Establishing the International Tribunal for the Law of the Sea

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Although the intent is not entirely clear, it seems to be implied that ratification of the LOS treaty should be made conditional on this additional action. That the United States fishing industry would support general application of the approach that led to the adoption of the driftnet resolutions by the General Assembly, an approach that might affect comparable fishing activities wholly within national jurisdiction, is difficult to believe. The effective impact of the driftnet resolutions, including their possible transformation into customary law, should diminish concern over their wide application.

CONCLUSION

If one were to make an assessment of the general value of the treaty to the United States based only on its impact on U.S. fishery interests, the conclusion would be a recommendation of approval. The shortest statement of a reason for this latter conclusion is that the LOS treaty was most heavily influenced by coastal state interests and it is designed to serve those interests as its overwhelming priority. As it happens, the predominant U.S. interests in fisheries are coastal in nature and therefore the treaty serves those interests. The United States also has significant distant water fishing interests and these are not prejudiced by the treaty. As noted above, the failure to deal fully and adequately with fisheries beyond national jurisdiction is now being addressed.

The fisheries articles of the LOS treaty benefit the U.S. coastal fishing industry because, in confirmation of a U.S. law drafted so that it would be compatible with the treaty (the Magnuson Fishery Conservation and Management Act), they provide for very wide discretion in the exercise by the United States of its exclusive fishery management jurisdiction in a zone of 200 miles from the baseline of the territorial sea. The treaty recognizes that the United States has sovereign rights to explore, exploit, conserve and manage all living resources within 200 nautical miles of its coasts. This discretion to exercise these rights enables the United States to seek its full range of fishery and other interests: political, economic, social and scientific. Furthermore, the treaty recognizes the special authority and needs of the state of origin of anadromous species, and not only extends that authority beyond the 200-nautical-mile zone, but also requires U.S. agreement to any fishing for such species beyond national zones of jurisdiction.

In short, the LOS treaty is fully consistent with U.S. national interests in fisheries, whether coastal or distant water, and further supports such interests by the provisions for compulsory dispute settlement.

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ESTABLISHING THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Article 308, paragraph 1 of the United Nations Convention on the Law of the Sea of 1982 provides that the Convention shall enter into force twelve months after the date of deposit of the sixtieth instrument of ratification or accession.[1] On November 16, 1993, Guyana deposited the sixtieth instrument with the Secretary-General. That set in motion

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[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982) [hereinafter Convention]. On Article 308, which has several other provisions regarding the entry into force of the Convention and actions to be taken on that event, see 5 UNIVERSITY OF VIRGINIA, CENTER FOR OCEANS LAW AND POLICY, THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 203 (Shabtai Rosenne & Louis B. Sohn eds., 1989) [hereinafter COMMENTARY].

a series of activities required to ensure the smooth entry into force of the Convention on November 16, 1994.[2]

One of those activities, of indirect concern to the International Tribunal for the Law of the Sea (ITLOS, or the Tribunal), concerned the adjustment of Part XI of the Convention on the international seabed area to make it acceptable to the industrialized states of both Eastern and Western Europe (including the United States of America). Negotiations on this, which had commenced several years ago, were accelerated and completed on July 28, 1994, with the adoption by the General Assembly of its Resolution 48/263 and the annexed Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.[3]

The complicated provisions connected with the entry into force of the Convention had anticipated that the quorum of sixty states parties might not be sufficiently balanced for the states members of the International Sea-Bed Authority—that is, through Article 156, paragraph 2, all states parties to the Convention—to be able to elect the Council of the Authority composed strictly in accordance with the requirements of Article 161 of the Convention (as adjusted by the 1994 Agreement). Article 308, paragraph 3 provides that the first Council "shall be constituted in a manner consistent with the purpose of article 161 if the provisions of that article cannot be strictly applied."[4]

ITLOS is established under Article 287, paragraph 1(a) and Annex VI (hereafter the "Statute") of the Convention. The Convention requires Meetings of the States Parties for a series of matters relating to the Tribunal and for the election of the members of the Commission on the Limits of the Continental Shelf established under Article 76 and Annex II of the Convention.[5] Regarding ITLOS, these include arrangements for, and the conduct of, the first election of its members and their remuneration, and the budget and financial regulations of the Tribunal.[6] This note is concerned with the initial steps taken in 1994 and in the first half of 1995 for the establishment of the Tribunal.

