Robert Hessel van Dijk

The first five years of the International Tribunal for the Law of the Sea: An overview

Robert Hessel van Dijk, Legal Officer of the Netherlands Ministry for Foreign Affairs. Formerly Legal Officer of the International Tribunal for the Law of the Sea

1. Introduction*

The International Tribunal for the Law of the Sea (ITLOS/Tribunal) is an international court dealing with law of the sea disputes – international disputes that have in the past not always been settled peacefully. In its first five formative years, the Tribunal seems to have gone from a stormy launch to a course that has led it into calmer waters. The Tribunal, deeply split in its first decision on the prompt release of the oil tanker M/V »Saiga«, has shown greater unity in most of the decisions that followed. The aim of this article is to explain the function of the Tribunal, highlight its accomplishments and briefly discuss the first cases submitted to it. In conclusion, an attempt will be made to analyse the Tribunal's caseload to date and to discern possible future trends.

On 1 October 1996, the Tribunal met for the first time at its temporary premises situated in the centre of Hamburg. The twenty-one judges had only shortly before been elected by the States Parties to the United Nations Convention on the Law of the Sea (the »Convention«).[1]

Eighteen days after their first meeting the judges took their oaths of office in Hamburg's City Hall in the presence of the Secretary-General of the United Nations, Dr Boutros Boutros-Ghali, and other high dignitaries.[2] That same day the foundation stone was laid for a superb modern courthouse, which the Tribunal was to start using four years later.

In its first year the judges met four times, each of these organizational sessions lasting four weeks.[3] The judges' first task was to organize themselves, in particular to adopt the rules relating to the receipt of cases and court procedure. The Tribunal managed to have its Rules in place one year after it had been established,[4] and two weeks after it had adopted them it received its first case.

In its first five years, eight more cases were to follow; a very promising record for an international court in its early years.[5] Shortly after the first five years, the tenth case was filed.

2. Mandate of the Tribunal

Although part of the large United Nations family, the Tribunal is an independent treaty-based organization, operating on the basis of the 1982 Montego Bay Convention (the United Nations Convention on the Law of the Sea). The Convention is often referred to as the »Constitution for the Oceans« because it deals with every aspect of ocean space, and it has near-universal application: 137 States and one international organization (the European Community) have become parties to the Convention.[6]

* The views expressed in this article are those of the writer alone. The content of this article reflects the situation as at 6 March 2002, unless otherwise indicated.

1 The judges were elected on 1 August 1996. A hundred States that were parties to the Convention on that day participated in the elections (see document SPLOS/14). The judges are elected for a nine-year term of office. The terms of one third of the judges end every three years (see article 5 of the Statute of the Tribunal).

2 Others present included Dr Klaus Kinkel, then German Federal Minister of Foreign Affairs, and Dr Henning Voscherau, First Lord Mayor of the Free and Hanseatic City of Hamburg. Also in attendance were representatives of the International Seabed Authority: Mr Satya Nandan, the Secretary-General of the Authority, Dr Hasjim Djalal, the President of its Assembly, and Mr Lennox Ballah, the President of its Council. The International Court of Justice was represented by the German judge on its bench, Dr Carl August Fleischhauer, and its Registrar, Mr Valencia-Ospina. In addition, representatives from over 67 countries and an audience of 500 to 600 others witnessed the event. Officiating at the inauguration were Mr Hans Corell, the Legal Counsel of the United Nations, and Mr Gritakumar Chitty, Director-in-Charge of the Registry, who was later elected as the Tribunal's First Registrar (see Press Release of the Tribunal ITLOS/Press/2 of 18 October 1996).

3 The Tribunal is a permanent court. The President of the Tribunal is required to reside at the Tribunal (article 12, para. 3, of the Statute of the Tribunal). The other judges are flown in on a case-by-case basis (see article 18, para. 1, of the Statute of the Tribunal).

4 The Tribunal had agreed to apply on a provisional basis the Rules prepared for the Tribunal by the Meeting of States Parties, in order to be in a position to deal with a case or application should one be submitted to it before it had adopted its Rules (see ITLOS/Press 5).

5 By comparison, the International Court of Justice had seven cases and six requests for advisory opinions submitted to it during its first five years.

