UNCLOS INSTITUTIONS AND THEIR ROLES

HELMUT TUERK*

I. Introduction

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[1]established three institutions: the International Tribunal for the Law of the Sea (ITLOS), the International Seabed Authority (ISA) and the Commission on the Limits of the Continental Shelf (CLCS).[2] Although structure, composition and area of competence of these institutions are quite different, they are nevertheless to be considered complementary as their task is to serve the States parties to UNCLOS in ensuring its coherent and efficient implementation, thus also securing the peaceful uses of the seas and the undisputed exploitation of maritime resources as a matter of common interest.

While ITLOS and the ISA are autonomous international organizations, though closely associated with the UN system, the CLCS is a treaty body consisting of independent national experts established to perform certain functions under the Convention and directly serviced by the United Nations.[3] A common feature of these three institutions is that they have by now been in existence for about twenty years and this is thus a good time to consider whether the expectations of their founders have been met.

II. ITLOS

ITLOS is the specialized international judicial body for the settlement of disputes concerning the interpretation or application of UNCLOS, and for the rendering of advisory opinions.[4]It is the largest world-wide judicial body, composed of 21 judges "with recognized competence in the field of the law of the sea",[5] representing the principal legal systems and the various geographical regions.

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[1] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 UNTS 3 (hereinafter referred to as 'UNCLOS').
[2] The Statute of ITLOS is contained in ANNEX VI to UNCLOS. The ISA is dealt with in Part XI, Section 4 and the CLCS in ANNEX II to UNCLOS.
[3] UNCLOS, Annex II, Article 2 (5).
[4] See also P.Chandrasekhara Rao, ITLOS: The First Six Years, 6 Max Planck Yearbook of United Nations Law, A. Von Bogdandy R. Wolfrum (eds.), Kluwer International Law, The Hague/London/New York, 183-300, p. 185 (2002).
[5] UNCLOS, ANNEX VI, Art. 2.

The Tribunal is open to States parties to UNCLOS, other States, as well as other entities, such as international organizations and natural or legal persons in any case expressly provided for in Part XI of the Convention – relating to exploration and exploitation of the international seabed "Area" – or in any case submitted pursuantto any other agreement conferring jurisdiction on the Tribunal that is accepted by all the parties to that case.[6] Access can thus be considered the major difference between ITLOS and the ICJ.[7]

ITLOS is, however, only one of four means for the settlement of disputes under UNCLOS entailing binding decisions. The other alternative means are the ICJ, an arbitral tribunal constituted in accordance with Annex VII and a special arbitral tribunal under Annex VIII for certain categories of disputes.[8] Such flexibility as to the choice of fora available to States parties was indispensable in order to achieve consensus on compulsory dispute settlement at the Third United Nations Conference on the Law of the Sea (the Conference).

The settlement of disputes is dealt with in Part XV of UNCLOS, the principal provision being Article 287, which provides that a State party is free to choose one or more of the aforementioned four means by submission of a written declaration to the UN Secretary-General. So far 52 States have made such a declaration – 39 of which have chosen ITLOS as the preferred procedure or as one possibility.[9] In the absence of such a declaration or if the parties have not accepted the same procedure under Article 287, they are deemed to have accepted arbitration under Annex VII to UNCLOS, which is thus the default procedure.

The jurisdiction of ITLOS is, however, subject to limitations spelled out in Article 297 UNCLOS relating to the exercise of certain discretionary powers by the coastal State and optional exceptions according to Article 298, for matters such as sea boundary delimitations. In two instances, ITLOS has compulsory jurisdiction independently of the choice of procedure mechanism under Article 287: these are Article 290(5) regarding provisional measures when a dispute has been submitted to

[6] UNCLOS, ANNEX VI, Art.20.
[7] A.E. Boyle, Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction, 46/1 International & Comparative Law Quarterly, 36-54, p. 51 (1997).
[8] Art. 287 (1) UNCLOS.
[9]For a list of these Declaration see: www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited 17 February 2017).

an arbitral tribunal, pending its constitution, and Article 292 concerning the prompt release of vessels and/or crews.

