

13 The International Tribunal for the Law of the Sea and Dispute Settlement under UNCLOS III

1) Introduction

The International Tribunal for the Law of the Sea (ITLOS) is the third international dispute settlement body to be considered in this part of the Manual. It was created by the 1982 United Nations Convention on the Law of the Sea (UNCLOS III). The Convention provides for dispute resolution by way of both arbitration and conciliation, permits disputes to be decided *ex aequo et bono* (provided the parties agree) and makes provisions for the establishment of a fact-finding Tribunal.

Part XV of UNCLOS III contains the provisions relating to the settlement of disputes. Article 284 in Part XV contains provisions dealing with Conciliation (the detail is set out in Annex V). Article 287 contains the choice of four means for the settlement of disputes relating to the interpretation and application of the Convention: through the Tribunal itself (the ITLOS Statute is set out in Annex VI); through the International Court of Justice (ICJ); through Arbitration (the relevant provisions are contained in Annex VII); or through Special Arbitration (the provisions are set out in Annex VIII).

This chapter will look at the Law of the Sea Convention, the Statute of ITLOS, cases decided by the Tribunal, the Conciliation provisions, the Arbitration provisions and the Special Arbitration provisions.

2) Historical Overview

UNCLOS III came into force on 16 November 1994. In October 1996, the Tribunal began to function at its seat in Hamburg.

The other supranational dispute resolution bodies considered in the Manual – the ICJ, the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) – were all made the primary court or tribunal by the instruments that created them: the United Nations Charter, the 1899 Hague Peace Conference and the ICSID Convention.

UNCLOS III, on the other hand, gave jurisdiction to resolve disputes not only to ITLOS but also to other tribunals. In all, as noted above, there are four procedures for dispute resolution under the 1982 Convention. The UNCLOS dispute settlement procedures are complex. This is hardly surprising given the complexity of the subject matter: two-thirds of the Earth's surface is covered by water, and the Convention contains a universal legal regime dealing with, among other things, the territorial sea, exclusive economic zones, the continental shelf and delimitation.

3) The Dispute Resolution Provisions of Part XV of UNCLOS III

Parts of UNCLOS III have been considered earlier in the Manual. For example, Part II of the Convention deals with the territorial sea and contiguous zone; Part V with the exclusive economic zone; and Part VI with the continental shelf. The Part to be considered now is Part XV, which is concerned with dispute resolution.

Part XV is divided into three Sections: Section 1 (Articles 279-285) contains general provisions dealing with peaceful settlement by non-binding means such as negotiation and conciliation; Section 2 (Articles 286-296) deals with compulsory procedures entailing binding decisions; and Section 3 (Articles 297-299) deals with limitations and exceptions.

Section 1: General provisions

Section 1 sets out the requirement that disputes be settled by peaceful means (Articles 279-281). Article 282 deals with the situation where other agreements, such as bilateral agreements, apply:

“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”

Article 283 provides that the States Parties are under an obligation to exchange views regarding the settlement of the dispute by negotiation or other peaceful means. They can agree to submit their dispute to conciliation in accordance with the procedures under Annex V or another conciliation procedure (Article 284).

Article 285 deals with disputes under Part XI, which is concerned with the Seabed Disputes Chamber.

Section 2: Compulsory procedures

Article 286 deals with compulsory dispute settlement procedures. It states that where no settlement has been reached by recourse to the provisions contained in Section 1, the dispute is to be submitted to the court or tribunal having jurisdiction under Section 2. The provisions are important, and deal with the four settlement procedures referred to earlier. Article 287 (1) provides for a choice, by means of a written declaration, of one or more of the following means for the settlement of disputes:

- “(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;*
- (b) the International Court of Justice;*
- (c) an arbitral tribunal constituted in accordance with Annex VII;*
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.”*

Article 287 (3) provides that a State party that 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”*.

If the parties have accepted the same dispute settlement procedure, the dispute may be submitted only to that procedure (unless the parties otherwise agree). However, Article 287 (5) states that if the parties to the dispute have not accepted the same procedure, the dispute *“may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree”*.

Declarations may be made when signing, ratifying or acceding to the Convention or at any time thereafter and are to be lodged with the UN Secretary-General.

Article 288 deals with the jurisdiction of the various courts or tribunals referred to in Article 287:

- “1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.*
- 2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.*
- 3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.*
- 4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.”*

The court or tribunal exercising jurisdiction in a dispute involving scientific or technical matters may select no fewer than two scientific or technical experts to sit with the court or tribunal. The experts do not have the right to vote (Article 289).

Article 290 deals with provisional measures. Article 290 (1) provides that the relevant court or tribunal has the power to order provisional measures that *“it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision”*.

