third, I do not wish to cast any aspersions on the recourse by States to international judicial dispute settlement when they are entitled to do so under the relevant legal instrument. However, sometimes it appears that a future judicial decision is viewed as one tool amongst others, to be used in order eventually to achieve a favourable outcome through other means.

Such cases can place international courts and tribunals in a difficult position. The function of judicial bodies is to assist the parties in the peaceful settlement of their disputes, not to aggravate disputes. International courts and tribunals cannot ignore the political consequences of their decisions. At the same time, it is not possible for them to decline to exercise their jurisdiction over a case if the legal requirements are properly met.

One can also question whether the choice of procedures set out in article 287 of the Convention has given rise to an element of forum shopping by States seeking to settle disputes. In accordance with article 287, arbitration under Annex VII of the Convention is mandatory when both parties have chosen Annex VII arbitration, when the parties have not made a declaration choosing a preferred procedure, or where their declarations have not accepted the same procedure, subject to the requirement in each case that the dispute is not covered by declarations made by the parties in accordance with article 298. In some circumstances, after a dispute has been submitted to arbitration under Annex VII, one of the parties may propose that the dispute be transferred either to the Tribunal or to a special *ad hoc* chamber of the Tribunal.

The mechanism of a special *ad hoc* chamber may be described as a “hybrid” between judicial settlement and arbitration. On the one

hand, parties can benefit from the advantages offered by a standing institution, and have their case heard by an experienced panel of judges, in accordance with pre-established rules of procedures, without incurring any procedural costs. On the other hand, the parties retain a degree of flexibility in choosing the members of the panel, in particular, since in the case of the Tribunal, as well as in the case of the International Court of Justice, the composition of the *ad hoc* chamber is to be determined by the Tribunal “with the approval of the parties”. The practice of the Tribunal indicates that there is little interest of the States Parties to the Convention in the “standing” special chambers established by the Tribunal to deal with particular categories of disputes.

While the settlement of an intractable dispute under Part XV is always to be welcomed, regardless of the choice of procedure, the interaction between the different procedures set out in article 287 allows the parties a degree of influence in the composition of the dispute settlement procedure and even involve some form of intimidation which was perhaps unforeseen at the time of drafting of the Convention.

Finally, I wish to mention the recent decision of the ICJ on preliminary objections in the *Somalia v. Kenya* maritime boundary dispute. In its declaration accepting the compulsory jurisdiction of the ICJ, made pursuant to article 36, paragraph 2, of the ICJ Statute, Kenya excluded from the scope of its acceptance “[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement”. Kenya submitted that as both parties had accepted the compulsory settlement of disputes under the Convention, the proper forum for the settlement of the dispute was an arbitral tribunal constituted in accordance with Annex VII of the Convention.

The ICJ was faced with the question of whether the parties’ optional clause declarations formed an agreement to appear before the ICJ so as to exclude recourse to the dispute settlement system under the Convention, in accordance with its article 282. The Court held that article 282 should be interpreted so that an agreement to submit to the Court’s jurisdiction through optional clause declarations falls within the scope of that article and applies “in lieu” of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya. As a result, the ICJ held that it has jurisdiction to hear the dispute.

In exercising its jurisdiction on the basis of article 36, paragraph 2 of its statute, the ICJ has interpreted the provisions of

Part XV of the Convention with potentially wide-reaching implications that need to be studied. It raises the question as to whether this issue needs to be addressed in negotiations now taking place at the United Nations on an additional supplementary regime to the Law of the Sea Convention

Ladies and Gentlemen, I do not wish to paint a gloomy picture of the future of international dispute settlement institutions in general, or of the Tribunal, particularly as an increasing number of disputes are being submitted for settlement under Part XV of the Convention. However, as we consider the future role of the Tribunal, and the new types of cases it may be called upon to settle, I believe that it is worthwhile to reflect on the nature of the Tribunal's work more generally, and on how emerging trends in international relations may impact upon its ability to assist States in the peaceful resolution of their disputes.

Thank you for your attention.

The Tribunal and the International Seabed Authority: The future of the advisory and contentious jurisdiction of the Seabed Disputes Chamber

Michael W. Lodge

Secretary-General, International Seabed Authority

It is a privilege to be invited to contribute to this event marking the conclusion of the 20th anniversary celebrations of the Tribunal. According to the programme, I have been asked to speak about the future of the advisory and contentious jurisdiction of the Tribunal. Lest I be accused of exercising “creeping jurisdiction”, I want to explain at the outset that my remarks will focus on the advisory and contentious jurisdiction of the *Seabed Disputes Chamber*.

The relationship between the Authority and the Tribunal is unique and may be traced back to the beginning of the negotiations at the Third Law of the Sea Conference. Although the initial idea was to establish a tribunal for the seabed as an organ of the Authority, in the end the decision was taken to create a single, unified International Tribunal for the Law of the Sea with a special dispute-settlement mechanism to deal with disputes concerning seabed-related activities. In this way, it was possible to avoid the consequence of creating two new tribunals, one dealing with general disputes concerning the law of the sea and the other dealing with disputes relating to the deep seabed.

The relevant provisions of Part XI of the Convention that set out the jurisdiction of the Seabed Disputes Chamber are relatively short. They give the Chamber extensive, in some respects exclusive, but not exhaustive, jurisdiction over a wide range of potential disputes arising from “activities in the Area”. I should mention that “activities in the Area” is a term of art used extensively in Part XI to qualify and limit the jurisdiction of both the Authority and the Chamber to activities of exploration for and exploitation of deep seabed mineral resources.

So far, no disputes have been brought to the Chamber under its contentious jurisdiction. One advisory opinion has been issued pursuant to article 191 of the Convention on the basis of a request by the Council.

I will make some comments about the Advisory Opinion before discussing the future of the contentious jurisdiction of the Chamber.

The advisory jurisdiction of the Chamber

As is well known, the first and, so far, only Advisory Opinion of the Seabed Disputes Chamber was given in Case No. 17, on the responsibilities and obligations of sponsoring States.¹ The request for the advisory opinion was made by the Council of the Authority in 2010, on the basis of a proposal made by the Republic of Nauru.² The background was that in 2008 Nauru had sponsored an application for a plan of work for exploration by a company named Nauru Ocean Resources Inc. Before that application was considered, however, Nauru began to have some doubts as to its capacity to meet any potential liability arising from its sponsorship of the applicant company.

Accordingly, at the request of the applicant and the sponsoring State, consideration of that application was postponed, while Nauru sought further guidance from the Council on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability.³

In a document submitted to the Council,⁴ Nauru pointed out that, in common with most other developing States, it lacked the technical and financial capacity to undertake deep seabed mining. In order to participate effectively in activities in the Area, developing States would therefore have to engage entities in the global private sector to conduct these activities on their behalf. Its sponsorship of the project was originally premised on the assumption that Nauru could effectively mitigate any potential liabilities or costs arising from its sponsorship. However, given that Nauru could not afford exposure to the legal risks potentially associated with such a project, there was a pressing need for guidance to be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability.

¹ Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion*, (February 1, 2011), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

² ISBA/16/C/6, *Proposal to seek 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. Submitted by the delegation of Nauru*, dated 5 March 2010, available at https://www.isa.org.jm/sites/default/files/files/documents/isba-16c-6_0.pdf

³ ISBA/15/LTC/6*, *Application for approval of plans of work for exploration by Nauru Ocean Resources Inc. and Tonga Offshore Mining Ltd. Note by the Secretariat*, dated 11 May 2009, available at https://www.isa.org.jm/sites/default/files/files/documents/isba-15ltc-6_1.pdf

⁴ ISBA/16/C/6, *supra* note 2.

This would allow developing States to assess whether it was within their capabilities to effectively mitigate such risks and, in turn, make an informed decision on whether or not to participate in activities in the Area.

The Council considered the issues raised by Nauru, but declined to provide guidance on the relevant legal provisions itself. It also declined to request the Authority's legal counsel to provide an opinion. Instead, after a full debate, the Council decided to use its powers under article 191 of the Convention to request an advisory opinion from the Chamber on the issues raised by Nauru.⁵ At the same time, however, the Council decided to frame the questions for the Chamber in a more abstract and concise manner.⁶

In brief, those questions were asking: What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area? What is the extent of liability of a State Party for any failure to comply with the applicable law by an entity which the State Party has sponsored? And, finally, what are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the applicable law?⁷

The Advisory Opinion was issued in February 2011, six months after the request was made.⁸ I am not going to go into the content of the Opinion. Much has been written on this, and I think we are all well aware of the legal issues involved. What I would like to discuss is what the practical effect of the Advisory Opinion for States Parties and for those entities conducting activities in the Area has been.

I think it is fair to say that the Advisory Opinion represented a significant milestone in the life of the Authority and has had a major influence on the decisions of private capital to invest in seabed mining. The importance of the Advisory Opinion lies both in the content of the Opinion and the fact that it demonstrates to the international community that the system for dispute settlement, set out in Part XI, is effective and efficient. Not least is the expeditious and transparent manner in which the Chamber issued the Advisory Opinion.

⁵ ISBA/16/C/13, *Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea*, dated 6 May 2010 6 May 2010, available at <http://www.isa.org.jm/files/documents/EN/16Sess/Council/ISBA-16C-13.pdf>

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Supra*, note 1.

Until Nauru made its request to the Council in 2010, the only entities conducting activities in the Area under contract to the Authority were the so-called former registered pioneer investors, whose rights had been “grandfathered” in by virtue of resolution II of the Third Conference and the provisions of the 1994 Agreement.⁹

The Advisory Opinion not only encouraged Nauru to proceed with its application, which was approved in 2011,¹⁰ but also opened the door to many other applications from private entities sponsored by both developed and developing States. Thus, since 2011, the Authority has approved 21 further plans of work for exploration, including five awarded to small island developing States. It is unlikely that any of these applications would have been made without the clarity given to investors by the Advisory Opinion.

The content of the Advisory Opinion has also changed the behaviour of States Parties. In clarifying the requirement for States Parties to adopt appropriate laws and regulations to protect themselves from liability, the Advisory Opinion has prompted many States Parties to enact or update such laws and regulations. In 2011, the Council of the Authority requested the Secretary-General to establish a database of existing sponsoring State legislation and to request States Parties to provide information on the status of their national legislation on an annual basis.¹¹ It is now a well-established practice that the Secretary-General provides a report to the Council on the status of national legislation at each annual session.¹² The Authority’s website also contains links to national legislation provided by States Parties and is

⁹ See *The Law of the Sea: Compendium of Basic Documents*, International Seabed Authority/The Caribbean Law Publishing Company, Kingston, Jamaica, 2001, “Final Act of the Third United Nations Conference on the Law of the Sea, Resolution II” at 325; and “General Assembly Resolution on the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (GA Res. 48/263 and the 1994 Agreement)” at 206.

¹⁰ ISBA/17/C/14, *Decision of the Council relating to a request for approval of a plan of work for exploration for polymetallic nodules submitted by Nauru Ocean Resources Inc.*, dated 19 July 2011, available at https://www.isa.org.jm/sites/default/files/files/documents/isba-17c-14_0.pdf

¹¹ ISBA/17/C/20, *Decision of the Council of the International Seabed Authority*, para. 3, available at https://www.isa.org.jm/sites/default/files/files/documents/isba-17c-20_0.pdf

¹² For the most recent report, see ISBA/22/C/8, *Laws, regulations and administrative measures adopted by sponsoring States and other members of the International Seabed Authority with respect to the activities in the Area Report of the Secretary-General*, dated 13 June 2016.

thus a valuable resource on the matter.¹³ So far, 26 States and one regional organization have provided information on the status of national legislation to the Authority.

More importantly, the practice has developed whereby every decision of the Council formally approving a plan of work for exploration contains a preambular paragraph taking note of the Advisory Opinion.¹⁴ This serves as a useful reminder to contractors and sponsoring States of the need to consider the relevant provisions of Part XI in light of the guidance contained in the Advisory Opinion.

So, I think it is beyond doubt that the Advisory Opinion in Case No. 17 solved a very real problem and has been of great value and assistance to States Parties, as well as potential investors in deep seabed mining. It was requested at a time when there was considerable uncertainty about the nature of the responsibilities and obligations of sponsoring States and it has helped to clarify the law. It promoted certainty in understanding the provisions of Part XI and made a valuable contribution to the rule of law.

Nevertheless, as Sir Michael Wood has noted, advisory opinions need to be approached with great caution and prudence.¹⁵ Although they have no binding force, they carry considerable authority and most certainly have legal effects.

In 2016, the Council was again faced with the question of whether to request an advisory opinion under article 191. This was in relation to a potential conflict between exploration carried out under a contract for exploration with the Authority, with exclusive rights, and activities carried out pursuant to articles 143 and 256 of the Convention

¹³ International Seabed Authority. *National Legislation*, available at <https://www.isa.org.jm/legal-instruments>

¹⁴ An example of this is, “*Taking note of the advisory opinion of 1 February 2011 of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*”, from ISBA/22/C/20, *Decision of the Council of the International Seabed Authority relating to an application for approval of a plan of work for exploration for cobalt-rich ferromanganese crusts by the Government of the Republic of Korea*, dated 29 July 2016, available at https://www.isa.org.jm/sites/default/files/files/documents/isba-22c-30_1.pdf

¹⁵ Wood, Michael, “Understanding the Advisory Jurisdiction of the International Tribunal for the Law of the Sea”, remarks delivered at the 20th anniversary of the International Tribunal for the Law of the Sea, Hamburg, October 2016, in: *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016*, Brill/Nijhoff, 2018, p. 213.

as marine scientific research in the Area.¹⁶ In particular, the issue arose as to the extent to which marine scientific research (hereinafter “MSR”) carried out by one State in an area allocated to another entity under a contract with the Authority could be regarded as unreasonable interference with the contractor’s exclusive rights. The question also arose as to the meaning of the “due regard” obligations contained within the Convention in that context.

In this case, the Council declined to request an advisory opinion, at least for the time being. It did note that advisory opinions had certain advantages, including the possibility of addressing difficult legal issues in the abstract, rather than in the context of a specific dispute between States Parties.¹⁷ The benefit of greater transparency was also noted, as the Chamber would benefit from submissions from all States Parties, including researching States and sponsoring States, as well as relevant international organizations such as the Authority and the Intergovernmental Oceanographic Commission of UNESCO.¹⁸

Although the Council was not obliged to, and did not, record its reasons for not requesting an advisory opinion, my impression of the debate is that the Council acknowledged the seriousness of the issues involved, but considered that the matter was not sufficiently urgent to request an advisory opinion. It also felt that the legal questions involved were not sufficiently well articulated and that more time was needed for delegations to study the issues.

In this regard, I believe that the Council demonstrated admirable prudence and caution.

The contentious jurisdiction of the Seabed Disputes Chamber

The Convention confers a wide contentious jurisdiction upon the Chamber over disputes arising from “activities in the Area”.

It is important to note, however, that the Chamber’s jurisdiction is neither comprehensive nor universal. A number of disputes are excluded from the Chamber’s jurisdiction by implication

¹⁶ *Supra* note 9, United Nations Convention on the Law of the Sea (hereinafter “LOS Convention”) at 50 and 116.

¹⁷ A counter-argument, albeit not one that was advanced before the Council, is that contentious litigation enables the court or tribunal to base its decision on facts, rather than abstract ideas.

¹⁸ ISBA/22/C/3*. Issues associated with the conduct of marine scientific research in exploration areas. Report of the Secretary-General, dated 12 May 2016; ISBA/22/C/30, Summary report of the President of the Council of the International Seabed Authority on the work of the Council during its twenty-second session dated 29 July 2016, para. 25.

of article 187 and the terms in which it has been drafted. Other disputes are subject to an optional alternative jurisdiction under article 188, and yet others are excluded by article 189. The latter provision, in particular, excludes disputes involving the exercise by the Authority of its discretionary power and declarations as to the conformity with the Convention or invalidity of the rules, regulations or procedures of the Authority; and those that fall under the dispute resolution procedures of the World Trade Organization.

When one considers the current status of activities in the Area, which are confined to the exploration phase, it is probably not surprising that no cases have yet arisen under the contentious jurisdiction of the Chamber. This situation may well change when exploitation begins, as significant commercial interests will then be at stake.

As you are probably well aware, the Authority is currently in the process of elaborating regulations to govern the exploitation phase, including the terms and conditions of exploitation contracts, as well as environmental and financial regulations.

In this respect, it has been noted that there are some surprising omissions from article 187, in addition to those already mentioned under article 189.¹⁹

Article 187 excludes, for example, any disputes not concerning “activities in the Area”, such as disputes relating to transportation of minerals on the high seas and processing on land. Disputes concerning the Authority arising under other parts of the Convention would also be excluded, such as disputes concerning interference with the rights of third parties under Parts VII, XII and XIII (a reference back, perhaps, to the MSR issue).

More importantly perhaps, article 187(c)(ii) limits the jurisdiction of the Chamber in respect of acts or omissions of parties to a contract to acts or omissions “relating to activities in the Area and *directed to the other party or directly affecting its legitimate interests*”.²⁰ This indicates quite a high bar for a complainant to satisfy the Chamber that it has jurisdiction under article 187.

A number of possible disputes seem to be beyond the jurisdiction of the Chamber. These include:

- Disputes between a contractor and a neighbouring coastal State, for example in the case of an alleged failure to have due regard for the

¹⁹ LOS Convention, *supra* note. 9 at 91.

²⁰ *Ibid* note. 9, at 90.

rights and legitimate interests of the coastal States as provided for under article 142.

- Disputes between neighbouring contractors, for example vessel collisions, entanglements of mining tools or encroachment on contract areas.
- Disputes with third parties, for example disputes between the Authority, the Enterprise or a contractor with a third-party user of the high seas or the Area, for example, owners of submarine cables and pipelines.
- Disputes involving a non-State Party.

Whilst each of these disputes may be amenable to settlement through a variety of different means, including commercial arbitration under article 188, the question is whether it may be desirable to seek to have as many disputes as possible heard before a single tribunal. This, it is argued, would promote consistency, avoid fragmentation and help to promote the original concept of the Seabed Disputes Chamber as the specialist tribunal concerned with disputes over matters relating to Part XI of the Convention.

There is also the point that the same incident may easily give rise to multiple proceedings before the Chamber and before other international and municipal courts and tribunals, leading to delays, increased costs and potentially inconsistent judgments and awards. An example of this might be a collision between two contractor vessels, which could involve: a claim by one contractor against the other in respect of loss or damage; claims for damages for personal injury or death; a claim from one contractor or sponsoring State against the Authority for failure to adequately monitor the other contractor; and a claim from a neighbouring coastal State against one or both contractors, or the Authority, in respect of damage caused to its marine environment.

In this regard, the question has been raised as to whether it might be sensible to include relatively widely drafted dispute-resolution provisions in the exploitation regulations and in exploitation contracts requiring any party involved in “activities in the Area” to submit to the jurisdiction of the Chamber.

There are many counter-arguments to this of course. First, it seems unlikely that the Authority or a contractor could compel a State Party, or any other entity that is not party to a contract, to accept the jurisdiction of the Chamber. Second, it might be argued that the Chamber is not necessarily the best place to deal with commercial disputes between contractors, especially those which are not States

Parties. And, thirdly, there may be a large category of technical and administrative disputes that could be dealt with more expeditiously than by reference to the Chamber. These would include, for example, disputes over royalty payments or minor regulatory infractions. It may be more appropriate to refer these to an independent expert panel.

Concluding remarks

Given the nature of the interests at stake, it may be several years before the contentious jurisdiction of the Chamber is invoked. However, in the process of developing the exploitation code, nobody has yet suggested any alternative to the dispute-resolution system contained in Part XI. Indeed, the suggestion has been made that, if anything, the jurisdiction of the Seabed Disputes Chamber should be enlarged to cover certain disputes that do not seem to be covered by article 187. Whilst it remains to be seen what is made of these suggestions, it seems that, in general, the Authority's stakeholders have confidence in the Chamber as the preferred mechanism for dispute settlement.

This is in large part due to the effective and efficient way in which the Chamber dealt with the Advisory Opinion in Case No. 17. That Advisory Opinion clarified the law and has made a real difference to the implementation of the regime for the Area under Part XI.

Questions of interpretation will inevitably continue to arise under Part XI and Annex III of the Convention, as well as other areas of "unfinished business" under the Convention. The possibility of seeking an advisory opinion on some of these issues has been raised. So far, the Council has exercised prudence and caution, indicating that member States may prefer to exhaust other avenues first before resorting to the Chamber for an advisory opinion. The Council has not, however, ruled out the possibility of seeking an advisory opinion and it may well be that we can expect this aspect of the Chamber's jurisdiction to be used again in the future.

The International Tribunal for the Law of the Sea and the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

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Your Excellency, Mr Vladimir Golitsyn, President of the International Tribunal for the Law of the Sea,
Honourable members of the International Tribunal for the Law of the Sea,

Mr Gautier, Registrar of the International Tribunal for the Law of the Sea,

Excellencies,

Ladies and Gentlemen,

I am very pleased and honoured to participate in this important symposium and would like to sincerely thank His Excellency, Judge Vladimir Golitsyn, President of the International Tribunal for the Law of the Sea, for the very kind invitation to give this presentation on behalf of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs at the United Nations on the topic “The Tribunal and the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.

The subject is very topical since the United Nations General Assembly decided in its resolution 69/292 of 19 June 2015 to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea²¹ (hereinafter “UNCLOS”) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.²² To that end, the General Assembly established a Preparatory Committee to make substantive recommendations to it on the elements of a draft text of an international legally binding instrument under UNCLOS, taking into account the various reports of the Co-Chairs on the work of the Ad Hoc Open-

²¹ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

²² *General Assembly resolution 69/292*. UN Doc A/RES/69/292 (2015) at para. 1, online: UN Documents <www.undocs.org/A/RES/69/292>.

ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, and to report on its progress by the end of 2017.²³ The Preparatory Committee is holding its third session later this month²⁴ and will continue to address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology.²⁵ Therefore, from the outset, I would like to emphasize that, while the Division's presentation will inevitably touch upon some of the issues under consideration in the Preparatory Committee, its purpose is to explore the relevance of the jurisprudence of the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") to date to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction in general, rather than focus on what could be reflected in elements of a draft text of a legally binding instrument. In addition, I wish to underline that the presentation is not intended to provide an exhaustive treatment of the subject.

Before turning to the jurisprudence of the Tribunal, I wish to briefly touch upon the place that the conservation and sustainable use of marine biological diversity has within UNCLOS. At the outset, it can be noted that UNCLOS does not specifically address issues relating to "biological diversity". That term is defined for the purposes of the Convention on Biological Diversity (hereinafter "CBD"), as

the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.²⁶

²³ *Ibid.* at para. 1(a).