6 As of 5 March 2002 the following 137 States and one international organization had deposited instruments of ratification, accession, succession or formal confirmation in relation to the United Nations Convention on the Law of the Sea with the United Nations Secretary-General: Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Cape Verde, Chile, China, Comoros, Cook Islands, Costa Rica, Cd'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Equatorial Guinea, European Community, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Hungary, Honduras, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Luxembourg, Madagascar, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, the former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Vanuatu, Viet Nam, Yemen, Yugoslavia, Zambia and Zimbabwe.

The importance of the oceans for life on earth is well known both as a source of oxygen and food. What is often not fully appreciated is the economic relevance of the oceans. A report has estimated that the economic value of ocean-related goods and services is close to double that of land-related goods and services.[7] The significance of the Tribunal's mandate further becomes clear when it is realized that oceans and seas cover more than 70% of the earth's surface and that the Tribunal's jurisdiction is vertical, covering not only the surface of the oceans, but also the seabed, its subsoil, the water column and the air space above it.

Cases before the Tribunal may concern such diverse topics as pollution of the marine environment, fisheries, passage of ships, release of vessels detained in foreign ports, the drawing of maritime boundaries, the exploration of the deep seabed (manganese/polymetallic nodules), but also questions relating to the overflight of civil and military aircraft over maritime areas.

3. Access to the Tribunal

The Tribunal is an international court, which means that it applies international law to subjects of international law. Traditionally, States were the only subjects of international law.[8] The Tribunal may, however, in certain circumstances, also hear disputes involving intergovernmental organizations, corporations and even private individuals. International organizations may appear before the Tribunal in those areas in which member States have transferred competence to the organization.[9] Member States of the European Community have, for example, transferred competence to the Community with respect to their fisheries policy, and the European Community is party to a case which is pending.[10]

In addition, with respect to disputes arising from the exploration and exploitation of the deep seabed, the International Seabed Authority (the authority created specifically to administer the resources of the deep seabed), but also State enterprises and natural or juridical persons, may have access to the Tribunal or its Seabed Disputes Chamber.[11] There are two other situations in which non-State entities may participate in proceedings before the Tribunal: prompt release proceedings and article 20, paragraph 2, proceedings.[12]

4. Internal organization of the Tribunal

The Tribunal has organized itself into chambers and working groups. The working groups are intended to provide a structure for the judges' involvement in administrative matters, with one exception: the working group on the Rules of the Tribunal. There is a working group that prepares the annual budget of the Tribunal, a working group on staff matters and a working group on library and publications. Also one working group keeps under constant review the hypermodern courtroom and its state-of-the-art electronic equipment.

The fact that the Tribunal is also organized into chambers gives parties the option of bringing their case before one of the standing specialized chambers, the full Tribunal, or a so-called *ad hoc* chamber. *Ad hoc* chambers have the advantage that parties are virtually free to determine how many and *which* particular judges are going to hear the case. The Tribunal has so far established one *ad hoc* chamber for the purposes of the *Swordfish Case* (see below).

The idea of a more efficient procedure involving a smaller number of judges seems attractive. However, in the case of the only other permanent international court, the International Court of Justice (ICJ) in The Hague, the use of chambers has been limited. In the more than 50 years of its existence the ICJ has seen the establishment of four[13] *ad hoc* chambers, but not once have parties made use of the existing chambers. One of the problems is getting both parties to agree to have the proceedings in a case submitted to a chamber.

More use is expected to be made of the Tribunal's standing chambers because under the Convention certain cases *must* be submitted to them.[14] In addition, the Tribunal has tried to promote the use of the Chamber of Summary Procedure in prompt release cases by providing in its rules that if both parties concur, such cases shall be dealt with by this Chamber instead of the full Tribunal.[15]

The existing Chambers are at present: the Chamber of Summary Procedure, the Seabed Disputes Chamber, the *Ad hoc* Chamber for the Swordfish Case, the Chamber for Marine Environment Disputes and the Chamber for Fisheries Disputes. The Seabed Disputes Chamber is really a court within a court. It has its own separate jurisdiction and arrangements for the enforcement of its decisions in the

7 See para. 5 of the 1998 Report of the United Nations Secretary-General on oceans and the law of the sea, document A/53/456 dated 5 October 1998, which pointed out that a recent study has estimated the economic value of all goods and services related to the oceans at $21 trillion, compared with $12 trillion for those related to the land.

