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International Tribunal on the Law of the Sea

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Abstract

Although most international disputes are resolved through political means, especially as bilateral discussions and suggestions, international decisions and an important element of arbitration dispute settlement. There are several organizations serving as a place to solve the laws of maritime disputes, but special judicial organs specially designed to conduct such disputes in the International Tribunal for the Sea Law (ITLOS). This article is mainly limited to the procedures and procedures of ITLOS, although it and some other judiciary will be compared. In addition, the views and practices of the settlement of judicial disputes in East Asian states will be examined based on the latest cases filed in ITLOSS. This article discusses the International Tribunal for the Law of the Sea and its relevance. The U.N. Convention on the Law of the Sea seems to contemplate extensive jurisdiction for the Tribunal, but since its inception, the Tribunal has heard a very limited number and scope of cases, in part because disputants have other options for adjudication. This article provides a detailed discussion of the jurisdiction of the Tribunal. Then, it concludes in a positive note by emphasizing the tribunal's desire to analyze the important decisions of the tribunal and to create a more effective role in its existing institutional limitations, to ensure a significant contribution in the field of international law and judgment.

Keywords: Organization; Procedure; Tribunal; Jurisdiction.

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1. Introduction

The five-seventh part of the Earth's surface plays a central role in supporting human population, the oceans form irrespective of the world's important resources. There are political, strategic, economic and social interests in the oceans of every state of the world. This assertion finds its justification certainly in the fact that before the entry into force of the UNCLOS, States generally solved their maritime conflicts through the traditional international disputes settlement system, which consists of the no judicial procedure and judicial procedures, for this author, the normal mode of settlement of international dispute negotiations. There are discussions to determine whether there is a mutual agreement between the parties of the dispute to reach a direct agreement or to resolve their disputes. He explained that international law has the obligation to discuss the issues arising from Section 1 of the UN Charter Chapter 1, which provides a dispute to the parties in a peaceful way of settlement of international disputes, especially based on discussion. These interests are visible in marine activities in fishing, product shipping, hydrocarbons and mineral extraction, naval missions and scientific studies. The sympathy of these interests, which often competes, has led to maritime demand that has led to a high degree of control in the international system increasingly. The previously mentioned Part XV of the Convention allows State Parties to choose one or more of the following four alternative means of dispute settlement: The International Tribunal for the Law of the Sea (ITLOS or the Tribunal), the ICJ, arbitration and special arbitration. In this set of mechanisms provided by UNCLOS, the Tribunal has an “important role and authority”, as declared by the United Nations General Assembly in its Resolution 54/31 of 16 November 1999. These qualities recognized in the tribunal and the debates surrounding its constitution justify the choice to devote study to it. Indeed, the entry into force of the UNCLOS seemed to show that the ITLOS might duplicate the ICJ (Treves, 1999, P. 809). Therefore, the idea of a proliferation of international courts that could lead to a division of international law emerged as well as the question of the relevance of the tribunal2. Indeed, the Tribunal is not designed as a specialized judicial body to settle disputes concerning the law of the sea under the supervision or control of the ICJ. This is a completely separate judiciary court; As a result, the international role of international law enforcement has reduced the central role of the ICSE in this case by the model. However, effective practices and more than fifteen years have already been resolved, these concerns and doubts seem to be related to the past. In fact, the analysis of the rules of ITLOSS (UNXLOSS) and its judicial rule can be analyzed that a tribunal is a special court that provides a main forum for the resolution of international disputes in both its methods and its rights; and further strengthen the law of international law and its implementation, through its judiciary.