²⁴ The third session of the Preparatory Committee took place from 27 March to 7 April 2017. This presentation was delivered on 18 March 2017.

²⁵ *General Assembly resolution 69/292*, *supra* note 2, para. 2.

²⁶ *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, article 2.

The CBD does not apply to the components of biological diversity in areas beyond national jurisdiction.²⁷ However, Contracting Parties are nonetheless obliged with regard to the conservation and sustainable use of such biodiversity to control the processes and the activities carried out under their jurisdiction or control and to cooperate directly, or through competent international organizations to that end.²⁸ The CBD also provides that its provisions shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.²⁹ Contracting Parties are required to implement the CBD with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.³⁰

UNCLOS devotes Part XII and several provisions in other parts to the protection and preservation of the marine environment. In particular, it sets out in its article 192 the general obligation of all States to protect and preserve the marine environment.³¹ In article 194, States are, *inter alia*, required to take, individually or jointly as appropriate, all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they must endeavour to harmonize their policies in this connection.³² Also States must take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with UNCLOS.³³ The Convention requires internationally accepted rules, standards and recommended practices and procedures to be applied as minimum standards in the formulation and enforcement of national laws, regulations and measures for pollution from activities in the Area,³⁴ from seabed activities subject to

²⁷ *Ibid.*, article 4.

²⁸ *Ibid.*

²⁹ *Ibid.*, article 22, para. 1.

³⁰ *Ibid.*, article 22, para. 2.

³¹ UNCLOS, *supra* note 21, article 192.

³² *Ibid.*, article 194, para. 1.

³³ *Ibid.*, article 194, para. 2.

³⁴ *Ibid.*, article 209.

national jurisdiction,³⁵ from vessels,³⁶ and by dumping.³⁷ Internationally accepted rules, standards and recommended practices and procedures must also be taken into account in the development of national laws and regulations relating to pollution from land-based sources³⁸ and pollution from or through the atmosphere.³⁹

“Harm to living resources and marine life” is specifically mentioned in the definition of pollution of the marine environment in article 1 of UNCLOS. The term “marine life” is also included in Part XII,⁴⁰ where also the terms “natural resources”,⁴¹ “ecosystems”⁴² and “species”⁴³ are mentioned. UNCLOS specifically requires States in article 194, paragraph 5, to take measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

The terms “living resources”, “harvested species” and “species associated with or dependent upon harvested species” are included in other parts of the Convention, as part of the provisions relating to the conservation and management of living marine resources.⁴⁴ While the terms “living resources” and “harvested species” appear to refer to species that either are or have the potential to be commercially exploited, “species associated with or dependent upon harvested species” also include other species non-commercially exploited. The Tribunal paid a great service to the international community by clarifying, when it prescribed provisional measures in the *Southern Bluefin Tuna Cases*, that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”.⁴⁵ It reiterated and elaborated further on that statement in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (hereinafter “Case No. 21”), when it recalled that living resources and marine life are part of the marine

³⁵ *Ibid.*, article 208.

³⁶ *Ibid.*, article 211.

³⁷ *Ibid.*, article 210.

³⁸ *Ibid.*, article 207.

³⁹ *Ibid.*, article 212.

⁴⁰ *Ibid.*, article 194, para. 5.

⁴¹ *Ibid.*, article 193.

⁴² *Ibid.*, article 194, para. 5.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, see for example, articles 61, 62 and 119.

⁴⁵ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures, Order of 27 August 1999*, *ITLOS Reports 1999*, p. 280, at p. 295, para. 70.

environment.⁴⁶ The Tribunal also observed that “the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource.”⁴⁷

In light of the foregoing, it can be argued that marine biological diversity is part of the marine environment. Moreover, since the Tribunal clarified in Case No. 21 that article 192 of UNCLOS applies to all maritime areas,⁴⁸ the general obligation contained in that article and other relevant obligations in the Convention relating to the protection and preservation of the marine environment, including those set out in article 194, paragraph 5,⁴⁹ can also be considered applicable to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. While these are not the only applicable obligations, this presentation is focused only on those obligations that have been the subject of consideration by the Tribunal.

Of particular relevance, in that regard, are the Advisory Opinions of the Tribunal which clarify the extent of responsibility and liability of States and sponsored persons and entities undertaking activities in the Area and those of flag States on the high seas. It can be noted that the Seabed Disputes Chamber⁵⁰ in the Advisory Opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (hereinafter “Case No. 17”), referred to “the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area”,⁵¹ thus recognizing that these obligations are owed to the international community as a whole, and that all States can be held to have a legal interest in their protection.⁵²

⁴⁶ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 61, para. 216.

⁴⁷ *Ibid.* at p. 55, para. 190.

⁴⁸ *Ibid.* at p. 34, para. 111.

⁴⁹ Which states: “The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

⁵⁰ The Seabed Disputes Chamber is a permanent chamber of ITLOS, established in accordance with Part XI, section 5, of UNCLOS and article 14 of the Statute. The Chamber has jurisdiction in disputes with respect to activities in the International Seabed Area.

⁵¹ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 59, para. 180.

⁵² For a discussion on the implications of the *erga omnes* obligation in regard to State responsibility, see article 48 of the *Draft articles on responsibility of States for internationally wrongful acts, with commentaries thereto* in *Yearbook of the*

UNCLOS places the primary responsibility for implementation and enforcement of its obligations on States. This presents an interesting quandary: for although the possibility of adverse impacts on the marine environment including marine biodiversity directly attributable to a State is quite real, many entities operating, both within and beyond areas of national jurisdiction, are private ones. In that regard, the jurisprudence of the Tribunal has already contributed substantially, in particular through its Advisory Opinions, to the establishment of the modalities for State responsibility in case of lack of compliance. Such jurisprudence is also of particular relevance for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

In Case No. 17, the Seabed Disputes Chamber recognized the distinct liability of a sponsored contractor for the failure to comply with its obligations and the liability of sponsoring States for not complying with their own set of obligations.⁵³

Having noted that, in accordance with article 139 of UNCLOS and article 4 of Annex III thereto, the existence of damage is essential for the establishment of the liability of the State,⁵⁴ the Chamber ruled that

the liability of sponsoring States arises from their failure to carry out their own responsibilities and is triggered by the damage caused by sponsored contractors. There must be a causal link between the sponsoring State's failure and the damage, and such a link cannot be presumed.⁵⁵

There is, however, a caveat to the Chamber's conclusion, in that the rules on liability set out in UNCLOS and the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 are without prejudice to the rules of general international law on State responsibility and liability.⁵⁶ As a consequence:

International Law Commission 2001, vol. II, (Part Two) (New York and Geneva: United Nations, 2007), pp. 126-128, document A/CN.4/SER.A/2001/Add.1 (Part 2).

⁵³ *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 31, at p. 57, paras. 171 and 172.

⁵⁴ *Ibid.*, at p. 58, para. 178.

⁵⁵ *Ibid.*, at p. 60, para. 184.

⁵⁶ *Ibid.*, at pp. 65-66, paras. 208-211.

- Where the sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability;⁵⁷
- If the sponsoring State has failed to fulfil its obligations but no damage has occurred, the consequences of such wrongful act are determined by customary international law.⁵⁸

The Seabed Disputes Chamber ruled that sponsoring States have two kinds of “due diligence” obligations under UNCLOS and related instruments. The first “due diligence” obligation is to make the best possible efforts to secure compliance by the sponsored contractors.⁵⁹ In that regard, the Chamber clarified the nature of the obligation “to ensure” in UNCLOS, noting that it is also contained in article 194, paragraph 2, of Part XII, among other articles.⁶⁰ It stated that

[t]he sponsoring State's obligation “to ensure” is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. ... [It] may be characterized as an obligation “of conduct” and not “of result”, and as an obligation of “due diligence”.⁶¹

The Chamber further clarified that the obligation of “due diligence” requires the sponsoring State to adopt laws and regulations and to take administrative measures which, are within the framework of its legal system, “reasonably appropriate” for securing compliance by persons under its jurisdiction.⁶² The standard of “due diligence” may vary over time depending on the level of risk and on the activities involved.⁶³

Turning to the second “due diligence” obligation, the Seabed Disputes Chamber described it as a direct obligation for the sponsoring State with which it must comply independently of its obligation to

⁵⁷ *Ibid.*, at p. 76, operative para. 4.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at p. 74, operative para. 3.

⁶⁰ *Ibid.* at pp. 40-43, paras. 107-116.

⁶¹ *Ibid.*, at p. 41, para. 110.

⁶² *Ibid.*, at p. 70, para. 228.

⁶³ *Ibid.*, at p. 74, operative para. 3.

ensure a certain conduct on the part of the sponsored contractors,⁶⁴ although compliance with these obligations may also be seen as a relevant factor in meeting the “due diligence” obligation of the sponsoring State.⁶⁵ The Chamber listed among the direct obligations of the sponsoring State the obligations to assist the International Seabed Authority set out in article 153, paragraph 4, of the Convention; the obligation to apply a precautionary approach; the obligation to apply the “best environmental practices”; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.⁶⁶

The Seabed Disputes Chamber indicated that sponsoring States are also under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment.⁶⁷ It stressed that the obligation to conduct such assessment is a direct obligation under UNCLOS and a general obligation under customary international law.⁶⁸ The obligation to conduct an environmental impact assessment had also already been implicitly upheld by the entire Tribunal in its prescription of provisional measures in *The MOX Plant Case*⁶⁹ and in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*.⁷⁰

However, in Case No. 17, the Seabed Disputes Chamber further developed the requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource,⁷¹

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* and also at p. 44, para. 123.

⁶⁶ *Ibid.* at p. 73, para. 236; and at p. 75, operative para. 3.

⁶⁷ *Ibid.* at p. 49, para. 141; and at p. 75, operative para. 3.

⁶⁸ *Ibid.* at p. 50, para. 145, see also pp. 50-52, paras. 146-150.

⁶⁹ *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, operative para. 1.

⁷⁰ *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 27, operative para. 1.

⁷¹ *Responsibilities and obligations of States with respect to activities in the Area, supra* note 31, at p. 51, para. 148.

recognized by the International Court of Justice in *Pulp Mills on the River Uruguay*.⁷² The Chamber observed that:

The [International Court of Justice]’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court’s references to “shared resources” may also apply to resources that are the common heritage of mankind.⁷³

Honourable members of the Tribunal,
Ladies and Gentlemen,

Also critical for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction is compliance by States with their responsibilities with respect to vessels flying their flag. UNCLOS addresses the duties of flag States in a number of its provisions, including articles 91, 92, 94 and 217, among others.

The Tribunal has had the opportunity to look at the provisions of UNCLOS in regard to the obligations of flag States, along with articles 192 and 193 concerning the protection and preservation of the marine environment, and other relevant provisions of UNCLOS, and clarify the meaning and scope of flag State obligations.

Thus, in the *M/V “SAIGA” (No. 2) Case*⁷⁴ and *The M/V “Virginia G” Case*,⁷⁵ the Tribunal provided its interpretation of the genuine link requirement in UNCLOS. It clarified that

the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.⁷⁶

⁷² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, pp. 82-83, para. 204.

⁷³ *Responsibilities and obligations of States with respect to activities in the Area*, supra note 31, at p. 51, para. 148.

⁷⁴ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10.

⁷⁵ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4.

⁷⁶ *M/V “SAIGA” (No. 2)*, supra note 74, at p. 42, para. 83.

The Tribunal elaborated further on this in its Judgment in *The M/V “Virginia G” Case* when it stated that it

considers that article 91, paragraph 1, third sentence, of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.⁷⁷

In the view of the Tribunal, once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of “genuine link”.⁷⁸

In Case No. 21 the Tribunal clarified the responsibility and liability of flag States. While the case is concerned with illegal, unreported and unregulated (IUU) fishing in the exclusive economic zones of a subset of States Parties to UNCLOS, the Tribunal had, as mentioned earlier, made the following very important finding, which is transposable to areas beyond national jurisdiction:

As article 192 applies to all maritime areas, including those encompassed by exclusive economic zones, the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone because, as concluded by the Tribunal, they constitute an integral element in the protection and preservation of the marine environment.⁷⁹

The Tribunal clarified that, as far as fishing activities are concerned:

The flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in

⁷⁷ *M/V “Virginia G”*, *supra* note 75, at p. 44, para. 110.

⁷⁸ *Ibid.*, at p. 45, para. 113.

⁷⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *supra* note 26, at p. 37, para. 120.

administrative matters under article 94 of the Convention, has the obligation to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State's responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment.⁸⁰

If the flag State receives a report from another State alleging that a violation occurred, the flag State “has the obligation to investigate and, if appropriate, take any action necessary to remedy the situation”, and to inform the other State of that action.⁸¹

The Tribunal described it as an obligation of “due diligence”. It stated that:

While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.⁸²

Similar to the approach of the Seabed Disputes Chamber in Case No. 17, the Tribunal held that the liability of a flag State arises only if it fails to comply with its “due diligence” obligations.⁸³ The flag State is not liable if it has taken all necessary and appropriate measures to meet its “due diligence” obligations.⁸⁴

In the aforementioned Advisory Opinions and in its other cases, the Tribunal was also provided with an opportunity to elaborate on the duty to cooperate and the precautionary approach, which are

⁸⁰ *Ibid.*, at p. 63, operative para. 3.

⁸¹ *Ibid.*

⁸² *Ibid.*, at p. 42, para. 138.

⁸³ *Ibid.* at p. 44, para. 146.

⁸⁴ *Ibid.* at p. 45, para. 148.

both also of central importance for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

In *The MOX Plant Case*, the Tribunal described the duty to cooperate as “a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.⁸⁵ It stated that “rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention”.⁸⁶

Elaborating on the actions that parties to the dispute should take to give effect to the duty to cooperate, the Tribunal, in the *Southern Bluefin Tuna Cases*, considered that the parties to the dispute “should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock”.⁸⁷ In *The MOX Plant Case*⁸⁸ and the *Land Reclamation in and around the Straits of Johor* case,⁸⁹ the Tribunal prescribed as a provisional measure that the parties to the dispute should enter into consultations in order to, *inter alia*, exchange information, and carry out an environmental impact assessment.

In Case No. 21, the Tribunal observed that:

the obligation to “seek to agree ...” under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are “due diligence” obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.⁹⁰

⁸⁵ *MOX Plant*, *supra* note 69, at p. 110, para. 82.

⁸⁶ *Ibid.*

⁸⁷ *Southern Bluefin Tuna*, *supra* note 25, at p. 296, para. 78.

⁸⁸ *MOX Plant*, *supra* note 69, at p. 110, operative para. 1.

⁸⁹ *Land Reclamation in and around the Straits of Johor*, *supra* note 70, at p. 27, operative para. 1.

⁹⁰ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *supra* note 26, at p. 59, para. 210.

In the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*,⁹¹ the Special Chamber of the Tribunal prescribed provisional measures which included an obligation for the parties to cooperate to “take all necessary steps to prevent serious harm to the marine environment, including the continental shelf and its superjacent waters, in the disputed area”.⁹²

Turning now to the precautionary approach, it can be noted that in its early jurisprudence the Tribunal did not explicitly mention the term “precautionary approach”, but rather referred to the need to “act with prudence and caution”. For example, in the *Southern Bluefin Tuna Cases*, the Tribunal implicitly established a link between the application of the approach and the due diligence obligations of the States concerned.⁹³ This emerged from the declaration of the Tribunal that the parties “should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of the southern bluefin tuna”,⁹⁴ and is confirmed by further statements that there is “scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna”⁹⁵ and that “although the Tribunal cannot conclusively assess the scientific evidence presented by the parties”,⁹⁶ the Tribunal found that “measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock”.⁹⁷ The Tribunal prescribed, *inter alia*, that the parties “should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock”.⁹⁸

The Tribunal also referred to the need to act with prudence and caution in *The MOX Plant Case*,⁹⁹ the *Reclamation in and around the*

⁹¹ *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146.

⁹² *Ibid.*, at p. 166, operative para. 1.

⁹³ *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 31, at p. 46, para. 132.

⁹⁴ *Southern Bluefin Tuna*, *supra* note 25, at p. 296, para. 77.

⁹⁵ *Ibid.*, at p. 296, para. 79.

⁹⁶ *Ibid.*, at p. 296, para. 80.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, at p. 299, operative para. 1 (f).

⁹⁹ *MOX Plant*, *supra* note 69, at p. 110, para. 84.

Straits of Johor case,¹⁰⁰ the *M/V “Louisa” Case*,¹⁰¹ and in the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean*.¹⁰²

In Case No. 17, the Seabed Disputes Chamber explicitly identified the precautionary approach as one of the direct “due diligence” obligations of the sponsoring State.¹⁰³ Having restated and analysed the content of Principle 15 of the Rio Declaration on Environment and Development¹⁰⁴ in relation to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area¹⁰⁵ and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area,¹⁰⁶ the Chamber observed that the incorporation into a growing number of international treaties and other instruments of the precautionary approach, many of which reflected the formulation of Principle 15 of the Rio Declaration, had initiated a trend towards making this approach part of customary international law.¹⁰⁷ The Chamber also decided that the stipulation in the Rio Declaration that the precautionary approach shall be applied by States “according to their capabilities” did not, however, apply to the obligation to follow “best environmental practices” set out in the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area since none of the general provisions of UNCLOS concerning the responsibility and liability of the sponsoring State provides for according preferential treatment to sponsoring States that are developing States.¹⁰⁸ What counted in a specific situation was “the

¹⁰⁰ *Land Reclamation in and around the Straits of Johor*, *supra* note 50, at p. 26, para. 99.

¹⁰¹ *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 77.

¹⁰² *Delimitation of the maritime boundary in the Atlantic Ocean*, *supra* note 71, at p. 160, para. 72.

¹⁰³ *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 31, at p. 46, para. 131.

¹⁰⁴ Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

¹⁰⁵ *International Seabed Authority*, Regulations on prospecting and exploration for polymetallic nodules in the Area, ISA Doc ISBA/19/A/9 and ISBA/19/C/17, annex.

¹⁰⁶ *International Seabed Authority*, Regulations on prospecting and exploration for polymetallic sulphides in the Area, ISA Doc ISBA/16/A/12 Rev.1, annex.

¹⁰⁷ *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 31, at p. 47, para. 135.

¹⁰⁸ *Ibid.*, at p. 53-55, paras. 158-163.

level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields”.¹⁰⁹

Honourable members of the Tribunal,

Ladies and Gentlemen,

As can be discerned from its jurisprudence over the past 20 years, the Tribunal has already contributed significantly to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through its effective resolution of disputes, its interpretation and application of the provisions of UNCLOS, including in the context of its Advisory Opinions, and through its prescription of provisional measures aimed at preventing serious harm to the marine environment by, for example, requiring the parties to cooperate and apply the precautionary approach. In its case law, the Tribunal also had the opportunity to further develop the law of the sea and general international law.

Indeed, UNCLOS gives the Tribunal ample latitude to apply other rules of international law not incompatible with it.¹¹⁰ The Tribunal also has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of UNCLOS which is submitted to it in accordance with that agreement.¹¹¹ In that same sense, UNCLOS requires States to cooperate in the further development of its provisions¹¹² and provides for the application of international rules and standards to be established through the competent international organization or general diplomatic conference.¹¹³

In that regard, it can be noted that 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 Stocks¹¹⁴ (hereinafter “United Nations Fish Stocks Agreement”) gives effect to the duty to cooperate in accordance with UNCLOS in the

¹⁰⁹ *Ibid.*, at p. 54, para. 162.

¹¹⁰ *UNCLOS*, *supra* note 1, article 293, para. 1.

¹¹¹ *Ibid.*, article 288, para. 2.

¹¹² *Ibid.*, see for example, articles 63, para. 2 and 64.

¹¹³ *Ibid.*, see for example articles 197, 207, para. 4, 208, para. 5, 209, para. 1, 210, para. 4, 211, para. 1, 211, para. 2, 211, para. 5 and 212, para. 3.

¹¹⁴ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, 2167 UNTS 3, 34 ILM 1542.

conservation and management of straddling fish stocks and highly migratory fish stocks. This Agreement establishes, *inter alia*, a specific link between biodiversity and the marine environment. It requires coastal States and States fishing on the high seas, in giving effect to their duty to cooperate in accordance with the Convention, to protect biodiversity in the marine environment.¹¹⁵ The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to the United Nations Fish Stocks Agreement concerning the interpretation or application of the Agreement and concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.¹¹⁶

At this stage, it is not clear what kind of dispute-resolution mechanism might be included in a legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. As previously mentioned, discussions on the elements of a draft text of such an instrument are under consideration by the Preparatory Committee established by General Assembly resolution 69/292. Proposed elements that have been received by the Chair of the Preparatory Committee before the third session in relation to the settlement of disputes have been compiled in the Chair's non-paper which is available on the website of the Division.¹¹⁷ Several proposals indicate a preference for using the provisions of UNCLOS relating to the peaceful settlement of disputes as a starting point. Some have proposed also drawing on the provisions of the United Nations Fish Stocks Agreement, while it has been noted by others that the existing mechanisms need to be built upon and be based on modern principles of good governance and ensure transparency, public participation and accountability. It has been suggested that the option to seek an advisory opinion from the Tribunal

¹¹⁵ *Ibid.*, article 5(g).

¹¹⁶ *Ibid.*, article 30.

¹¹⁷ Chair's non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (dated 28 February 2017), available at <www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf>, and Supplement to the Chair's non-paper (dated 24 March 2017), available at <www.un.org/Depts/los/biodiversity/prepcom_files/Supplement.pdf>.

should also be considered as a useful means for resolving differences in the interpretation of an international instrument.

Honourable members of the Tribunal,

Ladies and Gentlemen,

In closing, I wish to recall that States Parties to UNCLOS have continued to underline the vital role of and their trust in the work of the Tribunal year after year in the Meeting of States Parties to the United Nations Convention on the Law of the Sea. They have continuously highlighted the workload of the Tribunal, the efficiency with which it has delivered its decisions, its increasing contribution to the interpretation of the Convention and international law and to the progressive development of the law of the sea, as well as its role in the peaceful settlement of disputes. Undoubtedly, the importance of the Tribunal will continue to grow over time, as was also noted by the former Secretary-General of the United Nations, Mr Ban Ki-moon, on the occasion of the ceremony commemorating the 20th anniversary of the establishment of the Tribunal. The Division for Ocean Affairs and the Law of the Sea congratulates the Tribunal on its accomplishments to date and wishes it all the very best for the next 20 years and beyond.

Questions and answers (part 1)

President Golitsyn: Now we have time for questions and comments. I invite you to raise your hand if you want to ask questions or to make comments. Please identify yourself when you do so.