Under Article 290 (5), ITLOS is competent to prescribe provisional measures on a mandatory basis pending the constitution of an arbitral tribunal. When arbitral proceedings are instituted (e.g., in the event that the parties did not make a declaration under Article 287 of the Convention), the constitution of the arbitral tribunal may take some months before it becomes effective. In the meantime, since the rights of the parties need to be preserved, it may be necessary to prevent serious harm being caused to the environment. The Tribunal is therefore competent to prescribe provisional measures *“within two weeks from the date of the request for provisional measures”*. To date, four cases have been dealt with by the Tribunal under this paragraph.

Access to the dispute settlement procedures is only open to States Parties. Entities other than States Parties may use the procedures only as specifically provided for in the Convention (Article 291).

The prompt release of vessels and crews is dealt with in Article 292. The *M/V "Saiga" Case* and various other cases referred to later in this chapter were concerned with this Article.

Article 293 specifies that the court or tribunal having jurisdiction under the compulsory procedures of Section 2 is to apply *"this Convention and other rules of international law not incompatible with this Convention"* (Article 293 (1)). However, it may decide a case *ex aequo et bono*, if the parties agree (Article 293 (2)).

The relevant court or tribunal has power under Article 294 to decide whether a claim made under Article 297 (concerning the exercise by a coastal state of its sovereign rights or jurisdiction) constitutes an abuse of legal process.

Article 295 deals with the exhaustion of local remedies: *"Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law."*

A decision rendered by the court or tribunal having jurisdiction under Section 2 is final *"and shall be complied with by all the parties to the dispute"*.

Section 3: Limitations and exceptions

The final Section of Part XV sets out limitations on the applicability of Section 2. Article 297 provides that disputes relating to the exercise by a coastal State of its sovereign rights or jurisdiction are subject to the Section 2 procedures in the various cases that are listed: for example, when the coastal State has acted in contravention of the provisions of the Convention in relation to the freedoms and rights of navigation, overflight or the laying of pipelines.

Article 298 deals with optional exceptions to the applicability of Section 2. When signing, ratifying or acceding to the Convention, or at any time thereafter, a State may declare in writing that it does not accept any one or more of the procedures provided for in Section 2 in relation to the various categories of disputes set out in Article 298.

Notwithstanding the provisions of Articles 297 and 298, the parties may nevertheless be able to make use of the dispute review processes contained in Section 2. Article 299 (1) states that a dispute *"excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute"*.

Article 299 (2) states that nothing in Section 2 impairs the right of the parties to the dispute *"to agree to some other procedure for the settlement of such dispute or to reach an amicable settlement"*.

4) The Statute of ITLOS – the Tribunal: Annex VI

It was seen earlier that Article 287 in Part XV stated that one of the four means of settling disputes under UNCLOS III was by way of the international Tribunal “*established in accordance with Annex VI*”.

Annex VI of the Convention contains the Statute of the ITLOS, commencing with the provision creating the Tribunal in Article 1:

“1. *The International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute.*

“2. *The seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany....*”

Article 1 is followed by five sections.

Section 1: Organisation of the Tribunal

Section 1 (Articles 2-19) deals with the organisation and composition of the Tribunal, which comprises 21 members of recognised competence in the law of the sea. The representation of the principal legal systems of the world and equitable geographical distribution is assured – Article 3 provides that there shall be no fewer than three members from each geographical group as established by the UN General Assembly. At present, the Tribunal is composed of five judges from Africa, five from Asia, four from Latin America and the Caribbean, four from Western Europe and others, and three from Eastern Europe. There is to be a President, Vice-President and Registrar. Eleven members constitute a quorum.

The establishment of a Seabed Disputes Chamber is provided for in Article 14, and the Tribunal may form special chambers to deal with particular categories of disputes (Article 15). The Tribunal is to frame rules, in particular rules of procedure.

Section 2: Competence / jurisdiction of the Tribunal and applicable law

Section 2 (Articles 20-22) deals with the competence of the Tribunal. The Tribunal is open to States Parties, and also to entities other than States Parties “*in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case*”. Further, the parties to a treaty or convention already in force and that concerns the subject matter covered by the Convention may agree that “*any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal*” (Article 22).

Article 23 deals with the applicable law. The Tribunal is to decide all disputes and applications in accordance with Article 293, which provides that the relevant court or tribunal is to apply the Convention and other rules of international law not incompatible with the Convention and may also, if the parties agree, decide a case *ex aequo et bono*.