2. Organization of the Tribunal

As provided by article 2 of its Statute, the Tribunal is composed of 21 members “enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea". According to Vukas, this provision related to the moral character and competences of the judge has mutatis mutandis, been taken from art of the ICJ Statute. In this article, he noted that among the first 21 members elected by the Fifth Meeting of States Parties to the Convention on l August 1996. A great majority participated in the Third United Nations Conference on the Law of the Sea (two of them were chairmen of the Main Committees, three were members of the Secretariat of the Conference) and in the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (including its first President). A majority of them were also renowned authors in the field of the law of the sea. Furthermore, Vukas explained that since the law of the sea is "an integral part of international law as a whole", the fact that the nominees for ITLOS are required only to be persons of "recognized competence in the field of the law of the sea” and not in international law in general has created a fear. As a response, he noted that, even though it is difficult to determine when a person can be considered as having "recognized competence" in international law. 12 of the first 21 members of the Tribunal were at one time or another professors of international law, while 7 were members or associate members of the Institute of International Law (Institute de Droit International). Furthermore, as provided by article 2, paragraph 2 of its Statute, “in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution” have to be respected. To meet this requirement, in contrast to the ICJ, where the members of the Court are elected by the General. Assembly and by the Security Council the members of the Tribunal are elected by the States Parties to the Convention, which better reflects the principle of their equality.

The concept of "principal legal systems of the world" has not been clarified and supported by scientific data or legal arguments. There is no such common conventional definition because it is a complex notion covering many elements, (legal systems in terms of positive law; legal traditions; national, religious, historical, civilizational and other components; "common law", “continental law" "Muslim traditional law”, ethnic law and the law based on aboriginal tradition, etc…). Nonetheless, the current composition of the Tribunal resembles generally the notion of the “principal legal systems of the world”, whatever the scope and content that would be carried within this notion, Another requirement related to this principle of equitable geographical repartition of the members of the tribunal is that from each geographical group established by the General Assembly of the United Nations, there shall be no fewer than three members. Therefore, the composition of the Tribunal from the point of view of geographical representation is as follows since 20094:

- 5 judges from the African Group;

- 5 judges from the Asian Group;

- 4 judges from the Latin American and Caribbean Group;

- 3 judges from the Western European and other States Group;

- 3 judges from the Eastern European Group.

The remaining one member of the Tribunal shall be elected from among the Group of African States, the Group of Asian States, the Group of Western European, and other States.

The application of this principle of equitable geographical distribution has led to the Tribunal being composed proportionally of more judges from developing countries compared to the ICJ. This situation seems more representative of the international community, which in fact reflects the extensive participation in the Third United Nations Conference on the Law of the Sea.

3. The Chambers

The Seabed disputes Chamber was initially previewed to constitute the judicial organ of the International Seabed Authority. However, the works of the third Conference on the Law of the Sea permitted the successful integration of this judicial body within the ITLOS. According to Article 35 of the Statute of the Tribunal, which regulates its composition and its organization, the Seabed Disputes Chamber shall be composed of 11 members selected by a majority of the elected members of the Tribunal from among them. Similarly, to the composition of the members of the Tribunal as a whole, article 35 paragraph 2 provides that in the selection of the members of the Chamber, representation of the principal legal systems of the world and equitable geographical distribution shall be assured. What is more noticeable in this article is that it entrusts the Assembly of the International Seabed Authority to adopt recommendations of a general nature relating to such representation and distribution. This provision results certainly from the fact that during the third United Nations Conference on the Law of the Sea, it was previously envisaged to assign the Assembly of the Authority the right to elect the members of the Chamber, in order to establish an institutional connection between the Chamber and the Authority. However, the drafters of the Convention opted for the independence of this Chamber regarding the Authority while preserving the possibility for the latter to express its opinion on the representation of the principal legal systems of the world and the equitable geographical distribution. In this respect, during the first election of the members of the Tribunal at New York in 1996, the meeting of States Parties held before the elections issued, after deep negotiations, some resolutions in order to meet this requirement. Still following Article 35 of the Statute, the members of the Chamber shall be selected every three years and may be selected for a second term. Amongst its members, the Chamber elects its President who will serve for the term for which the Chamber has been selected. The Chamber must complete the

