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LOUIS B. SOHN AND THE SETTLEMENT OF OCEAN DISPUTES

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I. Introduction

The greatest contribution of Professor Louis B. Sohn to the field of international law is his unrelenting effort to confirm that it is a real and enforceable body of sound legal principles. He has promoted this idea throughout his life by working to construct effective international organizations and reliable permanent dispute-resolution mechanisms so that the rights protected by international law become predictable and binding, those who violate international norms are punished, and those who are injured receive compensation. Professor Sohn always recoiled from the view that international law is merely a relativistic balancing of policy preferences, malleable to suit nations' short-term needs. He always viewed international law as a legal system like any other body of law—a set of binding rules designed to guide conduct and resolve controversies.

Professor Sohn knows all the nuances of all the decisions of the International Court of Justice and other international tribunals1 and he quotes the principles and holdings found in these opinions as authoritative sources, applicable and binding upon other nations in comparable contexts. He has aided our understanding of the importance of the negotiating process at multilateral diplomatic conferences in accelerating agreement on customary international law norms. He has also stressed the significance of the texts developed at these conferences—even those not widely ratified—in providing authoritative evidence of the existence of binding customary principles, each “add[ing] a brick to the edifice of international law.”2 Although he has occasionally been character-

ized as a "dreamer," many of Professor Sohn’s dreams have come true, and "there is no doubt . . . that the law is steadily moving in the directions he has outlined."3 Because he has always been frustrated that international law does not have sufficiently sophisticated tribunals to protect the injured and punish the wrongdoers, Professor Sohn’s life’s mission has been to promote the creation of new and better dispute-resolution mechanisms that aggrieved parties can utilize to protect their rights and seek compensation for their losses.4

Throughout his career, Professor Sohn has inspired his students and informed national and international decisionmakers with his systematic descriptions of existing and possible decision-making procedures. During the 1970s at Harvard Law School, for instance, he asked his student research assistant to check the 5,000 treaties registered with the League of Nations “to find all the clauses on the settlement of disputes, and to provide a methodology for their classification and analysis.”5 He has worked hard to make the International Court of Justice more effective and more frequently

the signature of the convention.")). Professor Sohn has noted the acceptance of coastal state jurisdiction over the continental shelf within 13 years (1945-58) and acceptance of the main rules governing international environmental law in about a decade (1972-83) as examples of the rapidly changing international law. Louis B. Sohn, Dispute Settlement, in THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY: OPPORTUNITIES AND COSTS 126, 126 (Lawrence J. Judah ed., 1983) (stating "The old theories of customary law evolving over a long period of time no longer apply."). See also id. at 127-28 (stating that an agreement negotiated at a multilateral conference can be viewed as an authoritative source of customary international law "regardless of the question of whether the agreement has been ratified;" a multilateral treaty "quickly becomes the best evidence of what international law is").


5. Louis B. Sohn, ‘Generally Accepted’ International Rules, 61 WASH. L. REV. 1073, 1073 (1986) (the research assistant was Ted Stein, later a professor at the University of Washington School of Law). The research was published in SYSTEMATIC SURVEY OF TREATIES FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, 1923-48, U.N. Sales No. 1949.V.3.
utilized,6 and he has worked to include dispute-resolution procedures in numerous other treaty regimes.

II. THE DISPUTE-RESOLUTION PROCEDURES IN THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION

In 1970 Professor Sohn left Harvard for a year to become Counselor on International Law for the U.S. Department of State. After returning to academia, he continued to serve for many years as a Consultant to the State Department's Office of the Legal Adviser. His contributions to the development of international law in this position were numerous, but certainly one of his major accomplishments was crafting and nurturing the provisions on dispute-resolution in the 1982 United Nations Law of the Sea Convention.7 Professor Sohn participated as Deputy Representative on the U.S. delegation throughout the decade-long negotiations that produced the treaty, which he later characterized as "the most important event in the process of development of a viable international law."8 During this process, he focused on the drafting of provisions on the settlement of disputes.9 His vision and careful attention to detail are found throughout these articles, now found in Part XV of the Convention, and they remain a remarkable accomplishment.