8 Only States may be parties in cases before the International Court of Justice (ICJ). See ICJ Statute, Article 34, para. 1.

9 Articles 1 and 7, para. 2, of Annex IX to the Convention.

10 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community).*

11 Article 187 of the Convention

12 In prompt release proceedings a flag State may authorize a natural or legal person (e.g., the captain or owner of the vessel or cargo) to file an application with the Tribunal on its behalf. Unlike in the case of prompt release proceedings, the Tribunal has not yet had the opportunity to apply article 20, paragraph 2, of the Statute of the Tribunal. The relevant part of the provision reads: »[T]he Tribunal shall be open to entities other than States Parties [. . .] in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.«

13 *Gulf of Maine* (Canada/United States), *Frontier Dispute* (Burkina Faso/Mali), *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras, Nicaragua intervening), *ELSI* (United States v. Italy) cases.

14 The Seabed Disputes Chamber, which was established under section 4 of the Statute of the Tribunal, has compulsory jurisdiction in disputes concerning activities relating to the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, also known as the »common heritage of mankind«. The parties to a dispute may, however, agree to submit the dispute to a special chamber of the Tribunal, or one of the parties may request that it be submitted to an *ad hoc* chamber of the Seabed Disputes Chamber or to commercial arbitration (in the case of interpretation of a contract). Also article 25, para. 2, of the Statute of the Tribunal provides that provisional measures shall be prescribed by the Chamber of Summary Procedure established under article 15, para. 3, of the Statute of the Tribunal, if the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum.

15 Article 112, para. 2, of the Rules of the Tribunal.

territories of States Parties and consists of eleven judges of the Tribunal.

5. Cases

The cases submitted to the Tribunal have seen the involvement of States from nearly every continent.[16] Both developed States (Australia, France, Ireland, Japan, New Zealand and the United Kingdom) and developing States (Belize, Chile, Guinea, Panama, Saint Vincent and the Grenadines, Seychelles and Yemen) have been involved in proceedings before the Tribunal.

To date ten cases have been submitted to the jurisdiction of the Tribunal. Below I shall briefly discuss some of the main features of each of these cases.

A. The M/V »Saiga« Cases

Prompt release

On 13 November 1997 Saint Vincent and the Grenadines, a small Caribbean island State, filed an application for the prompt release of the M/V »Saiga«. The case resulted from a prolonged night-time chase and the shooting by customs enforcement officials at an oil tanker loaded with gas oil. It ended with the arrest of the vessel and its 25-member crew, including the captain.

The case clearly illustrates the international nature of the cases dealt with by the Tribunal. The vessel was arrested off the coast of Sierra Leone by the Guinean authorities. It was Cypriot-owned, under a Swiss charterer, managed by a Scottish company, allegedly registered in Saint Vincent and the Grenadines, with a crew from Ukraine and Senegal. In addition, the parties were represented in court by British, German and Senegalese lawyers.

Six days after the closure of the hearings and only three weeks after the institution of proceedings the Tribunal delivered its Judgment, ordering the release of the vessel upon the posting of a security consisting of the value of the gas oil cargo and a bond of US$ 400,000. Guinea complied with the Judgment on 4 March 1998, releasing the vessel and its crew. The Tribunal was deeply split over whether the claims of Saint Vincent and the Grenadines were admissible. A majority of twelve judges found that the case was admissible, as it fell, in their view, within one of the categories that enables a State to apply to the Tribunal for the prompt release of a vessel. Nine judges, including the President and the Vice-President, did not agree with this categorization or the standard of proof applied by the majority to reach their conclusions.

The then President of the Tribunal, Judge Thomas A. Mensah, has been severely criticized for not having been able to forge a larger majority,[17] but it should be realized that a divergence of views of this magnitude is not unusual when difficult issues need to be resolved.[18]

Merits

The initial proceedings with respect to the M/V »Saiga« only concerned the release of the vessel and crew upon the posting of a reasonable security. On 20 February 1998, the Governments of Guinea and Saint Vincent and the Grenadines also agreed to submit the legal questions underlying the dispute (the merits of the case) to the Tribunal.

This meant that many important issues arising from the establishment of the 200 nautical mile exclusive economic zone, an area of great commercial significance with a high intensity of interaction between competing interests, were brought before the Tribunal. The issues raised included freedom of navigation, enforcement of customs laws, bunkering of vessels, the right of hot pursuit, and the award of damages. The Judges delivered their Judgment on 1 July 1999.

