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The International Tribunal for the Law of the Sea: A Great Mistake? (The Earl Snyder Lecture in International Law)

Jillaine Seymour
Sidney Sussex College

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The International Tribunal for the Law of the Sea: A Great Mistake?

Jillaine Seymour*

Abstract

This article discusses the International Tribunal for the Law of the Sea and questions its role and value. The U.N. Convention on the Law of the Sea seems to contemplate fairly 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. The Tribunal has compulsory jurisdiction in "prompt release" cases and in claims for provisional measures where the arbitral tribunal before which the claim will ultimately be brought has not yet been constituted. These two types of jurisdiction comprise the majority of applications to the Tribunal. This article suggests ways that the Tribunal might seek to expand its competence and relevance and contribute to the interpretation of the Convention.

Introduction

The 1982 U.N. Convention on the Law of the Sea (UNCLOS or Convention) not only introduced comprehensive substantive change to the law of the sea, but also introduced a system of compulsory jurisdiction, which included the creation of a standing international tribunal, the International Tribunal for the Law of the Sea (Tribunal). The Convention appears to vest this Tribunal with very broad jurisdiction—the Tribunal is open to nonparties and is arguably capable of hearing disputes beyond those based on the Convention.

*Fellow and Lecturer, Sidney Sussex College, Cambridge, United Kingdom. This article is based on the Snyder Lecture delivered at Indiana University School of Law—Bloomington on March 23, 2005. I am grateful for the helpful comments made by the members of the faculty. Any errors remain my own.

However, in the aftermath of the recent election of seven members, the Tribunal’s role and value might reasonably be questioned. Despite the potential breadth of its jurisdiction and the apparent compulsion contained in the Convention, in the more than ten years since the Convention entered into force, the Tribunal has had just thirteen claims come before it, only two of which were brought on the merits and only one of which—M/V Saiga (No. 2), the first case brought before the Tribunal—was heard to judgment. The Tribunal’s jurisdiction has been almost exclusively limited to what might be referred to as “incidental proceedings”—claims for provisional measures and for the prompt release of vessels which have been arrested, ordinarily for contravening coastal states’ regulations regarding fishing in the exclusive economic zone (EEZ).

Even before the Tribunal’s establishment, it was argued that an additional standing tribunal was simply not necessary given the availability of the International Court of Justice (ICJ) and arbitration, both with existing expertise in the law of the sea. Does the past decade support Shigeru Oda’s prediction that the Tribunal “will prove to have been a great mistake”?

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7. Oda, supra note 6, at 864.

A. Dispute Settlement Provisions

The dispute settlement provisions in the 1958 Convention on the Law of the Sea were contained in an optional protocol. However, in relation to the 1982 Convention, arguments in favor of obligatory and binding third-party procedures prevailed. It was argued that the "interpretation and application of an instrument containing so many innovations was bound to generate disputes which could only be resolved by the use of a third party procedure which was obligatory . . . and binding" and that knowledge of the possibility of such procedures "discourages unreasonableness and so acts as a means of dispute avoidance." The inclusion of compulsory dispute settlement provisions was considered to be a key step forward. The dispute settlement mechanisms, primarily contained in Part XV, are a complex set of provisions providing for a combination of resort to existing procedures (the ICJ and arbitration), adjudication by a new specialist court (the Tribunal), and exclusion of certain classes of matters, which are effectively left either to states or to other specialist bodies.

B. Fundamental Principles

The dispute settlement procedures under the UNCLOS are based on a number of fundamental principles. Parties are obliged to settle their disputes by peaceful means. No reservations to the Convention are allowed, and, therefore, the parties are required to accept dispute settlement in accordance


11. Such as, for example, calculation of the total allowable catch in the EEZ.

12. Such as, for example, the Commission on Continental Shelf Margins.

13. UNCLOS, supra note 1, part XV, § 1.

14. Id. art. 279; see also id. art. 283(1) (requiring parties, when a dispute arises, to "proceed expeditiously to an exchange of views" as to the means of settlement to be adopted).

15. Id. art. 309.
with Part XV. However, a further fundamental principle is freedom of choice, and so Part XV\(^6\) gives states the right to settle any dispute between them by peaceful means of their own choosing. Clearly this affects the extent to which the UNCLOS dispute settlement provisions can be said to be “compulsory,” but it is clear that this provision was crucial to the acceptability of the Convention’s dispute settlement provisions.\(^7\)

\textit{C. Application of the Compulsory Dispute Settlement Procedures}

If the parties to a dispute have agreed upon a particular means of settlement, the UNCLOS compulsory procedures will apply only if such means prove unsuccessful, if the agreement between the parties does not exclude any further procedure,\(^8\) and if the dispute concerns the interpretation or application of the Convention.

Furthermore, the compulsory procedures are subject to a number of substantive exceptions. Article 297 provides that certain types of disputes are not included in the compulsory dispute settlement process.\(^9\) The UNCLOS also permits states to opt out of the compulsory procedures in relation to particular disputes.\(^10\) These articles acknowledge that, for some states, acceptance of the UNCLOS was contingent on the exclusion of some sensitive areas from the Convention’s dispute settlement procedures.\(^11\) The question of the disputes that are excluded from the compulsory jurisdiction procedures will be left to one side because these exclusions do not impact the Tribunal in particular, but rather are part of the landscape of the UNCLOS. However, as Oda notes, any assessment

\begin{itemize}
  \item 16. Id. art. 280.
  \item 17. Charney, \textit{supra} note 6, at 73.
  \item 18. UNCLOS, \textit{supra} note 1, art. 281.
  \item 19. Id. art. 297 (excluding disputes concerning the exercise by a coastal state of its sovereign rights or jurisdiction, its exercise of a right or discretion to regulate marine scientific research in its EEZ or continental shelf, and its exercise of its sovereign rights with respect to the living resources in the EEZ).
  \item 20. Id. art. 298. States can opt out of the compulsory dispute settlement procedures in relation to disputes concerning military and law-enforcement activities and sea-boundary delimitation, as well as disputes in respect of which the U.N. Security Council is exercising its functions and claims to historic bays or titles.
  \item 21. The excluded disputes “touch upon vital interests of the State, such as the State’s boundaries, security and some aspects of its control over its offshore resources.” R. R. Churchill & A. V. Lowe, \textit{The Law of the Sea} 455 (3d ed. 1999). \textit{See also} Boyle, \textit{supra} note 6, at 41–47 (raising the potential difficulties in defining whether a dispute falls outside the compulsory procedures).
\end{itemize}
of the dispute settlement procedures under the Convention has to be made in light of the significant exceptions to those procedures.22

Where the compulsory dispute settlement procedures do apply, states have four main choices23 for dispute settlement: the Tribunal,24 the ICJ, an arbitral tribunal,25 or a special arbitral tribunal.26 These four options represent four views that emerged when trying to determine what the compulsory method should be. There were those who advocated the need for a new tribunal to deal with innovations contained in the UNCLOS. Others were in favor of the ICJ because of its existing history of resolving law of the sea disputes. Some preferred the flexibility of arbitration, while others considered that the technical issues raised by many law of the sea disputes called for the creation of specialized bodies.27 All four views were accommodated as options, but it is noteworthy that a specialist standing tribunal was created and that it was given a broad jurisdictional ambit.

II. Breadth of the Tribunal's Jurisdiction

There are a number of possible interpretations regarding the extent of the Tribunal's jurisdiction, both in relation to the nature of the claims that may be brought before it and in relation to entities that may access the Tribunal. With regard to the subject matter of claims brought before the Tribunal, there are two relevant provisions in the UNCLOS: Article 288 of the UNCLOS and Annex VI, Article 21.

A. Claims within the Tribunal's Jurisdiction

Article 288 refers to the jurisdiction of all the possible compulsory dispute resolution bodies and relevantly provides that each shall "have jurisdiction over any dispute concerning the interpretation or application of this Convention which is

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22. Oda, supra note 6, at 863.
23. UNCLOS, supra note 1, art. 287(1).
24. See id. Annex VI.
25. Referred to as an Annex VII arbitral tribunal.
26. Referred to as an Annex VIII special arbitral tribunal and which provides for the optional submission of certain disputes to expert fact-finding on issues of fisheries, marine environment, marine-scientific research, or navigation.
27. Merrills, supra note 10, at 185.
submitted to it in accordance with this Part" and that each "shall also have jurisdi-
cision over any dispute concerning the interpretation or application of an interna-
tional agreement related to the purposes of the Convention, which is submitted to
it in accordance with the agreement." 