Because these dispute-resolution provisions are just now being utilized, it is too early to give a complete analysis of their impact. Nonetheless, they stand as a triumph for the international community—a system of binding procedures available to aggrieved parties, decisively enforced by a distinguished new tribunal. The United States has not yet ratified the Convention,10 so its citizens and companies cannot now utilize these procedures directly unless they are

also linked to an entity in a country that has ratified the Convention. The Convention has been ratified by 135 nations, and U.S. ratification must occur in the near future because the United States has so much to gain from the Convention's provisions, particularly these dispute-resolution procedures.11

After President Reagan announced that the United States would not ratify the Law of the Sea Convention, Professor Sohn noted that "many conflicts are likely to arise concerning its interpretation and the underlying question whether it accurately reflects the present customary law of the sea. It is rather discouraging that the United States has no access at this time to the elaborate dispute settlement provisions of the Convention."12 In fact, the U.S. negotiators insisted upon these procedures13 because they anticipated the many disputes that could occur, particularly regarding the carefully-balanced competing interests designed to be protected by the Convention's new legal regime, in the exclusive economic zone (EEZ).14 The rights of maritime nations seeking navigational freedoms and military mobility are almost inevitably going to be in conflict with the rights of coastal nations seeking to protect their coastal environments and their living resources. "After difficult negotiations an intricate system for the settlement of law of the sea disputes was devised, which was spelled out in more than 100 articles scattered throughout the Convention and several annexes."15

The process of developing these hundred articles began when the United States, acting under Professor Sohn's guidance, "included elaborate provisions for a special tribunal of the pro-

11. If the United States fails to ratify the Convention, it could nonetheless file a declaration with the International Court of Justice accepting the jurisdiction of the Court "with respect to those rules of customary international law which have been codified in the LOS Convention, with the exception of parts dealing with deep seabed mining," thus making a "contribution to the subjection of the law of the sea disputes to the rule of law," and "avoiding the danger of escalation of law of the sea disputes into threats to international peace and the security of the United States." LOUIS B. SOHN & KRISTEN GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL 246 (1984).


14. The goal of establishing "procedures leading to a binding settlement of law of the sea disputes" was "{t}he principal concern of the United States in the law of the sea negotiations," because it "would be impossible to "achieve stability, certainty, and predictability," and thus reduce conflicts, without such procedures. Louis B. Sohn, U.S. Policy Towards the Settlement of Law of the Sea Disputes, 17 VA. J. INT'L L. 9, 13 (1976) (hereinafter U.S. Policy).

15. SOHN & GUSTAFSON, supra note 11, at 241.
posed International Sea-Bed Resource Authority in its 1970 Draft Convention on the International Sea-Bed Area." At the end of the 1973 session of the U.N. Seabed Committee, the United States submitted a document containing draft articles on the settlement of disputes. The process of formulating the specific provisions governing dispute resolution began in earnest during the first negotiating session of the Third United Nations Conference on the Law of the Sea Convention held in Caracas in 1974, when a group of about 30 nations (including the United States) met as an informal working group. This group presented a working paper, with Professor Sohn serving as its rapporteur, to the Conference that "set out various possible alternatives, together with notes indicating relevant precedents." The 1974 paper documented the duty to settle disputes by peaceful means, explained the procedural options available to nations, provided detailed options that could be included into the Convention's text, and suggested the establishment of a Law of the Sea Tribunal. The paper urged, in particular, that mandatory dispute resolution procedures would benefit small countries because "the larger and richer countries can apply extra-legal, political and economic pressure to achieve their ends," that uniform interpretations of the new Convention would protect the compromises made during the negotiating process, and the dispute-resolution regime should be an integral part of the Convention because "[a]n optional protocol would be a totally inadequate way of dealing with the problem." On the basis of this paper, the president of the negotiating conference (H.S.