Section 3: Procedure of the Tribunal

Section 3 (Articles 24-34) of Annex VI is concerned with procedure. Article 24 contains provisions dealing with the institution of proceedings before the Tribunal:

1. *Disputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated.*
2. *The Registrar shall forthwith notify the special agreement or the application to all concerned.*
3. *The Registrar shall also notify all States Parties."*

Article 25 provides that the Tribunal (and its Seabed Disputes Chamber) has power to prescribe provisional measures in accordance with Article 290 of the Convention. That Article in Part XV states that the relevant court or tribunal has jurisdiction to prescribe provisional measures aimed at preserving the respective rights of the parties and preventing serious harm to the maritime environment, pending a final decision. Hearings shall be in public, unless the Tribunal decides otherwise or the parties demand that the public should not be admitted (Article 26).

The Tribunal makes orders for the conduct of the case, and decides *"the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence"*.

Article 28 makes provision for proceedings in default in the event that one of the parties does not appear or fails to defend its case: *"the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law."*

Decisions are by a majority of the members of the Tribunal. In the event of an equal vote, the President (or the member acting in this place) has the casting vote (Article 29). The judgement of the Tribunal is to state reasons and contain the names of the members who have taken part in the decision. If the judgement is not unanimous, any member is entitled to deliver a separate opinion (Article 30).

Articles 31 and 32 make provisions for intervention. A State Party that considers that it has an interest *"of a legal nature which may be affected by the decision in any dispute"* may submit a request to the Tribunal to be permitted to intervene. If the Tribunal grants such a request, its decision in respect of the dispute is binding on the intervening State Party. Furthermore, whenever the interpretation or application of the Convention is in question, the Registrar is to notify all States Parties, who are entitled to intervene. Similarly, where the interpretation or application of an international agreement is in question (Article 21 and 22) the parties to the agreement may intervene. Intervening parties are bound by the judgement of the Tribunal.

The decision of the Tribunal is final and binding (although the Tribunal can construe the meaning and scope of its decision) (Article 33).

Article 34 deals with costs. Unless otherwise decided, each party bears its own costs.

Section 4: Seabed Disputes Chamber

Section 4 (Articles 35-40) deals with the Seabed Disputes Chamber. Article 35 sets out provisions relating to the composition of the Chamber: 11 members, selected by a majority of the elected members of the Tribunal. The Chamber elects a President, and a quorum comprises seven members. The Chamber may create an ad hoc chamber for dealing with specific disputes (Article 36).

Articles 37 and 38 deal with access to the Chamber and with applicable law. The Chamber is open to the States Parties, the International Seabed Authority and the other entities referred to in Section 5 of Part XI. It is to apply the rules, regulations and procedures of the Authority and the terms of contracts concerning activities in the Area in matters relating to those contracts. Additionally, the Chamber is to apply the provisions of Article 293, namely the Convention and other rules of international law not incompatible with the Convention. The Chamber may also decide the case *ex aequo et bono*, if the parties agree.

Decisions of the Chamber are enforceable in the territories of the States Parties “*in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought*” (Article 39).

Other sections of Annex VI that are not incompatible with Section 4 apply to the Chamber.

Section 5

Section 5 of the Statute deals with amendments to Annex VI. The Tribunal has framed detailed Rules of Procedure in accordance with Article 16 of Annex VI. The Rules concern the organisation of the Tribunal and the procedure to be followed in proceedings before ITLOS and the Seabed Disputes Chamber. In addition, to assist parties appearing in proceedings before it, the Tribunal has also established Guidelines concerning the preparation and presentation of cases. The text of the Rules of the Tribunal and the Guidelines can be found on the ITLOS website.⁵³

5) The ITLOS Caseload and Some Decisions

When he addressed the UN General Assembly in 2004 (see Box 8), the President of ITLOS, Dolliver Nelson, noted that the Tribunal had to that point dealt with 12 cases involving 17 State parties. Subsequently, Case No. 13, the *Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau), Prompt Release*, was submitted to the Tribunal on 18 November 2004 and judgment was delivered on 18 December 2004.

Box 8: Comments by the President of ITLOS on the Tribunal

Addressing the 59th session of the UN General Assembly in November 2004, the President of ITLOS, Dolliver Nelson, looked back over the eight-year existence of the Tribunal and noted that 17 State parties had been involved in the 12 cases dealt with by the Tribunal at that time. In those cases, six judgements and 26 orders had been delivered: *"This bears favourable comparison with the record of other international courts and tribunals in the initial stages of their existence. It is gratifying to note that 17 States Parties from different regions of the world have been engaged in proceedings before the Tribunal. It should also be remarked, and this is generally agreed, that the Tribunal has rendered its decisions within remarkably short periods."*

The President stated that, although the Tribunal had often been used successfully to assist States to settle their maritime disputes without resorting to litigation, it had not been put to full use by prospective litigants – and had therefore been unable to develop its potential as the specialised judicial organ under the Convention for the settlement of maritime disputes.