The Tribunal is a body of twenty-one independent members, and in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution "shall be assured" (Article 2). Nominations and elections are governed by Article 4. Annex I, Resolution I, paragraph 10 of the Final Act of the

[2] MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1994, at 850, UN Doc. ST/LEG/SER.E/13, UN Sales No. E.95.V.5 (1995).

[3] *See* UNITED NATIONS, LAW OF THE SEA BULLETIN, Special Issue No. 4, Nov. 1994. The resolution and Agreement are reprinted in 33 ILM 1309 (1994). The Agreement was signed by the United States on July 29, in contrast to its negative vote in the conference when the Convention itself was adopted in 1982. *See* 16 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 154, 155, UN Sales No. E.84.V.2 (1984). For the submission of the Convention and the Agreement to the Senate, see S. TREATY DOC. NO. 39, 103d Cong., 2d Sess. (1994); and Contemporary Practice of the United States Relating to International Law, 89 AJIL 112 (1995). The preamble to General Assembly Resolution 48/263 refers specifically to the promotion of "appropriate representation" in the institutions established by the Convention on the Law of the Sea.

[4] By Article 308, paragraph 3, the Assembly of the Authority, consisting of all states parties, was to meet on the date of the entry into force of the Convention and was to elect the Council. The Assembly duly met at the seat of the Authority, in Kingston, Jamaica, for the first part of its first session between November 16 and 18, 1994. Its work was largely ceremonial. It held the second part of its first session also at Kingston between February 27 and March 17, 1995, when it elected Ambassador Hasjim Djalal (Indonesia) as President and adopted its rules of procedure. *See* UN Doc. ISBA/A/WP.3 (1995). The Assembly has not yet been able to elect the Council. Those rules of procedure were helpful in negotiating rules of procedure for the Meetings of States Parties.

[5] On this Commission, see 2 COMMENTARY, *supra* note 1, at 837 (Art. 76) and 1000 (Ann. II) (Satya N. Nandan & Shabtai Rosenne eds., 1993). The members of this Commission are elected for a term of five years. In consequence, a Meeting of States Parties has to take place every three years for the election of members of the Tribunal and every five years for the election of the members of the Commission, together with occasional meetings when required to hold by-elections. The periodicity of Meetings of States Parties has not yet been determined, and will be directly affected by the budgetary arrangements. However, the rules of procedure were drafted in such a way as not to institutionalize the Meetings of States Parties.

[6] On ITLOS, see 5 COMMENTARY, *supra* note 1, at 30 (Art. 287) and 331 (Ann. VI).

Conference on the Law of the Sea, establishing the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, required the Preparatory Commission to "prepare a report containing recommendations for submission to the meeting of the States Parties to be convened in accordance with Annex VI, Article 4, of the Convention regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea."[7] Accordingly, Special Commission 4 of the Preparatory Commission prepared a series of recommendations for submission to the Meeting of the States Parties. These recommendations included a suggestion that an ad hoc Meeting of the States Parties be convened as soon as possible after the entry into force of the Convention to discuss the organization of the Tribunal, and that at that meeting the states parties should consider the possibility of a one-time deferment of the election of the members of the Tribunal of a length to be decided by them.[8]

On that basis, the UN Secretary-General convened an ad hoc Meeting of States Parties at New York on November 21–22, 1994. The Secretary-General acted by virtue of Article 319, paragraph 2(*e*) of the Convention, authorizing him, as depositary, to "convene necessary meetings of States Parties in accordance with the Convention." The agenda included consideration of the one-time deferment of the election of the members of the Tribunal, and consideration of the subject matter of the report of the Preparatory Commission regarding practical arrangements for the establishment of the Tribunal.[9]

Article 4, paragraphs 2 and 3 of the Statute together provide that the first election of members of the Tribunal shall be held within six months of the date of the entry into force of the Convention; that at least three months before the date of the election, the Secretary-General in the case of the first election shall address a written invitation to the states parties (to the Convention) to submit their nominations for members of the Tribunal, that list to be submitted to the states parties before the seventh day of the last month before the date of the election. By paragraph 4:

> The members of the Tribunal shall be elected by secret ballot. Elections shall be held at a meeting of the States Parties convened by the Secretary-General of the United Nations in the case of the first election. . . . Two thirds of the States Parties shall constitute a quorum at that meeting. The persons elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties.[10]

After the first election, elections of one-third of the members of the Tribunal (to be determined by lot immediately after the first election) are to take place every third year, and by-elections as necessary whenever there is a vacancy in the Tribunal. By Article 3, paragraph 1 of the Statute, no two members of the Tribunal may be nationals of the same state. By paragraph 2, "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations."[11]

[7] For the Final Act of the Conference, Resolution I, para. 10, see 21 ILM at 1245, 1253.