17. Sohn, U.S. Policy, supra note 14, at 10-11 (stating "This document was submitted at the very end of the session, as it proved necessary to spend the whole eight weeks resolving several basic disagreements among the members of the U.S. delegation.").
18. Id. at 11-12 n.12.
20. Sohn, Settlement of Disputes, supra note 19, at 497-515.
21. Id. at 516.
22. Id.
23. Id.; see also Sohn, The Role of Arbitration, supra note 4, at 182 (stating "[T]he optional protocol to the 1958 Law of the Sea Conventions was not ratified by most parties to those treaties.")
Amerasinghe of Sri Lanka) prepared an “informal single negotiating text” in 1975.24 The ‘grand debate’ on these provisions took place in April 1976 in New York, with seventy-two delegations expressing views on the strategy that should govern the dispute resolution provisions.25 The debate concerned such topics as the number of tribunals, the extent to which they should be specialized, the types of entities that should be able to utilize these tribunals (i.e., only states or also private corporate entities), and what topics should be subject to mandatory jurisdiction.26 After this debate, President Amerasinghe prepared a “revised single negotiating text” incorporating the views of the participants, particularly those of the developing nations.27

“Flexibility”28 is the vision animating these intricate articles: “Unlike most other international instruments, the LOS Convention does not provide for a unitary system of dispute settlement.”29 Article 287 instructs each ratifying nation to pick from among four possible means of settling disputes over the interpretation of the Convention: (a) the International Tribunal for the Law of the Sea (ITLOS) (a 21-judge court located in Hamburg, Germany, established according to Annex VI), (b) the International Court of Justice (in The Hague, Netherlands), (c) a five-member arbitral tribunal established pursuant to Annex VII of the Convention, or (d) a “special arbitral tribunal” established pursuant to Annex VIII (designed for specialized disputes requiring scientific expertise, including “protection and preservation of the marine environment” and “navigation, including pollution from vessels and by dumping”).30 If a contracting party does not indicate its preference, it shall be deemed under Article 287(3) to have accepted the Annex VII arbitral tribunal.31 Similarly, if the disputing countries have picked different procedures and cannot agree on a procedure, their dispute will be resolved through an arbitration conducted according to Annex VII, which “provides a fool-proof

26. Id. at 225-27.
27. Id. at 224.
28. SOHN & GUSTAFSON, supra note 11, at 241; see also Sohn, Problems of Dispute Settlement, supra note 13, at 228-29; Sohn, The Role of Arbitration, supra note 4, at 183-86.
29. SOHN & GUSTAFSON, supra note 11, at 241.
30. LOS Convention, supra note 7, at art. 287, para. 1, 21 I.L.M. at 1322-23.
31. Id. at art. 287, para. 3, 21 I.L.M. at 1323.
method for selecting an arbitral tribunal." Sohn believes that the "flexible" approach, offering a diverse selection of tribunals, has the advantage of inviting all states to participate through the method of their choice, but also the possible disadvantage that the different tribunals may produce inconsistent results.

Despite potential inconsistencies, Professor Sohn believes that "this dispute settlement system applies without any exception to the vast majority of the provisions of the Convention." Professor Sohn has presented the view that:

90 percent of the treaty is covered by provisions for the settlement of disputes that insure a binding decision, 5 percent is covered by conciliation provisions that are less binding (conciliation itself is obligatory but the report of the conciliation commission is not binding), and 5 percent relating to such subjects as old boundary disputes, certain fishery dispute, and certain disputes relating to scientific research are excluded.

Controversies subject to mandatory dispute-resolution procedures include those involving coastal state environmental regulations limiting navigation, allegations that a coastal state is violating internationally-established environmental regulations, and allegations that a coastal state has improperly seized a vessel flying the flag of another country. Coastal states are not required to submit to these dispute-resolution procedures when making decisions regarding marine scientific research on their continental shelf and EEZ or decisions regarding management of their EEZ fisheries and the allocation of their surplus catch because of "the broad discretionary powers of the coastal state with respect to several aspects of coastal fisheries." Ratifying countries have the option of withdrawing from mandatory dispute resolution when