Mr Victor Ventura: Good morning. I would like to thank the three speakers for their very interesting presentations. My name is Victor Ventura. I am a Brazilian Ph.D. candidate at the University of Hamburg and my research deals with the environmental jurisdiction of the coastal State over the continental shelf, with a particular emphasis on the outer continental shelf. But I would like to ask a question to Mr Lodge linking with what Ms Goettsche-Wanli just said. Would it be possible, via an ampliative, expansive interpretation of UNCLOS and via a combination between UNCLOS and the CBD, to assume that the ISA has a mandate to establish marine protected areas on the high seas or on the seas or specific parts of the sea floor? My concern in this case would be to assess if this would even be a possibility for the Authority. Thank you very much.

President Golitsyn: Thank you. We will take several questions and then we will ask for the answers. Any further questions or comments?

Mr Esa Paasivirta: I am Esa Paasivirta from the European Commission. Question for Gabriele Goettsche-Wanli on the dispute-settlement provisions in the new legally binding agreement on marine biodiversity which is in negotiation: What do you see as the main issues under that agreement for dispute-settlement provisions? Just to mention that, since that too would be an implementation agreement, since we had the Fish Stocks Agreement. A cross-cut sort of solution in this regard would be simply to make a reference to UNCLOS as it was done in the Fish Stocks Agreement, whether or not it's the best choice from all the different forums that are available. But since there are many other issues under discussion, isn't there a big temptation simply to go for that even though you do mention also views for more modernized versions of dispute settlement. It would be interesting to hear your feelings on that. Thank you.

President Golitsyn: Any other question or we go to answers first? Yes, one more question. Judge Ndiaye.

Judge Ndiaye: In connection with what I have just heard I wanted to ask Gabriele if this new system, the BBNJ, would be a new implementation agreement first and would it need to expand the jurisdiction of ITLOS to deal with these issues? Thank you very much.

Judge Golitsyn: Thank you, we have one more question and then we will go to the answers.

Ms Liesbeth Lijnzaad: Thank you. Liesbeth Lijnzaad, I work at the Netherlands Ministry of Foreign Affairs. Maybe building on these questions about BBNJ: It seems to me when thinking about dispute settlement, in a future implementing agreement on BBNJ, the first question is, of course, what kind of, what type of problems are we expecting? It's no good just copying something because you need to have some sort of dispute settlement but the first reflection must be, what kind of disputes are we looking at? I would suspect disputes in the field of marine genetic resources, where I would personally doubt if that is within the remit of the Law of the Sea Tribunal or whether it is within the remit of its expertise most of all.

Other issues relate to environmental impact assessment or marine protected areas. I would think those are likely to be within the scope of expertise of the Law of the Sea Tribunal, but the more important thing, because I was looking at this text compiled by the chair or president of the PREPCOM: It seems as though we are collecting possibilities without perhaps taking the first step as to – well, if we continue with this work, dispute-settlement provisions follow the substance of the agreement. Perhaps we are discussing this at too early a stage, I am wondering. Do we sufficiently look at what this agreement is going to be about before we get into “let's copy paste from UNCLOS”, or “let's copy paste from the Straddling Fish Stocks Convention”. So it's a timing issue, I think. Maybe you can comment on that.

President Golitsyn: Thank you, it was a comment and a question. We all know that this text is a wish-list text, but we still take it seriously. So I will give the floor first to Mr Michael Lodge and then to Ms Goettsche-Wanli. Please.

Mr Michael Lodge: Thank you very much for the question. I think the question that was addressed to me is whether it is possible to read into the Convention and possibly the CBD Convention a mandate for the Authority to establish marine protected areas on the high seas, and I

think the answer to that is no. I don't think ISA has any mandate to create marine protected areas on the high seas because its mandate and responsibilities and functions are expressly limited to activities in the Area.

The other part of the question was whether there is a mandate to establish marine protected areas on the seafloor and I think there the power is more realistic and in fact the Authority has already acted to take measures to protect certain parts of the seafloor in a document called an environmental management plan in a region called the Clarion-Clipperton Zone although the areas in question are not called marine protected areas and there is a reason for that, because "marine protected areas" is a term that seems to mean different things to different people and I think the proper way to refer to it these days is area-based management tools – or ABMTs, to use yet another acronym – and in that sense, the Authority has adopted area-based management tools for parts of the seafloor because that is an area within the mandate of the Authority and it is open to the Authority to take the necessary measures to protect the environment in that part of the Area. Thank you.

President Golitsyn: Well, Ms Goettsche-Wanli, this new document, negotiations – there is a lot of interest, so you have several questions. Please.

Ms Gabriele Goettsche-Wanli: Thank you very much for the questions. I could see the interest. Perhaps if I may I will answer the last question first because perhaps in the presentation there wasn't enough time to explain the invitation for proposals and what I was mentioning. This was the result of an invitation by the Chair for participants in the Preparatory Committee to make proposals by 5th December. These proposals were made notwithstanding that there hasn't yet been a substantive discussion about settlement of disputes and what should be covered. So I think I take the point, what problems are we going to address? That conversation hasn't yet taken place. Settlement of disputes has been identified as one of the cross-cutting issues that will need to be addressed and so we hope that in this forthcoming Preparatory Committee, which will be very decisive in terms of actually addressing some of these very substantive issues, if we will move forward we will have more clarity.

In terms of the question as to who would have jurisdiction or which forum, of course, when we talk about marine genetic resources this is still a very highly divisive issue. There are different points of

view on the legal status of marine genetic resources or with States supporting or considering it the common heritage of mankind and other States not, thinking that it is a part of the freedom of the high seas. Of course, whatever result there will be, that will have a bearing also on the kind of forum that might be best placed to address these.

In terms of the question from Judge Ndiaye, do we need to expand the jurisdiction of ITLOS to deal with the issue? Maybe a little premature again. I am going to be dodging anything that goes into policy directions because, please, appreciate the fact that since these issues are under discussion, the Secretariat is trying to keep a very neutral position on these and that is perhaps also then the answer to Mr Paasivirta's question about whether - since we already have an implementing agreement that has essentially applied the provisions of Part XV *mutatis mutandis* - the same approach should be taken. That of course I mentioned earlier. I just want to highlight that in case No. 17, the Seabed Disputes Chamber did talk about the *erga omnes* character of the obligations relating to the preservation of the environment on the high seas and in the Area and I think some of the nongovernmental organizations are particular pushing for more of a participatory approach. But again this all is part of what will be discussed in the context of the Preparatory Committee. So perhaps I will leave it out for them. Thank you.

President Golitsyn: Thank you, I think that these questions and answers prove that it was a good idea to organize this symposium “looking into the future after 20 years” because there are a lot of developments taking place and of course the Tribunal and other judicial institutions should be mindful about these developments and be prepared to deal with the new issues when they arise. So the floor is open. Please, further questions or comments?

Mr Jun-ho Park: My name is Park Jun-ho from the Ministry of Foreign Affairs of Korea. Thank you for the wonderful speech of all three speakers. My question is to Ms Goettsche-Wanli also about BBNJ and due diligence and I think it was a wonderful elaboration of the past cases and the jurisprudence from both tribunals and my question was, is it possible for the jurisprudence of due diligence - especially based and developed on sovereignty issues - is it possible to be directly applied to the areas on the BBNJ shores because it is more beyond the national jurisdiction? So that was my primary question. Thank you.

President Golitsyn: One more question, I think, Judge Heidar had a question and then you will also.

Judge Heidar: Thank you, Mr President, I actually don't have a question but a few comments. I find it admirable that Ms Goettsche-Wanli, Gabi, as I call her personally, was able to give a whole lecture on BBNJ without once referring to the acronym, "BBNJ". Ms Lijnzaad, who used to be one of the Co-chairs of the BBNJ Working Group, was discussing the question of the dispute settlement mechanism in the new BBNJ agreement. I would tend to agree with her, having also spent a considerable part of my life working on this issue in the Working Group, that – although it is good to start thinking about it – it is probably better to focus on the substantive provisions first and then consider what is fitting in terms of dispute settlement when you know more about the substance of the agreement. Ms Lijnzaad also made a comment with regard to technical issues, such as marine genetic resources. My expectation is actually that the BBNJ agreement will be a kind of a framework agreement and I would be rather surprised if the agreement will go into much technical detail of marine genetic resources and other aspects of BBNJ, although it is of course not for me to say. So I would think it will be this Tribunal and the other mechanisms that are already in place that will be entrusted with dealing with disputes concerning interpretation and application of the new agreement. I would be surprised if that were not the case. However, this brings to my mind the option provided for in article 289 of the Convention to include two or more scientific or technical experts in a case. I think this provision may become quite practical in the future because the world is becoming more technical and complicated. This does not only apply in the context of BBNJ but in other areas as well, for example regarding disputes concerning delimitation or delineation of the continental shelf beyond 200 M. Thank you.

President Golitsyn: Thank you. There was a question at the back. Yes, please.

Ms Inês Aguiar Branco: Good morning. My name is Inês. I am a Nippon fellow here at the Tribunal. Actually I just finished my presentation to the Judges on this issue and my question is to Mr Lodge. It's connected to your reply to Victor's question. Given the fact that you consider – and I totally agree, by the way – that the International Seabed Authority can have a mandate to establish an MPA or whatever you decide to call them in the seabed, my question is whether or not

you think that this new agreement should also look at how cooperation should be arranged between the International Seabed Authority and regional organizations that either already have a mandate to establish high seas MPAs because - I don't know exactly - but maybe if you have an MPA in the high seas above an area of the Area maybe you will feel more compelled to also protect the seabed, maybe not, but if you, after having an MPA in the high seas above your area, if you will allow exploitation, maybe the purpose of having an MPA there would be completely overcome. So my question is whether or not your feeling in the negotiation is that cooperation is going to exist and how exactly that cooperation can be put inside the agreement? Because, for example, I know that OSPAR tried or is trying to make some kind of memoranda of understanding with the IMO and ISA like they did with NEFAC for marine protected areas in the high seas but so far no progress has been made with those memoranda of understanding. And therefore my question, thank you very much.

President Golitsyn: One more question. Sir Michael.

Sir Michael Wood: Thank you. Michael Wood. A very simple question: Is it time perhaps at the 20th anniversary to take active steps to try and get States to think again about their choice of procedure? We all know that arbitration is the fallback, maybe that is what States want, but I feel that bureaucratic inertia is the main reason why States haven't thought at least for 10 or 20 years since they joined the Convention, and perhaps not even then, which procedure to choose. Whether some active campaign on the part of the UN, I suppose, more than ITLOS itself, which would look a bit self-serving, might be a good thing. Thank you.

President Golitsyn: Thank you. So we will start with Ms Goettsche-Wanli.

Ms Gabriele Goettsche-Wanli: Thank you for the questions and the comment and the question. So perhaps first to the first question that was raised by the gentleman from the Ministry of the Republic of Korea about due diligence. If I understood his question correctly, how would the due diligence obligation that applies within areas of national jurisdiction also apply beyond areas of national jurisdiction, and here I just really want to reiterate what I said about case No. 21. It is really important also for areas beyond national jurisdiction, even though the case focused on IUU fishing within areas of national jurisdiction

because it elaborated quite a bit on the judice of the flag State, including also the expanded interpretation that has been given now to article 94 and that is not just looking at the administrative matters in relation to what had previously been highlighted – labour conditions, ship safety, prevention of pollution – but now we also have included in that fishing and so, of course, that article obviously can be looked at from a much broader perspective. And then of course it raises the question of the due diligence of the flag State, bearing in mind also what the Tribunal had already said in case No. 17 about the due diligence obligation, and this is a direct obligation.

I think with Judge Heidar I have no comment. And with respect to Sir Michael Wood's suggestion that perhaps the UN should become more active and perhaps give the opportunity to States to perhaps rethink. Certainly I think this is something we would be very open to as a suggestion, perhaps on the occasion if we have our colleagues from the International Tribunal for the Law of the Sea because I think there is a close relationship, or one could maybe organize this in the margins of the Meeting of States Parties, maybe a side event. There are various ways of bringing this forward so I think it's a very good suggestion. I think it is something that we could seriously consider and that we would be ready to help in that regard.

It is a fact, I just want to mention this, and perhaps being in the UN for many years - I am sorry, this is an aside - but I have noted over the thirty years that I am at the UN that there is less and less awareness of the 1982 United Nations Convention on the Law of the Sea. This is something that is a real problem. I know this is not the case here, but I just want to emphasize that point, so I think it's a good suggestion because it is also important to raise awareness that there is this constitution for the oceans, this legal framework within which all activities of the oceans are supposed to be carried out, so any opportunities that we can all perhaps do, maybe this is also an encouraging move forward in raising awareness of the importance of the Convention. I think it is definitely a very worthwhile effort and maybe that would also prompt States for further action. Thank you.

President Golitsyn: We take note of these assurances of the Director of DOALOS. Mr Michael Lodge.

Mr Michael Lodge: Thank you and I certainly agree with the last comments that were made by Gabi. Well, the question to me was whether there should be cooperation between different organizations or different agreements in respect of protection of areas beyond

national jurisdiction and I think the simple answer is yes, of course, there should be cooperation. But the extent of cooperation depends upon the facts and it depends upon the circumstances, depends upon what is necessary, so let me give you two contrasting examples.

One is the example of the Clarion-Clipperton Zone where there are certain areas of the seabed that are protected by the Authority. There may or may not also be fishing taking place in the high seas above those areas and there is, I understand, a certain amount of tuna fishing that goes on, but tuna are migratory species, they move in and out of the area, and it really makes no difference whatsoever to the protection of the seabed whether there is protection of a closed area for tuna fishing in that area. On the other hand, there could be situations for example in the case of a seamount; if you want to protect a seamount perhaps you want to prohibit mining, that would be a task for the Authority, then you might also want to prohibit bottom fishing on that seamount, that would be a task for the relevant regional fisheries management organization. So there would be a strong case there for cooperation and coordination between the competent organizations.

The question I suppose is whether you actually need a new international treaty to achieve that level of cooperation and coordination and I would question that. I am not sure you need a treaty just to establish coordination between organizations. It's arguable in fact that States already have an obligation to cooperate under the Convention, under article 192 and various other articles, so I am not sure what would be achieved by creating a new treaty for that purpose. But the short answer to your question is that yes, of course, cooperation and coordination are desirable and in my experience it is something that in general happens. I think organizations are reasonably well aware of the need to cooperate.

President Golitsyn: Thank you. Speaking about tuna, I recently had an opportunity to visit Japan and together with Judge Yanai we visited a tuna farm in Japan. The Japanese are well-advanced in this field and probably in five years there will not be any tuna fishing on the high seas because it will all be produced at the farms, at least I think in two or three years, we were told, 50 per cent of the Japanese requirements of tuna will be supplied by the tuna farms. So in the future you will be eating sushi and sashimi from farms and not from the high seas. Any other questions? Judge Lucky.

Judge Lucky: Thank you very much. My question is directed to the Secretary-General and the question is this: As you know, your

headquarters are in Jamaica, and as you also know, there is now a very keen interest of all the Caribbean States, most of which border the Atlantic. The question I want to ask is this: Based on what you have said with respect to the International Seabed Authority, there are matters that are coming up which involve commercial activity, commercial law and then, if I got it correctly, I hope I remember, if there are collisions with ships then the question of the law of contract and the law of tort. Now, as you know, there is this distinction in a commercial situation and in a situation of a tort and damages. These would be referred to the Council if something happens. On the question of jurisdiction then, does the Authority feel that, for example, the Tribunal would have the competence to deal with such a commercial matter or the Tribunal would have the authority – or even the ICJ, but we are dealing with the Tribunal – to deal with a matter involving damages or tort? And thirdly, I think you are aware of the Treaty of Chaguaramas and the establishment of the Caribbean Court of Justice. The Caribbean Court of Justice is now indicating that it has the authority to give an advisory opinion on matters pertaining to the members which are the Caribbean States and Belize is the headquarters for the Caribbean Fisheries Commission. So in those circumstances, I know you touched on it on commercial and torts etc., is the Authority considering this question of the jurisdiction of national, regional and international courts?

President Golitsyn: One last question. The Registrar has a question.

Mr Philippe Gautier: Thank you Mr President and I take note of the next side event to be organized in June in New York. We are ready for that. Now my question is addressed to Michael Lodge. I heard with great interest reference made to 21 contracts signed. I asked myself whether any consideration was given to the issue of multiple sponsorships within those contracts. According to the Convention, and I think it was recalled by the advisory opinion, sometimes a contractor should be sponsored by more than one State. Is there any thought given to that? That is a simple question.

President Golitsyn: Thank you. Mr Michael Lodge.

Mr Michael Lodge: Yes, thank you very much for the questions. Well, in answer to the question from the Registrar, I think I am right in saying there is only one contract at the moment that has multiple sponsoring States, which is the contract with the Interocean Metal Joint

Organization involving Poland, the Russian Federation and a number of other States. So I am not sure there is any other situation that is envisaged at this time. Although the regulations and the Convention do make provision for the situation where an entity changes its sponsorship for one reason or another.

The question from Judge Lucky, that's a very interesting question. I am not sure if we have given much consideration to that and I think it would also depend upon the facts of a particular situation and the jurisdiction of a particular regional court or tribunal before one could really express an opinion. In particular, I am not sufficiently well-aware of the jurisdiction of the Caribbean Court. Perhaps I should be, but I have to confess that I am not. The point that I was making in my statement, however, was that there are certain disputes that one could foresee, easily foresee, arising during exploitation phase that are not covered by article 187. And one of those types of dispute is a dispute between contractors which maybe arise out of a physical incident in the area, a collision, or one contractor poaching from another contractor's area, but they are not covered. Those disputes between contractors are not covered under article 187. The jurisdiction under article 187 is very much dependent upon the existence of a contract between the Authority and the other party. So the question arises as to how those disputes may be dealt with. It may well be that contractors are happy to deal with those types of disputes in commercial arbitration or through municipal courts in whatever jurisdiction they decide should apply. The question I was raising in my presentation was the suggestion that has been made in relation to the development of the new exploitation regulations that it might be, one solution might be to enlarge the jurisdiction of the Chamber to deal with that kind of dispute under the new regulations being adopted by the Authority. Of course, there are arguments both ways and I was not expressing a view either way. In fact I was trying to set out the arguments for and against that idea. But it is an idea that has been raised and may at some stage be discussed by the Council.

President Golitsyn: Well, this brings us to the end of this morning's session. I would like to thank the presenters including myself for our presentations. We reconvene here at 2:00 p.m.

Resolution of international fisheries disputes and regional experiences: The case of the European Union

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1. Introduction

The International Tribunal for the Law of the Sea (hereinafter “ITLOS”) – celebrating its 20-year anniversary – benefits from the particular hallmark of the rule of law which is associated with the existence of a judicial institution which is of a permanent standing nature. ITLOS was established by article 287 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”) as a permanent judicial body acting according to its Statute contained in Annex VI of the Convention. It has jurisdiction over any dispute concerning the interpretation or application of the Convention and other international agreements related to its purposes. ITLOS also serves as advisory jurisdiction, as provided for in the Convention and its Statute.

However, the Convention on the Law of the Sea does not have a monopoly on the settlement of international maritime disputes. While the negotiators of the Convention, in their wisdom, saw that a system of compulsory settlement of disputes is indeed necessary in order to secure the legal order of the oceans and seas, it was also considered appropriate to leave a certain degree of choice to the Parties to the Convention. Hence, in addition to ITLOS, article 287 foresees a range of different dispute-settlement bodies with equal standing, including the International Court of Justice (hereinafter “the ICJ”) and arbitral tribunals constituted in accordance with Annex VII. The drafters' search for a compulsory dispute-settlement system is perhaps best illustrated by Annex VII arbitration, which applies by default, in the absence of the choice of ITLOS or the ICJ. Furthermore, the principle of compulsory dispute settlement can be satisfied by yet another mechanism permitted under the Convention. Pursuant to article 282, the procedures of the Convention can be substituted with procedures under other international agreements, including regional or bilateral

* The views expressed in this paper are purely personal and not necessarily those of the Commission or other EU institutions.

agreements, on condition that such other procedures entail legally binding decisions. This leaves scope for regional courts such as the EU judiciary to fulfil the tasks within the Convention framework.

This paper addresses dispute resolution in the fisheries field and in particular it describes how international dispute resolution is further shaped by regional arrangements and experiences in the European Union. The European approach is led by two general considerations. Firstly, the EU has an “internationalist” outlook in that it participates actively in international treaties and promotes international dispute resolution. This has found its expression in the EU’s founding treaties pledging for the rule of law, respect for international law and promotion of multilateral solutions to common problems to guide its international action.¹¹⁸ The fisheries field is one example, and it is also a field in which the EU has taken a particular interest for a long period of time. This interest stems from the conduct of fishing activities overseas by EU member State-flagged vessels, and the EU is also an important import market for fisheries products from other States. Both fishing interests and trade interests influence the EU’s policies. The EU is a party to all major multilateral instruments, such as UNCLOS and the United Nations Fish Stocks Agreement. It has also concluded a large number of bilateral fisheries agreements with non-EU States, which provide, *inter alia*, for access to the waters of other States for the conduct of fishing operations and joint management of fish stocks. Secondly, as a regional actor, the EU has its own policies and interests and in particular it has its own legal order. It acts as the legislator for the whole region, on the basis of its exclusive competence in fisheries policy, as provided in its founding treaties.¹¹⁹ Its nature as a supranational regional legal order is predicated on reserving issues related to the interpretation of EU law to the control of its own judiciary. The EU judiciary – the Court of Justice of the European Union and the General Court – provide ultimate legal authority on issues concerning disputes over the interpretation of EU law. The member States are committed not to submit such disputes to any other method of dispute settlement.¹²⁰ In this respect, the commitment extends to disputes *inter se* between the EU member States and it applies to the interpretation of international treaties to

¹¹⁸ Article 21(1) of the Treaty on European Union (hereinafter “TEU”).

¹¹⁹ Article 3(1)(d) of the Treaty on the Functioning of the European Union (hereinafter “TFEU”).

¹²⁰ Article 344 of the TFEU.

which the EU and its member States are parties, such as UNCLOS, provided that the issues at stake fall within the EU competencies.¹²¹ It results from all this that the EU judiciary addresses, on a regular basis, fisheries and other maritime-related legal issues, including interpretation of international agreements. These regional institutional arrangements also affect and restrict the range of cases which could otherwise come under the jurisdiction of ITLOS or the other judicial or arbitral bodies foreseen in UNCLOS.