[8] Report of the Preparatory Commission under Paragraph 10 of Resolution I containing recommendations for submission to the Meeting of States Parties to be convened in accordance with Annex VI, article 4, of the Convention [on the Law of the Sea] regarding Practical Arrangements for the Establishment of the International Tribunal for the Law of the Sea, UN Doc. LOS/PCN/152 (4 vols., 1995) [hereinafter Report]. This Report covers 1,345 pages. For the recommendations regarding the first election, see UN Doc. LOS/PCN/L.115/Rev/1 and Corr.1 (1994), 4 *id.* at 221, 225.

[9] UN Docs. SPLOS/1 (1994); SPLOS/1/Rev/1 (1995).

[10] Convention, Ann. VI, Art. 4, para. 4.

[11] In the footnote to Rule 31 of the rules of procedure of the General Assembly, UN Doc. A/520/Rev.15 (1985), the geographical groups established by the General Assembly are the African, Asian, East European, Latin American, and West European and Other States.

At the same time, Article 186 of the Convention establishes the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea, governed in greater detail by Articles 35 to 40 of the Statute. Article 35 provides that the representation of the principal legal systems of the world and equitable geographical distribution shall be assured in this eleven-member Chamber; and that the Assembly of the International Sea-Bed Authority, established by Article 156 of the Convention, "may adopt recommendations of a general nature relating to such representation and distribution." This provision is interpreted as requiring some indication from the states parties as to the representation of the principal legal systems of the world and equitable geographical distribution.

The remuneration of the members of the Tribunal is addressed in Article 18 of the Statute, which reads in relevant part:

> 1. Each elected member of the Tribunal shall receive an annual allowance and, for each day on which he exercises his functions, a special allowance, provided that in any year the total sum payable to any member as special allowance shall not exceed the amount of the annual allowance.
>
> 2. The President shall receive a special annual allowance [by Article 12, paragraph 3 of the Statute, the President must reside at the seat of the Tribunal, Hamburg].
>
> 3. The Vice-President shall receive a special allowance for each day on which he acts as President.
>
> 5. The salaries, allowances and compensation shall be determined from time to time at meetings of the States Parties, taking into account the work load of the Tribunal. They may not be decreased during the term of office.
>
> 7. Regulations adopted at meetings of the States Parties shall determine the conditions under which retirement pensions may be given to members of the Tribunal . . . , and the conditions under which members of the Tribunal . . . shall have their travelling expenses refunded.
>
> 8. The salaries, allowances, and compensation shall be free of all taxation.[12]

By Article 19 of the Statute, the expenses of the Tribunal shall be borne by the states parties and by the International Sea-Bed Authority on such terms and in such a manner as shall be decided at meetings of the states parties.

The issues relating directly to the establishment of the Tribunal requiring decisions by the states parties included the following: the date and conduct of the first election of members of the Tribunal; the composition of the Tribunal in terms of Article 2 of the Statute; privileges and immunities away from the seat of the Tribunal; the remuneration of the members of the Tribunal; the financial arrangements for the Tribunal, covering both its expenses and its funding; and retirement pensions.