33. Sohn, Problems of Dispute Settlement, supra note 13, at 230.
34. SOHN & GUSTAFSON, supra note 11, at 242.
35. Sohn, Dispute Settlement, supra note 2, at 129.
36. LOS Convention, supra note 7, at art. 297, paras. 1(a) & 1(b), 21 I.L.M. at 1324.
37. Id. at art. 297, para. 1(c), 21 I.L.M. at 1324.
38. Id. at art. 292, 21 I.L.M. at 1325.
39. Id. at art. 297, para. 2, 21 I.L.M. at 1324.
40. Id. at art. 297, para. 3, 21 I.L.M. at 1324.
41. SOHN & GUSTAFSON, supra note 11, at 243. Some of the fisheries disputes exempt from mandatory dispute-resolution procedures can be presented to a compulsory conciliation procedure "which is not binding on the parties to the dispute but with which the parties usually comply." Id.
dealing with disagreements over maritime boundaries, disputes concerning military activities, and disputes pending before the U.N. Security Council.

Disputes relating to deep seabed mining are subject to a special regime, and the Sea-Bed Disputes Chamber of ITLOS, consisting of eleven of the twenty-one judges, will deal with most of these controversies, according to Annex VI. This procedure is innovative because private enterprises, as well as governments and the International Sea-Bed Authority, can utilize the procedure.

Article 297(1)(b) authorizes coastal and island states to bring claims against shipping nations whenever "it is alleged that a State in exercising [its navigational] freedoms, rights, or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention." Under Article 296, decisions rendered by a court or tribunal under these procedures "shall be final and shall be complied with by all the parties to the dispute."

III. THE FIRST THREE DECISIONS OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS)

After the Law of the Sea Convention came into force in 1994, twenty-one distinguished law-of-the-sea experts were elected to be judges on the ITLOS and the Tribunal has now been open for business for several years. As of this writing, three cases have been brought under the Convention’s procedures.

In the first case, The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea), the Tribunal ruled that a vessel registered in Saint Vincent and the Grenadines was exercising its navigational

42. LOS Convention, supra note 7, at art. 298, para. 1(a)(i), 21 I.L.M. at 1325.
43. Id. at art. 298, para. 1(b), 21 I.L.M. at 1325.
44. Id. at art. 298, para. 1(c), 21 I.L.M. at 1325. See also SOHN & GUSTAFSON, supra note 11, at 243-45.
45. LOS Convention, supra note 7, at Annex VI, sec. 4, at 1324.
46. SOHN & GUSTAFSON, supra note 11, at 249.
47. LOS Convention, supra note 7, at art. 297, para. 1(b), 21 I.L.M. at 1324.
48. Id. at art. 296, para. 1, 21 I.L.M. at 1324.
49. The M/V Saiga Case (St. Vincent v. Guinea) (1999 ITLOS (July 1)) (available via )
freedoms when refueling fishing vessels within the EEZ of Guinea.\textsuperscript{50} On October 28, 1997 Guinea seized and detained the \textit{M/V Saiga}, a commercial vessel registered in Saint Vincent and the Grenadines, and proceeded to prosecute and convict its master for violating Guinean customs laws.\textsuperscript{51} During the apprehension of the vessel the Guineans fired shots across the bow and, once they got on the deck of the \textit{Saiga}, shot up its engine room and radio causing considerable damage and seriously injuring two crew members.\textsuperscript{52}

The Tribunal made a preliminary ruling by a vote of 12-9 on December 4, 1997 that under Article 292 of the Convention, the vessel should be released in exchange for Guinea posting a $400,000 bond (plus the value of the cargo—$1,000,000—which had previously been seized).\textsuperscript{53} On December 22, 1997 Saint Vincent and the Grenadines instituted an arbitral proceeding against Guinea in accordance with Annex VII of the Law of the Sea Convention to recover the vessel and collect damages.\textsuperscript{54} On February 20, 1998 the two countries agreed to transfer the arbitration proceedings to the ITLOS and hearings were held on February 23rd and 24th.\textsuperscript{55} Guinea finally released the vessel March 4, 1998.\textsuperscript{56} Then, on March 11, 1998, the Tribunal issued a "provisional measure" under Article 290 (1) of the Convention, instructing Guinea to refrain from taking any enforcement action against the ship, its master, or its crew members.\textsuperscript{57} From March 8th to March 20th, the Tribunal held eighteen public sessions to hear witnesses presented by the two parties and review documentary evidence.\textsuperscript{58}