The Tribunal decided that Guinea had violated the rights of Saint Vincent and the Grenadines under the Convention in arresting and detaining the M/V »Saiga«, its crew and master, and that Guinea should pay compensation to Saint Vincent and the Grenadines in the sum of US$ 2,123,357.

B. The Southern Bluefin Tuna Cases

On 30 July 1999 New Zealand and Australia filed separate requests for the prescription of provisional measures against Japan in relation to the conservation of southern bluefin tuna. All parties agreed that the stock of southern bluefin tuna gave cause for serious biological concern since it was severely depleted and at its historically lowest levels.[19]

Australia and New Zealand claimed that Japanese fisheries threatened serious or irreversible damage to the stock, which would result in a loss of revenue and unemployment in the fishing industry. The media dubbed the conflict the »sushi war«, because the tuna is used for sushi and sashimi. It is a highly valuable stock, with a single fish fetching up to US$ 50,000. A bluefin tuna can live as long as 40 years, weigh up to 200 kilograms and grow to be over two metres long.

Japan does not have a tradition of appearing before international fora for dispute settlement. The agent of Japan stressed that: »[I]n international negotiations Japan makes every effort to reach agreement with other parties« and that it was »the first international adjudication to which Japan ha[d] been made a party in more than ninety years.«[20]

The Tribunal delivered its decision on 27 August 1999. It considered that the parties should in the circumstances act with *prudence and caution* and ordered that they should therefore not exceed the annual national allocations of catch previously agreed upon. The obligation to act with prudence and caution was a clear reference to what has become known as the »precautionary principle« or the »precautionary approach«. Judge Laing described the principle as follows: »Its main thesis is that, in the face of serious risk to or grounds (as appropriately qualified) for concern about the environment, scientific uncertainty or the absence of complete proof should not stand in the way of positive

16 Except North America.

17 *The Role of the Presiding Judge in Garnering Respect for Decisions of International Courts*, Jean Allain, 22 MJIL 391-421 (2001).

18 E.g., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, where the main issue was decided by the casting vote of the President.

19 *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan), Order of 27 August 1999*, para. 71.

20 Uncorrected Verbatim Records of 19 August 1999, ITLOS/PV.99/22, p. 7.

action to minimize risks or take actions of a conservatory, preventative or curative nature.«[21] Australia stated that »precaution is an essentially common-sense notion associated with conservation and the minimising of risk in the face of scientific uncertainty.«[22] The application by the Tribunal of the principle, albeit not expressly, was a great victory for Australia and New Zealand, which claimed that the principle was part of customary international law.[23]

C. Fishing vessels arrested in Antarctic waters

Between January 2000 and April 2001, the Tribunal dealt with *three* applications for the release of a fishing vessel and its crew: the *«Camouco«, »Monte Confurco«* and *«Grand Prince« Cases*. All three vessels had been arrested by France in Antarctic waters and charged with illegal fishing. In these cases the Tribunal had an opportunity to elaborate upon the circumstances it takes into account in its assessment of the amount of the security to be posted for the release of a vessel and its crew. The Tribunal indicated that the gravity of the alleged offences and the value of the detained vessel and of the cargo seized are of primary importance in determining a reasonable bond. The Tribunal ordered the release of the »Camouco« and »Monte Confurco« on the posting of bonds consisting partly of the value of the fish already seized. In the *»Grand Prince« Case*, the Tribunal held that it lacked jurisdiction.

D. The Swordfish Case

On 20 December 2000 the Tribunal constituted a Special Chamber to deal with a dispute between Chile and the European Community concerning swordfish stocks off the coast of Chile.[24] Chile claimed that the European Community had failed to cooperate with the coastal state to ensure the conservation of the highly migratory species, in violation of the United Nations Convention on the Law of the Sea. The European Community claimed that Chile's denial of port access violated substantive provisions of the General Agreement on Tariffs and Trade. Interestingly, at the same time as it instituted proceedings before the Tribunal, the European Community also brought the case before the World Trade Organization (WTO) in April 2000, and a Panel was established by the WTO's Dispute Settlement Body in December 2000.