proceedings in its original composition, in case that proceeding are still pending at the end of any three-year period for which it has been selected. If a vacancy occurs in the Chamber, the Tribunal selects a successor amongst its elected members, who shall hold office for the remainder of his or her predecessor's term. A quorum of seven of the members selected by the Tribunal shall be required to constitute the Chamber. Moreover, if the Chamber does not include upon the bench members, having the nationality of the parties when hearing a dispute, it may include one or more. It seems that even if the Tribunal respects the principle of representation of the principal legal systems of the world and equitable geographical distribution when constituting the Chamber, it does not apply this principle in a strict manner. In fact, during the first election, the allocation of seats to each regional group was the following 3 Judges for the Asian group, 3 judges for the African group, 2 Judges for the Latin American and Caribbean group, 2 Judges for the Western Europe and other States group and 1 Judge for the Eastern European group. However, during the second election of 4 October 1999, the number of seats allocated to the African group decreased from 3 to 2 while the number of Judges for the Eastern European group increased from 1 to 2, while the other regional groups conserved the same number of judges. In the selection of members of a given chamber, paragraph 2 of the Article provides that the Tribunal is to have regard to any special knowledge, expertise or previous experience of members in relation to the category of disputes concerned. A special role is foreseen for the President of the Tribunal who shall give advice to the Tribunal on a chamber's composition. This provision aims to provide some assurance that the factors of knowledge, expertise and experience are considered as well as other factors which in his or her consultations seem to be important to the Tribunal, for instance if the composition is representative of the Tribunal as a whole. Chapter 3 of Article 29 provides that the Tribunal may decide to dissolve a standing special chamber at any time provided that a chamber must finish any case pending before it. According to Judge Eiriksson, "In the case of dissolution, it can be argued that the chamber should in its then existing composition, complete each phase in respect of which it had already met at the time of dissolution in accordance with Article 68 of the Rules. With regard to each successive phase, the Tribunal should, if necessary, select new members to replace members who are no longer on the Tribunal following the expiration of their terms of office. Article 30 of the Rule of the Tribunal sets out the modalities for the formation of an ad hoc chamber. Thus, within two months after the institution of proceedings, a request for the formation of a chamber must be made. In the case that the request is made by one party instead of the parties jointly, the President shall check if the other party agrees. Upon the agreement of the parties for the formation of an ad hoc chamber, the President ascertains the views of the parties in respect of its composition and reports to the Tribunal consequently. The procedure applicable for the establishment of the original composition of the chamber is followed in the case of vacancies. The Tribunal determines the quorum for meetings of the chamber

but judges ad hoc are not included in the quorum, Article 12, paragraph 2 of the Statute of the Tribunal governs the position of the Registrar. In the discharge of his or her functions, the Registrar is responsible to the Tribunal Rules. According to Article 32 and 33 of the Rules of the Tribunal, the Registrar of the Tribunal, the Tribunal elects the Deputy Registrar and the Assistant Registrar for five-year terms (they may be re-elected) by secret ballot from among candidates nominated by judges. The relevant information on the candidates shall accompany the nomination whose date of closure is fixed by the President of the Tribunal. The candidates who obtain the votes of the majority of the judges composing the Tribunal at the time of election are elected.

4. Jurisdictions of the Tribunal

Due to the fact that the work of the Tribunal is linked, as a general rule, to a single document which is the Convention, the jurisdiction of the Tribunal is globally much less complicated than the jurisdiction of the ICJ whose work is based on hundreds of treaties that show the larger subject-matter scope of its jurisdiction. Despite this remark, the jurisdictional provisions of the Convention are extremely complex, with different ways the Tribunal can be seized of a dispute and a wide variety of exceptions and limitations. Article 288 of UNCLOS is the basis of the jurisdiction of the Tribunal. Indeed this Article provides that the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention and any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention. However, such jurisdiction is not exclusively conferred to the Tribunal. Article 288 of the Convention has also assigned jurisdiction to all other international courts and tribunals under Article 287 Paragraph 1. There are the ICJ., the arbitral tribunal constituted in accordance with Annex VII of the Convention and, for disputes over certain matters relating to the Convention (fishing, protection and preservation of the marine environment, marine scientific research and navigation and ship pollution and dumping), the Special Arbitral Tribunal provided for by Annex VIII of the Convention. So, under Article 287 paragraph 1 of the Convention, this jurisdiction is concurrently recognized by all international judicial bodies likely to intervene in disputes concerning the law of the sea.

