



matters of judge

Issues arising from pollution of the seas are far from new — as the dates of such major oil spills as the Amoco Cadiz (1978); Exxon Valdez (1989); Erika (1999) or Prestige (2002) prove. What probably is new is that, unlike these pollution incidents, such emerging issues as the depletion of fish stocks due to overexploitation, or the rise in sea-level as a result of climate change, are global and have a universal impact.

International law is relatively well equipped to deal with these issues. The 1982 United Nations Convention on the Law of the Sea dedicates its Part XII to the “Protection and Preservation of the Marine Environment”. States are required, among other things, to adopt national and international rules to prevent, monitor, reduce and control pollution from land-based sources, seabed activities, dumping, vessels and the atmosphere. The Convention also lays down rules on conserving the living resources of the high seas and the exclusive economic zone and places obligations on flag States.

Unlike many other international treaties, the Convention also provides a compulsory mechanism for settling disputes arising out of its interpretation or application. Any dispute relating to the Convention may be submitted at the request of any State Party to an international court or tribunal, subject to some limitations and optional exceptions. States Parties are free, however,

to select one or more of the following as their preferred means for settling disputes: the International Tribunal for the Law of the Sea (a judicial institution set up by the Convention, with its seat in Hamburg, composed of 21 judges who are experts in the law of the sea and elected by the States Parties), the International Court of Justice, arbitration and special arbitration. Parties to a dispute may submit a case to the Tribunal through a special agreement or through a unilateral application if both have made a declaration selecting it, deposited with the Secretary General of the United Nations. Otherwise arbitration is the compulsory mechanism available to the parties to the dispute, though — unlike recourse to the Tribunal — this would incur costs.

States have not yet made extensive use of the Convention’s large number of environmental rules in international litigation. The Tribunal has so far predominantly dealt with marine environmental issues in the context of provisional measures proceedings, pending the constitution of an arbitral tribunal — a specific procedure which may be used whenever arbitral proceedings are instituted. As constituting such a tribunal may take some months, it may be necessary in the meantime to preserve the respective rights of the parties or to prevent serious harm being caused to the environment. The Tribunal is then competent, at the request of any party, to prescribe provisional measures.

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by Philippe Gautier



To date, the following cases have been submitted on that basis:

- The Southern Bluefin Tuna Cases submitted by New Zealand and Australia against Japan in 1999, concerned a dispute on conservation measures for the Southern Bluefin Tuna stock and the allocation of catch relating to it;
- Ireland submitted The MOX Plant Case against the United Kingdom in 2001 which concerned the potential harmful effect of the operation of the MOX nuclear plant in Sellafield on the Irish Sea;
- In 2003, the Case concerning Land Reclamation by Singapore in and around the Straits of Johor was submitted to the Tribunal by Malaysia against Singapore. This related to the prejudice allegedly caused to the rights of Malaysia and to the environment by land reclamation work carried out by Singapore.

A case is also currently pending before the Tribunal between Chile and the European Community, concerning the exploitation of swordfish: Chile claims that the European Community did not ensure that European fishing vessels comply with its obligations under the Convention on conserving swordfish stocks.

Given the attention attracted by environmental issues, it is reasonable to expect that more cases concerning pollution or fisheries matters will be submitted to the Tribunal or to one of its chambers in future. The following elements should be kept in mind by potential parties to an environmental dispute:

- Legitimate concern is often expressed about the length of international proceedings. The practice of the Tribunal — which delivers its decisions in urgent proceedings within one month of their institution — demonstrates that cases brought before it are dealt with swiftly. This underlines the useful role that it could play, particularly when compared to the complexities of proceedings relating to international environmental claims submitted to municipal courts: proceedings in the Amoco Cadiz case before US courts took 12 years.
- Provisional measures proceedings may be of particular interest to States faced with environmental pollution where there is a risk of serious harm to the marine environment. Examples may relate to urgent clean-up or mitigation measures, or to measures impartially to assess the extent of environmental damage.



- The Tribunal has paid great attention in its jurisprudence to the procedural rights of States and taken measures to preserve them. This concerns, for example, the duty of a party to disclose information on a potentially harmful activity or to cooperate in assessing the risk of it.
- When pollution incidents cause prejudice to a large number of private persons, States may be reluctant to engage in international litigation because international law requires that the private victims first exhaust the remedies available to them before the local courts of the State which allegedly caused the damage. This, however, does not apply in cases where the breach of international law concerns a right which belongs directly to the applicant State. Where a coastal State is faced with serious damage to its marine environment — with resulting prejudice caused to individuals — it is reasonable to contend that an international claim would relate to a breach of its own right: it would be hopelessly unrealistic to require hundreds or thousands of victims first to institute proceedings before foreign local courts before a claim could be lodged before an international tribunal.

The Tribunal is competent to adjudicate not only disputes relating to the Convention, but ones relating to any other agreement which confers

jurisdiction on it. States then have the option to include provisions conferring jurisdiction on the Tribunal in their agreements — including ones on environmental or fisheries matters. It is also plausible to maintain that such special agreement could also cover agreements concluded between States and private entities (such as a classification society or insurance company) to assess, for example, the amount of damage caused by a casualty.

Finally, the Tribunal is entitled to render advisory opinions, and parties may prefer to request one than to submit a dispute to it. Requesting an opinion — which could be given urgently — could help them find a solution through negotiations or other means. A request, for example, could be submitted by a State faced with a serious pollution incident in order to determine which claims would be admissible.

The need to protect and preserve the marine environment cannot be emphasized strongly enough. The manifest role that the Convention already plays by ensuring that States have recourse to a binding dispute settlement mechanism promoting peaceful settlement highlights the importance of the part that the Tribunal could have in resolving future marine environment disputes. 