In this context, President Nelson stressed the ready availability of the Tribunal to States Parties, and he drew the attention of the General Assembly to the possibility of submitting disputes to special chambers of the Tribunal as a viable alternative to arbitration. He said that the Tribunal *"has already made some contribution to the development of international law with regard to issues such as the nationality of claims, reparation, use of force in law enforcement activities, hot pursuit and the question of the genuine link between the vessel and the flag State. It can be fairly said that the Tribunal has also developed a coherent jurisprudence in prompt release proceedings under article 292 of the Convention."*

The cases are as follows:

- *The M/V "Saiga" Case (Saint Vincent and the Grenadines v Guinea), Prompt Release;*
- *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v Guinea), Merits;*
- *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan), Provisional Measures;*⁵⁴
- *The "Camouco" Case (Panama v France), Prompt Release;*
- *The "Monte Confurco" Case (Seychelles v France), Prompt Release;*
- *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile / European Community);*
- *The "Grand Prince" Case (Belize v France), Prompt Release;*
- *The "Chaisiri Reefer 2" Case (Panama v Yemen), Prompt Release;*
- *The MOX Plant Case (Ireland v United Kingdom), Provisional Measures;*

- *The “Volga” Case (Russian Federation v Australia), Prompt Release;*
- *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore), Provisional Measures;*
- *The “Juno Trader” Case (Saint Vincent and the Grenadines v Guinea-Bissau), Prompt Release.*

A selection of ITLOS cases will now be considered.

i) The M/V “Saiga” Case

The International Tribunal received its first case – the *M/V “Saiga” Case (Saint Vincent and the Grenadines v Guinea), Prompt Release* – in November 1997. The case related to an application for the prompt release of a vessel and its crew.

The application on behalf of Saint Vincent and the Grenadines instituted proceedings against the Government of Guinea with regard to the alleged arrest of the M/V Saiga off the coast of West Africa. It requested the Tribunal to order the prompt release of the vessel and its cargo and crew detained in Conakry, Guinea. The vessel was allegedly “*attacked by representatives of the Guinean Government who shot at the ship and crew and injured four of them before taking control of the vessel. The vessel was brought into Conakry, Guinea at around 21:00 on 28 October 1997. Two seriously injured crew have since been allowed to leave. The vessel and remaining crew continue to be held hostage at Conakry.*”

The application was based on Article 292 of UNCLOS III, which provides that:

- *where the authorities of a government of a State that is a party to the Convention have detained a vessel flying the flag of another State which is also party to the Convention, and*
- *it is alleged that the detaining State has not complied with the requirements of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, then*
- *the question of release from detention may be submitted to the Tribunal if the parties have not agreed (within 10 days from the time of detention) to submit the case to another court or tribunal.”*

The application of Saint Vincent and the Grenadines stated that:

“Guinea has not to date sought any bond or other financial security in respect of the detention of the ‘Saiga’, nor has it advised any interested party of the reasons for its action, nor has it allowed their representatives access to the crew remaining on board.”

The Registry transmitted a copy of the application with all its attachments to the Government of Guinea. Guinea had until 24 hours before the date of the opening of the hearing to provide its response to the application.

There were 21 members of the Tribunal that heard and determined the case. The hearing opened on 21 November 1997 and, at the request of Guinea, was postponed until

27 November 1997. The Tribunal concluded its hearing on 28 November 1997 and six days later delivered its judgement. It:

"... ordered the prompt release of the oil tanker M/V 'Saiga' and its crew from detention in Conakry, Guinea. In addition to the cargo of gas oil, Saint Vincent and the Grenadines is to deposit 400,000 United States Dollars as a security for the release.

"... Guinea claimed that the M/V 'Saiga' was engaged in smuggling activities off its coast when arrested. The arrest, at a point outside Guinean waters, allegedly following a chase, was claimed to be in the exercise of the right of hot pursuit. Guinea also maintained that the Tribunal had no jurisdiction in the matter and that the claim was inadmissible. Saint Vincent and the Grenadines accused Guinea of piracy.

"The arrest took place on 28 October 1997.

"In view of the urgency attached to these proceedings and the humanitarian considerations for the crew, the Tribunal was obliged by the United Nations Convention on the Law of the Sea, to which both Countries are parties, and the Rules of the Tribunal to act rapidly.

Within ten days of the arrest there had been no agreement between the parties to go before any other court. The application for release was then filed with the Tribunal by Saint Vincent and the Grenadines on 13 November.

Within ten days of the filing of the application, the Judges convened to hear the case.

Within ten days of the Tribunal convening, written statements were filed by the parties and two days of oral proceedings were held.

Within ten days of the end of the oral proceedings the Judgment was delivered.

"The whole procedure before the Tribunal has taken exactly three weeks.