Jurisdiction recognized by the Tribunal is binding and is not subject to the consent of the States Parties. It is based on Article 286 of the Convention that the compulsory jurisdiction of the Tribunal will be exercised. Nevertheless, this Article allows the exercise of the compulsory jurisdiction only under the conditions prescribed in Articles 281, 282 and 283 of the Convention.

Moreover, the jurisdiction of the International Tribunal for the Law of the Sea is not limited to the provisions of Article 288 of the Convention. Indeed, Article 21 of the Statute also empowers the Tribunal whenever the parties to an agreement expressly recognize its jurisdiction. In addition, Article 20 Paragraph 2 of the same

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Statute provides that the Tribunal have jurisdiction in any case submitted pursuant to any other agreement-conferring jurisdiction on the Tribunal, which is accepted by all the parties to that case.

Throughout these different provisions, some differences are noticeable between the ITLOS and the ICJ. These differences or particularities that embody the novelties of this Tribunal can be addressed in respect of its jurisdiction ration personae and its jurisdiction rationed material.

5. Jurisdiction Ratione Materiae

The jurisdiction ratione materiae relates to the subject matter of the dispute, which could be brought before the Court or the Tribunal. According to Article 287 of UNCLOS, ITLOS is one of the four means offering, "Compulsory procedures entailing binding decision" for the settlement of disputes relating to the application or interpretation of the Convention. The other three are: - the International Court of Justice; - arbitration tribunals constituted in accordance with Annex VII to the Convention; and - special arbitration tribunals constituted in accordance with Annex VIII to the Convention, if the dispute falls within one of the categories referred to in that Annex.

Every State Party to the Convention has the possibility to choose one or more of these procedures that it is willing to accept for the settlement of a dispute in which it may be involved. Apart from the cases specifically provided in the Convention, the Tribunal will only have competence to deal with a dispute between States Parties concerning the interpretation or application of the Convention if all the parties to the dispute have accepted the Tribunal as the forum of choice. However, in some cases, the competence of the Tribunal to deal with a dispute does not depend on prior explicit acceptance of jurisdiction by the parties. It is the case when: - disputes are brought before the Seabed Disputes Chamber in respect of activities in the Area as specified in article 187;

30 - Requests are made to the Tribunal or the Seabed Disputes Chamber to prescribe provisional measures pursuant to paragraph 5 of article 190 of the Convention; and - applications are made to the Tribunal to order the prompt release of arrested vessels or their crew under article 292 of the Convention. Through these compulsory jurisdictions, the Convention gives to the Tribunal special competences that make it significantly different from the other procedures designated in article 287 (Mensah, 2001, P. 27). On top of that the Tribunal has an advisory jurisdiction, accessory jurisdictions and optional jurisdictions. It is difficult to consider independently the jurisdiction ratione materiae of the Tribunal and the way it is linked to the will of the parties, and to some extent, it highlights the originality of the Tribunal compared to the other means of disputes settlement. The main difference between the "compulsory" jurisdiction of the ICJ and that of the Tribunal lies in the fact that the compulsory jurisdiction of the Court is optional, while that of the Tribunal is not; albeit it