The ad hoc meeting elected Ambassador Satya N. Nandan (Fiji) as chairman and deferred election of other officials. It made a start on adopting its rules of procedure. This is an important matter, as the rules of procedure will regulate the conduct of the election of the members of the Tribunal as well as the decision making on the financial matters. With regard to the first election of members of the Tribunal, the meeting adopted the following decisions:

> (*a*) Having regard to the recommendations of the Preparatory Commission . . . there would be a deferment of the first election of the members of the Tribunal. The date of this first election of all 21 members would be 1 August 1996. That would be a one-time deferment;
>
> (*b*) The nominations would open on 16 May 1995. A State in the process of becoming a party to the Convention might nominate members. Such nominations

[12] Convention, Ann. VI, Art. 18 (selected paras.).

would remain provisional and would not be included in the list to be circulated by the Secretary-General of the United Nations in accordance with article 4(2) of annex VI, unless the State concerned has deposited its instrument of ratification or accession before 1 July 1996;

(*c*) The nominations would close on 17 June 1996;

(*d*) The list of candidates would be circulated by the Secretary-General on 5 July 1996;

(*e*) Subject to the above decisions, all procedures relating to the election of the members of the Tribunal as provided for in the Convention would apply;

(*f*) No changes would be made to that schedule unless the States Parties agreed by consensus;

(*g*) [The meeting] approved the recommendation of the Preparatory Commission contained in document LOS/PCN/L.115/Rev.1, paragraph 43(d).[13]

The Meeting of the States Parties resumed its session from May 15 to 19, 1995. Its principal tasks were to complete its rules of procedure, to decide how the first elections would be conducted, and to set in motion the necessary procedures for dealing with the financial aspects of the Tribunal.[14]

On the question of the composition of the Tribunal in light of the provisions of the Statute, the Preparatory Commission had included the following in its report to the states parties: "In connection with the equitable geographical distribution and the representation of the principal legal systems in the composition of the Tribunal and its chambers, the Special Commission [Special Commission 4] expressed the view that firm and detailed rules should not be established by the Special Commission."[15] This meant that the matter would have to be dealt with by the states parties. At the same time, Special Commission 4 in 1993 had examined a plan for what it termed "phasing in the establishment of the Tribunal." That was originally based on concern to achieve maximum economy in the establishment and initial functioning of the Tribunal, together with the possibility that there would be little more than sixty states parties in the initial stage at least. The implication of phasing was that not all the members of the Tribunal would be required to serve in the initial period, and the different plans were based on the immediate service of one, three, or five members, the remainder being retained and on call.[16]

The Meeting of the States Parties did not feel itself empowered to give firm directions to the Tribunal regarding its internal processes. On this aspect it decided that, although all the twenty-one members of the Tribunal would be elected at the Meeting of the States Parties on August 1, 1996, they would not necessarily all enter upon their duties on that date. In its instructions to the Secretariat for the preparation of the initial budget of the Tribunal, covering the period August 1996 to December 31, 1997, the meeting provided that the members of the Tribunal would hold their first organizational session in October 1996, and that they would meet for up to twelve weeks during the period of the budget, that is, up to December 31, 1997, in order to take the necessary decisions for the internal organization of the Tribunal. Provision would also have to be made for

[13] The latter required the Secretary-General to designate a staff member as Acting Registrar of the Tribunal before May 16, 1995, to be charged with making practical preparations for the organization of the Tribunal, including the establishment of a library. Statement by the Chairman of the Preparatory Commission, UN Doc. LOS/PCN/L.115/Rev.1, *supra* note 8. For the decisions quoted in the text, see Report of the Meeting of States Parties, prepared by the Secretariat, UN Doc. SPLOS/3 (1995). Mr. Gritakumar Chitty, of the Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, UN Secretariat, and secretary of Special Commission 4, was appointed Acting Registrar.

[14] *See* Report of the Meeting of States Parties, May 15–19, 1995, UN Doc. SPLOS/4, *reprinted in* LAW OF THE SEA INFORMATION CIRCULAR NO. 1, June 1995, at 23.

[15] 1 Report, *supra* note 8, at 13. And see *id.* at 23 for a further discussion of this aspect.

[16] For details, see UN Doc. LOS/PCN/SCN.4/WP.8/Add.1* (1993), 2 Report, *supra* note 8, at 278, and UN Doc. LOS/PCN/SCN.4/WP.16/Add.6 (1993), 1 *id.* at 151.

the members of the Tribunal to undertake preparatory work before both the October and the 1997 sessions.[17] The President will reside at the seat of the Tribunal, and the other members will attend meetings of the Tribunal as and when required.