Article 21 of Annex VI envisages a more expansive jurisdiction and provides
that "the jurisdiction of the Tribunal comprises all disputes and all applications
submitted in accordance with the Convention, and all matters specifically pro-
vided for in any other agreement which confers jurisdiction on the Tribunal." 

Both articles enable parties to refer any dispute concerning the UNCLOS
and related international agreements to the Tribunal. However, Article 288(2)
arguably limits the Tribunal's consensual jurisdiction to the interpretation or
application of any "international agreement related to the purposes of the Conven-
tion," whereas Annex VI, Article 21 refers to "any other agreement which con-
fers jurisdiction on the Tribunal." Furthermore, Article 288(2) confines the
Tribunal's consensual jurisdiction to "international agreements," whereas Article
21 refers only to "agreements."

A broad approach based on Article 21 of Annex VI appears to support
claims to use the Tribunal to resolve any dispute, regardless of whether it relates
to the law of the sea or whether it is based on an international agreement. An
agreement to bring the dispute to the Tribunal is all that would be necessary.

There are, of course, arguments that support a restrictive interpretation of
the Tribunal's jurisdiction. For example, Article 1(4) of Annex VI provides that
reference of a dispute to the Tribunal shall be governed by Parts XI and XV,
which suggests that Annex VI is subordinate to Part XV and, therefore, to Article
288. It might also be argued that the Tribunal's jurisdiction is limited by the
law that it is to apply. Article 293(1) provides that "[a] court or tribunal having

28. UNCLOS, supra note 1, art. 288(1) (referring to the Tribunal's compulsory jurisdiction) (emphasis added).
29. Id. art. 288(2) (emphasis added).
30. Id. annex VI, art. 21 (emphasis added).
31. Article 288(1), not surprisingly, limits the compulsory jurisdiction of the Tribunal to cases concerning the interpretation or application of UNCLOS. Id. art. 288(1).
33. Boyle, supra note 6, at 47-50.
34. Eiriksson, supra note 32, at 113-14 (referring also to Annex VI, Article 32(2) on the right of intervention by third parties, which refers to "international agreements" and seems to refer back to Article 288(2), but could be read as limiting the right to intervene). Eiriksson also notes that
jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. \(^{15}\)

This conflict might be resolved by noting that Article 293 refers to law applicable to a court or tribunal “having jurisdiction under this section,” \(^{36}\) and is therefore arguably only applicable if the parties are relying on jurisdiction under the section in which Article 293 appears, that is, Part XV, Section 2, but that it is not applicable to applications made under Annex VI, Article 21. However, it has been suggested that the scope of Article 293 is even narrower than this and does not apply to any jurisdiction based on Part XV, Section 2, but only applies to the Tribunal's compulsory jurisdiction under this section. Part XV, Section 2 refers not only to the Tribunal's compulsory jurisdiction, but to its consensual jurisdiction, as well. \(^{37}\) Alan Boyle argues that Article 293 does not determine the applicable law in consensual cases. \(^{38}\) Support for this interpretation of Article 293 is found in Article 288(2), \(^{39}\) which provides that a court or tribunal can have jurisdiction over any dispute concerning the interpretation or application of an international agreement “related to the purposes of the Convention.” \(^{40}\) It would arguably be odd if the law applicable in these situations was confined to the Convention and other international law not incompatible with it.

B. Access to the Tribunal

The Tribunal is clearly open to States Parties. \(^{41}\) However, reference to Annex VI, Article 20(2) supports the argument that the Tribunal’s consensual jurisdiction is also open “to entities other than States Parties . . . in any case sub-

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35. UNCLOS, supra note 1, art. 293(1). However, Article 293(2) provides that “[paragraph 1 does not prejudice the power of the court or tribunal to decide a case ex aequo et bono ["according to what is equitable and good"], if the parties so agree.” Id. art. 293(2).

36. Id. art. 293(1).

37. See id. art. 288(2).

38. Boyle, supra note 6, at 48–49.

39. See UNCLOS, supra note 1, part XV, § 2.

40. Id. art. 288(2).

41. Id. annex VI, art. 20(1). Article I(2)(2) extends the application of the Convention to the entities entitled to sign it pursuant to Article 305, which includes international organizations. Id. art. 1(2)(2).
mitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."42 Boyle accepts that "[v]iews may differ on whether this is a strained reading of Annex VI or whether it corresponds with the intention of the drafters," but concludes that it makes "considerable sense" to enable entities other than States Parties to access the Tribunal.43 This is in contrast to the ICJ, which is clearly only open to states,44 and in contrast to Annex VII and VIII arbitral tribunals, which appear to be open only to States Parties.45

If the Tribunal is open to entities other than States Parties, this provides further support for a broad interpretation of the potential subject matter of the Tribunal's consensual jurisdiction. It would make little sense to enable other entities to bring claims before the Tribunal but to then limit the law applicable to their dispute to "the Convention and other international law not incompatible with it."46

It is submitted that the objections to a broad jurisdiction cannot hold and that an expansive interpretation of the Tribunal's consensual jurisdiction must prevail. In addition to more detailed arguments based on the text of the Convention, "if parties to a dispute wish to take it to the Tribunal, it is difficult to see why they should not be allowed to do so."47

Despite the creation of this specialist standing tribunal with its potentially extensive jurisdiction, the claims brought before it have been limited both in number and in scope. This inevitably raises the question of why its work has been restricted. As already noted, the compulsory dispute settlement procedures under the 1982 Convention are based on the principle of freedom of choice—states are entitled to choose which dispute settlement process they would like to

42. Annex VI, Article 20 is noted without comment by Lauterpacht, supra note 6, at 61 n.4. The Seabed Disputes Chamber of the Tribunal has jurisdiction over the variety of entities that may be involved in a dispute in relation to exploitation of the seabed, including state enterprises, private contractors, and the International Seabed Authority. UNCLOS, supra note 1, art. 187.

43. Boyle, supra note 6, at 52-53 (noting that access to the Tribunal is, in any event, possible in arbitration).

44. Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 1059, 3 Bevans 1186. Rights of intervention are the same for both the ICJ and the Tribunal. Compare id. arts. 62-63, 59 Stat. at 1063, 3 Bevans at 1191, with UNCLOS, supra note 1, annex VI, art. 32.

45. Neither Annex VII or VIII contain an article similar to Annex VI, Article 20(2), and it would appear, therefore, that other entities would not have standing before these tribunals. See Collier & Lowe, supra note 9, at 90-91.

46. UNCLOS, supra note 1, art. 293.

47. Boyle, supra note 6, at 50.
apply, both prior to any dispute arising and after a dispute has arisen. It is only if dispute settlement based on choice fails that the compulsory procedures take effect. It is therefore relevant to examine the extent to which states can and do choose to bring claims to the Tribunal.

III. Choice of Dispute Settlement Procedure

Obviously, disputants are free to choose the Tribunal at the point at which a dispute arises. However, this possibility is subject to the practical limitation that, where parties are already in dispute, it is difficult for them to reach agreement as to which forum should adjudicate that dispute when there is a choice. This is not to say that such agreement is impossible. But, to date, only two claims have come before the Tribunal by agreement, and in only one of those, *M/V Saiga (No. 2)*, has the Tribunal reached a decision on the merits. In the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, the parties agreed to submit their dispute to a chamber of the Tribunal pursuant to Annex VI, Article 15. However, the parties reached a provisional arrangement in relation to the dispute, and proceedings before the chamber have been suspended until January 1, 2008.


50. *Id.* Chile had instituted the Annex VII arbitral procedure and had asked the president of the Tribunal to appoint an arbitrator, but, after consultation, it agreed to submit the dispute to a chamber of the Tribunal. *See generally Vaughn Lowe, The International Tribunal for the Law of the Sea: Survey for 2000*, 16 INT’L J. MARINE & COASTAL L. 549, 567-69 (2001).

The Convention also makes provision for States Parties to choose, prior to any dispute arising, any of the four means for dispute settlement nominated in Article 287(1). In the event of a dispute, if both parties have selected the same forum, it goes to that body, unless they otherwise agree. Many states have made no choice at all, but of the thirty-three states that had chosen as of September 9, 2005, the Tribunal is in fact a popular choice. Eleven States Parties nominated the Tribunal as their only first choice, and nine nominated the Tribunal and the ICJ as their equal first choices.

However, Robin Churchill and Vaughan Lowe argue that those relatively few states that have selected the Tribunal as their preferred forum for the compulsory settlement of disputes are so geographically diverse that it seems highly unlikely that a dispute could arise between some of them. While there have been cases between geographically distant states in the Tribunal, these claims were brought before the Tribunal on the basis of its compulsory prompt release jurisdiction, and those few claims that have come before the Tribunal on some other basis demonstrate the expected geographical proximity.