A provisional arrangement was arrived at between the parties during the last week of January 2001, effectively suspending proceedings at the WTO and the Tribunal.[25] The arrangement rested on a pilot phase in which the parties undertook to resume bilateral cooperation. If this provisional arrangement failed, proceedings would then resume.[26] This case highlights the danger of simultaneous proceedings before different international dispute settlement fora, possibly leading to different outcomes.

E. The »Chaisiri Reefer 2« Case

On 3 July 2001 an application was received for the release of the Panamanian vessel »Chaisiri Reefer 2« and its crew. The *»Chaisiri Reefer 2« Case* was settled before hearings had even started, providing a good example of how the pressure of international adjudication can give countries a strong incentive to settle a case. It shows that a court can help to resolve disputes not only by its decisions but also through the mere fact of its existence and the availability of recourse to it.

The »Chaisiri Reefer 2« was arrested for alleged violation of fishery laws by Yemeni coastguard officials while leaving the port of Mukalla (Yemen), bound for Thailand. The vessel was ordered to sail back to Mukalla, where the cargo of 765.74 metric tons of frozen fish (cuttlefish and mixed fish), valued at US$ 950,332, was unloaded and confiscated. The case was withdrawn after the Yemeni Government had guaranteed that it would return the cargo and that the vessel, its cargo and crew were free to leave.

F. The MOX Plant Case

Although strictly speaking the proceedings in the *MOX Plant Case* fall outside the scope of this article, since the case was submitted six weeks after the fifth anniversary of the Tribunal, the importance of the case is such that it deserves to be included. The case concerned the commissioning of a new nuclear facility (the »MOX« plant[27]) at Sellafield, in the United Kingdom. The Sellafield complex is located on the coast of the Irish Sea, much closer to Dublin than to London. As a result of the pollution from the site, the Irish Sea is said to be amongst the most radioactively polluted seas in the world.[28]

The Irish Government has been protesting about the Sellafield plant for decades and decided to do its utmost to stop a new plant from opening up at a facility which, according to one report, had already led to one of the largest man-made releases of radioactivity into the environment anywhere in the world.[29] Ireland submitted with the Tribunal a request for the prescription of provisional measures on 9 November 2001. In its request, the Irish Government expressed its concern that the operation of the plant would exacerbate the pollution of the Irish Sea and underlined the potential risks involved in the transportation of radioactive material to and from the plant. Ireland also placed the opening up of the new plant against the backdrop of the terrorist attacks of 11 September 2001 and the disastrous consequences that might result from similar attacks on Sellafield.

Ireland requested the Tribunal to order the United Kingdom to suspend the authorization of the MOX plant immediately or prevent the plant from operating and to end the transportation of radioactive material relating to the MOX plant through United Kingdom waters. The United Kingdom responded

21 Separate opinion of Judge Laing, para. 13.
22 Uncorrected Verbatim Records of 18 August 1999, ITLOS/PV.99/20, p. 16.
23 *Ibid.*, p. 22 *et seq.*
24 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*
25 ASIL Insight 60, »The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea«, by Marcos Orellana, February 2001.
26 *Ibid.* and ITLOS/Press 45.
27 The facility is designed to reprocess spent nuclear fuel, containing a mixture of plutonium dioxide and uranium dioxide, into a new fuel known as mixed oxide fuel, or MOX.
28 Statement of Case of Ireland, para. 10.
29 *Ibid.*

that the radioactive content of discharges from the MOX plant would be infinitesimally small. It stated that British Nuclear Fuels had characterized the annual combined liquid and gaseous discharges from the MOX plant as giving rise to a radiation dose to the most exposed members of the public equivalent to the dose received during two seconds of a flight in a commercial aircraft at cruising altitude or about nine seconds spent in Cornwall in south west England (this being an area underlain by granite).[30]

During the hearings, the United Kingdom also gave assurances that no additional marine transportation of radioactive material would take place either to or from Sellafield as a result of the commissioning of the MOX plant until summer 2002. These assurances, amongst others, resulted in the Tribunal's conclusion that the case lacked the urgency required for the prescription of the provisional measures requested by Ireland.

