

## **Global and Regional Tribunals**

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### **Introduction**

As our world becomes more interdependent and the lines separating countries continue to blur, the need for effective global and regional tribunals to settle disputes becomes increasingly evident. Although we are just beginning the job of constructing and supporting such institutions, a few of them are currently in operation and offer some hope of resolving controversies, promoting harmony, and establishing global legal standards.

This paper focuses on three bodies that potentially can be utilized by U.S. lawyers to protect the interests of their clients – the International Tribunal for the Law of the Sea in Hamburg, Germany, the Inter-American Human Rights Commission in San Jose, Costa Rica, and the Human Rights Committee of the International Covenant on Civil and Political Rights in Geneva, Switzerland.

### **The International Tribunal for the Law of the Sea**

Part XV of the 1982 United Nations Law of the Sea Convention establishes mandatory dispute resolution procedures. This innovative mechanism is just now beginning to be utilized by the contracting parties. The United States has signed, but not yet ratified the Convention, so its citizens and companies cannot now directly utilize these procedures unless they are also linked to an entity in a country that has ratified the Convention. But the Convention has been ratified by 132 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 the dispute-resolution procedures. These procedures have been carefully crafted to maintain the Convention's delicate balances among competing interests.

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”). If a contracting party does indicate its preference, it shall be deemed, under Article 287(3), to have accepted the Annex VII arbitral tribunal. Similarly, if the disputing countries have picked different procedures and cannot agree on a procedure, their dispute will be resolved through an Annex VII arbitration.

According to Article 297, controversies subject to mandatory dispute-resolution procedures include those involving coastal state environmental regulations that limit navigation (Article 297 (1) (a) & (b)), allegations that a coastal state is violating internationally-established environmental regulations (Article 297 (1) (c), and allegations that a coastal state has improperly seized a vessel flying the flag of another country (Article 292). Coastal states are not required to submit to these dispute-resolution procedures their decisions regarding marine scientific research on their continental shelf and exclusive economic zone (Article 297 (2)) or their decisions regarding management of their EEZ fisheries and the allocation of their surplus catch (Article 297 (3)). Ratifying countries have the option of withdrawing from mandatory dispute resolution disagreements over maritime boundaries (Article 298 (1) (a)), disputes concerning military activities (Article 298 (1) (b)), and disputes that are pending before the U.N. Security Council (Article 298 (1) (c)). Disputes relating to deep seabed mining are subject to a special regime, and the Sea-Bed Disputes Chamber of ITLOS will deal with most of these controversies. 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.

As of this writing, three cases have been brought under these procedures. In the first case, *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)* (ITLOS July 1, 1999), the International Tribunal for the Law of the Sea ruled that a vessel registered in Saint Vincent and the Grenadines was exercising its navigational freedoms when it was refueling fishing vessels within the exclusive economic zone (EEZ) of Guinea. The case was originally assigned to an arbitral tribunal in accordance with Annex VII of the Convention, but it was then transferred to ITLOS by agreement of the two parties. Guinea argued that it was being deprived of tax revenue by not being able to extend its customs laws to the vessel of Saint Vincent and the Grenadines. The Tribunal ruled that Guinea could not apply its custom laws to its EEZ except “in respect of artificial islands, installations and structures.” Paras 127 and 129 (citing Article 60(2) of the Convention). 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. 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.” Para. 131. It also concluded that Guinean interests were not “in grave and imminent peril,” thus rejecting the “necessity” argument. Para. 135.

In the second case, the *Southern Bluefin Tuna Cases (New Zealand and Australia v. Japan)* (ITLOS, provisional measures, Aug. 27, 1999), 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 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 is now scheduled to be presented to an arbitral panel for a full decision on the merits.

The third case is *The Camouco Case (Panama v. France)*(ITLOS, Application for Prompt Release, Feb. 7, 2000). The *Camouco* was 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 exclusive economic zone claimed around the remote Crozet Islands, which are uninhabited French possessions half-way between Madagascar and Antarctica. The fishing vessel was then 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 upon Panama’s providing 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 will eventually use is an Annex-VII arbitral tribunal, ITLOS can issue preliminary measures quickly to protect the marine environment from dangers.

To give another example of a dispute in the Pacific that might be resolved through these procedures, a claim could be brought by concerned coastal 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:

- (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 Article 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 results 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 is 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, but, if not, it might be necessary to proceed in two separate venues.

This new dispute-resolution procedure is now open for business, and the dispute regarding the obligations of the nations transporting ultrahazardous radioactive materials by sea appears to be an appropriate one for mandatory dispute resolution.

### **The Inter-American Commission on Human Rights**

The Inter-American Commission on Human Rights is a body of the Organization of American States with the mandate to monitor human rights in the Western Hemisphere and provide views and recommendations regarding petitions and complaints they receive. Based in San Jose, Costa Rica, it has seven-members, currently including Claudio Grossman and Robert Goldman, Dean and Professor, respectively, at the American University Law School. The United States has signed, but not yet ratified, the American Convention on Human Rights, so matters presented against the United States cannot be presented to the seven-member Inter-American *Court* of Human Rights. But the *Commission* can evaluate complaints brought against the United States, however, utilizing the principles in the American Declaration on the Rights and Duties of Man. Unlike the *Court*, which has the power to issue binding decisions, the *Commission*’s power is limited to making recommendations and working with nations to seek compliance, but it nonetheless has importance because of its moral authority. A number of important cases have already been presented against the United States ranging from death penalty matters, native rights, voting rights in the District of Columbia, Haitian refugees and abortions, to bombings in Grenada and Panama.

### **The Human Rights Committee of the International Covenant of Civil and Political Rights (ICCPR)**

The United States ratified the International Covenant of Civil and Political Rights in 1992, but has not yet ratified the Optional Protocol, which allows individual citizens to bring claims against their government to the 18-member Human Rights Committee based in Geneva. This Committee issues formal opinions regarding such complaints, and although it has only recommendatory authority, its decisions have led to changes in laws and have been utilized in domestic tribunals to establish principles of international law. The United States has issued a Declaration under Article 41, which authorizes other countries to bring claims against the United States. This procedure has not yet been utilized, but any other ratifying country could bring a claim on behalf of human rights victims in the United States before the Human Rights Committee under this Article 41 procedure.

### **Conclusion**

These procedures are still new, and relatively untested, but they should and will be utilized extensively in coming years. We are seeing our legal horizons broaden, and we will soon see uniform global legal principles emerge that should contribute to international peace and cooperation, and perhaps even prosperity.