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52. UNCLOS, supra note 1, art. 287 para 4.
55. In addition, Portugal’s declaration nominates all four options and Mexico nominates the Tribunal, the ICJ, and Annex VIII arbitration as equal first choices. A further seven states nominate the ICJ as their only first choice. Only two states nominate Annex VII arbitration as their only first choice. Id.
58. See infra Part IV.A.
Prior agreement to submit a dispute to the Tribunal may also be found in some other treaty, and there are several multilateral agreements which confer jurisdiction on the Tribunal. Of the seven agreements listed on the Tribunal’s website containing provisions relating to the jurisdiction of the Tribunal, four are now in force. Moreover, a fifth, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, had, as of October, 31, 2005, twenty-one of the necessary twenty-six ratifications.

Alternatively, if a preexisting agreement concerning the law of the sea does not provide for the Tribunal to have jurisdiction, the UNCLOS provides that jurisdiction can be conferred on the Tribunal if all the parties agree. Given that this provision requires the agreement of all parties to a treaty, it has been suggested that it is not “likely that article 22 would be applied in practice.” This is particularly so if the parties to the dispute can simply agree between themselves to submit the dispute to the Tribunal under Annex VI, Articles 20 and 21.

60. The list does not purport to be exhaustive.


64. See Boyle, supra note 6, at 48 (suggesting that Annex VI, Article 32 gives jurisdiction over such treaties, including the London Convention 1972 and the 1973/78 MARPOL Convention).

65. Eiriksson, supra note 32, at 124.
The opportunities for the Tribunal to be selected by agreement are limited at this time. This could arise if the parties in dispute have nominated the Tribunal as their first choice for dispute settlement under Article 287, if the Tribunal is nominated as the dispute settlement mechanism in some other treaty to which the states in dispute are party, or if they agree on the Tribunal when the dispute arises. This relatively limited consensual recourse to the Tribunal has been the subject of comment, with successive Tribunal presidents and the U.N. General Assembly urging greater use of Article 287.66

While it is clear that the costs of maintaining a standing tribunal have to be justified,67 arguably the Tribunal's success can only be judged in relation to its primary competitors, the ICJ and Annex VII tribunals.

The Tribunal's current level of activity does not suffer by comparison to the position of the ICJ in relation to the 1958 Conventions. The expectation that the ICJ would play "a prominent role"68 in the settlement of disputes arising under the 1958 Conventions was not realized. Just over thirty states ratified the optional protocol providing for disputes to be referred to the ICJ,69 and no case has been referred to the ICJ under that protocol.70 The argument that this was attributable to states' reluctance "to accept an open-ended obligation to submit future disputes, whose nature is almost impossible to predict, to any particular settlement procedure"71 applies equally to the Article 287 declarations under the UNCLOS.

Although the Tribunal does not suffer from comparison to the role of the ICJ in relation to the 1958 Conventions, this leaves open the question of whether, under the UNCLOS, states prefer the ICJ to the Tribunal. As noted at the outset, there was a view that there was simply no need for another standing court because the Tribunal's role could be fulfilled by the ICJ.72 Since the Convention

66. Churchill, supra note 53; Churchill & Lowe, supra note 56, at 455.
68. Churchill & Lowe, supra note 21, at 453.
69. Unless the parties agreed within a reasonable time upon some other means of peaceful settlement.
70. Churchill & Lowe, supra note 21, at 453.
71. Id. A similar comment might also be made about the ICJ's Optional Clause jurisdiction. Collier & Lowe, supra note 9, at 154–55.
72. Lauterpacht, supra note 6, at 22 (arguing that the Statute of the ICJ could be amended to encompass the limited situations in which the Tribunal's competence could be distinguished from that of the ICJ); Oda, supra note 6, at 864 (arguing that, rather than creating a new tribunal, the role of the ICJ ought to have been strengthened).
entered into force in late 1994, applications have been filed with the ICJ that could have been submitted to the Tribunal. However, there have been relatively few such applications, and it is not clear that they necessarily demonstrate a general preference for the ICJ compared to the Tribunal. Romania’s application in relation to its dispute with the Ukraine is based on a 1997 Treaty on Relations of Co-operation and Good-Neighborliness and an Additional Agreement under which the parties assume an obligation to conclude a treaty on, inter alia, the delimitation of the continental shelf and the EEZ in the Black Sea. Romania relies on a provision of the Additional Agreement as the basis for the ICJ’s jurisdiction. However, Romania did not ratify the UNCLOS until December 1996, and the Ukraine did not ratify the UNCLOS until July 1999. Therefore, it is not surprising that their 1997 agreement nominated the ICJ as the standing tribunal to resolve disputes in the event that negotiations failed. The two claims by Nicaragua relied on the Optional Clause and the Pact of Bogotá to establish jurisdiction of the ICJ in circumstances in which one or both of the parties had not, at the time of the application, made an Article 287

73. This is true particularly given the apparent breadth of its jurisdiction. While combined territorial and maritime delimitation disputes can be excluded, UNCLOS, supra note 1, art. 298(1)(a), even those disputes which can or have been excluded from the compulsory jurisdiction procedure of the Convention may, nevertheless, be referred to the Tribunal (or other dispute resolution body) by consent. UNCLOS, supra note 1, art. 299.


75. Id. para. 4.

76. While it is arguable that the Tribunal is open to nonparties, that interpretation is yet to be clearly established and presumably states will only nominate a dispute settlement mechanism if they are certain that it is open to them to access it. Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4, 1998), might also be explained on this basis. Spain’s application was filed in March 1995, but Spain did not ratify the Convention until January 1997, and Canada ratified it in November 2003:

77. Statute of the International Court of Justice, supra note 44, art. 36(2).


79. See generally Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicar. v Hond.), Application of Dec. 8, 1999, available at http://www.icj-cij.org/icjwww/idocket/inH/inH_orders/inH_iapplication_19991208.pdf. It should be noted, however, that since then both states have demonstrated a clear preference for the ICJ, nominating it as their only first choice tribunal under Article 287—Nicaragua upon ratification on May 3, 2000, and Honduras on June 18, 2002.
declaration. A number of recent decisions are based on applications made to the ICJ before the Convention entered into force.\textsuperscript{80}

Reference to the Tribunal’s other main competitor, Annex VII tribunals, has, until very recently, also been limited, with no reported decisions on the merits of any claim to date. In the \textit{Southern Bluefin Tuna Cases}, the Annex VII tribunal held that it did not have jurisdiction over the dispute.\textsuperscript{81} In \textit{MOX Plant}, the Annex VII proceedings have been suspended, due to concerns about an overlap with the exclusive jurisdiction of the European Court of Justice (ECJ), until the ECJ rules on a related case concerning European Community law issues or the arbitral tribunal orders otherwise.\textsuperscript{82} In 2004, Guyana and Suriname, as well as Barbados and Trinidad and Tobago,\textsuperscript{83} submitted disputes to Annex VII arbitration, and in early 2005, the Annex VII arbitral tribunal met with the agents of Malaysia and Singapore in relation to their dispute over land reclamation by Singapore in and around the Straits of Johor.\textsuperscript{84} This recent activity supports Donald Rothwell’s reference to

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\textsuperscript{80} See, e.g., Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), 1999 I.C.J. 31 (where the original application by Cameroon was filed in March 1994); Land, Island and Maritime Frontier Dispute (El Salv./Hond.: Nicar. Intervening), Application for Revision of Judgment of September 10, 2002 (where the parties submitted the dispute in 1986).


\textsuperscript{83} See Permanent Court of Arbitration—Recent and Pending Cases, http://www.pca-cpa.org/ENGLISH/RPC/#Guyana/Surinam (last visited Jan. 21, 2006); see also Press Release, Permanent Court of Arbitration, Meeting of the Arbitral Tribunal and the Parties in the Matter of an Arbitration Between Barbados and Trinidad and Tobago Pursuant to Annex VII of the Law of the Sea Convention (Aug. 23, 2004), available at http://www.pca-cpa.org/ENGLISH/RPC/BATRI/BATRIPress23Aug.htm. In both cases the proceedings are to be confidential, but it is expected that the award will be made public after it has been rendered.