Against that background, this paper addresses a series of particular issues and experiences related to dispute resolution in the fisheries field. This includes: the EU's attitude to international dispute settlement generally; the scope of ITLOS's advisory jurisdiction; the question of judicial control over access to fishing opportunities; unilateral action to address questions such as illegal, unreported and unregulated (hereinafter "IUU") fishing and unsustainable fishing; questions connected with the "split jurisdiction" of international treaty regimes; bilateral fisheries agreements; and the distribution of cases to the regional EU courts. The purpose is to provide an overview of the EU experiences and to discuss issues in so far as they may be of wider interest and relevant to the understanding of the role of ITLOS and international dispute resolution in the fisheries field.

2. The standing of the European Union before UNCLOS dispute-resolution institutions

The EU has recently conducted an internal review of its international ocean policy across different maritime sectors. In this connection, the Communication from the EU Commission and High Representative stresses, *inter alia*, the importance of a "rules-based approach" and calls for "improving the international ocean governance framework".¹²² The respective Council conclusions following the communication commit

¹²¹ Notably, EU competence does extend to disputes over maritime borders, which remain within the national competence of the EU member States, while EU institutions may act as facilitators in the process leading to arbitration proceedings between EU member States. This is reflected in the Slovenia/Croatia arbitration (PCA Case No. 2012-04) over their land and maritime boundaries. On the EU-related background, see in particular The Partial Award, 30 June 2016. <https://pcacases.com/web/sendAttach/1787>

¹²² Joint Communication on International Ocean Governance (Join(2016) 49 final of 10.11.2016: https://ec.europa.eu/maritimeaffairs/policy/ocean-governance_en

to promoting, in the context of political dialogues with other third countries,

the concept of peaceful settlement of maritime disputes, the dispute settlement mechanisms provided by the UNCLOS, including the International Tribunal for the Law of the Sea (ITLOS), and by the International Court of Justice, and the full implementation of decisions rendered by the courts and tribunals established under or referred to by the UNCLOS.¹²³

The statement by the EU High Representative on foreign and Security Policy stresses in the same vein, following the *Philippines v. China* arbitration award: “The EU recalls that the dispute settlement mechanisms as provided under UNCLOS contribute to the maintenance and furthering of the international order based upon the Rule of Law and are essential to settle disputes”.¹²⁴

At present, Annex VII arbitration procedures apply to the EU by default, since it has not made a specific declaration in favour of ITLOS as a permanent choice for future disputes. However, this does not prevent ITLOS or its chamber from playing a role in individual disputes, in addition to the role that ITLOS plays automatically as defined in the Convention, for instance as regards advisory jurisdiction.

At the time of the ratification of UNCLOS by the EU (1998), the choice of dispute-settlement procedures was under consideration within the EU institutions. Quite predictably, since it was question of a new judicial institution, most of the EU member States did not have a definite position and many of them considered that a possible choice of ITLOS on a permanent or case-by-case basis would depend to a large extent on the performance of the Tribunal. Also the Tribunal’s performance in its first Judgment in the *M/V “SAIGA” Case*¹²⁵ was not considered fully satisfactory.¹²⁶ The European Commission appears to

¹²³ <http://www.consilium.europa.eu/en/press/press-releases/2017/04/03-international-ocean-governance/>

¹²⁴ The statement of 15.7.2016: <http://www.consilium.europa.eu/en/press/press-releases/2016/07/15-south-china-sea-arbitration/>

¹²⁵ *The M/V “SAIGA” Case* (Saint Vincent and the Grenadines v. Guinea) (Judgment of 4 December 1997), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_1/judgment_041297_eng.pdf

¹²⁶ There has been wide-spread criticism of the handling of the procedural aspects of the majority judgment as expressed in the several dissenting opinion and legal commentary: W. Lowe, “The M/V SAIGA: The first case in the International Tribunal for the Law of the Sea”, 48 *International and Comparative Law Quarterly* 187 (1999).

have adopted a “wait-and-see”-attitude, like most of the member States. At the time, it estimated that the EU was more likely to be involved in fisheries cases which rather relate to the United Nations Fish Stock Agreement than the Convention itself, and regional fisheries agreements have their own dispute-settlement mechanisms. On the other hand, it was acknowledged that ITLOS was a prepaid and easy-to-reach procedure. The internal deliberations were followed up by the European Commission making a proposal to the Council not to express preference for ITLOS as, in its analysis, the time was not yet ripe for such a choice as the Tribunal’s initial decisions were as yet inconclusive. Consequently, no specific declaration in favour of ITLOS was made.¹²⁷ That outcome applies also to the Fish Stocks Agreement, which contains in its Article 30(3) a cross-reference to article 287 of UNCLOS.

Thus, currently, UNCLOS Annex VII arbitration applies by default to the EU. It did not, however, prevent the EU, in the context of the Swordfish case (2000-2009),¹²⁸ from entrusting the dispute to a special chamber of ITLOS, constituted under Annex VII prerogatives.

These basic choices regarding dispute-settlement procedure under UNLCOS have not been deliberated during recent years and the “wait and see”-attitude still applies. The reality is that for a political institution to review or change its earlier position some concrete triggers are normally required, which give rise to fresh reflection, often as part of a wider setting of amendments or adjustments to the agreements.

Moreover, the EU took an active part in the ITLOS advisory proceedings, without questioning ITLOS’s jurisdiction despite the highly controversial nature of the scope of the jurisdiction.

The possibility of introducing dispute-settlement clauses into the EU’s bilateral fisheries agreements has been mentioned in informal contacts between ITLOS and the European Commission, and the issue of such clauses has been flagged in the context of a public

¹²⁷ Proposal for a Council Decision concerning the Community’s choice of dispute settlement procedures under the United Nations Convention on the Law of the Sea of December 1982. COM(1999) 233 final of 18.05.1999. Regardless of its title, that proposal did not result in any formal decision by the Council and years later the proposal was withdrawn. COM(2004) 542 final of 10.3.2005 at p. 32.

¹²⁸ *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*, <https://www.itlos.org/cases/list-of-cases/case-no-7/>

consultation.¹²⁹ Yet this has not led to any initiatives in the context of bilateral agreements.¹³⁰

3. The role of ITLOS advisory opinions in the fisheries field: diverse experiences over jurisdiction *versus* substance

ITLOS Advisory Opinion No. 21 of 2015¹³¹ relating to IUU fishing proved to be a controversial case in respect of ITLOS jurisdiction, while the Opinion makes useful substantive contributions and above all highlights the importance of combatting IUU fishing practices.

This was a case brought by the Sub-Regional Fisheries Commission, a West-African fisheries organization consisting of seven member States, requesting the Tribunal's opinion relating to certain issues relating to IUU fishing practices. It raised four questions, relating to flag State duties, responsibilities in situations involving a competent international organization and coastal States' rights and duties. Yet the main issues turned out not to be on substance, but whether the Tribunal had jurisdiction to render such an opinion, attracting most observations during the proceedings.

The advisory jurisdiction of ITLOS is foreseen in article 138 of the Rules of the Tribunal, which the Tribunal had adopted itself as part of its legal autonomy.¹³² Yet advisory jurisdiction was not expressly provided for in the Convention, except in the case of the

¹²⁹ In the EU Commission's Green Paper: Towards a future of Maritime Policy for the Union: A European vision for the oceans and seas, it was stated: "The application and enforcement of rules agreed in the context of UNCLOS can be strengthened by the systematic introduction in agreements of referrals to the International Tribunal of the Law of the Sea or, where appropriate, to other forms of dispute settlement of any disputes which cannot be resolved by diplomatic consultation". COM(2006) 275 final Vol. II Annex, 7.6.2006, at p. 42. http://eur-lex.europa.eu/resource.html?uri=cellar:b2e1b06a-6ca9-4e24-ac15-60e1307f32e2.0003.03/DOC_1&format=PDF

¹³⁰ For instance, this is no longer mentioned in the EU Commission's follow-up communication on an Integrated Maritime Policy for the European Union COM(2007) 575 final of 10.10.2007 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0575&from=EN>

¹³¹ Case No. 21: *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion*, 2 April 2015, <https://www.itlos.org/cases/list-of-cases/case-no-21/>

¹³² Article 138 (1)-(2) of the Rules of the Tribunal provides: "1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purpose of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal."

advisory role of the Seabed Disputes Chamber, which is established directly in article 191 of the Convention.¹³³ So, the question regarding advisory opinions in fishery matters raised an issue of the validity of article 138 of the Tribunal's own Rules and its consistency with the Convention. That was a daunting scenario and it did not come as a great surprise that the Tribunal did not confirm any *ultra vires* and let down its own Rules, but concluded that it was competent to issue such advisory opinions. The key provision is article 21 of the ITLOS Statute (which is an integral part of the Convention), providing for the Tribunal's jurisdiction, not only with regard to "disputes" and "applications", but crucially also in respect of "all matters" specifically provided for in any other agreement which confers jurisdiction to the Tribunal. On the basis of this wording, the Tribunal ruled that, while the Convention does not directly establish advisory jurisdiction in respect of matters other than those falling within the functions of the Seabed Disputes Chamber, the Convention nevertheless permits the Tribunal to fulfil advisory functions, provided that this is established in another agreement related to the purposes of the Convention and the request fulfils certain conditions. Thus, the advisory jurisdiction functions can be effected under certain conditions.

Admittedly, the Tribunal's legal reasoning is perhaps not fully reassuring, in particular since the question of advisory jurisdiction was addressed in a brief and cursory fashion.¹³⁴ The Tribunal relied ultimately on subtle linguistic distinctions, but absent of any real discussion of the arguments that were advanced against it.¹³⁵ In spite of this, the Tribunal's approach is quite possible. Namely, there is a difference in *establishing* advisory jurisdiction in the Convention itself (Seabed Disputes Chamber) and *permitting* the exercise of such jurisdiction in other cases provided that jurisdiction is actually conferred by another agreement related to the purposes of the Convention.¹³⁶ Arguably this amounts to the same, provided that, in the

¹³³ ITLOS gave an earlier Advisory Opinion in Case No. 17: *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, <https://www.itlos.org/cases/list-of-cases/case-no-17/>

¹³⁴ Advisory Opinion, paragraphs 40-51 (summary of arguments) and 52-59 (reasoning).

¹³⁵ For a critical discussion, see, e.g., T. Ruys and A. Soete, "'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea", *Leiden Journal of International Law* (2016)155-176.

¹³⁶ Advisory Opinion, paragraph 58.

latter case, the exercise of jurisdiction is properly controlled and confined to specific issues, especially of regional or local character in order to avoid circumvention of the consent of other parties. It is not irrelevant that the parties to UNCLOS seem not to have reacted against the adoption of article 138 of the Tribunal's Rules. It could be argued that they must be presumed to have had knowledge of it as contracting parties, even though not formally participating in the adoption of the Tribunal's Rules.¹³⁷ Under those conditions, the Tribunal could serve a useful function in relation to specific issues in the context of fisheries or facilitate boundary delimitations or compatibilities between conservation measures between high seas and exclusive economic zone (hereinafter "EEZ") regimes, if so requested, especially by a regional body or organization.

In any event, it is quite possible and even likely that doubts around the question of advisory jurisdiction continue to persist also in the future. The diversion of views was also felt amidst the European Union as the views of the member States were entirely divided on this question while others did not have a clear position. Hence, the European Commission, representing the EU as a contracting party to UNCLOS, decided not to address the controversial question of jurisdiction. The EU observations were focused on the substance, without prejudice to jurisdiction, the aspect that was addressed by some of the EU member States. The compromise was motivated by practical considerations, also given the importance of combatting IUU fishing in EU policy and the high likelihood that the Tribunal was expected to assume jurisdiction.

As regards the substance, the first two questions the Tribunal was requested to address concerned flag State duties and potential liabilities in cases of IUU fishing. The third question concerning the liability of a competent international organization was of particular interest to the European Union as it relates to the central role that it plays in fisheries policy-making in respect of its own member States and the potential liabilities that may follow from this. The Tribunal confirmed, in relation to fishing licences issued within the framework of a fisheries access agreement between a coastal State and an international organization having exclusive competence in fisheries

¹³⁷ Cf. by analogy, O. Dörr and K. Schmalenback (eds), *Vienna Convention on the Law of Treaties. A Commentary*. Springer 2012, p. 802, suggesting, in respect of Article 46(2) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, that members of an international organization must be presumed to have knowledge of limitations on the competence of the organization.

matters in respect of its member States, that the obligations of the flag States become the obligations of the organization. Therefore, the organization itself, and not its member States, may be held liable for violations of the due diligence obligations normally belonging to the flag States.¹³⁸ This was in line with UNCLOS provisions as well as the observations of the EU during the proceedings. The Opinion is a useful clarification of the international law doctrine of the responsibility of international organizations, though it leaves intact certain issues and areas where the organization does not have exclusive competence but shares it with its member States. The fourth question concerned duties of the coastal States for sustainable management of shared stocks and stocks of common interest and the Tribunal usefully highlighted a variety of cooperation duties related to articles 63 and 64 of the Convention

In this connection it is perhaps of interest to note the detail that the ITLOS Opinion in Case No. 21 later played a role in the EU legislative process in that it assured additional control by public authorities over fishing activities. This concerned in particular control of what Brussels jargon calls “private licences”, which refers to situations not covered by an international access agreement where the operator seeks a licence directly from the coastal State. Thus, as a follow-up later in 2015, when the EU Commission made a proposal for an internal EU Regulation concerning management of external fishing fleets, its motivation relied partly on the ITLOS Opinion in Case No. 21 in view of acquiring more effective control mechanisms for fishing activities under such private licences.¹³⁹ While that legislative process

¹³⁸ Advisory Opinion, paras 172-173.

¹³⁹ In this respect, the explanatory memorandum of the relevant EU Commission proposal stated: “Finally, in April 2015, the International Tribunal for the Law of the Sea (ITLOS) delivered its advisory opinion on Illegal, Unreported and Unregulated (IUU) matters within the exclusive economic zones (EEZs) of the members of the Sub-Regional Fisheries Commission. ITLOS considers that a flag State’s responsibility to prevent and/or repress IUU fishing activities within the EEZs of coastal States to be an obligation of ‘due diligence’. ITLOS stresses the liability of the Union, and not its Member States, for any breach of the fisheries access agreements it has with coastal states”. Proposal for a Regulation of the European Parliament and of the Council on the sustainable management of external fishing fleets, repealing Council Regulation (EC) No. 1006/2008 COM(2015) 636 final (10.12.2015), at p. 3. <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-636-EN-F1-1.PDF>

is not fully completed, it appears that there is political agreement to reform the system in that direction.¹⁴⁰

It is perhaps fair to say that the Advisory Opinion in Case No. 21 has left the UNCLOS contracting parties with mixed feelings. In addressing IUU fishing – a key challenge in the oceans – the Opinion surely promotes the aim of establishing “a legal order for the seas and oceans”, as envisaged in the preamble of the Convention. Yet it has left others doubtful whether this was done “with due regard for the sovereignty of all States”, as also envisaged in the preamble. A practical consequence of jurisdictional controversies may be increasingly reduced participation in future proceedings and, also depending on how the opinions are treated in subsequent judicial and State practice, they could be seen to reflect less authority than might otherwise be the case.

4. To what extent are coastal States beyond judicial control? The experience of the *Atlanto-Scandian Herring Arbitration*

Fisheries do not constitute a unified field in legal terms, but it is a highly fragmented field, including with regard to mechanisms for dispute settlement. Substantive rules are partly contained in UNCLOS, partly in a number of subsequent instruments, in particular the United Nations Fish Stocks Agreement. The jurisdictional rules of UNCLOS are complex and the dispute-settlement provisions contain exceptions and limitations which can be split between different aspects of what is in reality the same dispute. This complicates the management of the litigation as no single tribunal is able to have oversight of all aspects. It in turn can give rise to sophisticated litigation tactics and very qualified legal claims, excluding some aspects and including others, though in fact they are part of the same pattern of activities.

The *Atlanto-Scandian Herring Arbitration*¹⁴¹ between the Faroe Islands (Denmark) and the European Union featured these kinds of potential issues, though they did not surface fully since the case was soon settled by negotiation between the parties. While the case is therefore of limited legal value, it points to certain problems in the UNCLOS judicial/arbitral procedures.

¹⁴⁰ Provisional agreement resulting from interinstitutional negotiations. European Parliament Fisheries Committee, Chapter II, Section 2 relating to operations under direct authorisations. [http://www.europarl.europa.eu/RegData/commissions/pech/inag/2017/06-26/PECH_AG\(2017\)607818_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/pech/inag/2017/06-26/PECH_AG(2017)607818_EN.pdf)

¹⁴¹ PCA Case N° 2013-30, Kingdom of Denmark in respect of the Faroe Islands v. European Union, <https://pca-cpa.org/en/cases/25/>

This dispute originated in a dispute between the Faroe Islands (which are part of Denmark, but outside the EU) and the EU over the quota arrangements concerning the shared stock of Atlanto-Scandian herring. The stock has traditionally been managed through consultations amongst the relevant coastal States whose EEZ is visited by these fish during their migration cycle. Following the failure to reach agreement in the annual consultations, the Faroe Islands unilaterally announced new and increased catch limits for its fleet, which deviated significantly from the previous sharing arrangements, which the EU side considered unsustainable. This led to the EU adopting measures banning the import of fish or fishery products caught by vessels flying the flag of the Faroe Islands and the vessels were subjected to restrictions on the use of EU ports.¹⁴² In 2013, in the face of the EU measures, the Faroe Islands then initiated arbitration proceedings under Annex VII of UNCLOS, under the auspices of the Permanent Court of Arbitration.

The point which is relevant for the present purpose concerns the limited scope of the arbitration proceedings. UNCLOS generally favours coastal States as regards their own EEZs, where they enjoy sovereign rights, in the sense that it does not impose an obligation for them to submit exploitation-related disputes to legally binding dispute settlement. In this regard, it is noted that the claim brought by the Faroe Islands alleged violation by the EU of its obligations to cooperate under article 63, paragraph 1, of the Convention,¹⁴³ which was a very narrowly defined legal ground whereby the Parties are committed to “seek to agree” on the measures necessary to coordinate and ensure the conservation and development of the relevant fish stocks. That narrowly construed “zonal approach” reflected the structure of UNCLOS, while the EU’s had concerns which were “stock based”, relating to sustainable fishing and going beyond the maritime zones.¹⁴⁴ That poses a potential issue as to whether disputes can be dealt with adequately in arbitration proceedings where basically coastal States benefit from certain exceptions.

Namely, section 3 of Part XV of the Convention contains a series of carefully drafted limitations and exceptions restricting the invocation of dispute-resolution provisions of the Convention against coastal States as concerns certain activities and sectors. While the

¹⁴² Commission Implementing Regulation (EU), No. 793/2012, OJ L 223, p. 1.

¹⁴³ Press Release of the Permanent Court of Arbitration, 17 March 2014, <https://pcacases.com/web/sendAttach/302>

¹⁴⁴ See European Commission’s Press release, 11 June 2014, http://europa.eu/rapid/press-release_IP-14-668_en.htm

Convention's dispute-resolution mechanism does apply to the fisheries field, it can be invoked against a coastal State only to a limited extent in so far as disputes concerning fishing opportunities in its EEZ are concerned. Article 297, paragraph 3(a), of the Convention provides that coastal States are not obliged to accept submission of disputes to the otherwise available jurisdiction of ITLOS or an Annex VII arbitration tribunal relating to its "sovereign rights" with respect to the living resources in its exclusive economic zone

or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

The above-mentioned fairly broad limitations concerning legally binding dispute-settlement procedures were already identified as "hard core" issues during the UNCLOS negotiations and extreme and conflicting views on them were expressed.¹⁴⁵ In the light of the final wording of article 297, paragraph 3(a), it is, however, arguable that they are perhaps not in all respects as restrictive as it may first appear. Namely, while that provision makes an exception to the principle of compulsory legally binding dispute settlement, the restriction applies only so that the coastal State "shall not be obliged to the submission" to such settlement of any dispute relating to its sovereign right relating to living resources, while it could be argued that this does not necessarily apply to a situation where the coastal State itself initiates judicial/arbitral procedures under UNCLOS. In that case the coastal State has in fact *exercised* its sovereign rights, by initiating proceedings, and thus arguably waived potential restrictions regarding the scope of the dispute. The dispute has been removed from the realm of sovereignty to the hands of a tribunal, which could well be expected to give a restrictive interpretation to an exception to the main principle.

Be that as it may, given the above carve-outs favouring coastal States, any contracting party could in any event get around them by

¹⁴⁵ For example, the delegate of the Soviet Union considered that an exemption of a dispute arising out of discretionary rights by the coastal State would considerably diminish the value of the dispute-settlement procedures. On the other hand, the Icelandic representative argued that the concept of the EEZ would be rendered illusory and meaningless. See H. Nordquist, S. Rosenne and L.B. Sohn (eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*. Volume V. Martinus Nijhoff Publishers, 1989, at pp. 91-93, 100.

resorting to an alternative route and initiate conciliation procedures against a coastal State. Such conciliation procedures do not involve similar restrictions and they are compulsory in the sense that they can be initiated unilaterally. Thus, for instance, pursuant to article 297, paragraph (3)(b)(i)-(iii), of the Convention, such procedures can be initiated, for instance, when it is alleged that a coastal State has “manifestly failed” to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in its EEZ is not seriously endangered. The conciliation commission, acting under Annex V of the Convention, would issue a report of its conclusions on factual and legal aspects. While the conclusions are not legally binding on the parties, the report of the conciliation commission would no doubt carry significant weight owing to the fact that it is to be communicated to appropriate international organizations (article 297, paragraph 3(d),) and could be invoked in other relevant contexts. So far, this alternative or substitute has remained rather untested in practice. In any event, such conciliation constitutes a “competing jurisdiction” to the above judicial/arbitral procedures. It would seem to permit the restrictions connected with a State’s sovereign rights in the EEZ on broader conservation-related grounds connected with sustainable fishing practices to be overcome. Hence, it widens the strict “zonal” approach of article 297, paragraph 3, to a more “stock based” approach. Such procedure could be more able to deal with the fact that fish do not respect borders and there are no walls in the oceans.

Thus, the dispute raises the issue as to how narrowly or how broadly the relevant Tribunal would have interpreted its own jurisdiction. The limited legal point of “seek to agree”-duty at stake would have involved assessment of behaviour patterns in the relevant coastal consultations, a very fact-intensive and kind of “law-lite” aspect, and the extent to which broader environmental considerations related to sustainable fishing practices would have been taken into account. The Tribunal did not have a chance to address these issues, nor were they even litigated by the parties, and no conciliation proceedings were initiated in connection with this dispute. Not surprisingly, however, the parties continued their negotiations during the proceedings, and settled the dispute, which in the end led to the Faroe Islands reducing their fish catches and the EU lifting the import

restrictions. The UNCLOS proceedings were terminated by joint request less than one year later.¹⁴⁶

5. Readiness to take unilateral action to address IUU fishing or unsustainable fishing generates litigation in international or regional courts

In the area of EU fisheries policy, certain actions by vessel operators or third States will typically be addressed by essentially *unilateral* corrective instruments, notably the lack of State cooperation, the fight against IUU fishing, or the commission of IUU infringement by vessels under Regulation 1005/2008 of 29 September 2008¹⁴⁷ (hereinafter “the IUU Regulation”), and the non-sustainable fishing of stocks of common interest under Regulation 1026/2012 of 25 October 2012.¹⁴⁸ Such unilateral action can be justified by the seriousness of the threats caused by illegal or unsustainable fishing activities for other nations involved in fishing.