With regard to the conduct of the election, Rule 69 of the rules of procedure simply provides that the elections of the members of the Tribunal shall take place in accordance with the Statute.[18]

As for the remuneration of the members of the Tribunal, the meeting decided that the overall remuneration will consist of three elements: an annual allowance, a special allowance for each day that a member is engaged in the business of the Tribunal, and a subsistence allowance for each day that a member attends meetings at the seat of the Tribunal or elsewhere. "The overall remuneration for a Member of the Tribunal shall not exceed that of a judge of the International Court of Justice."[19]

Another matter closely related to the establishment of the Tribunal, because of its direct impact on the budgetary arrangements (and perhaps a less direct impact on the availability of candidates for election to the Tribunal), concerned the official languages of the Tribunal. As far back as 1985, Special Commission 4 had reached a deadlock on this issue and had decided that it was a matter for the states parties.[20] The difficulties arose out of concern that any departure from the language practices of the International Court of Justice could form an undesirable "precedent."[21] On this aspect the meeting reached general agreement that the official languages of the Tribunal are English and French, and that the Tribunal is to determine which of the two texts of a decision should be considered as authoritative (following Article 39 of the Statute of the Court). The instruction to the Secretariat regarding the preparation of the first budget of the Tribunal adds that a party to a dispute may use another language for its written and oral pleadings and related documentation: the translation and interpretation into one of the Tribunal's official languages shall be at that party's expense. This procedure follows the language practice of the International Court. When a language other than one of the official languages of the Tribunal is chosen by the parties to the dispute, and that language is an official language of the United Nations, the decision of the Tribunal shall, at the

[17] These arrangements broadly correspond to the establishment of the International Court of Justice. The first election was completed on February 8, 1946, when the term of office of those then elected began. An informal meeting of the judges there present took place and the acting secretary of the Court was in attendance and asked for nominations for a chairman. The senior judge present was invited to take the chair. The judges fixed April 3, 1946, as the date for the Court's first meetings, at which it would have to discuss various organizational matters. The Court met for its first organizational session as agreed, on April 3, 1946, and elected its President, Vice-President and Registrar. It held its formal inaugural session on April 18, 1946. 1946–1947 ICJ Y.B. 27–29.

[18] UN Doc. SPLOS/2/Rev.3 (1995). Earlier versions of this rule concluded with the phrase "and in accordance with these Rules." Those rules contain provisions for restricted ballots in the event of a deadlock over the election of the officers of the Meeting of States Parties. Restricted ballots had been employed in the UN General Assembly for the election of members of the International Court of Justice up to 1960. The effect of dropping this phrase from the rules of procedure of the Meetings of States Parties is to throw this matter open for ad hoc decision, as occurred in the General Assembly. The rules of procedure adopted on May 19, 1995, leave open the rules relating to financial and budgetary matters, which are being developed.

[19] The current remuneration of the Members of the International Court of Justice is U.S. $145,000.00 per annum, free of all taxation. Unlike membership on the Court, membership on the Tribunal is not a full-time occupation; the members are only required to disengage themselves from activities and to divest themselves of financial interests that are incompatible with their membership on the Tribunal, a matter to which, no doubt, the Tribunal will itself give attention in due course. The postponement of the Tribunal's organizational session to October 1996 enables members elected in August to take the necessary steps to comply with Article 7, paragraph 1 of the Statute regarding incompatible activities and financial interests.

[20] 1 Report, *supra* note 8, at 13. For the initial deadlock, see UN Doc. LOS/PCN/SCN.4/L.3 (1985), 3 *id.* at 41.

[21] The language practices of the International Court of Justice follow those of the Permanent Court of International Justice, and reflect the language practices of the League of Nations with only two official languages, English and French. The United Nations today has six official languages, Arabic, Chinese, English, French, Russian and Spanish.

request of any party, be translated into that official language of the United Nations at no cost to the parties (this is an innovation). Finally, subject to the availability of funds and provided that it would not result in an increase in the Tribunal's budget, consideration would be given in the future to the translation of final decisions of the Tribunal into the other official languages of the United Nations at the request of any of the states parties. For this purpose, any contributions from any source would be welcomed and placed in a Voluntary Fund to be established for that purpose. This, too, is an innovation.

Aside from the financial questions, including the financial regulations of the Tribunal, the most important outstanding matters requiring the attention of the states parties are the overall distribution of seats on the Tribunal, as required by the Statute, and the question of privileges and immunities away from the seat. The Meeting of the States Parties is scheduled to resume in March 1996, when these and other outstanding matters will be examined. There is also to be a meeting of budgetary experts at the end of November 1995.