is determined (at least partially) by an option. Indeed, the Court can be seized by party only if a special declaration of acceptance of its “compulsory" jurisdiction has been made by all parties to the dispute6, in case of treaties providing for compulsory jurisdiction7 or on the basis of an ad hoc consent. Conversely, the Tribunal can be seized without this previous declaration of acceptance based on the rules of the Convention conferring the power to settle disputes to a court or tribunal whose decisions are binding. The only condition is that the Tribunal should have been chosen, through a declaration of general scope, by the States and other entities to which such power is recognized and which parties to the dispute are. This mechanism is set out in article 287 of the Convention and is called “Montreux formula According to this mechanism, when the Convention institutes cases of compulsory jurisdiction, the Tribunal (or the ICJ depending on the case) can function as a dispute-settlement body which may be seized unilaterally by parties submitting disputes on the matters indicated by the Convention. However, this prerogative is only allowed when all parties to the dispute, with a declaration made at the time of signature or ratification or later, have select it (article 287 paragraphs 1 and 4). In event that the parties to the dispute have not made the same choice, an arbitral tribunal established under Annex VII of the Convention shall be seized based on "compulsory” jurisdiction according to paragraph 5 of the same Convention. It is difficult to consider independently the jurisdiction ratione materiae of the Tribunal and the way it is linked to the will of the parties, and to some extent, it highlights the originality of the Tribunal compared to the other means of disputes settlement. The main difference between the “compulsory” jurisdiction of the ICJ and that of the Tribunal lies in the fact that the compulsory jurisdiction of the Court is optional, while that of the Tribunal is not; albeit it is determined (at least partially) by an option. Indeed, the Court can be seized by party only if a special declaration of acceptance of its “compulsory" jurisdiction has been made by all parties to the dispute6, in case of treaties providing for compulsory jurisdiction7 or on the basis of an ad hoc consent. Conversely, the Tribunal can be seized without this previous declaration of acceptance based on the rules of the Convention conferring the power to settle disputes to a court or tribunal whose decisions are binding. The only condition is that the Tribunal should have been chosen, through a declaration of general scope, by the States and other entities to which such power is recognized and which parties to the dispute are. This mechanism is set out in article 287 of the Convention and is called “Montreux formula (Treves, 2001, pp. 114-115)”. According to this mechanism, when the Convention institutes cases of compulsory jurisdiction, the Tribunal (or the ICJ depending on the case) can function as a dispute-settlement body, which may be seized unilaterally by parties submitting disputes on the matters indicated by the Convention. However, this prerogative is only allowed when all parties to the dispute, with a declaration made at the time of signature or ratification or later, have select it (article 287 paragraphs 1 and 4). In event that the parties to the dispute have not made the same choice, an arbitral tribunal established under Annex VII of the Convention shall be seized based on "compulsory” jurisdiction according to paragraph 5 of the same

Convention. The first case in which the Tribunal may exercise such compulsory jurisdiction independently of the choice of procedure mechanism concerns its competence to prescribe provisional measures. Besides its general power to prescribe provisional measures in disputes submitted to it in application of Article 290, paragraphs 1 to 4 of UNCLOS, the Tribunal is allowed under paragraph 5 of the same article to prescribe, modify or revoke provisional measures in a dispute over which the Tribunal does not otherwise have jurisdiction. This faculty applies when the parties to a dispute have agreed to bring it to arbitration in conformity with Annex VII to the Convention but have not yet finalized the constitution of the arbitration tribunal. In this case, the competence of the Tribunal is "conditional and residual" and may only be applied if one of the parties to a dispute has made a request for such provisional measures, and if, within two weeks from the date of the request, the parties do not agree on a court or tribunal to consider the request. In that case, at the request of the party concerned, the Tribunal may prescribe, modify or revoke appropriate provisional measures "if it considers that prima facie the tribunal which is to be constituted would have jurisdiction" to deal with the dispute and that "the urgency of the situation so requires" (Article 290, paragraph 5 UNCLOS). All provisional measures prescribed by the tribunal in exercise of this jurisdiction may be modified, revoked or affirmed by the appropriate tribunal when constituted and acting in conformity with the relevant provisions of the Convention. The Tribunal followed this procedure for the first time in the Southern Bluefin Tuna case where Australia and New Zealand, after having seized under article 287 an arbitral tribunal of a fisheries dispute against Japan, demanded, under article 290, paragraph 5, the Tribunal to prescribe provisional measures pending the establishment of the arbitral tribunal.