The EU’s IUU Regulation qualifies certain fishing activities as IUU fishing, such as fishing operations without a valid licence issued by the flag State or the relevant coastal State, non-recording and reporting of catches, fishing in closed areas or during closed season, fishing with non-compliant gear, falsification or concealment of identification, fishing in contravention of measures adopted by a regional fisheries management organization (hereinafter “RFMO”) or fishing by stateless vessels (article 3(1) IUU Regulation).

The IUU Regulation also provides, as a condition for importation, for the obligation to submit a catch certificate, validated by the vessel’s flag State (or validated in conformity with the requirements of an RFMO), which contains all the necessary details for assessing that the fish have been caught legally (articles 12 to 16 IUU Regulation).

¹⁴⁶ Order of the Tribunal, 23 September 2014, <https://pcacases.com/web/sendAttach/781>

¹⁴⁷ Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999, OJ L 286, 29.10.2008, p. 1.

¹⁴⁸ Regulation (EU) No. 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, OJ L 316, 14.11.2012, p. 34.

If, following an investigation establishing that IUU infringements have been committed,¹⁴⁹ no appropriate sanctions are imposed on the vessel operator by the flag State (or by the coastal State), the IUU Regulation provides for the possibility, after allowing the vessel operator to defend its case, for the European Commission to place the ship on the IUU vessel list (article 27 IUU Regulation). What the IUU Regulation understands by appropriate sanctions and measures is effective proportionate and dissuasive (administrative) sanctions, intended to deprive the perpetrator of the benefit of the infringement (certain value indications are given) and accompanying measures such as immobilization of the vessel, confiscation or suspension of the authorization to fish (articles 44 to 46 IUU Regulation). Under article 30 of the IUU Regulation the Commission includes in the IUU vessel list the vessels which are on the IUU lists of RFMOs.

As a consequence of being on the European Union's IUU list, a vessel cannot keep or obtain fishing permits from member States, or (for third-country vessels) be authorized to fish in Union waters or be chartered, and their catches cannot be accepted in the Union (article 37 IUU Regulation).

In practice, so far the European Commission has not placed vessels autonomously on the IUU list under article 27 of the IUU Regulation, but it has regularly updated the IUU list based on RFMO lists¹⁵⁰ under article 30 of the IUU Regulation.

In the *Seatech* cases an economic operator from Columbia had challenged the inclusion of a vessel, the “*Marta Lucia R*”, on the IUU list, following its inclusion on the IUU list of an RFMO (the Inter-American Tropical Tuna Commission or IATTC) because it was not on the list of vessels authorized to fish in the IATTC waters. In its challenge, the Columbian operator argued against the validity of the IUU Regulation itself.¹⁵¹

¹⁴⁹ The IUU Regulation provides for investigation procedures based on cooperation with the different authorities involved through an alert system (the flag member State, the coastal State concerned, the port State, the State where the fish is marketed).

¹⁵⁰ Commission Regulation (EU) No. 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, OJ L 131, 29.5.2010, p. 22, last amended by Commission Implementing Regulation (EU) 2016/1852 of 19 October 2016 amending Regulation (EU) No. 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, OJ L 284, 20.10.2016, p. 5.

¹⁵¹ Cases T-337/10 and 500/13: OJ C 288, 23.10.2010, p. 46 and OJ C 377, 21.12.2013, p. 16.

Following the imposition of certain sanctions and the inclusion of the vessel on the list of authorized vessels, the IATTC withdrew the “*Marta Lucia R*” from its IUU list.¹⁵² Consequently, the European Commission removed the vessel from the EU list,¹⁵³ and thereafter the applicant withdrew the case.¹⁵⁴ The sequence of events of this case demonstrates that the inclusion of a vessel of the EU’s IUU list (in addition to the inclusion on an RFMO IUU list) is a powerful incentive or extra incentive for the flag State to impose the required sanctions and for the vessel operator to obtain the necessary authorizations for the vessel to fish.

As far as third States are concerned, the IUU Regulation provides for a system of identification and listing of non-cooperating third States (articles 31 to 35 IUU Regulation). As a first step, after preliminary contacts and fact finding, the European Commission can announce to a third State the possibility of being identified on the basis of concerns regarding the way that State discharges the duties incumbent on it under international law, as flag State, coastal State, port State or market (transit) State (article 32 IUU Regulation). Usually such an announcement or pre-identification is called a “yellow card”, as in sporting parlance. The findings of the Commission (with the accompanying evidence and the ways to address the concerns) are communicated to the third State concerned (usually by way of a letter and a “note verbale”).

Following this announcement a dialogue process (the duration of the dialogue process is set in the announcement, but it can be extended provided there is some progress) is started between the Commission Services and the authorities of the third State concerned, on the basis of a detailed action plan on how to resolve the concerns. Of course the third State concerned can dispel certain concerns and address others by remedial action.

If, following the dialogue, the third State refuses or fails to remedy the concerns (and is not able to disprove the findings), the Commission can identify that State as non-cooperating (article 31 IUU Regulation) and at the same time propose that the Council put that third State on the list of non-cooperating States (article 33 IUU Regulation).

¹⁵² Decided at the 85th session of the IATTC on 10-14 June 2013 (see at: <https://www.iattc.org/Meetings/Meetings2013/June/pdfs/IATTC-85-Minutes.pdf>)

¹⁵³ Commission Implementing Regulation (EU) No. 137/2014 of 12 February 2014 amending Regulation (EU) No. 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, OJ L 43, 13.2.2014, p. 47.

¹⁵⁴ OJ C 315, 15.09.2014, p. 72.

Following the effective identification under article 31 of the IUU Regulation, the third State concerned can no longer validate catch certificates (article 18(1)(g) IUU Regulation), and once it is placed on the list of non-cooperating States under article 33 of the IUU Regulation, importations of fishery products caught by vessels flying the flag of that State are prohibited (unless the identification is for a specific stock), purchases by Union operators of vessels from that State are prohibited, chartering agreements are prohibited and existing bilateral agreements are to be denounced and new ones cannot be negotiated (article 38 IUU Regulation).

In practice the Commission has delivered 24 pre-identifications¹⁵⁵ (“yellow cards”) to Belize, Cambodia, Comoros, Curaçao, Fiji, Ghana, Kiribati, Republic of Korea, Liberia, Panama, Papua New Guinea, Philippines, Republic of Guinea, Sierra Leone, Solomon Islands, Sri Lanka, St. Kitts and Nevis, St. Vincent and the Grenadines, Taiwan, Thailand, Togo, Trinidad and Tobago, Tuvalu and Vanuatu, and of these it was possible to revoke 10 during the dialogue process, without having to proceed with an identification (Curaçao, Fiji, Ghana, Republic of Korea, Panama, Papua New Guinea, Philippines, Solomon Islands, Togo, and Vanuatu).¹⁵⁶ Of the remaining cases, eight are still in the dialogue process (Kiribati, Liberia, Sierra Leone, St. Kitts and Nevis, Taiwan, Thailand, Trinidad and Tobago, and Tuvalu), and in three cases it was possible for the subsequent

¹⁵⁵ Commission Decision of 15 November 2012, OJ C 354, 17.11.2012, p. 1 (Belize, Cambodia, Fiji, Republic of Guinea, Panama, Sri Lanka, Togo and Vanuatu), Commission Decision of 26 November 2013, OJ C 346, 27.11.2013, p. 26 (Curaçao, Ghana and Republic of Korea), two Commission Decisions of 10 June 2014, OJ C 185, 17.6.2014, p. 2 and 16 (Papua New Guinea and Philippines), four Commission Decisions of 12 December 2014, OJ C 447, p. 6, 16 and 23 and C 453, p. 5 (Solomon Islands, St. Kitts and Nevis, Tuvalu, St. Vincent and the Grenadines), Commission Decision of 21 April 2015, OJ C 142, p. 7 (Thailand), two Commission Decisions of 1 October 2015, OJ C 324, p. 6 and 17 (Comoros and Taiwan), and three Commission Decisions of 21 April 2016, OJ C 144, p. 4, 9 and 14 (Kiribati, Sierra Leone, and Trinidad and Tobago).

¹⁵⁶ Notice of information of the termination of the demarches with third countries notified on 15 November 2012, OJ C 364, 15.10.2014, p. 2, Notice of information of the termination of the demarches with third countries notified on 26 November 2013, OJ C 142, 29.4.2015, p. 5, Notice of information of the termination of the demarches with a third country notified on 10 June 2014, OJ C 142, 29.4.2015, p. 6, Notice of information of the termination of the demarches with third countries notified on 26 November 2013, OJ C 324, 2.10.2015, p. 15, Notice of information of the termination of the demarches with a third country notified on 10 June 2014, OJ C 324, 2.10.2015, p. 16.

identification and listing to be revoked when the concerns had been addressed (Belize, Republic of Guinea and Sri Lanka). Finally the identification¹⁵⁷ and listing¹⁵⁸ are still in force in three cases (Cambodia, Comoros and St. Vincent and the Grenadines).

This practice demonstrates that, while the EU institutions take unilateral decisions on pre-identification, identification or the listing of non-cooperating third countries, a cooperative dialogue follows with the aim to resolve (or dispel) the concerns on the third States' cooperation in the fight against IUU, and such dialogue is still kept "open" even after identification and listing. Again, the number of cases where the third State could finally have the concerns lifted (after pre-identification or after identification and listing) demonstrates that this unilateral action constitutes a strong incentive for third States (be it as coastal State, flag State, port State or market State) to take seriously their international obligations to fight against IUU fishing.

Another instrument bearing certain similarities to IUU Regulation, is the Regulation on unsustainable fishing of shared stocks, Regulation 1026/2012.¹⁵⁹ Under this instrument, the European Commission can identify a third country for allowing unsustainable fishing of a fish stock of common interest, where it fails to cooperate in the management of that stock or to take the necessary fishery management measures with due regard to the interest of the Union (article 3 Regulation 1026/2012).

¹⁵⁷ Commission Implementing Decision of 14 October 2014 identifying a third country that the Commission considers a non-cooperating third country pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ L 297, 15.10.2014, p. 13, Commission Implementing Decision (EU) 2017/889 of 23 May 2017 identifying the Union of the Comoros as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, OJ L 135, 24.5.2017, p. 35, and Commission Implementing Decision (EU) 2017/918 of 23 May 2017 identifying Saint Vincent and the Grenadines as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, OJ L 139, 30.5.2017, p. 70.

¹⁵⁸ Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ L 91, 27.3.2014, p. 43, as last amended by Council Implementing Decision (EU) 2017/1332 of 11 July 2017 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting illegal, unreported and unregulated fishing, as regards the Union of the Comoros, OJ L 185, 18.7.2017, p. 37.

¹⁵⁹ OJ L 316, 14.11.2012, p. 34.

With identification, which is to be decided after the third State concerned has been allowed to defend itself or to remedy the situation (article 6 Regulation 1026/2012), the Commission can adopt import restrictions as well as other measures, such as restrictions to access to ports, prohibition of reflagging, chartering etc. (article 4 Regulation 1026/2012).

This instrument has been used once, in the *Atlanto-Scandian Herring* case concerning the Faroe Islands. The stock of Atlanto-Scandian herring is a stock of common interest between the Faroe Islands, Norway, Iceland, Russia and the Union, and, following the failure to set the catch limits in line with the applicable management plan, the Faroe Islands unilaterally increased its share to a point where the stock would be overfished. The four remaining interested parties maintained their traditional shares (leaving aside the usual share of the Faroe Islands).

After allowing the Faroe Islands to comment, in August 2013 the European Commission adopted a Decision¹⁶⁰ restricting access to the EU markets of the fleets active in the Atlanto-Scandian herring fishery. Following this decision, the Faroe Islands initiated an arbitration procedure under Annex VII of UNCLOS (claiming a lack of cooperation), and a dispute-settlement procedure under the WTO, claiming unjustified trade restrictions, as noted further below.

Since the Faroe Islands had set its unilateral fishing opportunities at a level close to a sustainable level the subsequent year, the European Commission repealed the trade measures it had adopted,¹⁶¹ and following this the arbitration and WTO procedures were discontinued.

The practice under Regulation 1026/2012 shows that, although the instrument provides for unilateral Union trade measures, the third States concerned are involved in the procedure, and that dispute-resolution processes which may indirectly address the measures can be activated. Here too, the trade measures constitute an important incentive for third States to maintain their fishing opportunities at levels which, taking into account the shares of the other fishing countries, would be sustainable.

¹⁶⁰ Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, OJ L 223, 21.8.2013, p. 1.

¹⁶¹ Commission Implementing Regulation (EU) No. 896/2014 of 18 August 2014 repealing Implementing Regulation (EU) No. 793/2013 establishing measures in respect of the Faroe islands to ensure the conservation of the Atlanto-Scandian herring stock, OJ L 244, 19.8.2014, p. 10.

6. The challenge of the “horizontal split” of jurisdictions when a fisheries dispute is not only about fishing

Beyond fishing operations, downstream of the fisheries cycle, the applicable trade regimes constitute an additional sectoral divide for dispute resolution. This “horizontal” split between sectoral regimes and resort to parallel dispute-resolution mechanisms poses a particular dilemma for the management of disputes which may originate in the fisheries field.

The EU has twice faced such proliferation of disputes in recent years. In 2013, it occurred in parallel with the above-mentioned *Atlanto-Scandian Herring Arbitration* between the Faroe Islands and the EU and before that between Chile and the EU (2000). Both involve parallel proceedings under UNCLOS and before the WTO.¹⁶²

In the *Swordfish Case*¹⁶³ that Chile brought against the EU before a Special Chamber of ITLOS, it invoked its right to conservation measures regarding highly migratory fish in its EEZ adjacent to the high seas, and challenging the fishing activities of EU-flagged fishing vessels which relied on the freedom of the high seas (UNCLOS article 116). Chile’s action followed immediately after the EU had submitted the dispute concerning Chile’s unilateral conservation measures to the WTO. This led to the establishment of a parallel WTO panel, where the EU complained of a violation of GATT rules (Articles V and XI) on the part of Chile, which had prevented its fishing vessels from unloading their swordfish in Chilean ports either to land them for warehousing or to transfer them to other vessels. Chile’s defence in turn relied on the general exceptions of GATT (Article XX).¹⁶⁴ While these parallel cases were pending and suspended, informal contacts continued. With their negotiations, the parties finally succeeded in reaching a settlement, after nine years. The ITLOS case was discontinued in 2009 and the WTO case was discontinued in 2010.¹⁶⁵

¹⁶² Esa Paasivirta, “The European Union and the United Nations Convention on the Law of the Sea” (2015) 38 *Fordam International Law Journal* 1045–71, 1056–58.

¹⁶³ *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, Order of 20 December 2000, www.itlos.org.

¹⁶⁴ WT/DS193/1 of 26 April 2000.

¹⁶⁵ Order 2009/1 of 16 December 2009, www.itlos.org; Joint Communication WT/DS193/4, G/L/367/Add.1 June 2010.

In 2013, a similar horizontal split between UNCLOS and the WTO was involved in the dispute between the Faroe Islands and the EU. In parallel with the above *Atlanto-Scandian Herring Arbitration*, the Faroe Islands initiated proceedings under the WTO dispute-settlement system to contest the compatibility of the EU trade measures with the GATT.¹⁶⁶ These measures had banned the import of fish or fishery products caught by vessels flying the flag of the Faeroe Islands and restricted the use of EU ports, to counter what was seen as the unsustainable fishing practices of the Faroe Islands.¹⁶⁷

Again, outside the proceedings, contacts between the two parties continued and a settlement was reached. The Faroe Islands reduced its quota significantly and this, taken together with the quotas of the other coastal States, was not considered to undermine the conservation efforts of the EU, and the EU repealed its trade measures.¹⁶⁸ Along with the UNCLOS arbitration, the trade dispute was also terminated in September 2014.

The above cases both show proliferation from the fisheries to the trade scene as different sectoral regimes are seized at the same time. In neither situation does an international dispute-resolution body have an opportunity to address the dispute as a whole. We did not manage to witness how the parallel proceedings could have influenced each other, entailing a risk of divergent interpretations. Resolution of the respective disputes was kept firmly in the hands of the parties themselves, who were able to find a satisfactory settlement by way of negotiation.

No tribunal or panel would command a supervisory role in such inter-sectoral situations. If anything can be drawn from this, it is at least that multiple proceedings in sectoral dispute-resolution bodies increase the likelihood of the litigating parties themselves staying in control and finding a negotiated solution.

¹⁶⁶ Request for Consultations by Denmark in Respect of the Faroe Islands, *European Union — Measures on Atlanto-Scandian Herring*, WTO Doc. WT/DS469/1 (7 November 2013).

¹⁶⁷ Commission Implementing Regulation (EU), No. 793/2012, [2012] OJ L223, at 1 (21 August 2003).

¹⁶⁸ Commission Implementing Regulation 896/2014, Establishing Measures in Respect of the Faroe Islands to Ensure the Conservation of the Atlanto-Scandian Herring [2014] OJ L 244/10.

7. EU's bilateral fisheries protocols are in essence of a "transactional" nature and bypass international judiciary. Why?

Access to fishing waters (EEZ) of third States requires agreements or arrangements between the interested fishing State and the competent coastal State (see article 62 UNCLOS). In order to obtain access for its fleets, the Union has been concluding access agreements with coastal States (called Sustainable Fisheries Partnership Agreements or SFPAs).

The European Economic Community, as it then was, concluded its first bilateral fisheries agreements in the late 1970s. Hitherto, more than 30 other bilateral agreements have been concluded, mainly with developing States in Africa or in the Pacific.

The SFPAs provide for a (tacitly renewable) framework agreement for access (including general principles, joint bodies, suspension and termination, exclusivity), but the access itself is made possible through separate protocols (typically three years), where the fishing opportunities and financial contribution are set out in detail. The financial contribution consists of an access payment and a sectorial aid payment (and apart from the EU, the vessel operators also pay a fee).

The European Union has currently 12 active SFPA protocols in force with third countries, namely eight tuna agreements (Cape Verde, Cook Islands, Côte d'Ivoire, Liberia, Madagascar, Sao Tomé and Príncipe, Senegal, and Seychelles)¹⁶⁹ and four mixed agreements

¹⁶⁹ Council Regulation (EC) No. 2027/2006 of 19 December 2006 on Cape Verde Agreement, OJ L 414, 30.12.2006, p. 1, and Council Decision of 15 December 2014 on the Cape Verde Protocol OJ L 369 of 24.12.2014, Council Decision (EU) 2016/776 of 29 April 2016 on the Cook Islands Agreement and Protocol, OJ L 131, 20.5.2016, p. 1, Council Regulation (EC) No. 242/2008 of 17 March 2008 on the Côte d'Ivoire Agreement, OJ L 75, 18.3.2008, p. 51, Council Decision of 28 January 2014 on the Côte d'Ivoire Protocol OJ L 54, 22.2.2014, p. 1, Council Decision (EU) 2016/1062 of 24 May 2016 on the Liberia Agreement and Protocol, OJ L 177, 1.7.2016, p. 1, Council Regulation (EC) No. 31/2008 of 15 November 2007 on the Madagascar Agreement, OJ L 15 of 18.01.2008, and Council Decision of 15 December 2014 on the Madagascar Protocol, OJ L 365, 19.12.2014, p. 6, Council Regulation (EC) No. 894/2007 of 23 July 2007 on the São Tomé and Príncipe Agreement, OJ L 205, 7.8.2007, p. 35, Council Decision of 19 May 2014 on the signing, on the provisional application of the São Tomé and Príncipe Protocol, OJ L 168, 7.6.2014, p. 1, Council Decision of 8 October 2014 on the Senegal Agreement and Protocol, OJ L 304, 23.10.2014, p. 1, Council Regulation (EC) No. 1562/2006 of 5 October 2006 on the Seychelles Agreement, OJ L 290, 20.10.2006, p. 1, and Council Decision of 16 December 2013 on the Seychelles

(Greenland, Guinea-Bissau,¹⁷⁰ Mauritania and Morocco).¹⁷¹ There are also agreements on the exchanging of access to each other's waters, instead of for a financial contribution (so-called Northern Agreements with Norway, Iceland and the Faroe Islands), which essentially provide for a consultation mechanism to propose quota exchanges.

The European Union also has nine "dormant" agreements (Comoros, Equatorial Guinea, Gabon, Gambia, Kiribati, Mauritius, Micronesia, Mozambique, and Solomon Islands,), where there is an SFPAs in place but no protocol in force. Under these "dormant" agreements, Union vessels are therefore not allowed to fish in waters of these countries.

Such bilateral agreements typically contain no judicial dispute-settlement procedure, beyond the discussion within a joint commission of problems raised by either side, and a resolution of the differences by common accord in the joint commission. The management of fishing operations is conducted in the joint bodies and is subject to the dual control of both parties.

This absence of judicial dispute-settlement mechanisms can be explained by the essentially "transactional" nature of access agreements, where the Union makes a financial contribution (or a contribution in kind in the form of access) in order to obtain access. It is therefore logical that, if parties cannot agree on a difference, they will not submit such a difference to judicial dispute resolution (such as ITLOS or an Annex VII arbitral tribunal), but discuss the "quid pro quo" in a bilateral body, such as the joint commission. If they fail to find common ground on a major disagreement, the parties can suspend or even terminate the agreement or the protocol.

Protocol, OJ L 4, 9.1.2014, p. 1.

¹⁷⁰ Council Regulation (EC) No. 753/2007 of 28 June 2007 on the Greenland Agreement, OJ L 172, 30.6.2007, p. 1, Council Decision (EU) 2015/2103 of 16 November 2015 on the Greenland Protocol, OJ L 305, 21.11.2015, p. 1, Council Decision of 4 December 2007 concerning the Guinea-Bissau Agreement, OJ L 342, 27.12.2007, p. 1, Council Decision of 16 October 2014 on the Guinea-Bissau Protocol, OJ L 328 of 13.11.2014, Council Regulation (EC) No. 1801/2006 of 30 November 2006 on the Mauritania Agreement, OJ L 343, 8.12.2006, p. 1, Council Decision (EU) 2016/870 of 24 May 2016 on the Mauritania Protocol, OJ L 145, 2.6.2016, p. 1, Council Regulation (EC) No. 764/2006 of 22 May 2006 on the Morocco Agreement, OJ L 141, 29.5.2006, p. 1 and Council Decision of 16 December 2013 on the Morocco Protocol, OJ L 349, 21.12.2013, p. 1.