"The Judges of the Tribunal heard oral argument on 27 and 28 November. It also heard oral testimony from two witnesses called by Saint Vincent and the Grenadines: Mr. Sergiy Klyuyev, Second Officer of the 'Saiga', and Mr. Mark Vervaet, representative in Senegal of the charterers of the 'Saiga'. Mr. Klyuyev told the Tribunal under oath how he received fragments of a bullet in his arm when the Guinean authorities arrested the ship.

"The Judges heard evidence on the activities and the route of the M/V 'Saiga', which was bunkering fishing boats in the coastal waters of Guinea, supplying them with gas oil. They were also told that the captain of the vessel was still kept imprisoned in Guinea. Extracts from the logbook of the M/V 'Saiga' were also submitted to the Tribunal.

"Agents and Counsel of both Saint Vincent and the Grenadines and Guinea participated at the hearings.

"The Judges, having completed their deliberations on the case, set up a drafting committee in accordance with the Internal Judicial Practice of the Tribunal. The Committee is composed of five Judges holding the majority opinion. The draft Judgment produced by this Committee went through two readings after which a final vote was taken to adopt the Judgment. The Judgment was delivered, six days after the end of the oral proceedings.

*"The Judgment was unanimous as to the Tribunal having jurisdiction, but divided 12 to 9 on the question of the release. The dissenting Judges filed two collective dissenting opinions and two dissenting opinions by individual Judges."*⁵⁵

The decision of the Tribunal dealing with the merits of the *M/V "Saiga" Case* – in an award released in July 1999 – is considered later.

The Tribunal has dealt with seven other applications for the prompt release of a vessel and its crew.

ii) The Southern Bluefin Tuna Cases

In 1999 the role of the Tribunal in the *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, *Provisional Measures* was restricted to the prescription of provisional measures. Following that, the dispute was dealt with by an arbitral tribunal constituted under the provisions of Annex VII of the 1982 Convention.

The Registry reported that:

"Australia and New Zealand filed with the Registrar of the Tribunal requests for the prescription of provisional measures (interim injunction) in a case against Japan. The dispute between Australia and New Zealand on one side and Japan on the other concerned the conservation of the population of Southern Bluefin Tuna. The species is, according to the applicants, significantly overfished and is below commonly accepted thresholds for biologically safe parental biomass.

*"In the absence of agreement between the parties for the settlement of the merits (substance) of the dispute between them, the Governments of Australia and New Zealand decided to submit their dispute with Japan to an arbitration procedure under Annex VII of the United Nations Convention on the Law of the Sea. Pending the constitution of such an arbitral tribunal, the Governments of Australia and New Zealand have requested the International Tribunal for the Law of the Sea to prescribe provisional measures, pursuant to paragraph 5 of Article 290 of the Convention."*⁵⁶

iii) The Mox Plant Case

The *Mox Plant Case (Ireland v United Kingdom)*, *Provisional Measures* in 2001 again involved a dispute in which the parties came before the Tribunal in relation to a request for provisional measures, with the merits of the dispute later being heard and determined by an arbitral tribunal constituted under Annex VII to the Convention.

The *MOX Plant Case* concerned objections by Ireland to the United Kingdom's construction of a mixed oxide (MOX) plant. These included the possibility that the plant or shipments of radioactive material associated with the plant might release radioactive material into the Irish Sea.

55 See *M/V "SAIGA" (Saint Vincent and the Grenadines v Guinea)*, *Prompt release, Judgment*, ITLOS Reports 1997, p 16. The judgment and dissenting opinions can also be found on the ITLOS website at www.itlos.org.

56 See *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, *Provisional Measures, Order of 27 August 1999*, ITLOS Reports 1999, p 280. The order concerning the Southern Bluefin Tuna Cases can also be found on the ITLOS website.

In the Notification and Statement of Claim of 25 October 2001, Ireland requested the Annex VII arbitral tribunal to adjudge and declare:

- "1) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant, including by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from (1) intended discharges of radioactive materials and/or wastes from the MOX plant, and/or (2) accidental releases of radioactive materials and/or wastes from the MOX plant and/or international movements associated [with] the MOX plant, and/or (3) releases of radioactive materials and/or wastes from the MOX plant and/or international movements associated the MOX plant*
- "2) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant by failing (1) properly or at all to assess the risk of terrorist attack on the MOX plant and international movements of radioactive material associated with the plant, and/or (2) properly or at all to prepare a comprehensive response strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and international movements of radioactive waste associated with the plant;*
- "3) That the United Kingdom has breached its obligations under Articles 123 and 197 of UNCLOS in relation to the authorisation of the MOX plant, and has failed to cooperate with Ireland in the protection of the marine environment of the Irish Sea inter alia by refusing to share information with Ireland and/or refusing to carry out a proper environmental assessment of the impacts on the marine environment of the MOX plant and associated activities and/or proceeding to authorise the operation of the MOX plant whilst proceedings relating to the settlement of a dispute on access to information were still pending...."*

On 3 December 2001 the International Tribunal prescribed a provisional measure. The Tribunal:

"1. Unanimously,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention:

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

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

"2. Unanimously,

Decides that Ireland and the United Kingdom shall each submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 17 December 2001, and authorizes the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.