"the emerging popularity of recourse to Annex VII [Arbitral] Tribunals."\(^8\) However, until a more convincing pattern of submission of disputes to Annex VII tribunals emerges, it is difficult to disagree with Churchill's assessment that the Tribunal's "lack of activity reflects the limited use that has so far generally been made of the dispute settlement procedures of the Law of the Sea Convention."\(^8\)

IV. COMPULSORY DISPUTE SETTLEMENT PROCEDURE

In the event that the parties in dispute cannot agree on a dispute settlement procedure, or the procedure selected has failed to resolve the dispute, the parties are deemed by the Convention to have accepted one of the four dispute settlement options. However, despite the creation of a specialist standing tribunal, the dispute settlement option that the parties are deemed to have accepted is not the Tribunal but rather Annex VII arbitration.\(^7\) While there were those who supported the proposition that the Tribunal should have residual discretion where the parties could not agree, attempts to invest the Tribunal with this residual discretion were "completely abandoned" in 1977.\(^8\) Likewise, if the parties have selected different tribunals under Article 287, the dispute is referred to an Annex VII arbitral tribunal unless the parties agree otherwise.

While the Convention does not nominate the Tribunal as the fallback dispute resolution procedure where the parties in dispute fail to agree, there are three situations in which the Convention, in practice, confers compulsory jurisdiction on the Tribunal, two of which are of particular interest here. These are "prompt release" cases and cases in which provisional measures are requested in a dispute that has been submitted to an arbitral tribunal under the Convention's compulsory jurisdiction, but the tribunal has not yet been formed.\(^9\) The inev-

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87. UNCLOS, *supra* note 1, art. 287(3), (5).
89. UNCLOS also specifies that disputes concerning activities in the International Seabed Area go to the Seabed Chamber of the Tribunal. See UNCLOS, *supra* note 1, art. 287(2). This provision was welcomed even by those who doubted the value of the Tribunal more generally. See Lauterpacht, *supra* note 6, at 20; Oda, *supra* note 6, at 869.
table urgency involved in both these applications requires that they be heard by a preestablished judicial body, and in contrast to general dispute resolution procedures, the Tribunal is nominated as the fallback position in the event that the parties fail to agree.

A. Article 292: Prompt Release

The UNCLOS introduced significant extensions of coastal state jurisdiction with respect to marine resources, environmental protection, and scientific research. This raised concerns that the coastal state's jurisdiction could interfere unreasonably with foreign shipping, and therefore a number of safeguards were introduced, including limitations on the legislative jurisdiction of coastal states and a variety of dispute settlement procedures. One of these procedures, the Article 292 provision for prompt release, has dominated the Tribunal's jurisdiction.

Article 292 provides a limited right of action for a state party when a vessel flying its flag has been detained by the authorities of another state party. These cases usually arise in circumstances in which fisheries or naval authorities of the coastal state suspect that a fishing vessel is illegally fishing in its EEZ. The coastal state then arrests the vessel and its crew, detaining them at a coastal state port. The UNCLOS is concerned to protect not only the humanitarian rights of the crew and the property rights of the vessel's owner, but also the ability of a coastal state to effectively enforce its regulation of the EEZ. Therefore, Article 292 provides for the prompt release of the vessel upon payment of a reasonable bond. It enables unilateral application to the Tribunal in the absence of agreement between the flag state and the detaining state.

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91. Lowe, *supra* note 5.

92. Seven of the Tribunal's thirteen decisions to date have concerned prompt release. The special and separate nature of prompt release proceedings is recognized by a separate section in the Rules of the Tribunal. See *ITLOS Rules, supra* note 34, arts. 110–14.

93. If the parties agree, the Tribunal's Rules provide that the application can be dealt with by the Chamber of Summary Procedure, although the Convention does not mention this possibility. Compare *ITLOS Rules, supra* note 34, art. 112(2), *with* UNCLOS, *supra* note 1, annex VI, art. 25(2) (concerning provisional measures). The Rules provide a five-day time limit for the response of the detaining state in order to allow the full Tribunal to be convened if necessary. In *M/V Saiga,*
Given the factual circumstances that will precede such a claim, it is not surprising that Article 292(3) requires a court or tribunal dealing with applications for prompt release to do so without delay. The Tribunal's rules give applications for prompt release priority over all other proceedings before the Tribunal and emphasize expeditiousness in prompt release cases. A hearing is to be held within fifteen days after receipt of an application, and the detaining state is to submit a response at least ninety-six hours before the start of the oral hearing. The result is that a prompt release case will, as a rule, be dealt with in less than thirty days from application to reading of the judgment.

The action under Article 292 is limited in nature. The Tribunal's jurisdiction does not extend to every case in which a vessel or its crew has been detained, but only to cases in which it is alleged "that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security." While vessels may be detained by a coastal state in a number of situations, there are only three provisions permitting detention of vessels in the Convention that require prompt release upon the posting of a bond. These three provisions

Saint Vincent and the Grenadines requested that the application be heard by a chamber, but there was no response from Guinea within five days, so the application was heard by the full Tribunal. M/V Saiga (St. Vincent v. Grenadines), 110 I.L.R. 737, 741 para. 5. Eiriksson expresses the view that it was, in retrospect, desirable that the first case was heard by the full Tribunal. Eiriksson, supra note 32, at 206.

94. ITLOS Rules, supra note 34, art. 112(1). Second in priority are requests for the prescription of provisional measures, and where seized at the same time of both, the Tribunal is to take the necessary measures to ensure that both are dealt with without delay. Id. arts. 90(1), 112(1). Decisions on the intervention of third parties in proceedings are also to be taken as a matter of priority. See id. art. 102; Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea) arts. 31–32 (Dec. 10, 1982), available at http://www.itlos.org/documents_publications/documents/statute_en.pdf [hereinafter Annex VI].

95. The Rules were revised and the relevant time limits extended in 2001. See Lowe & Churchill, supra note 3, at 466.

96. ITLOS Rules, supra note 34, art. 112(3). Previously, the hearing was to be held within 10 days after receipt. Lowe & Churchill, supra note 3, at 466.

97. ITLOS Rules, supra note 34, art. 111(4). Previously, the response was required within 24 hours. Lowe & Churchill, supra note 3, at 466.

98. Previously, the release case was to be dealt with within 21 days. Lowe & Churchill, supra note 3, at 466.

99. UNCLOS, supra note 1, art. 292(1).

100. See M/V Saiga (St. Vincent v. Guinea), 110 I.L.R. 737, 750 para. 52 (Int'l Trib. L. of the Sea 1997) (citing UNCLOS, supra note 1, arts. 73(2), 220(6)–(7), 226(1)(c)).
are concerned with the conservation and management of living resources in the EEZ and with the protection and preservation of the marine environment. If, for example, a state was successfully to argue that a vessel had been arrested for breach of customs measures, the flag state would not be able to apply unilaterally for prompt release of the vessel, and the Tribunal would have no jurisdiction on this basis. This restrictive interpretation of Article 292 has judicial support, which relies on the travaux préparatoires. Therefore, the Tribunal has historically refused to consider arguments based on the breach of any other provision of the Convention, not even those provisions which have a close connection with prompt release. For example, the Tribunal has held that it cannot consider claims that the coastal state has breached Article 73(4) of the Convention by failing promptly to notify the flag state of the arrest or detention of a vessel and any penalties imposed.

The Tribunal’s prompt release jurisdiction is also constrained by the requirement that the Tribunal shall deal with the question of release without prejudice to the merits of any case before the domestic forum against the vessel, its owners, or its crew. Domestic courts are not bound by any findings of fact or law made by the Tribunal to reach its judgment. However, authorities of the detaining state are bound to comply promptly with the Tribunal’s decision concerning the release of the vessel or its crew.

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101. Release of the vessel could, however, be sought as a provisional measure under Article 290. UNCLOS, supra note 1, art. 290. In M/V Saiga, the majority did not accept Guinea’s argument that the M/V Saiga was arrested for breach of a customs measure. See Lowe, supra note 5, at 194 (arguing that the minority analysis is more persuasive).


103. See Lowe, supra note 5, at 195.

104. See Camouco (Pan. v. Fr.), 125 I.L.R. 164, 181-82 para. 59 (Int'l Trib. L. of the Sea 2000) (noting “in passing” that there is a connection between the provisions, as failure to notify may inhibit the flag state’s ability to act “in a timely and efficient manner”); see also Monte Confurco (Sey. v. Fr.), 125 I.L.R. 220, 242 para. 63 (Int'l Trib. L. of the Sea 2000).