Guinea argued that it was being deprived of tax revenue by its inability to extend its customs laws to the vessel of Saint Vincent and the Grenadines.\textsuperscript{59} Voting 18-2 on most questions (with Judges Warioba and Ndiaye dissenting), the Tribunal issued a strong opinion in favor of Saint Vincent and the Grenadines, and thus in favor of maritime freedom in the EEZ.\textsuperscript{60} The Tribunal ruled that

\begin{itemize}
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id. at para. 33.
\item \textsuperscript{52} Id. at paras. 155, 158.
\item \textsuperscript{53} Press Release, ITLOS, Guinea Complies with Judgment of the Tribunal – Arrested Vessel Released from Detention, (March 6, 1998) (available via ).
\item \textsuperscript{54} The \textit{M/V Saiga} Case, \textit{supra} note 49, at para. 1.
\item \textsuperscript{55} Id. at para. 5.
\item \textsuperscript{56} Id. at para. 99.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id. at para. 21.
\item \textsuperscript{59} Id. at para. 116.
\item \textsuperscript{60} Id. at para. 136.
\end{itemize}
Guinea could not apply its custom laws to its EEZ except "in respect of artificial islands, installations and structures." 61 It also rejected the Guinean claim that its "public interest" or "self-protection" or "state of necessity" justified extending its jurisdiction over an area not authorized by the Convention. 62 The Tribunal ruled that the Guinean "public interest" in avoiding "fiscal losses" was not sufficient to "curtail the rights of other States in the exclusive economic zone." 63 It also concluded that Guinean interests were not "in grave and imminent peril," thus rejecting Guinea's "necessity" argument. 64 In the course of reaching its result in favor of St. Vincent and the Grenadines, the opinion presents important views on the questions of the sufficiency of a 'genuine link' to authorize a country to assign its flag to the vessel, the parameters of hot pursuit in a case such as this one, and whether a complaining country in this situation must exhaust any local remedies.

The Tribunal's carefully written opinion is significant for its style as well as its substance. The Tribunal seems to have gone out of its way to cite to precedents from other tribunals and related treaties in order to confirm that it would be operating in the mainstream of international law. When addressing the question of damages, for instance, the Tribunal quotes from the venerable Chorzow Factory Case 65 for the proposition that every wrong requires a remedy:

It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." 66

Pursuant to this standard, the Tribunal awarded $2,123,357 to Saint Vincent and the Grenadines for costs resulting from the detention of the Saiga, damage to the vessel, and injury to the crew members. 67 Similarly, to support its conclusion that Guinea had used excessive force in boarding the Saiga, the Tribunal quoted from the standard in Article 22(1)(f) of the Straddling and Migra-

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61. Id. at para. 127 (citing art. 60(2) of the LOS Convention).
62. Id. at paras. 130-36.
63. Id. at para. 151.
64. Id. at para. 135.
65. Id. at para. 170 (citing Factory at Chorzow, Merits Judgment No. 13, 1928 P.C.I.J. (ser. A) No. 17, at 47 (m/d)).
66. Id.
The decision confirms and protects maritime freedoms in the EEZ, even though the activity in question involved the selling of fuel to fishing vessels that were exploiting resources under the sovereignty of the coastal state. The Tribunal might have concluded that because the coastal state could regulate the harvesting of resources in this zone, it could also regulate the refueling of fishing vessels engaged in the harvesting, but instead it relied on a formalistic reading of the Convention's text. The Tribunal concluded that the coastal state does not have the power to engage in such regulation because the Convention text says nothing about regulating refueling in the EEZ. It may be possible, however, for coastal states to regulate this activity in the future by conditioning fishing licenses on agreements to buy fuel from within the coastal country or to pay tax on the fuel.