¹⁷¹ The Morocco Agreement applies also to the non-autonomous territory of the Western Sahara (which is, for its greatest part, *de facto*, administered by Morocco).

It should therefore not be a surprise that the transactional nature of the SFPAs and their protocols leaves little scope for third party international dispute resolution.

8. Diversification of fisheries-related cases to the regional judiciary

Fisheries-related disputes in the European Union involve different actors and constellations. This includes cases between the EU institutions, cases between the EU and its Member States, disputes between EU Member States, or disputes between the EU and individuals (economic operators or NGOs), which have been dealt with by the regional courts of the EU (the Court of Justice and the General Court). In this way the EU judiciary has participated in the shaping of “regional-international” case law in this field. While these cases involve specific aspects of EU law, the issues at stake are often set against the background of UNCLOS or other international rules. Without trying to be exhaustive, three decided cases can be mentioned by way of illustration.

Firstly, the “Venezuelan Fishers” cases C-103 and 165/12¹⁷² concerned primarily a purely internal EU issue of correct decision-making procedure and legal basis (the requirement of the consent of the European Parliament for an access instrument for Venezuelan vessels in certain EU waters)¹⁷³. The Court also had to consider the question of the form of the instrument applied for the access of Venezuelan vessels to a surplus in EU waters. On this question the Court took into account the context established by UNCLOS and its EEZ-related provisions. This concerned in particular article 55 of UNCLOS, which provides that the exclusive economic zone is subject to a specific legal regime, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of that convention; article 56, paragraph 1(a), of UNCLOS, which provides that the coastal State has the right to utilize the living resources in its exclusive economic zone; and article 62, paragraph 2, of UNCLOS, which provides that it does not have the capacity to harvest the entire allowable catch, the coastal State is

¹⁷² Judgment of the Court, 26 November 2014, European Parliament and European Commission v. Council, Joined Cases C-103/12 and C-165/12, EU:C:2014:2400

¹⁷³ Council Decision of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana, OJ L 6, 10.1.2012, p. 8.

required to give other States access to the surplus of the allowable catch, by way of “agreements or other arrangements”. Against that background it considered that the States concerned cannot act in isolation but engage in a joint undertaking. After having examined the targeted offer from the European Union (which the Commission considered to be a unilateral binding engagement), and the reaction on the part of the Venezuelan authorities, the Court concluded that this constituted an agreement as provided for in article 62, paragraph 2, of UNCLOS. In this respect the Court considered that whether such an agreement is formally established in a single document or in two or more related written instruments is irrelevant. In view of the fact that Venezuela is not party to UNCLOS, the Court underlined that

[s]uch an undertaking [to comply with the management measures], given by means of an agreement or other arrangement concluded with the coastal State, is all the more necessary where the interested State is not a contracting party to UNCLOS and is therefore not bound by article 62(4) of that convention.

On the basis of this premise, the Court reached the conclusion that, for this type of agreement, the Council requires the consent of the European Parliament (articles 43(2) and 218(6)a TFEU) and therefore annulled the EU Council’s decision, which had been adopted without the Parliament’s consent. In order to preserve the rights of operators engaged in the fishery, the Court preserved the effects of the annulled decision until the adoption of a new decision on the correct legal basis and following the correct decision-making procedure.¹⁷⁴

Second, in connection with the ITLOS advisory procedure on IUU fishing, and in particular the responsibilities of coastal States, flag States and international regional organizations empowered to conclude access agreements (Case No. 21), the Court of Justice decided in Case C-73/14¹⁷⁵ the dispute as regards the EU institution which has competence to decide on the submission of the EU position in international courts.

¹⁷⁴ This was brought about by Council Decision (EU) 2015/1565 of 14 September 2015 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana, OJ L 244, 19.9.2015, p. 55.

¹⁷⁵ Judgment of the Court of 6 October 2015, *Council v. European Commission*, Case C-73/14, EU:C:2015:663.

The Court considered that it is a general principle that the European Union has the legal capacity and is to be represented, to that end, by the Commission, in spite of the wording of article 335 TFEU dealing with the situation in the EU member States. The Court further considered where the EU is to take a position before an international tribunal such as ITLOS, there is no room for a separate decision by the Council for establishing the position foreseen in Article 218(9) TFEU, which concerns EU participation to decisions *in a body* established by an international agreement, rather than positions *before* an international tribunal.

The Court confirmed that no prior political decision is required from the Council (Article 16(1) TEU) in respect of the submission of EU observations to ITLOS. These observations described the international agreements related to the issue of IUU fishing (UNCLOS, the FAO Compliance Agreement, the United Nations Fish Stocks Agreement and bilateral agreements) and detailed internal EU rules (the IUU Regulation). The Union's written observations suggested answers to the questions raised in that case, by setting out the manner in which the European Union envisaged the interpretation and application of the relevant provisions of these agreements in relation to IUU fishing, and by describing the relevant provisions and measures contained in the partnership agreements and the EU legislation. The Court concluded that

[t]he purpose of that statement was therefore not to formulate a policy in relation to IUU fishing ... but to present to ITLOS, on the basis of an analysis of the provisions of international and EU law relevant to that subject, a set of legal observations aimed at enabling that court to give, if appropriate, an informed advisory opinion on the questions put to it.

Even if the Commission did not need to obtain a prior Council decision, the Court underlined the need to have close consultations, in the spirit of the mutual duty of loyal cooperation. As that consultation requirement had been well respected, the Court rejected the annulment action brought by the Council.

Thirdly, in a preliminary ruling case C-565/13,¹⁷⁶ questions were asked in essence as to whether a provision such as article 6 of the Fisheries Agreement with Morocco,¹⁷⁷ must be interpreted as excluding any possibility for Community vessels to carry out fishing activities in Moroccan fishing zones on the basis of a licence issued by the Moroccan authorities without the intervention of the competent European Union authorities. In its response, the Court considered that

an intervention of the competent European Union authorities is always required in order for a Community vessel to be authorised to carry out fishing activities in Moroccan fishing zones and, consequently, that such a vessel cannot carry out such activities in those zones under a licence issued by the competent Moroccan authorities in the absence of such intervention.

In this context the Court also underlined that

granting Community vessels the possibility of accessing Moroccan fishing zones in order to carry out fishing activities there by dispensing with the intervention of the competent European Union authorities would run contrary to the objective of the Fisheries Agreement, which seeks ... to introduce responsible fishing in those fishing zones in order to ensure the long-term conservation and sustainable exploitation of fisheries resources, in particular by implementing a control system covering fishing activities as a whole, in order to ensure the effectiveness of the measures for the conservation and management of those resources.

As a consequence, for the Court of Justice it would appear that the governance of access to third country waters requires in general the intervention of both the coastal and the flag State of the vessel.

¹⁷⁶ Judgment of the Court of 9 October 2014, Criminal proceedings against Ove Ahlström and Others, Case C-565/13, EU:C:2014:2273.

¹⁷⁷ “Community vessels may fish in Moroccan fishing zones only if they are in possession of a fishing licence issued under this Agreement. The exercise of fishing activities by Community vessels shall be subject to the holding of a licence issued by the competent Moroccan authorities at the request of the competent Community authorities.”

In addition to these three cases, one can simply refer (without commenting on *sub judice* cases) to two pending cases: C-266/16¹⁷⁸ Western Sahara Campaign and case T-180/14¹⁷⁹ Polisario Front, which concern the EU-Morocco Agreement and the non-autonomous territory of the Western Sahara.

9. Concluding remark

The United Nations Convention on the Law of the Sea – “the Constitution of the Oceans” – including the principle of compulsory dispute settlement has been a remarkable global achievement. Yet regional arrangements, as in the case of the EU, complement the international legal scene and are indeed accommodated in the framework of the Convention.

The above discussion attempts to provide an overview of fisheries-related dispute resolution from such a regional perspective and share some of the regional experiences to the extent that they may be of wider interest. Some of the EU experiences and arrangements could be of especial relevance in the regions of the world particularly affected by resource-related conflicts.

From the European perspective, IUU fishing has been a prominent international fisheries issue and is likely to remain important. As the above account shows, the EU has been keen to take action in that area, whether by participation in ITLOS procedures or even by unilateral action

As ocean resources are under continuous strain and disputes over fisheries are on the rise rather than declining, the duty to cooperate is increasingly the order of the day. In that respect, it is also important that the regional and global frameworks work seamlessly together.

¹⁷⁸ OJ C 260, 18.7.2016, p. 31.

¹⁷⁹ OJ C 184, 16.6.2014, p. 33.

Comments: Settlement of fisheries disputes

Tomas Heidar
Judge, ITLOS

It may be argued that the rule of law has reached a more advanced stage in the field of the law of the sea than in general international law. This is due both to the substantive provisions of the Law of the Sea Convention and the inclusion in its Part XV of a mechanism for compulsory settlement of disputes arising out of the interpretation or application of its provisions.

However, it became clear during the UNCLOS negotiations that agreement was only possible at the price of significant exclusions from compulsory jurisdiction. There was no consensus on bringing all of the Convention's provisions within such jurisdiction. The most significant exclusion involves the exercise of sovereign rights and jurisdiction of the coastal State over fisheries and marine scientific research in the exclusive economic zone (article 297). States also have the option of excluding maritime delimitation disputes (article 298).

The excluded matters concern subjects which proved politically sensitive and where many of the rules are subject to a lot of discretion or appreciation. The reluctance of many States to commit themselves to binding settlement in these cases was strong and understandable, particularly with respect to fisheries and boundaries.

At the Third Conference, disputes relating to fisheries were divided into three categories: (i) disputes that would remain subject to compulsory jurisdiction under section 2 of Part XV, i.e. disputes that do not fall into the other two categories; (ii) disputes that would be excluded from compulsory jurisdiction but are still subject to procedures under section 1 of Part XV; and (iii) disputes that would be subject to compulsory conciliation.

This classification of fisheries disputes is reflected in article 297, paragraph 3, of the Convention. The first category is included at the beginning of paragraph 3(a), the second category in the remainder of paragraph 3(a) and the third category in paragraph 3(b). Article 297, paragraph 3(a) and (b), reads as follows:

3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the

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

- (b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
- (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
 - (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
 - (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

Looking first at the second category, the coastal State shall not be obliged to accept the submission to settlement under section 2 of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise. Four categories of discretionary powers of the coastal State are mentioned but these are examples of the types of disputes that are excluded and the list is not exhaustive. However, these examples are probably

indicative of the nature of the rights the disputes over which are excluded from compulsory jurisdiction. Probably, any dispute relating to material duties of the coastal State to which those rights are subject is also excluded from compulsory jurisdiction. This includes, for example, the duty to promote the objective of the optimum utilization of the living resources of the EEZ, although not mentioned specifically in article 297, paragraph 3(a).

In this context, it should be noted that article 298, paragraph 1(b), permits a State to exempt from compulsory jurisdiction disputes concerning law enforcement activities in regard to the exercise of sovereign rights excluded from the jurisdiction of a court or tribunal under article 297, paragraph 3. Given that enforcement of its fisheries legislation in its EEZ would seem to be part of a coastal State's "sovereign rights" in respect of the living resources of its EEZ, it is debatable whether this exception really adds anything to the exception in article 297, paragraph 3.

The third category includes disputes involving clear cases of abuse of discretion, where a coastal State manifestly or arbitrarily has failed to comply with some basic obligations under the Convention. Where no settlement of such a dispute has been reached by recourse to section 1, it is subject to compulsory conciliation. The recommendations of a conciliation commission are not binding and the benefits of this process reside in the politically persuasive value of the recommendations.

Having dealt with the second and third categories, the question is then which disputes fall within the first category and are subject to compulsory jurisdiction. As so appropriately put by Professor Robin Churchill, "is there much in the net?" In their joint dissenting and concurring opinion in the *Chagos Case*, Judges Kateka and Wolfrum opined that, if the beginning part of article 297, paragraph 3(a), confirming compulsory jurisdiction, "is to retain some meaning, not all disputes on fisheries can be interpreted as 'any dispute relating to its sovereign rights with respect to living resources'". The second part of the provision must be "narrower in scope" than the first. I share this view, which is not controversial.

Approximately 90 per cent of living marine resources are located within the 200-mile EEZ. This means that the exception in article 297, paragraph 3, is obviously very far-reaching and limits significantly the compulsory jurisdiction of the Tribunal, and the other dispute settlement bodies referred to in Part XV, to deal with fisheries disputes. However, it should be kept in mind that a considerable part of fish stocks located in the EEZ does not respect such boundaries and

is either shared stocks that migrate between EEZs of two or more States or transboundary stocks that migrate between EEZs and the high seas, for example straddling and highly migratory fish stocks. It is also relevant to point out that there is much more potential for disputes in the case of such “international” fish stocks.

There is no doubt that disputes relating only to high seas fisheries fall within the Convention’s provisions on compulsory jurisdiction. However, relatively few fish stocks are discrete high seas stocks, exclusively located in a high seas area, and most fish stocks on the high seas are transboundary stocks.

An important question is therefore whether, and to what extent, the exception in article 297, paragraph 3, applies to transboundary stocks. Let me for the sake of simplicity take straddling fish stocks as an example. It could be argued that as a straddling stock is a single biological unit, and as disputes in relation to such a stock on the high seas are clearly subject to compulsory dispute settlement, disputes in relation to such a stock in the EEZ should also be subject to compulsory jurisdiction, thus excluding the application of article 297, paragraph 3, to straddling stocks completely.

However, given that the examples listed in article 297, paragraph 3(a), of a coastal State’s “sovereign rights” in the EEZ, such as its power to determine the allowable catch, are all matters that are applicable to straddling stocks, it would seem that the exception in article 297, paragraph 3, should apply to disputes relating to such stocks occurring in the EEZ. This conclusion is supported by the UN Fish Stocks Agreement, which incorporates, by reference, Part XV of UNCLOS. Article 32 of the Agreement makes article 297, paragraph 3, of the Convention applicable to disputes concerning the Agreement that relate to straddling stocks.

This suggests that the exception of article 297, paragraph 3, does not apply to disputes relating to straddling stocks on the high seas and that they are subject to compulsory jurisdiction. In this regard, it should be noted that the material scope of the UN Fish Stocks Agreement is limited to straddling and highly migratory fish stocks. It may be argued that, had it been the intention of the drafters of the Agreement to exclude disputes regarding such stocks altogether from compulsory jurisdiction, a provision to this effect would have been included in the Agreement, rather than the provision of article 32.

A consequence of this position is that a coastal State may exclude from compulsory jurisdiction disputes concerning its management of a straddling stock in its EEZ, whereas disputes relating to the management of that stock on the high seas may not be so

excluded. This means that a coastal State may refer to compulsory dispute settlement a dispute between itself and States fishing on the high seas for a straddling stock that occurs in its EEZ, but that the converse is not possible. This is arguably inequitable.

The view has been expressed that this lack of equivalence might justify a tribunal's refusing on equitable grounds to entertain claims brought by coastal States unless they are willing to agree to jurisdiction over any counter-claim made by the respondent high seas fishing State with regard to the straddling stock in dispute.

In the case of a typical dispute on the allocation of a straddling stock between one or more coastal States and States fishing on the high seas, it may not be practical to separate the high seas element of that dispute from the EEZ element and only address the former. Such a stock is a single biological unit that needs to be managed as a whole. Not dealing with such a dispute comprehensively would in many cases be ineffective.

Article 63 of the Convention sets out the procedural obligation of States to seek to agree on conservation and management measures. Paragraph 1 deals with shared stocks and paragraph 2 with straddling stocks. The Tribunal elaborated on this obligation regarding shared stocks in its Advisory Opinion on the Request by the Sub-Regional Fisheries Commission and clarified, *inter alia*, that this is a due diligence obligation. The obligation to seek to agree on conservation and management measures is obviously an obligation of conduct, not of result.

In his Separate Opinion, Judge Paik expanded on the meaning and scope of this obligation and noted in this regard the following: “[A]ny dispute arising from the alleged failure to comply with the obligation under article 63, paragraph 1, of the Convention, unlike those disputes arising from the exercise of sovereign rights of the coastal State with respect to the living resources in its EEZ, can be submitted to the compulsory procedure under Part XV, section 2, of the Convention.”

In the *Chagos Case*, the arbitral tribunal came to the opposite conclusion. It stated that articles 63 and 64 are, “on their face, measures in respect of fisheries and in their application in the exclusive economic zone are subject to the exclusion of Article 297(3)(a).” The arbitral tribunal stated that it did not find any basis in prior jurisprudence in support of Mauritius’ argument that the article 297, paragraph 3, limitation does not apply to procedural obligations.

I am not convinced by the rationale of the arbitral tribunal and it is worth noting that it does not contain any reference to “sovereign

rights” of the coastal State. Taking into account my earlier comments, I think the better view is to regard the carrying out of the procedural obligation of article 63, to seek to agree on conservation and management measures for straddling stocks, not as an exercise of sovereign rights of the coastal State with respect to the living resources in its EEZ, within the meaning of article 297, paragraph 3(a). In my opinion, the same should apply to similar procedural obligations of coastal States and States fishing on the high seas under article 7 of the UN Fish Stocks Agreement.

The assessment of a court or tribunal of the availability of its compulsory jurisdiction in the case of a fisheries dispute much depends on how the dispute is formulated. What matters in practice is not only what each case involves, but also how the issues are characterized. It seems evident from both the *M/V “SAIGA”* cases of the Tribunal that characterization of the issues in dispute will be decided by the court or tribunal hearing the case, rather than by the parties to the dispute.

Referring once again to the *Chagos Case*, the dispute between Mauritius and the United Kingdom concerned, *inter alia*, a marine protected area (hereinafter “MPA”) established by the United Kingdom. Mauritius contended that the MPA was an environmental issue and that the jurisdiction of the arbitral tribunal was therefore established by article 297, paragraph 1(c), concerning the protection of the marine environment. The United Kingdom, however, considered the MPA to be an issue relating to “sovereign rights with respect to living resources” in the EEZ and argued that jurisdiction was precluded by article 297, paragraph 3(a), concerning fisheries.

The arbitral tribunal took the view that the question of its jurisdiction hinged on the characterization of the Parties’ dispute and on the interpretation and application of article 297. In its decision, the arbitral tribunal did not accept that the MPA was solely an issue relating to fisheries. It evaluated a number of public statements by the United Kingdom in which it stressed the environmental value of the MPA. The arbitral tribunal’s consideration of Mauritius’ relevant submission therefore could not be excluded entirely by the exception from jurisdiction set out in article 297, paragraph 3(a). The Parties’ dispute therefore could not, “as a whole, be dismissed as a fisheries matter.”

Obviously, despite the limitations set forth in article 297, paragraph 3, the parties to a fisheries dispute may always agree to submit their dispute to the Tribunal or the other compulsory procedures provided for in section 2. This follows from article 299, paragraph 1, of the Convention. Parties to a fisheries dispute may also prefer to

obtain a non-binding recommendation or opinion to facilitate a solution of the dispute in question. An advisory opinion of the Tribunal represents an interesting option in this respect.

It is evident that the scope of the limitations to compulsory jurisdiction in article 297, paragraph 3, of the Convention regarding fisheries disputes remains unclear. It will be for courts and tribunals, including the Tribunal, to clarify that scope and determine how much fish there is in the net.

Questions and answers (part 2)

President Golitsyn: So after we had such interesting presentations, we now have time for questions and comments. Please identify yourself when you ask a question.

M. le Vice-Président Bouguetaia : As interpretation is provided I will speak in French. Monsieur le Président, ma question s'adresse à Monsieur Paasivirta. Le premier volet est plutôt une demande d'explication. Vous avez dit, si j'ai bien compris, et je crois avoir bien compris, que la demande, à partir du moment où un certain nombre de petits pays ou un petit nombre de pays demandent un avis consultatif au Tribunal international, cela devient quelque peu détestable pour le reste des autres pays. J'avoue que j'ai du mal à suivre la logique qui vous amène à ce constat, d'autant plus qu'il s'agit bien d'un avis consultatif, donc rien de très contraignant, et certainement moins pour les autres Etats que pour les Etats qui demandent l'avis consultatif. J'ai pour mémoire les deux avis consultatifs que le Tribunal a donnés : le premier a été rendu par la Chambre des fonds marins et je crois que ce matin Monsieur Michael Lodge a évoqué cet avis consultatif en termes très élogieux. Il a apporté énormément de choses à la communauté internationale et surtout à l'Autorité des fonds marins, qui a même sur la base de cet avis consultatif modifié ses règlements et enrichi les règlements pour l'exploitation et l'exploration. Le deuxième avis consultatif qui a été rendu par le Tribunal, c'est celui sur la pêche INN qui a été demandé par certains pays de l'Afrique de l'Ouest. Là, je comprends qu'il y avait une certaine hésitation de la part de certains pays à reconnaître ou à accepter la compétence consultative du Tribunal, mais je me souviens aussi que l'Union européenne ne s'était pas opposée à cette compétence. Au contraire, sa contribution était très probante et elle a beaucoup aidé le Tribunal à rendre cet avis consultatif. Alors, je ne vois pas en quoi l'avis consultatif du Tribunal international du droit de la mer pourrait gêner ou être détestable pour la majorité des pays quand c'est juste un petit nombre de pays qui le demandent. Je voudrais une petite explication à ce propos et peut-être que vous approfondissiez un peu cette idée.

Le deuxième aspect que vous avez abordé et qui est très intéressant, c'est l'accord de pêche entre l'Union européenne et le Sahara occidental. Problème politique d'actualité, problème juridique aussi, vous savez très bien que cet accord est passé devant deux instances juridictionnelles. En première instance, il a été reconnu que l'accord ne pouvait pas couvrir la zone maritime du Sahara occidental.