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This is a convenient opportunity to restate some essential factors that led the Third United Nations Conference on the Law of the Sea to establish ITLOS and its Sea-Bed Disputes Chamber. There has been much controversy about this Tribunal, and about the primary place that Article 287 of the Convention, on the choice of procedure for the settlement of disputes, seems to give to it. Some provisions of the Tribunal's Statute are also the source of difficulties and questioning.

The major set of compromises embodied in the 1982 Convention relate to the establishment of the exclusive economic zone: on the one hand, the coastal state has sovereign rights over the natural resources of the EEZ beyond the outer limit of its territorial sea up to 200 nautical miles from the baselines, and, on the other, it must assure freedom of navigation and overflight over all the sea beyond the outer limits of its territorial sea, itself now agreed as not extending beyond 12 nautical miles from the baselines. The underpinning for this compromise was acceptance of the dispute settlement procedure of Part XV (Articles 279–99) of the Convention for all disputes concerning the interpretation or application of the Convention, subject to the limitations set out in Article 297, which are not of concern here.[22] Following the adoption of the "choice of procedure" provision of Article 287 of the Convention, it became necessary to include provisions for a residual compulsory jurisdiction extending to the prescription of provisional measures of protection both as regards the rights of the parties in dispute and the protection of the environment and as regards assurance of the prompt release of vessels detained by the coastal state, before any nonpermanent dispute settlement mechanism—particularly arbitration—could be set up.

The essential safeguard for the freedoms of navigation, overflight and the laying of submarine cables and pipelines is supplied by the intricate provisions for the prevention and settlement of disputes contained in Part XV of the Convention. The conference insisted that disputes concerning the interpretation or application of the Convention with regard to the exercise by the coastal state of its sovereign rights or jurisdiction provided for in the Convention shall be subject to compulsory procedures entailing binding decision, inter alia, when it is alleged that a coastal state has contravened the Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in the Convention (Article 297, paragraph 1(*a*)). As part of the compromise,

[22] I dealt with some aspects of these limitations, while the conference was still in progress, in my *Settlement of Fisheries Disputes in the Exclusive Economic Zone,* 73 AJIL 89 (1979).

Article 290 on provisional measures of protection provides that the competent court or tribunal may prescribe binding provisional measures of protection "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."[23] Article 292 provides for submission to a court or tribunal of the question of release from detention of vessels and crews detained by a state when it is alleged that the detaining state has not complied with the provisions of the Convention on the prompt release of vessels or their crews.[24] Two provisions allow for the detention of a foreign vessel on specified conditions: Article 73 in Part V, on the enforcement of the laws and regulations of the coastal state in its exclusive economic zone; and Article 220 in Part XII, on enforcement by coastal states of the provisions on the protection and preservation of the marine environment. Taken together and in the context of the extensive rights given to the coastal state in the enlarged areas now coming within its jurisdiction, those two provisions give wide openings to a coastal state to interfere with the freedom of navigation beyond the outer limits of its territorial sea, and enforceable guarantees for the freedom of navigation became essential.

In both those articles, if the machinery for the settlement of the dispute as chosen by the parties in accordance with the Convention, especially arbitration, has not yet been organized, the Tribunal has residual compulsory jurisdiction to prescribe provisional measures and to order the release of the vessel and crew regardless of whether it has jurisdiction over the main proceedings, until the agreed procedure is in place. That, too, was an essential feature of the general compromise negotiated through the Second Committee of the Third United Nations Conference on the Law of the Sea.

The Sea-Bed Disputes Chamber or its ad hoc chambers have a wide residual compulsory jurisdiction over disputes with respect to activities in the international seabed area, including disputes involving entities that are not states (Article 197). In addition, it has the power to give advisory opinions at the request of the Assembly or the Council of the International Sea-Bed Authority.

That is the background to the position of ITLOS in the 1982 Convention.