In the second case, the Southern Bluefin Tuna Cases (New Zealand v. Japan and Australia v. Japan), the Tribunal acted under Article 290 of the Convention, which authorizes it to prescribe “provisional measures” pending final outcome whenever “appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.” After hearing testimony and receiving legal memoranda, the Tribunal ordered Japan to “refrain from authorizing or conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna,” unless the catch from such a program is deducted from Japan's annual national allocation as agreed upon with Australia and New Zealand. This dispute was assigned to a five-member Article VII arbitral tribunal pursuant to Article 287(3) of the Law of the Sea Convention. But the decision of the panel was one that must surely have disappointed Professor Sohn, because the panel reached the surprising

70. LOS Convention, supra note 7, at art. 290, para. 1, 21 I.L.M. at 1323.
71. Southern Bluefin Tuna Cases, supra note 69, at para. 28(2)(a).
72. The arbitral tribunal consisted of Judge Stephen M. Schwebel (President), H.E. Judge Florentino Feliciano, the Rt. Hon. Justice Sir Kenneth Keith, KBE, H.E. Judge Per Treslett, and Professor Chusei Yamada.
conclusion that it did not have jurisdiction to reach the merits of the dispute. By a 4-1 vote, the panel decided that the dispute-resolution procedures of the 1993 Convention for the Conservation of Southern Bluefin Tuna, which were not obligatory, took precedence over the dispute-resolution procedures of the 1982 Law of the Sea Convention, which were obligatory for this type of dispute. This ruling thus undercuts the strategy behind Part XV of the Law of the Sea Convention, which was to create obligatory dispute-resolution procedures that all contracting parties would have to participate in, in order to reduce tensions and resolve disputes.

The ruling appears to create a significant loophole whereby countries can agree not to be bound by the Part XV dispute-resolution procedures, undermining the "package deal" approach of the 1982 Convention, which prohibits reservations and requires contracting parties to accept the entire set of compromises found in the carefully-negotiated Convention. Sir Kenneth Keith's dissenting opinion presents the better view that the Convention's dispute-resolution procedures should take precedence and remain in force, despite any other agreements that the parties may have entered into, because the Convention is designed to be "a comprehensive constitution for the oceans which would stand the test of time." Sir Kenneth quoted the last president of the negotiating conference that produced the 1982 Convention, Tommy T.B. Koh, for the proposition that "the Convention forms an integral whole. States cannot pick what they like and disregard what they do not like."

The third case is The Camouco Case (Panama v. France), involving a fishing vessel registered in Panama and licensed by it to catch Patagonian toothfish by longline in the South Indian Ocean. On September 28, 1999 a French helicopter spotted the vessel in the

73. Bluefin Tuna Jurisdiction Award, supra note 32.
74. LOS Convention, supra note 7, at art. 309, 21 ILM at.
75. See, e.g., Consensus and Confrontation: The United States and the Law of the Sea Convention 58-68 (Jon M. Van Dyke, ed., 1985) (where Tommy T.B. Koh, the last President of the negotiating conference that produced the Law of the Sea Convention explained the nature of the "package deal").
76. Bluefin Tuna Jurisdiction Award, supra note 32, Separate Opinion of Sir Kenneth Keith, para. 27.
78. The Camouco Case (Pan. v. Fr.), 2000 ITLOS (Feb. 7) (Application for Prompt Release Judgment) (available via ) [hereinafter The Camouco Case].
79. Id. ar para. (A)(1).
EEZ claimed around the remote Crozet Islands, which are uninhabited French possessions between Madagascar and Antarctica. The fishing vessel was escorted to Reunion, a French island much closer to Madagascar. The ship's master was arrested and put under court supervision, and the French court said the boat would be released only upon a payment of 20 million French francs. On January 17, 2000 Panama filed an application before the International Tribunal for the Law of the Sea, seeking prompt release of the vessel. Two rounds of oral proceedings promptly occurred, and on February 7, 2000 the Tribunal ordered the vessel released were Panama to provide a bank guarantee of 8 million French francs. The Tribunal determined that amount based upon the gravity of the alleged offenses and the value of the detained vessel and its cargo.

These three early cases demonstrate that the Tribunal is prepared to act boldly and decisively with regard to highly contentious disputes. Even if the procedure that the parties eventually use is an Annex-VII arbitral tribunal, ITLOS can issue preliminary measures quickly to protect the marine environment from dangers. It must be hoped that the arbitral tribunal's crabbed conclusion that it could not reach the merits of the Southern Bluefish Tuna Case will not be followed and that countries will utilize the Convention's dispute-resolution procedure regularly and in good faith to resolve disputes peacefully.