“3. Unanimously,
Decides that each party shall bear its own costs.”⁵⁷

iv) The M/V “Saiga” (No 2) Case: decision on the merits

The decision of the Tribunal in the M/V “Saiga” Case prompt release case was considered earlier. Now the decision of the Tribunal in the later case on the merits will be considered.

On 1 July 1999, by eighteen votes to two, ITLOS declared that Guinea had violated the rights of Saint Vincent and the Grenadines in arresting the M/V Saiga and awarded US\$2,123,357 with interest as compensation. This included compensation for the detention of the Captain and the crew, for the gunshot injuries to the Second Officer and another, for the confiscated cargo and for the damage to the vessel. The Tribunal also decided that Guinea had used excessive force when arresting the vessel.

The Tribunal rejected the claim by Saint Vincent and the Grenadines that Guinea violated its rights by naming it as civilly responsible in the schedule of summons against the Master of the Saiga. The Tribunal also rejected Saint Vincent’s claim that Guinea violated its rights by failing to promptly release the Saiga and its crew. In previous proceedings, the Tribunal ordered its release on the deposit of a security.

The Tribunal in its award first set out the factual background to the case:

“The Saiga is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Shipmanagement Ltd. of Glasgow, Scotland. The ship was chartered to Lemania Shipping Group Ltd. of Geneva, Switzerland. The Saiga was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The Master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who were employed as painters. The Saiga was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

“Under the command of Captain Orlov, the Saiga left Dakar, Senegal, on 24 October 1997 fully laden with approximately 5,400 metric tons of gas oil. On 27 October 1997, between 0400 and 1400 hours and at a point 10°25’03”N and 15°42’06”W, the Saiga supplied gas oil to three fishing vessels, the Giuseppe Primo and the Kriti, both flying the flag of Senegal, and the Eleni S, flying the flag of Greece. This point was approximately 22 nautical miles from Guinea’s island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. The Saiga then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. Upon instructions from the owner of the cargo in Geneva, it later changed course and sailed towards another location beyond the southern border of the exclusive economic zone of Guinea.

“At 0800 hours on 28 October 1997, the Saiga, according to its log book, was at a point 09°00’01”N and 14°58’58”W. It had been drifting since 0420 hours while

57 See *Mox Plant, (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, p 89. The order may also be found on the ITLOS website.

awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the exclusive economic zone of Guinea. At about 0900 hours the Saiga was attacked by a Guinean patrol boat (P35). Officers from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its Master was detained. The travel documents of the members of the crew were taken from them by the authorities of Guinea and armed guards were placed on board the ship. On 1 November 1997, two injured persons from the Saiga, Mr. Sergey Klyuyev and Mr. Djibril Niasse, were permitted to leave Conakry for Dakar for medical treatment. Between 10 and 12 November 1997, the cargo of gas oil on board the ship, amounting to 4,941.322 metric tons, was discharged on the orders of the Guinean authorities. Seven members of the crew and two painters left Conakry on 17 November 1997, one crew member left on 14 December 1997 and six on 12 January 1998. The Master and six crew members remained in Conakry until the ship was released on 28 February 1998.

"An account of the circumstances of the arrest of the Saiga was drawn up by Guinean Customs authorities in a 'Procès-Verbal' bearing the designation 'PV29'... PV29 contains a statement of the Master obtained by interrogation by the Guinean authorities. A document, 'Conclusions présentées au nom de l'Administration des Douanes par le Chef de la Brigade Mobile Nationale des Douanes' (Conclusions presented in the name of the Customs administration by the Head of the National Mobile Customs Brigade), issued on 14 November 1997 under the signature of the Chief of the National Mobile Customs Brigade, set out the basis of the action against the Master. The criminal charges against the Master were specified in a schedule of summons (cédula de citation), issued on 10 December 1997 under the authority of the Public Prosecutor (Procureur de la République), which additionally named the State of Saint Vincent and the Grenadines as civilly responsible to be summoned (civilement responsable à citer). Criminal proceedings were subsequently instituted by the Guinean authorities against the Master before the Tribunal of First Instance (tribunal de première instance) in Conakry.

"On 13 November 1997, Saint Vincent and the Grenadines submitted to this Tribunal a Request for the prompt release of the Saiga and its crew under article 292 of the Convention. On 4 December 1997, the Tribunal delivered Judgment on the Request. The Judgment ordered that Guinea promptly release the Saiga and its crew upon the posting of a reasonable bond or security by Saint Vincent and the Grenadines. The security consisted of the gas oil discharged from the Saiga by the authorities of Guinea plus an amount of US\$400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.