Cette décision a été confirmée par la Cour de justice européenne, et ce qui est intéressant c'est qu'elle a non seulement considéré que la Cour ne pouvait pas l'appliquer à cette région mais qu'elle a même qualifié juridiquement le statut du Sahara occidental comme étant une partie qui n'était pas sous la souveraineté du Maroc, que le Sahara occidental était encore inscrit à la quatrième commission de colonisation comme un Etat non encore décolonisé, que le Secrétaire général des Nations Unies avait nommé un représentant personnel pour essayer de faciliter le rapprochement entre les deux protagonistes, le Sahara occidental (le Polisario) et le Maroc pour trouver une solution définitive. A ce titre donc, il est évident que l'accord ne pouvait pas couvrir cet espace maritime qui était encore, comment dirais-je, entre les mains des Nations Unies pour un règlement définitif. Mais, et ça tout le monde le sait, depuis quelque temps le Maroc fait fortement pression, en disant nous allons trouver des partenaires en matière de pêche ailleurs en Europe et qui ne seront pas sujets à une cour européenne ou à une autre cour et nous allons signer des accords avec ces pays. Donc devant cette pression, beaucoup de pays européens essayent aujourd'hui de détourner, sinon d'éviter d'appliquer la décision de la Cour de justice européenne. Alors comment voyez-vous l'évolution de la situation dans le cas où nous sommes dans une situation de blocage où certains pays européens refusent d'accepter cette décision qui est de leur propre cour et que le Maroc insiste encore pour menacer les autres pays, les pays européens, d'aller vers des accords avec d'autres pays. Vous avez dit que malheureusement tous ces chemins ne mènent pas au Tribunal international du droit de la mer. Je ne sais pas si je peux partager votre avis. N'y a-t-il pas possibilité ou n'y a-t-il pas lieu aujourd'hui, dans ce cas de figure en particulier, et il y en a d'autres certainement, de trouver un petit chemin vicinal chaotique qui mènerait jusqu'aux portes de cette maison pour peu qu'on ait peut-être un bon GPS juridique

President Golitsyn: Judge Wolfrum.

Judge Wolfrum: Thank you, Mr President. Mr President I would like to comment upon Mr Paasivirta's presentation which I found not only very interesting and rich but also very encouraging. Although one could have been less cautious. Let's put it this way, I believe that there are many reasons to endorse an advisory opinion and you are right when you say that, due to the controversy about jurisdiction, the Tribunal should stick to the focus of the question raised. You mentioned one focus which I wanted to endorse and even emphasize, namely that many of these things which are perhaps prone for the

advisory opinion are in the interest of the international community. Fisheries is one of them. Many of the environmental issues are also. And in this respect the advisory opinion has certain advantages: first, it is not binding; secondly, it allows procedurally that many States voice their views, whereas in a typical case before the Tribunal or arbitration there are only two States; due to the rigid rules on intervention, other States have no say in this respect. Therefore, I disagree with the quotation of what Australia said that it is unfavourable or unfortunate that few bring a case. It is the other way around. This is exactly the situation in adjudication which portrays every dispute as a bilateral one although at its centre is an issue which is in the interest of the international community or at least of many States. Let's take as an example the question of which maritime feature qualifies as island. Nevertheless the interpretation of article 121 of the Convention was decided in a bilateral case. Therefore, this is one particular positive example for the advisory opinion and we should be more forthcoming and strongly in favour of advisory opinions as long as they cover community interests.

I was slightly astonished to say the least to hear today, this morning rather, something like: "The present dispute-settlement system is not really ready to face new challenges." I totally disagree. The Law of the Sea Tribunal has very clearly demonstrated its capability to be very flexible. Ms Goettsche-Wanli very well explained how much the Tribunal promoted marine environmental law in substance and also how the Tribunal did that in respect of the procedure. Therefore, before one believes one has to establish new fora for something – I know, today there is a trend to forget old things, take something new – this is not the right approach. I believe particularly the history of the Law of the Sea Tribunal – you may all say that I am biased, sure I am, I accept that – but still, as Ms Goettsche-Wanli has very well explained how well we did in the last 20 years. I think one should be encouraged and opt for the existing system, which will prove to be flexible enough to accommodate the issues which will confront us, be it climate change or genetic resources or whatever. Thank you.

President Golitsyn: Just one more question and I will close the list.

M. le juge Cot : Une question pour Madame Takamura au sujet du problème de l'influence du réchauffement climatique sur les lignes de base et donc sur la délimitation maritime. J'aurais souhaité que vous puissiez nous donner un peu plus d'éléments de réflexion là-dessus. Il est évident que le changement climatique a des effets considérables

dans certains cas sur les lignes de base, peut modifier leur orientation et donc avoir des effets sur les accords de délimitation déjà conclus. Est-ce que cela oblige à remettre en cause des délimitations déjà conclues par accord et les lignes de base et la délimitation – en l’absence d’accord évidemment ? Là, effectivement, le changement climatique, par la modification des lignes de base et donc par la modification des principes de délimitation et notamment l’équidistance, pose des problèmes sérieux. J’aurais donc souhaité avoir vos réflexions sur ce sujet. Merci.

President Golitsyn: Just one more question, yes, please.

Ms Farah Ouirghimmie: Good afternoon everyone, thank you for the presentation. My name is Farah Ouirghimmie, I am an ITLOS and IFLOS alumni and currently a researcher and I will be speaking in French, too, if that will be okay for you.

Bonjour Madame, j’ai une question sur le régime juridique international du changement climatique. J’avoue que j’ai un certain malaise par rapport à la présentation en soi. Sur la place, en fait, de l’océan dans la construction de ce régime juridique international. Dans la convention de 1992, l’océan n’est même pas évoqué. Il n’y a même pas de mesures ou de dispositions qui soient spécifiques à l’environnement marin et c’est seulement lors de la COP 21 qu’on a mentionné l’océan, et encore seulement dans le préambule. Actuellement, on a des dispositions générales qui peuvent éventuellement s’appliquer à l’océan et je me demande s’il est aujourd’hui vraiment important de parler du changement climatique ou bien uniquement du droit international de l’environnement marin, qui lui existe et que le Tribunal est déjà en train d’appliquer, parce que jusqu’à présent on peut uniquement voir les conséquences du changement climatique sur l’environnement marin. La biodiversité, on a une convention là-dessus et sur la protection de l’environnement marin, pareil pour le transport maritime. Je me demande vraiment quelle est la place de l’océan aujourd’hui dans cette construction juridique internationale ? Est-elle autonome ? Je sais que c’est une question d’ordre plutôt théorique. Ou bien serait-il suffisant de travailler sur le droit international de l’environnement ? Merci.

President Golitsyn: Thank you, now I give the floor to Mr Paasivirta to answer the questions

M. Esa Paasivirta : Tout d'abord, je vais répondre à la question de Monsieur le juge Bouguetaia concernant l'avis en l'affaire 21. En fait, une simple explication sur ce point est que l'Union européenne, quand elle a fait face à la Cour, n'a pas exprimé son opinion sur la juridiction en tant que telle. Les vues des Etats membres de l'Union divergeaient à ce propos. Donc c'était une sorte de compromis. En fait, les Etats membres ont exprimé leur point de vue et il y avait des divergences entre eux, mais l'Union ne s'est pas exprimée sur ce point. Ce que j'ai dit était assez factuel et je voulais simplement le dire parce que vous ignorez peut-être que la Commission européenne s'est inspirée de cet avis pour faire une proposition visant à mieux contrôler les bateaux européens. On peut donc dire que cet avis a eu une influence.

Pour ce qui est du Sahara occidental et la pêche à là-bas, la Cour a rendu un arrêt en décembre dernier sur le commerce des produits agricoles. Donc ce n'était pas exactement des opérations de pêche, mais il y avait quand même des principes importants que la Cour a annoncés, mais surtout la question des pêches au large des côtes du Sahara occidental. Les deux affaires que j'ai indiquées qui sont pendantes à la Cour de Luxembourg concernaient exactement les opérations de pêche. On ne peut donc pas vraiment dire que l'Union n'a pas suivi ce que sa propre cour a dit. En fait, celle-ci n'a rien dit pour l'instant. Je dois ajouter que c'est une question qui soulève beaucoup d'opinions différentes et qui est actuellement débattue par le Parlement européen et les Etats membres.

Judge Wolfrum, thank you very much, it's encouraging again regarding advisory opinions. I think I understand that the court made its decisions basically on what is its jurisdiction. I was quite factual simply that this may repeat itself. If that is so, in the interest of everybody one should nevertheless carefully think in that situation where the focus is. There has to be some common interest which is largely consensual in a certain way as regards substance. So this is just a very pragmatic point that I am making. I do think that the point that Australia made is a valid one. It's an indication of a general issue as perceived by parties to UNCLOS and it was made in that spirit; whether Australia is right or wrong, an issue it is. Of course, one maybe for the future of the Tribunal. Merci beaucoup.

President Golitsyn: Ms Takamura, it's your turn to answer questions.

Ms Yukari Takamura: Thank you. I will try to first respond to the baseline questions and thank you very much for the question. Definitely I am not an appropriate person to respond correctly. But at

least the stability of the border agreement or delimitation treaty is very important to keep, not to bring contentious because of such change of baseline, but for doing so, to keep as much stability of especially delimitation and the border agreement with other countries. I think the interpretation of article 5 of UNCLOS might be considered. That I think I could say on your point. I think it's not enough but we could have a discussion in the panel.

And I try to respond to the second question. If I understand correctly, international environmental law is sufficiently effective to tackle and address the environmental issues, is that right? [Answer: yes] Especially if it is special character about the ocean, and I think the climate change issue is a matter of global emissions, so the Paris Agreement provides for an ambitious target but still we have a long distance to go because our accumulated target level is much, much lower than this long-term goal. So the area that maybe should be strengthened is actually the maritime transport area. I understand that the International Maritime Organization tried to establish an emission standard, but still more stringent measures are expected in light of the predicted increase in the emissions from this sector. Maybe the climate change regime could be a kind of guide for various international regimes relevant to climate change, including the Montreal Protocol and also the IMO treaties and others, that provide guidance or a direction for all regimes, but each regime does address an issue in its competence whereas the direction is provided by the Paris Agreement, for instance. Maybe it's a good analogy to the UNCLOS. Thank you.

President Golitsyn: Judge Heidar as a commentator

Judge Heidar: Thank you, Mr President. I just have a short comment on advisory jurisdiction. I agree that advisory jurisdiction needs to be applied very carefully and statements to that effect by States Parties to the Convention cannot be ignored. That being said, however, in my view, the application of advisory jurisdiction should not necessarily be limited to a community interest. It is quite possible that an advisory opinion could be a facilitator to a solution of a dispute between, let's say, two or more neighbouring countries, for example regarding delimitation of maritime boundaries or fisheries. Such States could submit a request to the Tribunal for an advisory opinion. An advisory opinion could therefore potentially be quite concrete and only affect a very limited number of States. Advisory opinions of the Tribunal in the future could therefore be quite diverse. Thank you.

QUESTIONS AND ANSWERS (PART 2)

President Golitsyn: So we've come to an end of this session, we'll have a coffee break for 20 minutes until 4.10 p.m. and the round table will also be extended by ten minutes until 5.10 p.m. So we are adjourning until 4.10 p.m., I would appreciate your coming on time.

A user-friendly Tribunal in the service of the international community

Shunji Yanai
Judge, ITLOS

Opening remarks

I would like to make some brief opening remarks by touching upon the strengths of the Tribunal and the challenges it is facing, public relations efforts made by the Tribunal, and the accumulation of its jurisprudence. I will then ask the distinguished panellists to share their respective thoughts on the topic of this round table: “A user-friendly Tribunal in the service of the international community”. This will be followed by a question-and-answer session with the audience. In my view, the Tribunal has a number of strengths, in particular, the following:

First, the Tribunal is a judicial institution specialized in the law of the sea, consisting of 21 judges elected from among persons of recognized competence in the field of the law of the sea;¹⁸⁰

Second, the Tribunal has a well-balanced composition with 21 judges assuring the representation of the principal legal systems of the world and equitable geographical distribution;¹⁸¹

Third, no expenses are incurred by the parties to a dispute for the judicial services rendered by the Tribunal; while, in arbitration, the parties must defray all the costs including the remuneration of arbitrators, the cost of secretarial services rendered by the Registry and the rental of conference facilities;

Fourth, the Tribunal has a good track-record of fair and expeditious judicial work, not only in such urgent cases as the prompt release of vessels and crews, and provisional measures, but also in

¹⁸⁰ Article 2, paragraph 1, of the Statute of the Tribunal reads: “The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.”

¹⁸¹ Article 2, paragraph 2, of the Statute reads: In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.”

In the present composition of the Tribunal, the distribution of seats among the five geographical groups established by the United Nations General Assembly is as follows: five for Africa, five for Asia, four for Latin American and Caribbean States, four for Western European and other States, and three for Eastern Europe.

cases on the merits, including a complex maritime boundary delimitation case, as demonstrated in the Bangladesh/Myanmar maritime delimitation case, which was dealt with in slightly over two years from its application to the reading of judgment;

Fifth, the transparency of proceedings is assured by the wide use of the Tribunal's website and the live broadcasting of oral proceedings while nevertheless leaving the possibility for the parties to choose a closed hearing to which the public is not permitted access;¹⁸² and

Sixth, the Tribunal also ensures the flexibility of its procedures by offering the possibility for the parties to a dispute to use special chambers composed of three or more judges or a five-member Chamber of Summary Procedure.¹⁸³

The Tribunal is celebrating its 20th anniversary, but it is a much younger institution than the International Court of Justice, which commemorated its 70th anniversary last year. The Tribunal is still not very well known by the international community and, as a result, its judicial services are under-utilized in spite of its above-mentioned strengths. It is understandable that, in the early years of the Tribunal, States were not sure as to how the newly elected 21 judges would handle and judge cases brought before them. Even today, after 20 years of existence of the Tribunal, it must be admitted that many States are not sufficiently familiar with the procedures and jurisprudence of the Tribunal, let alone its strengths. This seems to be the toughest challenge the Tribunal is facing still now. Therefore, the Tribunal has been making efforts to disseminate information on its procedures, jurisprudence and strengths, including through the following measures.

One such measure is the holding of regional workshops aimed at familiarizing ministers, legal advisors, other officials of the governments concerned, and law of the sea experts of the countries of selected regions with the work of the Tribunal. The Tribunal has held 11 workshops in different regions of the world, including the first one in Dakar in 2006 with the cooperation of the government of Senegal, and the most recent one in Bali, Indonesia, in 2015. The Tribunal selects a country which is prepared to co-host a workshop with the Tribunal and invites to the workshop officials and law of the sea experts of the host country and neighbouring States. The Tribunal sends its President, several Judges, in particular from the region concerned, and the Registrar and certain of his staff to the capital or another city of the

¹⁸² Article 26, paragraph 2, of the Statute and article 74 of the Rules of the Tribunal.

¹⁸³ Article 15 of the Statute.

host country where the workshop is held. The participants from the Tribunal make presentations on its procedures, strengths and jurisprudence.

There is another measure that makes the Tribunal more user-friendly. Article 1, paragraph 3, of the Statute and article 70 of the Rules of the Tribunal¹⁸⁴ enable special chambers to sit outside Hamburg, where the Tribunal has its seat. This allows the parties to a dispute to attend the special chamber concerned in a conveniently located city in the region to which the parties belong without travelling all the way to Hamburg. To implement this arrangement, the Tribunal issued joint declarations¹⁸⁵ with the governments of Argentina, Bahrain and Singapore concerning the provision of facilities should the Tribunal consider it desirable for a special chamber to sit in a suitable place in the regions where these countries are located. For instance, under the declaration issued by the Tribunal and the Ministry of Foreign Affairs of Argentina, it was agreed that, whenever proceedings before a special chamber of the Tribunal involved States from the region, the parties to the proceedings and the special chamber might find it appropriate to hold meetings at a suitable city in the region. In this declaration, Argentina expressed its willingness to provide the necessary facilities in the event the Tribunal and the parties consider it desirable for a special chamber to sit, or otherwise exercise its functions, in Buenos Aires.

Yet another important effort for the dissemination of information on the work of the Tribunal is the recent publication of the Digest of Jurisprudence of the Tribunal. This Digest covers the 24 cases that were brought before the Tribunal between 1996 and 2016 and is made up of two parts. The first part consists of a short presentation of each case, while the second part sets out excerpts from the Tribunal's jurisprudence organized by topic. As indicated in its introduction, the Digest of Jurisprudence has been prepared by the Registry. The introduction also includes the disclaimer that the Digest in no way engages the responsibility of the Tribunal; in particular, any information provided on Judgments, Orders, and Advisory Opinions is

¹⁸⁴ Article 1, paragraph 3, of the Statute provides that the Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable.

Article 70 of the Rules of the Tribunal reads: "The Tribunal may, if it considers it desirable, decide pursuant to article 1, paragraph 3, of the Statute that all or part of the further proceedings in a case shall be held at a place other than the seat of the Tribunal. Before so deciding, it shall ascertain the views of the parties."

¹⁸⁵ The joint declarations with Argentina, Bahrain and Singapore were issued respectively in May 2008, February 2008 and August 2015.

not authoritative, cannot be relied upon in opposition to the actual wording of the decisions or in any other way, and does not constitute an interpretation of the decisions. On this understanding, the Digest is a very useful document for academics, practitioners and students who study the jurisprudence of the Tribunal.

As part of its public relations efforts, the Tribunal has made a promotional film on its work. I would like to add that the events commemorating the 20th anniversary of the Tribunal, including the symposium held in October 2016 and this round table, would also contribute to the further dissemination of information on the Tribunal.

The accumulation of jurisprudence may be the best way to make the Tribunal more user-friendly for the international community, as jurisprudence can give potential user States more specific information on the procedures and decisions of the Tribunal, and therefore inform States as to what might be expected from its work. In the first decade of the Tribunal's existence, the cases concerning the prompt release of fishing vessels and crews outnumbered the other types of cases, such as those on the merits and provisional measures.¹⁸⁶ This situation even gave the wrong impression that the Tribunal mainly dealt with prompt release cases. Nevertheless, in the second decade, the number of prompt release cases decreased sharply and no cases of this type were submitted to the Tribunal after 2007, when the last two cases of this type were filed.¹⁸⁷ This change of trend may be attributed to the fact that both coastal States and distant fishing nations have gained experience in the management of the exclusive economic zone regarding fishing activities. In the second period, between 2007 and the present, the types of cases brought before the Tribunal became diversified, particularly with two maritime boundary delimitation cases¹⁸⁸ and two requests for an advisory opinion. While the number of prompt release cases has decreased, cases on the merits increased, with those concerning the arrest and detention of vessels other than fishing vessels, and this was in addition to the two cases on the merits regarding delimitation. During the second decade of the Tribunal, four cases on provisional measures were submitted.

¹⁸⁶ In the period between 1996 and 2006, seven prompt release cases, five provisional measures cases and two cases on the merits were brought before the Tribunal.

¹⁸⁷ *The "Hoshinmaru" Case (Japan v. Russian Federation)* and *The "Tomimaru" Case (Japan v. Russian Federation)*.

¹⁸⁸ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* and *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*. The latter is still pending before a Special Chamber.

Among the new types of cases brought before the Tribunal, the requests for an advisory opinion deserve special attention. The first request for an advisory opinion was submitted by the International Seabed Authority (hereinafter “the ISA”) to the Seabed Disputes Chamber (hereinafter “the Chamber”) of the Tribunal. On 1 February 2011, the Chamber gave its first Advisory Opinion regarding *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*. As activities in the international deep seabed Area increase and move from the exploration phase to the exploitation phase, requests for an advisory opinion from the ISA to the Chamber may increase in the future. On the other hand, in March 2013, the Sub-Regional Fisheries Commission (hereinafter “the SRFC”), consisting of seven West African States, submitted to the Tribunal a request for an advisory opinion on illegal, unreported and unregulated (IUU) fishing. This was the first request for an advisory opinion submitted to the full Tribunal. Opinions were divided among States and international organizations on the question as to whether the full Tribunal has the jurisdiction to give an advisory opinion. On 2 April 2015, the Tribunal delivered its Advisory Opinion in which it unanimously ruled that it had jurisdiction to give the advisory opinion requested by the SRFC and answered four questions¹⁸⁹ asked by the SRFC regarding the regulation of IUU fishing activities. This Advisory Opinion was a great help to the SRFC in its fight against IUU fishing. Thus the Tribunal opened the possibility for the international community to submit requests for an advisory opinion to the full Tribunal on various legal questions in the field of the law of the sea.

In my view, the merit of an advisory opinion is at least two-fold. First, it can prevent international disputes from arising or deteriorating, by clarifying or settling the legal questions of potential disputes and thus facilitate negotiations between the parties concerned. Second, an advisory opinion can be a more acceptable solution to the

¹⁸⁹ The four questions asked by the SRFC are the following:

1. What are the obligations of the flag State in cases where IUU fishing activities are conducted within the EEZ of third party States?
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where the fishing licence is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna?

parties to a dispute who desire to resort to a third-party settlement but are reluctant or hesitant to accept a legally binding decision.

A user-friendly Tribunal in the service of the international community

*José Luíz Jesus,
Judge, ITLOS*

Mr Chairman,
Distinguished participants,
Dear Colleagues,

I will make a few comments on the issue of the possible advantages or incentives a State party may have in coming to this Tribunal.

The Tribunal as a specialized law of the sea court

The first observation I would like to make in this regard is that the Tribunal is well positioned to assist States in the resolution of their law of the sea disputes:

1. It has received 25 cases concerning a variety of law of the sea issues as no other court or tribunal referred to in article 287;
2. It has established meaningful case law in the field; and
3. It has, as a result, accumulated substantial expert knowledge on the resolution of disputes concerning different matters covered by the Convention.

My second observation is that the Tribunal offers a number of other advantages or incentives of a material or procedural nature in comparison with other settlement means referred to in article 287.

I will outline a few of these advantages or incentives. They are:

1. Time-efficiency in the handling of cases;
2. A less costly alternative to Annex VII arbitration;
3. The use by the Tribunal of the advisory opinion procedure:
 - (a) As a means to provide guidance to groups of States to facilitate the settlement of disputes between them through negotiations;
 - (b) As an alternative to conciliation;
 - (c) As a means to provide guidance to the Commission on the Limits of the Continental Shelf (hereinafter “CLCS”) in the implementation of its functions under the Convention.

1. On the issue of the time efficiency with which the Tribunal manages its case log

The several urgent cases the Tribunal has entertained have been dealt with within a time frame of four weeks.

This is really a very tight schedule for dealing with a case, even if it is an urgent proceeding, such as the prompt release of vessels and crews and provisional measures under article 290, paragraph 5. Nonetheless, throughout the past 20 years the Tribunal has been able to maintain this time frame for urgent cases. This tight schedule saves States Parties resources and anguish to parties to the dispute and to others involved.

The time efficiency is also observed by the Tribunal in dealing with cases on the merits and advisory opinions.

In the contentious cases on the merits it has entertained and the advisory opinions it has delivered, the average time frame is less than three years, a period that includes the submission of the case, the filing of written proceedings, the holding of the hearings, the deliberations, and the pronouncement of the Tribunal's decision. Case 16, for example, a major case on delimitation of maritime boundaries, which covered the delimitation of three maritime areas, took only 27 months to be dealt with.

This time efficiency in case management is undoubtedly a hallmark of the judicial work of the Tribunal which may not be easily matched by other courts or tribunals.