Interestingly, the Tribunal did not stop there. It went on to find that rights arising from the duty to cooperate needed to be preserved. In the view of the Tribunal, prudence and caution required that the parties cooperate (1) in exchanging information concerning the risks or effects of operating the MOX plant and (2) in devising ways to deal with those risks and effects. The Tribunal therefore ordered the parties to cooperate and enter into consultations immediately, and to exchange information, monitor the risks and devise measures to prevent pollution. The Tribunal also decided that Ireland and the United Kingdom should each submit an initial report on compliance with the provisional measures prescribed by 17 December 2001 at the latest. This date was clearly a strategic choice for the Tribunal. It was only shortly before the planned commissioning of the plant and obviously chosen to maximize pressure on the parties to comply with the terms of the Order.

6. Final remarks

6.1 Speed of the proceedings

One of the most notable features of the proceedings before the Tribunal has been the speed with which the Tribunal has dealt with the cases submitted to it. The *M/V »Saiga« Prompt Release Case* took only three weeks from filing of the application with the Registrar of the Tribunal to the reading of the Judgment.[31] For prompt release cases the Tribunal has set very tight time-limits, because of the cost, and not least the human suffering, associated with the detention of vessels in foreign ports.

The Tribunal found it difficult, however, to stay within these tight time-limits and, by decision of 15 March 2001, amended its Rules to give all parties involved in prompt release proceedings more time. Nevertheless, the extension should not be used as an excuse not to deal with cases as quickly as possible, especially if they are straightforward or the circumstances require quick action. The Tribunal should be careful not to forfeit the goodwill it has obtained.

Other examples of swift action by the Tribunal are the requests for provisional measures, a kind of interim injunction, involving measures required to preserve the respective rights of the parties or prevent serious harm to the marine environment pending resolution of the main case (which may take years). Their very nature is one of urgency.

Where urgent action is not required, such as in the *M/V »Saiga« (No. 2) Case*, the Tribunal takes more time. This particular case took a little over sixteen months, but even that is not long for a full case on the merits.[32] It should also be realized that in such cases it is often the parties that ask the court for more time in order to prepare their case better.

The Tribunal has acquired a reputation for rapid dispute resolution. It should, however, not rest on its laurels, but remain alert, build on its reputation and endeavour to deliver justice expeditiously. It remains true that justice delayed is justice refused – and this applies particularly to the Tribunal's compulsory jurisdiction with respect to urgent matters. In this connection, it should also be pointed out that the ICJ has acted very expeditiously in some requests for provisional measures, to the extent that in one case it took less than 24 hours to arrive at its decision.[33]

It will be difficult for the Tribunal to match the swiftness with which the ICJ acted in the *LaGrand Case*, since the Tribunal is for the time being only in session for two to four months a year. There are situations where the Chamber of Summary Procedure could make a binding decision, which would mean that at least three judges would have to be at the seat of the Tribunal.[34] Also, the President of the Tribunal may call upon parties to act in such a way as will enable any order the Tribunal may make to have its appropriate effects.[35] The most efficient way of dealing with a matter of great urgency may prove to be the use of modern technology. The Tribunal could hold a »virtual« meeting in order to take an urgent decision.

6.2 Not a court of summary procedure

Most of the cases submitted to the Tribunal to date have involved the Tribunal's compulsory jurisdiction (i.e., one party can oblige the other to come to court) where urgency was required. This does not mean that the Tribunal has become a court of summary procedure. As illustrated by the *M/V »Saiga« (No. 2) Case* and the *Swordfish Case*, the Tribunal may be called upon by the parties to deal with

30 Written Response of the United Kingdom, para. 14.
31 See ITLOS/Press 10.
32 An average case before the ICJ would last anywhere between three and five years. The case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* took an unprecedented nine-and-a-half years from filing to final resolution by the ICJ.
33 The *LaGrand Case (Germany* v.*United States of America),* Order of 3 March 1999.
34 Article 25, para. 2, of the Statute of the Tribunal and article 28, para. 6, of the Rules of the Tribunal.
35 Article 90, para. 4, of the Rules of the Tribunal.

the merits of their dispute and decide important issues of international law.[36]

Although it is to be expected that urgent proceedings will remain an important source of cases for the Tribunal in the future, it is also to be expected that, with increased awareness of the quick justice that the Tribunal can deliver, more and more States will be interested in bringing all kinds of disputes to the Tribunal for resolution. Decision-makers will inevitably be attracted by a court that will finish dealing with a case before the end of their term of office.