"On 17 December 1997, judgment was rendered by the Tribunal of First Instance in Conakry against the Master."

Various articles of Codes and Laws had been cited in support of the charge brought against the Master of the vessel, namely that he had *"imported, without declaring it, merchandise that is taxable on entering national Guinean territory, in this case diesel oil, and that he refused to comply with injunctions by Agents of the Guinean Navy, thus committing the crimes of contraband, fraud and tax evasion"*. The International Tribunal continued:

"The Tribunal of First Instance in Conakry found the Master guilty as charged and imposed on him a fine of 15,354,024,040 Guinean francs. It also ordered the confiscation of the vessel and its cargo as a guarantee for payment of the penalty.

"The Master appealed to the Court of Appeal (cour d'appel) in Conakry against his conviction by the Tribunal of First Instance. On 3 February 1998, judgment was rendered by the Court of Appeal. The Court of Appeal found the Master guilty of the offence of 'illegal import, buying and selling of fuel in the Republic of Guinea' which it stated was punishable under Law L/94/007. The Court of Appeal imposed a suspended sentence of six months imprisonment on the Master, a fine of 15,354,040,000 Guinean francs and ordered that all fees and expenses be at his expense. It also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

"On 11 March 1998, the Tribunal delivered the Order prescribing provisional measures, referred to in paragraph 8. Prior to the issue of its Order, the Tribunal was informed, by a letter dated 4 March 1998 sent on behalf of the Agent of Saint Vincent and the Grenadines, that the Saiga had been released from detention and had arrived safely in Dakar, Senegal. According to the Deed of Release signed by the Guinean authorities and the Master, the release was in execution of the Judgment of the Tribunal of 4 December 1997."

The Tribunal then went on to consider jurisdiction, admissibility, exhaustion of local remedies, nationality of claims, the arrest of the "Saiga", hot pursuit and the use of force.

In respect of the use of force, the Tribunal noted that:

"... Saint Vincent and the Grenadines claims that Guinea used excessive and unreasonable force in stopping and arresting the Saiga. It notes that the Saiga was an unarmed tanker almost fully laden with gas oil, with a maximum speed of 10 knots. It also notes that the authorities of Guinea fired at the ship with live ammunition, using solid shots from large-calibre automatic guns.

"Guinea denies that the force used in boarding, stopping and arresting the Saiga was either excessive or unreasonable. It contends that the arresting officers had no alternative but to use gunfire because the Saiga refused to stop after repeated radio messages to it to stop and in spite of visual and auditory signals from the patrol boat P35. Guinea maintains that gunfire was used as a last resort, and denies that large-calibre ammunition was used. Guinea places the responsibility for any damage resulting from the use of force on the Master and crew of the ship."

The Tribunal then went on to say that, in considering the use of force by Guinea in the arrest of the "Saiga":

"... the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

“These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (S.S. “I’m Alone” case (Canada / United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark – United Kingdom, 1962), I.L.R., Vol. 35, p. 485). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks....”

The Tribunal noted that in the present case, the “Saiga”

“... was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the Saiga had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the Saiga and not the result of a deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice

“ The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

“For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law.”⁵⁸

6) Conciliation: Annex V

It will be recalled that Article 284 in Section 1 of Part XV provides that disputes may be submitted to conciliation in accordance with the procedure under Annex V of UNCLOS III (or indeed in accordance with any other conciliation procedure). The conciliation process is non-binding.

Section 1 of Annex V is concerned with the voluntary dispute settlement procedures of Section 1 of Part XV. The process is commenced by one party serving written notice on the other party or parties. The UN Secretary-General is to maintain a list of conciliators. Every State Party shall be entitled to nominate four conciliators *“each of whom shall be a person enjoying the highest reputation for fairness, competence and integrity”*. Provisions are made for the constitution of the conciliation commission (Articles 1-3). Unless the parties have agreed otherwise, the commission determines its own procedure with the consent of the parties. It may invite any State Party to submit its views orally or in writing. Its decisions relating to procedural matters, the report and recommendations are to be by a majority vote (Article 4).

The provisions at the heart of the conciliation process are contained in Articles 5 and 6 and are succinct. Article 5 states that: *“The commission may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute.”* Article 6 states that the functions of the commission are to hear the parties, examine their claims and objections, and make proposals to them with a view to reaching an amicable settlement.

Article 7 contains provisions relating to the commission’s report, which is non-binding:

- “1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.*
- 2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.”*

The conciliation proceedings are terminated when settlement has been reached, when the parties have accepted the recommendations of the report, when one party has rejected those recommendations, or when a period of three months has expired from the date of transmission of the report to the parties (Article 8).