2. On the issue of the Tribunal as an alternative to Annex VII arbitration - another advantage or incentive

States Parties to Annex VII arbitration may consider transferring their case to the Tribunal. That is what happened with several cases on the merits that were entertained by the Tribunal. These cases were first submitted to Annex VII arbitration and later transferred to the Tribunal upon the agreement of the two parties.

The advantages of using the Tribunal, as compared with Annex VII arbitration, are:

(a) The existence of an infrastructure, including modern installations and proper equipment, and a registry whose costs are not to be borne by the parties to the dispute. These costs are covered by the ordinary budget of the Tribunal. In the case of arbitration, the costs are to be shared by the two parties to the dispute.

(b) The remuneration of the Judges of the Tribunal, as well as the travel costs and other associated expenses incurred when a case is being dealt with, are covered by the Tribunal's ordinary budget. The parties to a dispute before the Tribunal incur no expense of this kind. In the case of arbitration, all similar expenses incurred by the arbitrators are borne exclusively by the two parties to the arbitration. These expenses may amount to substantial sums of money that the parties would have saved had they decided to bring the case to the Tribunal.

(c) In addition, the participation of a wider group of judges in a case provides room for an ample exchange of views in the consideration of the issues raised by the case, thus enriching the deliberations on those issues, which may contribute to a balanced outcome of the case. An arbitration composed usually of five arbitrators is necessarily much limited in this respect.

(d) In addition - though a minor point - I would note that States Parties to a dispute before the Tribunal that may be in need may qualify for financial aid from a fund established for that purpose by the United Nations General Assembly. Such financial aid is not available in the case of Annex VII arbitration.

3. On the Tribunal's use of the advisory opinion procedure

Here I will make three points:

First: the use of the Tribunal as a means to provide guidance to groups of States to facilitate the settlement of disputes between them through negotiations.

The Tribunal's advisory opinion is an added advantage for groups of States wishing to clarify a point of law arising from the provisions of the Convention so as to conform their actions to the rights and obligations under the agreements between them on implementing the provisions of the Convention.

The Tribunal, in its advisory case 21 - the first one it dealt with - provided useful guidance to the States of the West African Sub-Regional Fisheries Commission (hereinafter "SRFC") as to the obligations of flag States whose fishing boats are found fishing illegally in their EEZs and the rights and obligations of those particular member States in respect of the conservation of certain fish stocks in their EEZs.

This case is an example of how the advisory opinion procedure of the Tribunal may be used by States Parties to request guidance on certain legal points raised in the interpretation and application of the provisions of an international agreement related to the purposes of the

Convention, in the context of States' activities related to their maritime areas and marine resources under the Convention.

It is true that during the consideration of case 21, a number of countries spoke against the advisory opinion jurisdiction of the Tribunal, as they believed the Convention does not grant that authority, while other States that intervened in the hearings asserted the jurisdiction of the Tribunal to do so.

The Tribunal, in asserting its jurisdiction in case 21, clarified two points in this regard:

(a) that its basis for jurisdiction was not the Convention but the agreement between the SRFC member States that specifically provides for the Tribunal's jurisdiction to deliver an advisory opinion on issues that arise out of the agreement adopted in pursuance of the Convention, as foreseen in article 21 of the Statute of the Tribunal;

(b) that the jurisdiction of the Tribunal in the case was limited to the EEZs of the member States of the Sub-Regional Fisheries Commission.

Therefore, the Tribunal's advisory opinion procedure could be used by countries that may need guidance on legal issues related to their activities regarding the provisions of an agreement between them and related to the purposes of the Convention.

My second point is on the Tribunal's advisory opinion as an alternative to conciliation.

Parties to a dispute sometimes may not be able to surmount a difficulty raised during the negotiations or may be unable to reach a compromise on a possible solution to their dispute, but at the same time, they may find it difficult to agree to submit the dispute to resolution before an international court or tribunal. In such cases the parties may make an agreement requesting an advisory opinion from the Tribunal, seeking guidance to cope with a particular legal difficulty so as to remove the obstacle to a negotiated solution of the dispute.

Short of a contentious case on which States may not be prepared to embark, the Tribunal's advisory role provides a non-binding avenue for clarification of a point of law, opening the way to resolution of an existing dispute. This may attain the same goal envisaged with a conciliation procedure, which is to facilitate a solution between parties, without their bearing the expenses that they would otherwise incur with the conciliation procedure

The advantages of such procedure are that, as in the case of Annex VII arbitration, the ordinary budget of the Tribunal would bear the expenses.

This could be used, for example, in a case of delimitation of a maritime boundary, where the States involved may be given some guidance which could facilitate a negotiated solution to their disputes.

Finally, my third point deals with legal guidance for the CLCS.

The Convention created three institutions, all of them crucial to the implementation of its provisions: the Tribunal, as a judicial body established to handle disputes arising out of the provisions of the Convention; the International Seabed Authority, for managing the Area; and the CLCS, for assisting with the much needed delineation of the outer limit of the continental shelf.

While the Tribunal is given a role regarding disputes and legal points that arise from activities in the Area, over which the Tribunal's Seabed Disputes Chamber has exclusive jurisdiction for contentious and advisory cases, the same cannot be said of the CLCS. It is known that at times the CLCS needs legal guidance in its efforts to implement the provisions of the Convention. To assist the CLCS in the exercise of its functions, the Tribunal, through the advisory opinion procedure, could be requested, on the basis of an agreement of the States Parties to the Convention or even by a formal decision taken in the Meeting of States Parties, to provide an advisory opinion concerning a legal point under a provision of the Convention raised in the context of the work of the CLCS.

Thank you.

A user-friendly Tribunal in the service of the international community

Philippe Gautier
Registrar, ITLOS

Mr Chairman,

The statements already made by two former presidents have covered most of the attractive features which the Tribunal may offer to potential users. I would like, however, to make some additional comments on this matter. In so doing, I will address four topics.

Urgency and prompt release proceedings

My first comment concerns the time factor. As already mentioned, the Tribunal has been commended for its ability to deal swiftly with cases submitted to it. The delimitation case between Bangladesh and Myanmar¹⁹⁰ is an illustration of the short period of time within which the Tribunal handles cases. The duration of the whole proceedings took slightly more than two years, a remarkably short period of time, in particular in light of the fact that most of the time was allocated to written proceedings. The period of time required for the deliberations and preparation of the judgment took less than six months. It demonstrates that the judicial practice of the Tribunal has implemented article 49 of the Rules of the Tribunal, which states: “[t]he proceedings before the Tribunal shall be conducted without unnecessary delay or expense.”

In this context, I would like to refer to one example of the urgent proceedings available under the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), i.e., prompt release proceedings under article 292. Pursuant to this provision, the flag State of a detained vessel may institute proceedings against the detaining State and request the Tribunal to order the release of the vessel and its crew upon the posting of a financial security.

Prompt release proceedings are urgent proceedings. Under the Rules of the Tribunal, they are subject to strict time-limits and the whole case, from the filing of the request to the delivery of the judgment, may not exceed one month. In addition, prompt release

¹⁹⁰ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4.*

proceedings deal only with the issue of the release of the ship, without addressing the merits of any case pending before municipal courts.¹⁹¹ This means that, once the conditions of article 292 are met, the vessel and its crew are likely to be released, the main issue to be addressed by the Tribunal being the determination of the amount of the bond to be posted. Given these elements, prompt release proceedings should, from the point of view of a ship-owner, appear an attractive option, particularly when they are faced with protracted municipal law litigation.

For some years now, no new prompt release proceedings have been instituted before the Tribunal. This does not mean that these proceedings have become obsolete, certainly not if one looks at the number of foreign ships detained around the world. It may be noted, however, that recourse to prompt release proceedings is not intended to apply to every case in which vessels are detained. Under article 292 of the Convention, the proceedings are available when 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”.¹⁹² Therefore, a flag State may only institute prompt release proceedings when it may invoke a breach of a provision requiring the detaining State to release the vessel and its crew upon the posting of a reasonable bond. So far, all prompt release cases submitted to the Tribunal related to vessels detained for alleged fishery offences in the exclusive economic zone. They were based on article 73, paragraph 2, of the Convention which states that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.” It should be added, however, that prompt release proceedings may also be useful in the case of vessels’ being detained for pollution offences, pursuant to article 220, paragraphs 6 and 7, and article 226, paragraphs 1(b) and (c), of the Convention.¹⁹³ So far, no flag State has made use of this option. Nevertheless, this is an efficient tool which a flag State could consider whenever a vessel flying its flag is detained in circumstances demanding urgent judicial remedies.

¹⁹¹ See article 292, para. 3, of the United Nations Convention on the Law of the Sea.

¹⁹² Article 292, para. 1, of the Convention.

¹⁹³ On these provisions, see e.g., Ph. Gautier, "Urgent Proceedings before the International Tribunal for the Law of the Sea," *Issues in Legal Scholarship*; Vol. 8; Issue 1 (Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea), The Berkeley Electronic Press, 2009 (<http://www.bepress.com/ils/iss11/art5>), pp. 5-6.

Provisional measures proceedings

My second comment relates to provisional measures proceedings under article 290 of the Convention. Pursuant to article 290, paragraph 1, of the Convention, the Tribunal may prescribe provisional measures in order to “preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.”

In the dispute-settlement system set out in the Convention, the Tribunal has a specific role to play as regards the prescription of provisional measures. Under article 290, paragraph 5, of the Convention, the Tribunal has compulsory jurisdiction to prescribe provisional measures in a particular instance, i.e., pending the constitution of an arbitral tribunal to which a dispute is being submitted under Part XV, section 2, of the Convention. Indeed, under Part XV of the Convention, arbitration is the default compulsory mechanism, where no other forum has been selected by the parties to the dispute, either by declarations made by them under article 287 of the Convention or by an agreement between them. The process of selecting the members of an arbitral tribunal may take a couple of months. However, during the period of time required for the constitution of the arbitral tribunal, the rights of the parties may suffer irreparable harm or there may be a risk of serious harm caused to the marine environment. In those circumstances, any party to the proceedings may have recourse to the Tribunal – acting then on the basis of its compulsory jurisdiction – and request it to prescribe provisional measures.

In this context, it may be noted that, in some instances, a State Party to the Convention may be faced with an urgent situation which requires prompt judicial remedy. The State may then consider instituting arbitral proceedings to deal with the merits of the pending dispute, with a view to being entitled to request the Tribunal to prescribe provisional measures. In such circumstances, the State Party concerned would then unilaterally institute arbitral proceedings and, at the same time, ask the respondent to take certain provisional measures. If no other agreement is reached between the parties within a time-limit of two weeks – to be calculated from the date when provisional measures were requested¹⁹⁴ – the State Party could then submit to the Tribunal, on the basis of article 290, paragraph 5, of the Convention, a request for the prescription of provisional measures.

¹⁹⁴ See article 290, para. 5, of the Convention: “... within two weeks from the date of the request for provisional measures”.

It may be observed that this approach has been followed in a number of cases submitted to the Tribunal, mostly concerning the protection of the marine environment and the detention of vessels. Provisional measures proceedings constitute an efficient and powerful tool since the Tribunal will act swiftly and deliver an order within one month. In addition, the order will be binding upon the parties,¹⁹⁵ and, under article 95, paragraph 1, of the Rules, each party has the obligation to “inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed.”

Procedural rules

My third comment relates to procedural rules applicable to cases before the Tribunal. As already mentioned, the Rules of the Tribunal were drafted with a view to ensuring that a case is handled without unnecessary delay. The Rules are also user-friendly in the sense that they may be adjusted to the needs of the parties. For example, in the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*, the Parties had agreed that the proceedings before the special chamber would be “governed by the provisions contained in Part III, sections A, B and C, of the Rules of the Tribunal.”¹⁹⁶ This was approved by the Tribunal in its order of 20 December 2000,¹⁹⁷ although cases before a special chamber would normally be governed by section D of Part III of the Rules.¹⁹⁸

In this context, I would like also to mention two additional points which may be of interest to potential users of the Tribunal.

The first relates to any contact made with the Registry prior to the filing of a case. From time to time, the Registry is approached by representatives of States who may ask questions relating to the handling of potential cases. Certainly, the Registry cannot give States any legal advice but it may provide information on procedural matters, refer the State concerned to the rules applicable to specific proceedings, or indicate that a similar issue had been addressed by the Tribunal in an earlier judgment.

¹⁹⁵ Article 290, paragraph 6, of the Convention: “The parties to the dispute shall comply promptly with any provisional measures prescribed under this article”.

¹⁹⁶ *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*, Order of 20 December 2000, *ITLOS Reports 2000*, p. 151.

¹⁹⁷ See *ibid.*, operative para. 3, p. 153.

¹⁹⁸ See articles 107-109 of the Rules.

The second point relates to an important step in the conduct of a case, i.e., the consultations between the President and the representatives of the parties on procedural questions. The consultations are referred to in article 45 of the Rules which states:

In every case submitted to the Tribunal, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose, he may summon the agents of the parties to meet him as soon as possible after their appointment and whenever necessary thereafter, or use other appropriate means of communication.

These consultations play a crucial role in the conduct of the case. They give the parties an opportunity to explain their needs in terms of written pleadings (e.g., number of pleadings and time-limits for their filing) and oral proceedings (e.g., number of days for the hearing, intention to call witnesses and/or experts). During the consultations, the parties may also raise procedural issues which will then be settled with the assistance of the President. For example, a party may wish to submit new documents to the Tribunal after the completion of the written proceedings. Pursuant to article 71 of the Rules, this requires either the consent of the other party or the approval of the Tribunal. The consultations with the President may be the right place to discuss such an issue and seek an agreed solution. For example, the production of the new document could be authorized on the understanding that the other party would be given the opportunity to comment on it within a specified time-limit. It is preferable to try to find a solution during these consultations, rather than to act without prior notice – for example by presenting the new document during the hearing —, with the risk that the other side might raise objections. This would then create a procedural incident which would probably attract attention but would not necessarily serve the interest of administration of justice.

Costs of proceedings

Finally, I would like to address the issue of costs. In this respect, it is useful to recall that there is no fee for using the Tribunal. The remuneration of judges – including judges *ad hoc* – and of the Registry's officials is paid for out of the regular budget of the Tribunal. States Parties contribute to the budget and, therefore, do not have to cover the Tribunal's expenses relating to the handling of cases.

Likewise, States Parties may use the building and its facilities, including fully equipped offices, free of charge. The same applies to interpretation and translation costs – with the exception of costs related to the use of a language other than one of the official languages of the Tribunal – as well as the preparation of verbatim records of the hearings and the use of the Library. This contrasts with the practice followed in arbitral proceedings, where all the costs listed above have to be paid by the parties.

When considering the advantages of the Tribunal in comparison with arbitral proceedings, the issue of costs should be borne in mind, in particular at a time when the use of public funds in most States is under close scrutiny. Certainly, arbitration is the oldest mechanism for the settlement of international disputes and it is perfectly legitimate for States to prefer arbitration. It should be observed, however, that, under the Convention, the submission of a dispute to arbitration is not necessarily the result of a choice made by the States Parties concerned. Pursuant to article 287 of the Convention, arbitral proceedings are the default mechanism, in the absence of an agreement between the parties to submit the dispute to another forum.¹⁹⁹ That said, once arbitral proceedings are unilaterally instituted as a compulsory mechanism, there is always the possibility for the States concerned to agree to transfer the procedure to the Tribunal. The cost element may play a role in their decision.

In this context, it is sometimes claimed that States prefer arbitral proceedings because of their confidential character compared with the openness and publicity of proceedings before a permanent court or tribunal. Here, I would like to underline the fact that, under article 26, paragraph 2, of the Statute,²⁰⁰ it is possible for the parties to a dispute to request that the hearing – or part of it – be held *in camera*. Likewise, pursuant to article 67 of the Rules, a party may request that certain parts of the written pleadings not be made public.²⁰¹ In the

¹⁹⁹ See article 287, para. 3, of the Convention: “A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.”

²⁰⁰ Article 26, para. 2, of the Statute: “The hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted.” See also article 74 of the Rules.

²⁰¹ See article 67, paras 2 and 3, of the Rules:

2. Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal or the President if the Tribunal is not sitting so decides after ascertaining the views of the parties.

practice of the Tribunal, reference may, for example, be made to the “*Enrica Lexie*” Incident (*Italy v. India*), *Provisional Measures*, where, at the request of Italy, part of the hearing dealing with the presentation of confidential information relating to the situation of Italian naval officials took place in camera.²⁰² The flexibility of the Rules may thus enable the Tribunal to accommodate the legitimate concerns of the parties and to avoid the communication of confidential information to the public. This point also helps to reinforce the attractiveness of the Tribunal.

This concludes my comments. Thank you for your attention.

3. However, the Tribunal, or the President if the Tribunal is not sitting, may, at the request of a party, and after ascertaining the views of the other party, decide otherwise than as set out in this article.”

²⁰² See the statement of the President in verbatim record ITLOS/PV.15/C24/1/Rev.1 (10 August a.m.): “Before withdrawing, however, I wish to inform the public that, in accordance with article 26 of the Tribunal’s Statute and article 74 of its Rules, Italy has requested that part of the hearing be held in camera in order to present arguments dealing with some confidential information. Thus, further to the agreement reached between the Parties, an in camera sitting will be held. This will take place directly after the break. Only the Tribunal, the Parties’ representatives and teams and the Registry staff will be able to attend this part of the sitting.

The general public is requested to remain outside of the courtroom until the public sitting resumes. This part of the sitting will not be broadcast on the internet. The estimated duration of the sitting in camera will be 30 minutes. After that the hearing will continue in public and the public will be invited to return to the courtroom.”

Questions and answers (part 3)

Judge Yanai: I thank Mr Gautier for his statement. As this round table started 15 minutes behind schedule, I would like to extend this session until 5:15 so that the distinguished participants can ask questions on the topic. Any questions? Yes.

Sir Michael Wood: Well, Michael Wood again, I'm afraid, to thank the members of the round table. The title is "A user-friendly Tribunal in the service of the international community" and it does not have a question mark at the end, so we know the answer and, I do agree, it is a user-friendly Tribunal, but it rather suggests that there are other tribunals which aren't so user-friendly and I am not sure that is a correct implication. I mean there are big differences between arbitration and coming here. For example, if you come here or to the International Court, you have an automatic right to a separate procedure on jurisdiction and admissibility, if you raise it. You don't have that automatic right if you go to arbitration. It depends upon the arbitration rules that the parties agree on. There is a number of quite important differences, but I guess I wanted to make two suggestions perhaps.

First is, the International Court a few years ago held a meeting of agents or counsel who had appeared recently before it and they asked what can we improve, what could we do better. And it might be a good thing for this Tribunal to do at a certain point. For example, if I were invited to such a meeting, I would question the very puzzling request that you make at the start of the oral hearing in advance to set out the points that you are going to raise and the authorities you are going to rely on, which is impossible really for the one who is going to speak second, because you do not know what points you are going to make till you've heard the first speaker. It's just a very curious request. I would question the rather rigid way that you try to insist that the agent at the end of the oral hearing only reads out the submissions, because agents like to say a bit more than that at the end of the oral hearing, but you are very insistent. I would suggest that more thought might be given to the timing of oral proceedings, not just how much time you get to speak, that is perhaps less important, but how much time you get to think between the different rounds. I think that's something that could be looked at. So a suggestion of a meeting with agents or counsel at some point could be valuable.

And the second point going to the public relations aspect that Judge Yanai mentioned. I wonder whether it is not just a matter of going around the world and telling them about the Tribunal, but

bringing the world to see the Tribunal, to get a feel for it, which you do through these very important training programmes for example. But also perhaps these facilities could be used more for conferences, not conferences that are just Tribunal conferences like this one – if it is possible legally and within your mandate to use these facilities, so that more people come to Hamburg, perhaps for joint meetings with the university or something and they come here. One thought in that regard is that many years ago there was this suggestion that arbitral tribunals might have the option of using these facilities, if they paid for them, no doubt. Now there may have been legal reasons against that, there may have been reasons of competition against that, but actually having some arbitral tribunals meeting in these facilities would publicize these facilities and show to the lawyers and all those involved in the arbitral tribunals what a useful facility there is here. So it might be worth just thinking about that again. Thank you.

Judge Yanai: Thank you, Sir Michael Wood, for your very useful suggestions. Any others? Yes, over there.

Ms Jetta Abgarian: Honourable speakers, Judge Yanai, Judge Jesus and the Registrar Gautier, thank you for your speech. Actually I have a small comment. Let me introduce myself. I am a former Nippon fellow, 2012-2013. I am a Ph.D. candidate. I am specializing in international maritime law. What I wanted to suggest is a simple suggestion: Judge Yanai, you mentioned the commercialization issues and I wonder whether it is possible somehow - or whether maybe you have thought about that also - to make a kind of an edition, a special edition of the Tribunal's publishing editions that will contain some translations of all the meaningful decisions and opinions and consultations into the Russian language, for example. It will be a kind of an Internet publishing edition or maybe not, it may be written and published, and I think it will help much, for example, for studying purposes, maybe not for promoting the role of the Tribunal between the States Parties to apply to the Tribunal, but for studying purposes it will be a very efficient measure, because not all of the students for example in Moscow read English, not all of them understand the language. So that is the suggestion. Thank you.

Judge Yanai: Thank you very much for your good suggestion. Certainly if our judgments and decisions were translated into more languages other than the two official languages, that would make the Tribunal very user-friendly, but it involves a lot of financial

implications and also it needs manpower. Maybe, Mr Gautier, do you have any comments on this a practical suggestion?

The Registrar: Mr Chairman, it is a very good suggestion indeed, but as you mentioned the source of funding should be contemplated. But there are perhaps ways if there is a will, but that is a suggestion to be kept in mind.

Judge Yanai: Thank you, Mr Gautier. M. le juge Cot.

M. le juge Cot : Merci beaucoup. Je ne suis pas d'accord. Je considère que ce sera jeter de l'argent par la fenêtre pour une bonne raison, c'est que ceux qui s'intéressent au droit international parlent le français et l'anglais ou le français ou l'anglais et qu'il y a vraiment mieux affaires que considérer que les internationalistes ne sont pas capable de maîtriser l'une des deux langues officielles. Donc pour ma part je trouve que c'est une très mauvaise idée. Excusez-moi.

M. le juge Yanai : Merci, M. le juge Cot. Nous avons pris bonne note de votre objection. Peut-être la traduction dans les autres langues devrait être fait par des autres institutions, personnes ou chercheurs, pas par le Tribunal. Merci.

Any other questions? Thank you very much for your attention. I think it is time to adjourn. You must be quite tired after very rich discussions. So I ask President Golitsyn to say the closing remarks.

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