IV. An Example of an Appropriate Case for the International Tribunal of the Law of the Sea Regarding the Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials

Another example of a dispute that might be resolved through these new procedures would be a claim brought by concerned coastal and island states contending that the nations that have been shipping ultrahazardous nuclear wastes from Europe to Japan (i.e., France, Japan, and the United Kingdom) have violated:

80. Id. at para. (B).
81. Id.
82. Id.
83. Id. at para. (A).
84. Id. at para. (A)-(B)(8).
85. Id.
(A) their duties under Articles 204-06 to prepare and disseminate an environmental impact statement (because "planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment"),

(B) their duty to consult affected states, including specifically their duty under Article 199 to "jointly develop and promote contingency plans for responding to pollution incidents in the marine environment,"

(C) their general duty under Articles 192 and 235 to "protect and preserve the marine environment," including the more specific duty under Article 194(5) "to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life," and

(D) their more specific duty under Article 235(3) to create an appropriate liability regime, including the "development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds."

One awkward aspect of this possible claim would result from the United Kingdom’s selection of the ICJ as its mechanism of choice while France and Japan have not made any selection, thus triggering the Article VII arbitral tribunal as the default choice. Because of these differences, it might be necessary to proceed separately against the United Kingdom in the ICJ and against France and Japan in an arbitral tribunal. It appears from the language of Article 290 that the ICJ could issue preliminary measures against the United Kingdom, and the ITLOS could issue preliminary measures against France and Japan if an arbitral tribunal were not established within two weeks of the filing of the complaint. It would be preferable, of course, if the countries could agree upon a single tribunal for this adjudication.

The substantive law that would be used to resolve this dispute is somewhat innovative, but a strong case can be made that this law has become part of customary international law through the accelerated procedure that Professor Sohn has identified in other com-
parable areas. The duties of the shipping nations appear to be established clearly in the provisions of the Law of the Sea Convention identified above, and it is certainly vital to enforce these provisions in appropriate cases. These requirements form part of the fabric of the “precautionary principle” or the “precautionary approach,” which now underlies many international treaty regimes.

The precautionary principle is somewhat controversial, because some commentators view it as being too vague and unrealistic but it is now a major presence at all international negotiations. It appears regularly in treaties and documents because it reflects the view that it is necessary to be extra vigilant in our stewardship of ocean resources, especially in light of the many mistakes we have made in recent years. The essence of the precautionary principle can be summarized as follows:

It requires policymakers to be alert to risks of environmental damage, and the “greater the possible harm, the more rigorous the requirements of alertness, precaution and effort.” It rejects the notion that the oceans have an infinite or even measurable ability to assimilate wastes, and it instead recognizes that our knowledge about the ocean’s ecosystems may remain incomplete and that policymakers must err on the side of protecting the environment. It certainly means that, at a minimum, a thorough evaluation of the environmental impacts must precede actions that may affect the marine environment. All agree that it requires a vigorous pursuit of a research agenda in order to overcome the uncertainties that exist.

Some commentators have explained the precautionary principle by emphasizing that it shifts the burden of proof: “[W]hen scientific information is in doubt, the party that wishes to develop a new project or change the existing system has the burden of demonstrating that the proposed changes will not produce unacceptable adverse impacts on existing resources and spe-

94. See supra note 2.
95. See, e.g., Daniel Bodansky, Scientific Uncertainty and the Precautionary Principle, 33 ENV'T 4-5 (1991) (stating “Although the precautionary principle provides a general approach to environmental issues, it is too vague to serve as a regulatory standard because it does not specify how much caution should be taken.”). But see Daniel Bodansky, Remarks: New Developments in International Environmental Law, 85 AM. SOC'Y INT'L L. PROC. 413, 413 (1991) (stating “Indeed, so frequent is its invocation that some commentators are even beginning to suggest that the precautionary principle is ripening into a norm of customary international law.”).
cies.” Others have suggested that the principle has an even more dynamic element, namely, that it requires all users of the ocean commons to develop alternative non-polluting technologies.97

Some commentators and diplomats have tried to draw a distinction between the “precautionary principle” and the “precautionary approach,” arguing that the latter is more acceptable as an international norm in that it lays out a flexible perspective rather than a rigid rule.98 However these disputes are resolved, it is now clear that a norm of precaution has emerged and that our collective stewardship of shared resources requires caution before we embark on new activities that will alter the marine environment. Certainly the inclusion of the precautionary standard in the 1996 Protocol to the London Dumping Convention99 and in the 1995 Straddling and Migratory Stocks Agreement100 provides strong evidence that this approach is here to stay.