Article 9 deals with fees and expenses of the commission, which must be borne by the parties. The parties may modify the provisions of the Annex (Article 10).

Section 2 contains provisions relating to compulsory submission to conciliation, pursuant to Section 3 of Part XV. Proceedings are instituted by written notice by one party to the other party or parties: *“Any party to the dispute, notified under paragraph 1, shall be obliged to submit to such proceedings”* (Article 11). Article 12 states that failure to reply to notification of institution of proceedings, or to submit to those proceedings, shall not constitute a bar to the conciliation process.

The conciliation commission shall decide a disagreement as to whether it has competence (Article 13). Article 14 applies Articles 2 to 10 of Section 1 of the Annex (namely the provisions as to procedure, amicable settlement, functions of the commission, etc).

7) Arbitration: Annex VII

Annex VII of UNCLOS III contains 13 Articles covering the institution of proceedings, the constitution and functions of the tribunal, procedure and the arbitral award.

Arbitration is instituted by one party giving written notification to the other party to the dispute. The notification is to be accompanied by a statement of claim and the grounds on which the claim is based (Article 1).

The UN Secretary-General is to draw up and maintain a list of arbitrators. Each State Party is entitled to nominate four arbitrators. An arbitrator shall be *"a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity"* (Article 2). Unless the parties agree otherwise, the arbitral tribunal is to consist of five members.

Article 3 contains detailed provisions dealing with the constitution of the tribunal, which is to function in accordance with Annex VII and the other provisions of the Convention. The tribunal determines its own procedure *"assuring to each party a full opportunity to be heard and to present its case"* (Articles 4 and 5). The parties are to facilitate the work of the tribunal, in particular *"in accordance with their law and using all means at their disposal"*. The parties are to provide the tribunal with all relevant documents, facilities and information, and are to enable it (when necessary) to call witnesses or experts and to visit the localities to which the case relates (Article 6).

Article 7 provides that the expenses of the tribunal are to be borne equally by the parties, unless it decides otherwise because of the particular circumstances of the case.

Decisions of the tribunal are taken by a majority vote: *"The absence or abstention of less than half of the members shall not constitute a bar to the tribunal reaching a decision. In the event of an equality of votes, the President shall have a casting vote"* (Article 8).

Article 9 deals with default of appearance. If one of the parties does not appear before the tribunal or fails to defend its case, the other party may request the tribunal to *"continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."*

Articles 10 to 12 deal with the award. This is to be confined to the subject matter of the dispute and is to give the reasons on which it is based. It is to contain the names of the members and the date of the award. Any member may attach a separate or dissenting opinion. The award is final and without an appeal, unless the parties have agreed in advance to an appellate procedure. The parties are to comply with the award. Any controversy regarding the interpretation or manner of implementation of the award may be submitted to the tribunal: or, by agreement of all the parties, to another court or tribunal under Article 287.

Article 13 states that the provisions of the Annex apply, *mutatis mutandis*,⁵⁹ to any dispute involving entities other than States Parties.

8) Special Arbitration: Annex VIII

Annex VIII contains special arbitration provisions dealing with disputes relating to "(1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping".

The submission to arbitration is by way of written notification to the other party accompanied by a statement of claim and the grounds on which the claim is based (Article 1).

Lists of experts are to be established and maintained in respect of the four fields mentioned above. Article 2 lists the various organisations of the United Nations and the International Maritime Organisation that are to draw up the lists of experts. Each State Party is entitled to nominate two experts in each field whose competence "*in the legal, scientific or technical aspects of such field is established and generally recognized and who enjoy the highest reputation for fairness and integrity*".

Article 3 concerns the constitution of the special arbitral tribunal. Article 4 provides that the arbitration provisions of Articles 4 to 13 of Annex VII are to apply to the special arbitration proceedings in Annex VIII.

Provision is made in Article 5 for a fact-finding procedure covering the four categories listed in Article 1. The parties can agree to request the special arbitral tribunal to carry out an inquiry and establish the facts giving rise to the dispute. Unless the parties agree otherwise, the findings of fact are to be considered as conclusive between the parties. Further, provided all the parties agree, the special arbitral tribunal "*may formulate recommendations which, without having the force of a decision, shall only constitute the basis for a review by the parties of the questions giving rise to the dispute*".

9) Conclusions

ITLOS is an international tribunal that performs a function of considerable global importance. Its significance is demonstrated by the powers bestowed on it by the United Nations under the 1982 Convention, and its importance is in no way reduced because of the relatively small number of cases it has handled to date. In part, the number of cases dealt with by the Tribunal may be a result of the various choices of settlement procedures that are provided in UNCLOS III.

The nature of the disputes coming before the Tribunal provides clear evidence that it ranks high among the world's leading dispute settlement bodies.

59 With the necessary changes.