105. UNCLOS, supra note 1, art. 292(3).

106. See M/V Saiga (No. 2), 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999).

107. UNCLOS, supra note 1, art. 292(4).
B. Article 290: Provisional Measures

Any of the courts or tribunals nominated in Part XV of the Convention may prescribe provisional measures. However, the Tribunal is given a particular role if the case is to be heard by an arbitral tribunal that has not yet been constituted. In these circumstances, provisional measures may be prescribed by the Tribunal, either on the basis of agreement between the parties to the dispute, or if the parties do not agree (either on the Tribunal or some other court or tribunal) within two weeks of the request, on unilateral application to the Tribunal. Before prescribing provisional measures, the Tribunal must be satisfied that prima facie the arbitral tribunal would have jurisdiction and that the urgency of the situation so requires. If these conditions are satisfied, the Tribunal may prescribe measures that it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision of the arbitral tribunal. Given the necessary urgency, the Tribunal’s Rules give applications for provisional measures priority over all other claims—with the exception of prompt release applications—and require the Tribunal to fix the earliest possible date for a hearing.

Claims brought before the Tribunal on this basis make up the remainder of the thirteen decisions of the Tribunal to date, and the Tribunal has, in five claims, prescribed provisional measures.

108. Article 290 of UNCLOS is modeled after Article 41 of the Statute of the International Court of Justice, but explicitly provides that provisional measures are binding. See also Annex VI, supra note 94, art. 25 (affirming the Tribunal’s power to prescribe such measures and to do so by chamber). 109. UNCLOS, supra note 1, art. 290(5).
111. UNCLOS, supra note 1, art 290(1), (5).
112. ITLOS Rules, supra note 34, art. 90.
V. Response to Limitations on Jurisdiction

Thus far, the Tribunal’s jurisdiction has been dominated by prompt release applications, supplemented by applications for provisional measures. Rothwell suggests that there is a risk that the Tribunal “may be seen by some states as only a court of first instance, useful for an initial hearing of the facts and for seeking provisional measures or prompt release, but not for a final determination of the dispute.”

In these circumstances, what might the Tribunal do to expand its competence and relevance? Obviously, one possibility is to seek to increase its selection as the tribunal of choice in both compulsory and consensual resolution under the Convention. In both M/V Saiga (No. 2) and the Swordfish Stocks case, the parties agreed to transfer proceedings from arbitral proceedings to the Tribunal. There may be advantages in referring a dispute to the Tribunal, but it may also be that a preference for confidentiality and control over the arbitral panel still dictates states’ choice of dispute settlement mechanism.

That possibility aside, do the prompt release and provisional measures applications that currently dominate the Tribunal’s jurisdiction offer it any opportunity to contribute more generally to the interpretation of the Convention, the development of international law, and the resolution of disputes?

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114. See generally Lowe and Churchill, supra note 3, at 466 (commenting that “while they must obviously be treated with all necessary care, prompt release cases are not major international disputes”).
118. Boyle, supra note 6, at 50–52 (setting out advantages that the Tribunal may have in relation to the ICJ, including its competence in the law of the sea and the geographical distribution of its members). Taking a dispute to a standing court or tribunal may also offer cost savings.
119. The assumption that disputes that could be taken to the Tribunal are being diverted to ad hoc arbitration requires further investigation.
A. Prompt Release Applications

1. Jurisdiction and Admissibility

Questions of jurisdiction and admissibility in applications for prompt release have raised issues of more general interest under the Convention and international law. These issues include whether a state is a "flag state" and whether a vessel is being detained.

Only the flag state can make an application for prompt release, and in Grand Prince, the Tribunal took the opportunity to comment on the definition of flag state. It held that it had no jurisdiction over the matter, as the evidence failed to establish that "Belize was the flag State of the vessel when the Application was made." The Tribunal noted, in particular, that the vessel was on the Belizean register only a very short time while the owners sought registration in Brazil and that the circumstances of registration, crew, fishing activity, and ownership did not suggest any "genuine link" between the vessel and Belize. Lowe expresses the hope that the case will serve as a "crucial step towards the correction of the lamentable failure of the international community to get to grips with the problems of flags of convenience," noting that the "facility with which ships may move between flags is a major impediment to the establishment of effective international regimes for the control of fishing, pollution, safety, and other matters at sea," and on this basis, he approves of the Tribunal's willingness to deny the flag state the last word on what are ships of its nationality.

Juno Trader provided the Tribunal with another opportunity to comment on the definition of a flag state. Guinea-Bissau submitted that confiscation of the

121. Id. at 300 para. 93.
122. Id. at 298 para. 82 (referring to UNCLOS, supra note 1, art. 91(1), which concerns the nationality of ships and states that "[t]here must exist a genuine link between the State and the ship"). See also id. at 303 para. 3 (declaration of Judge Wolfrom). There is also a reference to the need for a "genuine link" in the United Nations Convention on the High Seas, Apr. 29, 1958, art. 5, 13 U.S.T. 2314, 450 U.N.T.S. 11; see also United Nations Convention on the Conditions for the Registration of Ships, Feb. 7, 1986, art. 1, http://r0.unctad.org/ttl/docs-legal/unc-cml/United%20Nations%20%20Convention%20on%20Conditions%20for%20Registration%20of%20Ships,%201986.pdf.
123. Lowe & Churchill, supra note 3, at 473-76 (noting in particular the reference to "fictional registration").
and the subsequent transfer of ownership of the vessel to the government of Guinea-Bissau meant that Saint Vincent and the Grenadines was no longer the flag state and, therefore, was not entitled to bring the claim for prompt release. However, a number of judges raised the possibility that a change of ownership may not necessarily result in a change in the flag state, continuing the Tribunal’s contribution to the general law on flag states.

Similarly, coastal states have argued that confiscation of a detained vessel operates to deny the Tribunal’s jurisdiction. In *Juno Trader*, Guinea-Bissau argued that Article 292 has no application after a national court has given its ruling on the merits and confiscated a vessel as a penalty for illegal fishing. The Tribunal’s prompt release jurisdiction was redundant because the vessel was no longer under “arrest or detention” but rather was the property of the detaining state. France made a similar argument in *Grand Prince*.

The Tribunal did not need to address the legality of this domestic penalty in either decision. In *Grand Prince*, the Tribunal held that the claim was inadmissible because Belize had not demonstrated that it was the flag state and had not therefore demonstrated that it was entitled to bring the claim on behalf of the confiscated vessel. In *Juno Trader*, the Tribunal found that the decision of the Regional Court of Bissau to suspend execution of the decision imposing a fine on the vessel also rendered any sanction for nonpayment of the fine, such as confiscation, inapplicable.

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125. *Id.* at 510–11 paras. 58–59.  
129. *Id.* at 511–12, paras. 67, 74.  
130. *Grand Prince*, 125 I.L.R. at 294–95, paras. 64–66 (relying on UNCLOS art. 292(3), which provides that the Tribunal “shall only deal with question of release, without prejudice to the merits of any case before the appropriate domestic forum”).  
131. *Id.* at 300 paras. 93–94.  
However, the legality of confiscation of a vessel is raised in a number of the separate opinions and declarations in each decision. In *Grand Prince*, Judge *ad hoc* Cot agreed with the majority but went on to argue that he would have denied jurisdiction in any event on the basis that the vessel was not being detained but had, under the French criminal code, been confiscated. In contrast, Judge Laing expressed doubts about the legality of such a remedy under the Convention, referring to the presumption against the legality of confiscation of property of foreign nationals, and indicated his preliminary view that such confiscation sits uncomfortably with the coastal state's limited rights over the EEZ. He concluded that whether confiscation is a type of measure “adopted by [the coastal state] in conformity with this Convention” would need careful consideration. He also suggested that confiscation could not be legal where it would exclude the adjudicatory role of an international tribunal or an entire remedial scheme.

More recently, members of the Tribunal suggested that confiscation is legal but subject to the demands of due process. In *Juno Trader*, Judges Mensah and Wolfrum voiced their explicit support for the legality of confiscation. However, they noted that such a remedy would have to be exercised within the framework of the UNCLOS and general international law. Therefore, the reversion of ownership to the detaining state by an administrative decision without any possibility of legal or administrative appeal was inconsistent with due process and so could not be relied on to exclude the Tribunal’s prompt release jurisdiction. In the same case, Judge Treves did not express a clear view on the legality of confiscation more generally, but also referred to due process concerns,

134. *Id.* at 313.
135. *Id.* at 312; see also *Juno Trader*, 44 I.L.M. at 526–27 para. 12 (joint separate opinion of Judge Wolfrum and Judge Mensah) (suggesting that UNCLOS art. 292 cannot be set aside “by mere administrative action,” as this “would deprive the prompt release procedure . . . of all its meaning”).
137. *Id.*
138. In *Juno Trader*, confiscation was automatic on nonpayment of a fine. *Id.* at 509–10.
139. *Id.* at 524 para. 3 (joint separate opinion of Judges Mensah and Wolfrum); see also *Grand Prince*, 125 I.L.R. at 313 para. 13 (separate Opinion of Judge Laing) (referring to the importance of due process in relation to the legality of confiscation); but see *id.*, at 305 (Declaration of Judge *ad hoc* Cot) (stating that if it could be established that the confiscation was prompted by an intention to evade UNCLOS art. 292, then the confiscation would not be effective to deny the Tribunal jurisdiction).
saying that "confiscation obtained in violation of due process would seem to me abusive so that it cannot preclude an order for release."  