97. Jon M. Van Dyke, Applying the Precautionary Principle, supra note 81, at 380 (quoting Jon M. Van Dyke, Durwood Zaelke, & Grant Hewison, Freedom for the Seas in the 21st Century 477 (1993)).

98. See, e.g., 1992 Rio Declaration on Environment and Development, Principle 15, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874 (1992) (stating “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

99. Under the 1996 Protocol to the London Dumping Convention, the presumptions established in the original convention are reversed, and the dumping of all wastes are prohibited unless the item to be dumped is explicitly listed in Annex I. The 1996 Protocol to the London Dumping Convention, Nov. 8, 1996, 36 I.L.M. 1, 9-10. Even materials listed in Annex I, which include dredged material, sewage sludge, vessels, and ocean platforms, cannot be dumped without a permit. See id. at 21. Permits can be granted only after assessments are undertaken that evaluate options and describe the potential effects of the dumping. See id. at 21, 23. Incineration at sea is completely prohibited, and the dumping of industrial wastes is substantially prohibited. See id. at 10, 21. The new 1996 Protocol is thus based on the precautionary approach as well as the polluter-pays principle. See id. at 9. The burden has thus shifted “from (1) dumping unless it were proven harmful to (2) no dumping unless it is shown there are no alternatives.” David Hunter, James Salzman & Durwood Zaelke, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 765 (1998).

100. Agreement for the Implementation of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/CONF.164/97, Sept. 8, 1995, 34 I.L.M. 1542 (1995), reprinted in S. Treaty Doc. No. 104-24 (1996). Article 5(c) lists the “precautionary approach” among the principles that govern conservation and management of shared fish stocks, and Article 6 elaborates on this requirement in some detail, focusing on data collection and monitoring. See S. Treaty Doc. No. 104-24 at 5, 6. Then, in Annex II, the Agreement identifies a specific procedure that must be used to control exploitation and monitor the effects of the management plan. See id. at 55. For each harvested species, a “conservation” or “limit” reference point as well as a “management” or “target” reference must be determined. See id. at 55-54. If stock populations go below the agreed-upon conservation/limit reference point, then “conservation and management
This example illustrates how important a tribunal with binding powers can be. As outlined in a scholarly publication, this claim that the shipping nations are required to prepare an environmental assessment, consult with affected coastal states, prepare emergency contingency plans, protect rare and fragile ecosystems, and develop a viable liability regime might seem unrealistic because it pits small nations against large and powerful nations. But if the International Tribunal for the Law of the Sea were to adjudicate such a claim and rule in favor of the smaller nations, then the rights and duties of all states would be enunciated and international law would take greater shape. It has been the dream and goal of Professor Louis B. Sohn that the norms of international law will become more specific and detailed and that these norms will be taken seriously and be enforced, even against the powerful countries of our world.

The International Tribunal for the Law of the Sea is now open for business, and its early decisions illustrate how important a tribunal with mandatory powers can be in giving teeth to legal principles and bringing order to ocean conflicts. The Tribunal now exists because of the vision and persistence of Louis Sohn and others who shared his vision. Let us hope that this new Tribunal continues to resolve disputes and clarify the law for generations to come, and that it serves as an example for the establishment of other tribunals that can bring certainty and stability.

action should be initiated to facilitate stock recovery." See id. at 53. Overfished stocks must be managed to ensure that they can recover to the level at which they can produce the maximum sustainable yield. See id. at 54. The continued use of the maximum sustainable yield approach indicates that the Agreement has not broken free from the approaches that have led to the rapid decline in the world’s fisheries, but the hope seems to be that the conservation/limit reference points will lead to early warnings of trouble that will be taken more seriously.