6.3 Tribunal proceedings to avoid costly arbitration

In those instances where the Tribunal does not have compulsory jurisdiction, the Convention provides that, if the parties have not made declarations selecting the same forum for dispute settlement, a dispute will go to international arbitration.[37] Two cases which were brought before the Tribunal had originally been submitted to arbitration.[38] By agreement, the parties decided to transfer the cases to the Tribunal.

An important reason for transferring proceedings to the Tribunal is efficiency. The judges, the court building, the procedural rules, and the staff to service the meetings of the judges are all in place. Another reason may well be the costs related to arbitral proceedings. If a case goes to arbitration, the parties must pay the salaries of the arbitrators, their staff and for the infrastructure at the seat of the tribunal. Since the Tribunal is paid for by means of annual contributions from the States Parties, no such costs have to be borne by parties to a case before the Tribunal. This makes it attractive for States to transfer arbitral proceedings to the Tribunal. In future many cases are also expected to come before the Tribunal this way.

6.4 Relative unity of the court

The Tribunal has shown remarkable unity in many of its decisions following the *M/V «Saiga« Prompt Release Case*. It should be realized that many of the judges of the Tribunal took part in the negotiations leading to the adoption of the Convention, in which consensus played a major role. Together with »package deals«, it was consensus that made this major exercise in international codification possible.

In a court of law consensus plays a different role. If consensus is a result of the clarity of the law that the Tribunal applies, then consensus is a positive development, because it strengthens the authority of the decisions of the Tribunal. However, consensus should never be the ultimate goal of a court, but justice. Judge *ad hoc* Szekely in the *MOX Plant Case* said »that, at times, the Tribunal resembled more a diplomatic exercise than a judicial one«[39] and Judge *ad hoc* Shearer stated (in the *Southern Bluefin Tuna Cases*) that it seemed to him »that the Tribunal (. . .) ha[d] behaved less as a court of law and more as an agency of diplomacy« and that »[w]hile diplomacy, and a disposition to assist the parties in resolving their dispute amicably, ha[d] their proper place in the judicial settlement of international disputes, the Tribunal should not shrink from the consequences of proven facts«[40].

It is a fine balance that the Tribunal will need to strike. In the *M/V »Saiga« Prompt Release Case* and the *Grand Prince Case*, the Tribunal has, however, proved that it does not shy away from serious debate.

6.5 Trust in the Tribunal

It is interesting to note that in the *Southern Bluefin Tuna Cases*, the parties had a choice as to where to bring the case: to the Tribunal or the ICJ. Both courts would have seemed to have had jurisdiction to deal with the dispute, but Australia and New Zealand nevertheless decided to bring their case before the Tribunal. One of the considerations borne in mind by the parties may have been that the Tribunal, as a new, modern court, might be more inclined to apply evolving norms of international law. Australia and New Zealand were not disappointed. The Tribunal, albeit not explicitly, clearly applied the precautionary principle, which was at that time, and probably still is, very much an »evolving« rule of international law.[41]

Being able to chose between different international bodies for dispute settlement is often referred to as »forum shopping«. The possibility of bringing an international dispute before different fora is not new. International arbitration and international adjudication through the Permanent Court of International Justice (PCIJ) and later the ICJ have coexisted peacefully for over eighty years. The different means of dispute settlement have always shown great respect for and often refer to one another's judgments.

The *Swordfish Case* does, however, show that there is a danger under the present system that different fora may simultaneously consider the same issue and possibly reach different conclusions. There are certain safeguards built into the system to avoid this,[42] but even when different fora pronounce in different ways, that may not be a major problem, since the questions put to the fora and the regime that these fora apply are seldom the same.

It is all in all very promising that both developing and developed States have placed their trust in the Tribunal to resolve their disputes justly, even in instances where alternative means were at their disposal.

36 The Tribunal's mandate is to resolve international law of the sea disputes; it may, however, in the process of determining these disputes also develop general international law (see article 293 of the Convention and article 23 of the Tribunal's Statute).

37 See article 287 of the Convention and the exceptions listed in section 3 of Part XV of the Convention.

38 The *M/V »Saiga« (No. 2) Case* and the *Swordfish Case*.

39 Separate opinion of Judge *ad hoc* Székely, para. 21.

40 Separate opinion of Judge *ad hoc* Shearer, p. 5.

41 Separate opinion of Judge Laing, para. 15, footnote v.

42 See article 282 of the Convention.