Given the extent to which prompt release claims have dominated the Tribunal's decisions to date, there would clearly be an enormous impact on the Tribunal's role and relevance if states were able to avoid its jurisdiction by the relatively simple measure of providing for confiscation of any ship suspected of breaching provisions regulating fishing in the confiscating state's EEZ. If, however, as recent judgments suggest, such a remedy could not take effect without the demands of due process being satisfied, it seems likely that the Tribunal's prompt release jurisdiction could be activated before any domestic judicial determination to confiscate could be finally made.

2. Determination of Prompt Release Applications

It is not clear that questions of admissibility or jurisdiction in prompt release applications can raise issues other than whether the applicant state is the flag state or whether the vessel is being detained. If the Tribunal's prompt release jurisdiction is established, Article 292(1) limits the Tribunal to determining whether release of the detained vessel has been "prompt" or whether the bond imposed for its release by the detaining state was "reasonable." There have been some indications that the questions of promptness and reasonableness might provide the Tribunal with opportunities to comment more generally on the Convention, on principles of international law, and on the merits of related claims.

So, for example, in *Juno Trader*, the Tribunal stated that its prompt release jurisdiction was subject to due process and humanitarian considerations. Judge Treves welcomed the Tribunal's reference to these considerations but noted that the judgment does not make clear the precise respect in which due process and humanitarian considerations might be relevant. He suggested a number of respects in which these considerations may play a role, including that a lack of due process may justify a claim that release was not prompt, "even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements."

140. *Juno Trader*, 44 I.L.M. at 533 para. 6 (separate opinion of Judge Treves).
141. *Id.* at 512 para. 77.
142. *Id.* at 531–32 para. 1 (separate opinion of Judge Treves).
143. *Id.* at 532–33 paras. 5–6.
The Tribunal’s prompt release jurisdiction is also limited by Article 292(3), which provides that the Tribunal “shall deal only with the question of release without prejudice to the merits of any case before the appropriate domestic forum.” The Tribunal has understood this provision to prohibit consideration of facts relevant to the merits of the dispute in proceedings for prompt release of the detained vessel, but has nevertheless stated that the Tribunal is “not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond.” The criterion of reasonableness would appear to offer the Tribunal some opportunity to comment more generally on the facts of the dispute. However, as Judge ad hoc Shearer points out, the Tribunal seems “reluctant to state or enter into an evaluation of the facts other than those directly concerned with the reasonableness of the bond for prompt release.”

The facts “directly concerned” with the “reasonableness” of the bond are those necessary to establish the factors identified as relevant in Camouco. These factors are: the gravity of the alleged offenses, the penalties imposed or imposable under the laws of the detaining state, the value of the detained vessel and of the cargo seized, and the amount of the bond imposed by the detaining state and its form. These factors do not offer the Tribunal significant opportunity to extend its jurisprudence or to refer to the merits of the claim. The penalties imposed or imposable and the amount of the bond imposed by the detaining state and its form will be a matter of evidence. While the value of the detained vessel may give rise to a dispute between the parties, resolution of that issue is unlikely to make significant contribution to the interpretation of the Convention, to international law more generally, or to the resolution of the dispute. Reference to the gravity of the alleged offenses may appear to offer more scope for an exposition of the law, but the Tribunal has, to date, preferred to make this determination on the basis of the penalties imposed or imposable under the laws of the detaining state.

144. Monte Confurco (Sey. v. Fr.), 125 I.L.R. 220, 244 para. 73 (Int'l Trib. L. of the Sea 2000); see also Juno Trader, 44 I.L.M. at 513–14 para. 84 (quoting Monte Confurco, 125 I.L.R. at 244).
147. Volga, 126 I.L.R. at 454 para. 69; see also Juno Trader, 44 I.L.M. at 514 para. 89.
Although the Tribunal has stated that the list of relevant factors is not closed, attempts to expand the list and, therefore, the range of issues that the Tribunal might consider have not met with significant success. For example, in *Juno Trader*, the Tribunal held that the circumstances of the vessel's seizure were not relevant to the reasonableness of bond. In *Volga*, the Tribunal noted the applicant's concerns in relation to illegal fishing but did not think this was relevant to the determination of the gravity of the offense.

Some members of the Tribunal have taken issue with this approach to the reasonableness of the bond imposed by the detaining state and have suggested additional factors that they consider relevant to the determination of a reasonable bond. In *Volga*, Judge ad hoc Shearer expressed the view that reasonableness could not be assessed in isolation from the "grave allegations of illegal fishing in a context of the protection of endangered fish stocks in a remote and inhospitable part of the seas." In the same case, Judge Anderson expressed the opinion that the coastal state's duty under Article 61 to ensure the conservation of the living resources of the EEZ is relevant to the determination of a reasonable bond, as are the obligations of parties to the Commission for the Conservation of Antarctic Marine Living Resources to protect the Antarctic ecosystem. In *Juno Trader*, Judge Treves suggested that unnecessary use of force, due process, and violation of human rights must also be taken into consideration in fixing a reasonable bond.

In *Juno Trader*, a number of the members of the Tribunal suggested that the gravity of the offense cannot be assessed without reference to the nature and strength of the evidence adduced in support of the charges and, therefore, the likelihood of conviction. They did not think that such an assessment contra-

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148. Monte Confurco, 125 I.L.R. at 245 para. 76.
149. Juno Trader, 44 I.L.M. at 515 para. 95.
150. Volga, 126 I.L.R. at 454 paras. 68–69; see also Juno Trader, 44 I.L.M. at 514 paras. 87, 89 (noting concern in relation to illegal fishing in the course of considering the reasonableness of the bond, but the reference to the gravity of the offenses being determined by reference to the penalties imposed suggested that it was not viewed as relevant).
151. Volga, 126 I.L.R. at 482 para. 7 (dissenting opinion of Judge ad hoc Shearer).
152. See id. at para. 2; Rothwell, supra note 67, at 139 (agreeing that Article 61 "appears highly significant to a determination of the reasonableness of a bond" but noting that "the Tribunal has not ventured into environmental issues in its prompt release jurisprudence").
153. See Juno Trader, 44 I.L.M. at 532–33 para. 4–5 (separate opinion of Judge Treves).
154. See id. at 519 para. 2 (joint declaration of Judges Kolodkin, Anderson, and Cot); id. at 537 para. 31 (separate opinion of Judge Lucky). Judge Lucky appears to go further, suggesting that evaluation of the evidence is justified whenever it is necessary "for the Tribunal to arrive at an equitable decision." Id. at 537 para. 27–30.
vened Article 292(3) by prejudicing the merits of the case. Judge Lucky, in particular, noted that if the Tribunal makes a finding on the facts, that finding will not bind a domestic court. It was suggested that the Tribunal would “have to weigh that gravity in the same manner as a national judge determining urgent applications, for example, in injunctive proceedings, and find whether a prima facie case has been made out,” and that, therefore, the Tribunal would not be making any finding on the merits per se.