6. Procedure before the Tribunal

The procedure before the Tribunal is principally detailed in its Rules, which were adopted on 28 October 1997 then amended on 15 March and 21 September 2001 and on 17 March 2009. In elaborating the Rules, the Tribunal, following the main lines drawn in its Status, had to take the Rules of the ICJ as a basis while taking into account the particular aspects of the Tribunal's jurisdiction and the need to reach a good administration of justice. Indeed the Tribunal was well aware that the ICJ was criticized because its justice is too slow and too expensive, and that, at least, some of the reasons for this were to be found in its Rules and in its internal judicial practice (Treves, 2001, P. 136). Thus, the Tribunal decided through Article 49 of its Rules that, without limiting the right of the parties to a fair trial and to argue fully their case, its proceedings should be as expeditious and cost-effective as possible.

This article can be seen as the cornerstone of the Rules and can serve as a general clause useful for its understanding, particularly of the provisions related to the procedure to be followed in cases submitted to it. However, the Tribunal recognized that the policy stated in this article would be effective only if applied in all

the relevant rules and in the internal judicial practice of the Tribunal. The desire to implement this policy explicates why many of the features of the Rules and the Resolution on the internal judicial practice of the Tribunal differ from those of the ICJ.

The aim in this chapter is not to discuss systematically and in detail the 138 articles of the Rules, but only to emphasize the procedural features that make the Tribunal different from the ICJ. Time limits are set in a number of provisions in the Rules of the Tribunal with the purpose of making the procedure expeditious. Article 59, paragraph 1, which lies in the section on the written proceedings, provides that: "The time-limits for each pleading shall not exceed six months". This so-called "six-month rule" was proposed according to Judge Treves, scholars and practitioners to avoid the problems faced by the ICJ. Therefore, according to Judge Eiriksson, the written pleadings in cases with two rounds of pleadings would finish, excepting incidental proceedings or other situations causing delay, no later than two years after the relevant order is adopted. For instance, in the M/V "SAIGA" Case, as fixed by the Tribunal, the time offered to file the Memorial was 88 days. For Counter Memorial 119 days thereafter, for the Reply 35 days thereafter and for the Rejoinder 38 days thereafter, for a total of 280 days. Thus, the total period from the institution of proceedings until the closure of written proceedings was 340 days, considering that the case began as arbitral proceedings.

7. Conclusion

Created by the 1982 United Nations Convention on the Law of the Sea, the International Tribunal for the Law of the Sea is a standing judicial body that in many aspects differs from other international courts such as, for instance, the International Court of Justice. Its innovative features offer many benefits over the alternative mechanisms of international dispute settlement.

Firstly, the fact that the tribunal is a specialized judicial body allows it to resolve, more easily, cases that demand special expertise like fisheries, marine environment and marine research. Furthermore, the fact that the jurisdiction of the tribunal is limited, in principle, to decide on the interpretation and application of the UNCLOS, offers it the advantage to judge a case more expeditiously than the ICJ, which has to deal with several other matters different from the law of the sea. Secondly, the special composition of the Tribunal with 21 Judges (against 15 judges at ICJ) specialized in the field of the law of the sea, might be the subject of consideration by parties before submitting a dispute to the Tribunal. Compared to ICJ, the Tribunal is a much larger body regarding the strength of the bench and the fact that the election of its members is very independent from the United Nations unlike ICJ. Moreover, Judges from developing countries are proportionally more numerous at ITLOS than at the ICJ.

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Reference

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6. SPLOS/201
7. Akl, 2001, P. 77
8. Article 49 of the Rules of the International Tribunal for the Law of the Sea: "The proceedings before the Tribunal shall be conducted without unnecessary delay or expense
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10. See Pact Of Bogota : http://www.oas.org/juridico/english/treaties/a-42.html