Of the states that by April 30, 1995 (the last date for which full particulars are available) had become parties to the Convention, only the following had selected ITLOS as their preferred dispute settlement procedure: Cape Verde, Germany, Oman, Tanzania and Uruguay. Most of those states had not expressed any preference, and by Article 287, paragraph 5 of the Convention, their silence implies acceptance of arbitration as the preferred mode of settlement. That makes the residual provisions of Articles 290 and 292 all the more essential.[25] The debate on this topic in the conference showed a wide preference for arbitration as the dispute settlement method. Nevertheless, the practice of many states in many different parts of the world since the conference began in 1973

[23] That article must now be read together with Articles 83–88 of the final draft rules of the Tribunal prepared by the Secretariat and included in 1 Report, *supra* note 8, at 65 (originally UN Doc. LOS/PCN/SCN.4/WP.16/Add.1 (1994)). This conception of provisional measures goes beyond Article 41 of the Statute of the International Court. On some of the differences between the Tribunal and the International Court, see my *The International Tribunal for the Law of the Sea and the International Court of Justice: Some Points of Difference, in* THE BALTIC SEA: NEW DEVELOPMENTS IN NATIONAL POLICIES AND INTERNATIONAL COOPERATION 200 (Renate Platzöder & Philomène Verlaan eds., 1994).

[24] See Articles 89–93 of the rules of the Tribunal, *supra* note 23.

[25] Note that by Article 31 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on August 4, 1995, by the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, UN Doc. A/CONF.164/33 (1995), a similar residual compulsory jurisdiction is conferred on the Tribunal: it would be empowered to prescribe provisional measures to preserve the respective rights of the parties to a dispute or to prevent damage to the stocks in

shows increasing use of the International Court for the settlement of maritime boundary disputes.

There is no evidence to support the view that a multiplicity of international judicial institutions for the settlement of disputes seriously impairs the unity of jurisprudence (a difficult proposition at the best of times). The Convention requires ITLOS to perform tasks that are beyond the competence of the International Court under its present Statute. If only for that reason, the cautious observer will hesitate before crying redundant.

SHABTAI ROSENNE*

THE PROCEDURAL FRAMEWORK OF THE AGREEMENT IMPLEMENTING THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

November 16, 1994, marked an important new milestone not only in the history of the law of the sea, but also in the evolution of international law. On that day, the United Nations Convention on the Law of the Sea (the Convention), the most far-reaching instrument ever to be negotiated, entered into force.

This date also marked the "provisional entry into force" of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (the Agreement), adopted on July 28, 1994, by a resolution of the UN General Assembly[1] to open the door to universal participation in the Convention. The negotiation of this Agreement, as well as its content and legal effect on the Convention, modified in many ways the pattern set for establishing rules of international law. Once again, the law of the sea stands on the frontier of the development of international law in general.

The Agreement was negotiated within a four-year period through informal consultations[2] convened by the UN Secretary-General to resolve "the serious defects and shortcomings" of certain provisions of Part XI and of Annexes III and IV,[3] dealing with the regime of the seabed, that had prevented the main industrialized countries from ratifying or acceding to the Convention. A zone without any foreseeable economic uses had held the whole Convention hostage for more than a decade. The Convention, "which represents an attempt to establish true universality," was considered by states and users as "a monument to international cooperation in the treaty-making process."[4] Unfortunately, this comprehensive instrument was frequently portrayed by the media as confined to regulating the deep seabed. Yet, as the Secretary-General pointed out, it also "establishes distinct zones of sovereignty and jurisdiction for coastal States. It formulates rules for the high seas. It lays down rights and duties of states with respect to navigation. It

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question, pending the settlement of the dispute, if the parties to the dispute are also parties to the 1982 Convention.

* Honorary member, American Society of International Law; member of the Institute of International Law. This essay is based on a talk given at New York University School of Law on April 4, 1995.

[1] GA Res. 48/263 (July 28, 1994), 33 ILM 1309 (1994) (including the text of the Agreement annexed to the resolution).

[2] *See* Jean-Pierre Levy, *Les Bons Offices du Secrétaire général des Nations Unies en faveur de l'universalité de la Convention sur le droit de la mer: La préparation de l'Accord du 28 juillet 1994,* 94 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 871 (1994).

[3] See the declaration by Belgium at the time of signature of the Convention, and similar expressions by most of the European states, including the European Economic Community, in STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, UN Sales No. E.85.V.5 (1985).

[4] See statement by Bernardo Zuleta, former Under-Secretary-General for the Law of the Sea, in THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, at xix, UN Sales No. E.83.V.5 (1983).