In addition to suggestions that reasonableness requires reference to the likelihood that the offense alleged was committed, some members of the Tribunal have voiced concerns about the coastal state’s substantive entitlement under the Convention to impose the proposed penalties. In *Monte Confurco* and *Volga*, France and Australia’s entitlement to detain the vessels was based on their entitlement to claim an EEZ around, respectively, the Kerguelen Islands and around Heard Island and the McDonald Islands. Vice-President Vukas disassociated himself from all statements or conclusions in the decisions based on these claims to an EEZ. In the latter decision, he explained in some detail his doubts as to the compatibility of the claimed EEZ with Article 121(3) of the Convention, which provides that rocks that cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf. In *Juno Trader*, Judge Kolodkin took the opportunity to reiterate that the EEZ does not form

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155. See id. at 538 para. 37.
156. See id. at 538-39 para. 40. There was also some discussion of the standard of proof. Judges Kolodkin, Anderson, and Cot drew a comparison to domestic courts determining whether to release an accused from custody, concluding that, in their view, such an approach would have justified the imposition of a lower amount for the bond in the claim before them. See id. at 519 paras. 2–3. Judge Lucky proposed that facts should be regarded as established where no evidence was put forward by the other party to contradict them. See id. at 539 para. 42; see also Volga, 126 I.L.R. 433, 482 para. 8 (dissenting opinion of Judge *ad hoc* Shearer); Juno Trader, 44 I.L.M. at 537 para. 33 (separate opinion of Judge Lucky) (emphasizing that the decisions of domestic courts will assist in determining whether an offense has been committed and must be respected).
157. See Oda, supra note 6, at 866. Oda had expressed doubt that the reasonableness of a bond could be determined without consideration of the coastal state’s entitlement to impose a fine under the Convention.
159. See Volga, 126 I.L.R. at 463 (declaration of Vice-President Vukas). Vice-President Vukas’s declarations in both this case and in *Monte Confurco* are concerned with this issue alone.
part of the territorial sea.\textsuperscript{160} He went on to note a trend in demands by coastal states for prior notification by vessels intending to enter the EEZ, even if only for the purpose of transit, and suggested that such demands are inconsistent with Article 58(1) of the Convention, which guarantees freedom of navigation.\textsuperscript{161}

However, there are limits beyond which the Tribunal’s Article 292 jurisdiction cannot extend. It is clear that it is not possible to claim anything beyond release of the detained vessel upon payment of a reasonable bond. So, in \textit{Juno Trader}, Judge Treves adopted a broad approach to evidence that may be relevant to a prompt release claim, but he recognized that claims that the coastal state breached Article 73(4) by failing to notify the flag state that the vessel had been detained remain “inadmissible as independent claims in prompt release proceedings.”\textsuperscript{162}

Moreover, there has been hesitation, even among those who have expressed views about broader legal issues, about whether the Tribunal’s prompt release jurisdiction is the appropriate forum for considering broader questions. In \textit{Monte Confurco}, the Tribunal noted that the requirement that prompt release claims be decided without delay “suggests a limitation in prompt release proceedings on the extent to which the Tribunal could take cognizance of the facts in dispute and seek evidence in support of the allegations made by the parties.”\textsuperscript{163}

A number of commentators share this view.\textsuperscript{164} In \textit{Grand Prince}, Judge Anderson

\textsuperscript{160} See \textit{Juno Trader}, 44 I.L.M. at 518 para. 2–3 (Int’l Trib. L. of the Sea 2004) (declaration of Judge Kolodkin) (prompted by Guinea-Bissau’s use of the expression “maritime waters” to refer to its EEZ).

\textsuperscript{161} See \textit{id.} at 518 para. 4.

\textsuperscript{162} See \textit{Juno Trader}, 44 I.L.M. at 532 para. 4 (separate opinion of Judge Treves). Judge Treves did, however, express the view that claims the coastal state failed to notify in accordance with Article 73(2) were relevant “as aspects of non-compliance with paragraph 2, in light of the common human rights and due process dimension.” The Tribunal in \textit{Juno Trader} also noted that “it is not contested that the notification to the flag State... has not been made,” but it is not clear exactly what influence, if any, this had on the Tribunal’s decision. \textit{id.} at 512 para. 76.

\textsuperscript{163} Monte Confurco, 125 I.L.R. at 244. See also in \textit{Juno Trader}, in which Judge Chandrasekhara Rao observes in his separate opinion that:

The parties are seen devoting more time to the merits of their cases rather than to the determination of reasonable bond. If the parties were to focus their attention on the question of bond and the evidence bearing on it, the time limits specified by the Rules would prove workable.

\textit{Juno Trader}, 44 I.L.M. at 531 para. 21 (separate opinion of Judge Chandrasekhara Rao).

noted that this requirement also limits the ability of other states to exercise their Article 32 right to intervene where a question of interpretation of the Convention is at issue.\textsuperscript{165}

**B. Provisional Measures Applications**

Recent decisions evidence efforts by members of the Tribunal to use the opportunities offered by applications for prompt release to develop the Tribunal's jurisprudence, but the fact remains that the issues that can come before the Tribunal are necessarily limited. This article will next examine whether the Tribunal's provisional measures jurisdiction is similarly limited or whether it has offered the Tribunal greater opportunity to comment on the Convention and international law or to influence resolution of disputes.

As with its prompt release jurisdiction, there are issues with which the Tribunal will have to grapple when determining whether it has jurisdiction in an application for provisional measures. The Tribunal only has jurisdiction to order provisional measures under Article 290(5) "if it considers that \textit{prima facie} the tribunal which is to be constituted would have jurisdiction" and "the urgency of the situation so requires."\textsuperscript{166}

Clearly, the Tribunal's consideration of the former issue will have broader relevance for the interpretation of the Convention's compulsory dispute settlement provisions. A number of potential jurisdictional hurdles have not, to date, given rise to significant controversy. In only one claim has the respondent argued that there is no dispute,\textsuperscript{167} and the Tribunal applied the existing body of international law\textsuperscript{168} on this issue.\textsuperscript{169} When a dispute arises, the parties are obliged to proceed expeditiously

\begin{enumerate}
\item \textsuperscript{165} Grand Prince (Belize v. Fr.), 125 I.L.R. 273, 309 (Int'l Trib. L. of the Sea 2001) (separate opinion of Judge Anderson), available at http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=7&lang=en. In his separate opinion in the same case, Judge Laing also makes it clear that the views expressed are his "first thoughts" and "not to be taken as [his] decisive views." See Grand Prince, 125 I.L.R. at 309 (separate opinion of Judge Laing).
\item \textsuperscript{166} UNCLOS, supra note 1, art. 290(5).
\item \textsuperscript{167} See generally UNCLOS, supra note 1, art. 283.
\item \textsuperscript{168} See MALCOLM N. SHAW, INTERNATIONAL LAW 969–72 (5th ed. 2003).
\item \textsuperscript{169} In the Southern Bluefin Tuna Cases, the Tribunal rejected Japan's submission that the dispute was scientific not legal, finding that the differences between the parties also raised points of law. Southern Bluefin Tuna Cases (N.Z. v. Japan) (Austl. v. Japan), 117 I.L.R. 148, 160 (Int'l Trib. L. of the Sea 1999), available at http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=3&lang=en. In the
\end{enumerate}
to an exchange of views, and while respondents have raised the applicant's refusal to continue with negotiations to contest jurisdiction, the Tribunal's response has consistently been that the parties are not obliged to continue negotiations if all possibilities have been exhausted. Japan's argument that Australia and New Zealand had not exhausted the procedures for amicable dispute settlement under Article 281 met with a similar response.

Compulsory jurisdiction only applies if the dispute concerns the interpretation or application of the Convention. In the Southern Bluefin Tuna Cases, Japan argued that the dispute concerned the interpretation or implementation of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (1993 Convention) and not the interpretation or application of the UNCLOS. The Tribunal did not deal with this argument in any great detail, finding that the fact that the 1993 Convention applied to the dispute did not exclude Australia's and New Zealand's right to invoke the provisions of the UNCLOS in regard to the conservation and management of southern bluefin tuna.

The Annex VII Tribunal agreed that the dispute, "while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the
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Sea." However, the Annex VII Tribunal went on to find that the 1993 Convention fell within the terms of Article 281(1) in that it was an agreement between the parties “to seek settlement of the dispute by peaceful means of their own choice” and also found that the relevant dispute settlement provision did “exclude any further procedure” and, therefore, denied the Annex VII Tribunal jurisdiction to hear the dispute.178

In MOX Plant, the United Kingdom argued that the Annex VII Tribunal would not have jurisdiction. In support of its argument, the United Kingdom relied on Article 282, which provides that where the parties to a dispute have agreed that the dispute “shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision,” the compulsory procedures in the Convention will not apply.179 The Tribunal found that Article 282 is concerned with agreements which provide for the settlement of disputes concerning the interpretation or application of the Convention. The Tribunal also found that the other dispute settlement procedures invoked by Ireland dealt with disputes concerning the application of those agreements and not with disputes arising under the Convention.180 The Annex VII Tribunal in the Southern Bluefin Tuna Cases found that an Article 281 agreement could exclude the Convention’s compulsory dispute settlement procedures by implication.181 In contrast, the Tribunal’s approach to Article 282 is that an alternative dispute resolution mechanism would have to specifically purport to regulate a dispute under the Convention before it could exclude the Convention’s compulsory dispute settlement procedures.182

177. Id.
178. Id. at 162 para. 54–59. Justice Sir Kenneth Keith disagreed with the Tribunal on this issue, and its decision has been subjected to criticism. See, e.g., David A. Colson & Peggy Hoyle, Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?, 34 Ocean Dev. & Int'l L. 59, 60–61, 66–67, 69 (2003); see also Southern Bluefin Tuna Cases, 117 I.L.R. at 181 (separate opinion of Judge Shearer), available at http://www.worldbank.org/icsid/highlights/bluefintuna/award080400.pdf.
179. MOX Plant, 126 I.L.R. at 272 para. 38.
180. MOX Plant, 126 I.L.R. at 273–74 paras. 48–53. Contrast the finding by the Annex VII tribunal in Southern Bluefin Tuna Cases that there was “a single dispute arising under both Conventions.” Id. at 274 para. 54.
The Tribunal's decision is a significant contribution to the important issue of competing dispute resolution mechanisms and, in particular, to the understanding of the compulsory jurisdiction procedures under the Convention. However, the decision was not to be definitive. While the Annex VII Tribunal in *MOX Plant* agreed that the Tribunal had *prima facie* jurisdiction, it acknowledged that it was possible that the dispute would fall within the exclusive competence of the ECJ and suspended proceedings before the Annex VII Tribunal.\(^{183}\) While the proliferation of international courts and tribunals seems likely to keep the issue of resolution of concurrent jurisdiction on the agenda,\(^{184}\) the Tribunal has arguably used its provisional measures jurisdiction to adopt a clear position on the relationship between the Convention's compulsory procedures and other dispute settlement mechanisms.

If the Tribunal determines that it has jurisdiction, it may prescribe provisional measures if it is satisfied that “the urgency of the situation so requires,”\(^ {185}\) an issue which does not have obvious relevance beyond this interim jurisdiction. However, applicants in the relatively few provisional measures applications to date have all relied to some extent on the precautionary principle.\(^ {186}\) While the Tribunal does not expressly adopt the precautionary approach, its references to the need for “prudence and caution” in the face of scientific uncertainty\(^ {187}\) may

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184. For example, the dispute between Chile and the European Community had also been submitted to the WTO dispute settlement procedure by the European Community, so *Swordfish Stocks* could also have raised the relationship between concurrent procedures in international law. Lowe, *supra* note 50, at 569; see also Rothwell, *supra* note 67, at 131, 146–48 (discussing competing dispute mechanisms).

185. UNCLOS, *supra* note 1, art. 290(5).


187. Southern Bluefin Tuna Cases, 117 I.L.R. at 163–64 para. 77, 79; MOX Plant, 126 I.L.R. at 277 para. 84; Case Concerning Land Reclamation by Singapore in and around the Straits of Johor, 126 I.L.R. 487, 504–05 paras. 95–96, 99; see also Rothwell, *supra* note 67, at 140, 144.
indicate support for such an approach.\textsuperscript{188} However, Gwenaele Rashbrooke argues that it is not certain that the references to "prudence and caution" necessarily imply application of the precautionary principle in all cases,\textsuperscript{189} and that, even insofar as these references contribute "to the normative value"\textsuperscript{190} of the precautionary principle, "it is less clear that [the Tribunal] has contributed significantly to clarification of the content of these principles."\textsuperscript{191}

It is acknowledged that the provisional measures jurisdiction, like the prompt release jurisdiction, is constrained by short time frames, which inhibit the Tribunal's ability to develop its views.\textsuperscript{192} Lowe's suggestion that "there may be merit . . . in issuing a decision . . . within the prescribed time limits but reserving the statement of the full reasoning of the Tribunal for later delivery, so that fuller consideration can be given to the complexities of the case"\textsuperscript{193} is made in relation to the prompt release jurisdiction, but might equally be suggested in relation to claims for provisional measures.

Apart from any contribution that it may make to interpretation of the Convention or to international law more generally, does the Tribunal's provisional measures jurisdiction provide any opportunity to comment on the merits or to promote settlement of the dispute? A provisional measures order should not

\textsuperscript{188} However, in his separate opinion in \textit{Southern Bluefin Tuna Cases}, Judge Treves suggests that, whatever its status in international law, reference to the precautionary approach is "a logical consequence of the need to ensure that, when the arbitral tribunal decides on the merits, the factual situation has not changed" and that a precautionary approach is "inherent in the very notion of provisional measures." \textit{Southern Bluefin Tuna Cases}, 117 I.L.R. at 179–80 para. 9 (separate opinion of Judge Treyes). The separate opinion of Judge \textit{ad hoc} Shearer also considers the relevance of a precautionary principle or approach, concluding that the measures ordered by the Tribunal "are rightly based upon considerations deriving from a precautionary approach." \textit{Id.} at 181 (separate opinion of Judge \textit{ad hoc} Shearer). \textit{But see MOX Plant} 126 I.L.R. at 293 (separate opinion of Judge Wolfrum). \textit{See generally} Brown, \textit{supra} note 110, at 284–86.


\textsuperscript{190} Rashbrooke, \textit{supra} note 189, at 534.

\textsuperscript{191} \textit{Id.; see generally id.} at 521–35 (discussing the Tribunal's contribution to international environmental law).

\textsuperscript{192} \textit{Id.} at 534.

\textsuperscript{193} Lowe & Churchill, \textit{supra} note 3, at 475.
prejudge the decision on the merits.\textsuperscript{194} However, assessment of the urgency of the measures requested will necessarily involve some preliminary assessment of the evidence,\textsuperscript{195} and some provisional measures may necessarily influence the outcome of the dispute. For example, Malaysia's main concern in \textit{Land Reclamation} was that no environmental impact assessment had been carried out.\textsuperscript{196} One of the provisional orders made by the Tribunal required Singapore and Malaysia to cooperate in establishing a group of independent experts to report in no more than a year from the date of the order.\textsuperscript{197} It would have been difficult to ignore the findings of that assessment when considering the merits.

It may be argued that the Tribunal should exercise any influence it has over the merits of the claim with caution. States may not be willing to bring applications for provisional measures to the Tribunal if they fear that this will result in, effectively, a decision on the merits.

While any orders made by the Tribunal are necessarily interim in nature, the Tribunal may play a meaningful dispute resolution role in provisional measures applications, whether by breaking a deadlock in negotiations or by virtue of its orders assisting in the final resolution of the dispute. For example, in the \textit{Southern Bluefin Tuna Cases} before the Annex VII tribunal, counsel for Australia pointed out that the provisional measures ordered by the Tribunal "already had played a significant role in encouraging the Parties to make progress on the issue of third-party fishing," and the agents of both applicants declared that progress in settling the dispute had been made.\textsuperscript{198} Although limited, the history of the Tribunal's provisional measures jurisdiction to date leads Churchill to conclude that the Tribunal "is able to play a significant role in conflict management through its provisional measures jurisdiction."\textsuperscript{199}

\begin{thebibliography}{99}
\item[195] Lowe & Churchill, \textit{supra} note 3, at 482 (commenting that in \textit{MOX Plant} the Tribunal "made no attempt to evaluate the evidence for itself").
\item[196] Case Concerning Land Reclamation by Singapore in and around the Straits of Johor, 126 I.L.R. 487, 494-95 para. 22.
\item[197] \textit{Id.} at 505-06 paras. 106.
\item[199] Churchill, \textit{supra} note 53, at 379-80.
\end{thebibliography}
Conclusion

Whatever the impetus behind creation of the Tribunal, its present challenge is to justify its existence. While it is true that the pay arrangements for members of the Tribunal suggest that membership of the Tribunal is not expected to be a full-time post, successive presidents of the Tribunal have noted that the Tribunal is “not being put to full use.”

The Tribunal’s most recent decisions arguably demonstrate an emerging willingness to carve out a more useful role within its existing institutional constraints. It is not yet clear that the creation of the Tribunal was a “great mistake,” and commentators remain cautiously optimistic that it may yet be capable of relevant and robust contributions to interpretation of the Convention and to the law of the sea. Ultimately, however, increased resort to the Tribunal may be something over which it “will have little control.”

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200. See generally Lauterpacht, supra note 6, at 19, 21; Oda, supra note 6, at 865.
201. Merrills, supra note 10, at 204; Lauterpacht, supra note 6, at 20.
203. Oda, supra note 6, at 864.
204. See Lowe & Churchill, supra note 3, at 484; Rothwell, supra note 67, at 133.