The Seabed Disputes Chamber has been granted exclusive and compulsory jurisdiction over disputes arising out of the exploration and exploitation of the "Area", including those between States parties and the ISA, independent of any choice of procedure made under Article 287.[10]Itshall furthermore give advisory opinions at the request of the Assembly or the Council of the ISA "on legal questions arising within the scope of their activities."[11]

Although UNCLOS does not explicitly provide for advisory jurisdiction of ITLOS as a full tribunal, in 1997 it decided to include in Article 138 of its Rules the possibility of exercising advisory jurisdiction. Accordingly, it "may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion".[12]

ITLOS has already established a reputation for an expeditious and efficient management of cases and made substantial contributions to the development of international law, especially to environmental law.[13]Thus far altogether 25 cases, including two requests for advisory opinion, have been submitted to the Tribunal. These cases have provided a good opportunity for a number of important pronouncements, such as regarding freedom of navigation, the nationality of ships, the use of force on the seas, the protection of the marine environment, the delimitation of the continental shelf beyond 200 nautical miles, the question of bunkering of fishing vessels in the EEZ, the obligations of States sponsoring activities in the international seabed "Area" and the obligations of flag States and international organizations regarding illegal, unregulated and unreported (IUU) fishing in the EEZs of third States.

[10]See also Presentation by Judge H.Tuerk, Vice-President of ITLOS, at the Seminar on Exploration and Exploitation of Deep Seabed Mineral Resources in the Area: *Challenges for Africa, and Opportunities for Collaborative Research in the South Atlantic Ocean*, Abuja, Nigeria, 24 March 2009, pp. 9-10, available at:www.itlos.org.
[11] Art. 191 UNCLOS.
[12] See also Kateka, *Advisory Proceedings before the Seabed Disputes Chamber and before the ITLOS as a Full Court*, 17 Max Planck Yearbook of the United Nations Law (2013), 159-172, p.169.
[13] Statement by Judge R. Wolfrum, President of ITLOS, on the Report of the Tribunal to the Sixteenth Meeting of States parties to UNCLOS, 19 June 2006, p. 5, available at: www.itlos.org.

Although ITLOS is still underutilized, it can nevertheless be regarded as being at the centre of the dispute resolution system of Part XV of UNCLOS.[14] In its jurisprudence the Tribunal has also consistently sought to uphold the balance between the rights of coastal States and those of the international community as a whole, a balance that is the very foundation of the contemporary law of the sea.

III. ISA

The ISA is the organization through which the parties to the Convention, in accordance with its Part XI, organize and control exploration for, and exploitation of the mineral resources of the "Area",[15]- that is the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction the common heritage of mankind. The precise extent of the "Area" can, however, only be determined until all coastal States have delineated the outer limits of the continental shelf beyond 200 nautical miles in accordance with Article 76 UNCLOS. Although directly affected by that delineation, no role in the proceedings was given to the ISA.[16]

All States parties to the Convention are *ipso facto* members of the Authority, at present 168, including the European Union.[17] Once commercial exploitation of the deep sea bed will have begun the ISA will have to adopt the necessary rules and procedures regarding the equitable sharing of financial and other economic benefits derived from activities in the "Area" as well as with respect to the payments and contributions pursuant to Article 82 UNCLOS by coastal States exploiting the continental shelf beyond 200 nautical miles. At the present time, it seems more likely that the first source of revenues for the international community will accrue under Article 82 rather than from any revenues derived from the exploitation of the deep sea bed.[18]

Although the core function of the ISA is to encourage the development of deep seabed mining, it has been entrusted by UNCLOS with other important tasks. These

[14] See D.R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford and Portland, Oregon, p. 457 (2010).
[15] M. C. Wood, *The International Seabed Authority: Fifth to Twelfth Sessions (1999-2006)*, Max Planck Yearbook of United Nations Law, Vol. 11, A. von Bogdandy and R. Wolfrum (eds.), 47-98, p. 49 (2007).
[16] See SV. Suarez, *The Outer Limits of the Continental Shelf, Legal Aspects of their Establishment*, Chapter V, Springer, Berlin/Heidelberg/New York, p. 234 (2008).
[17] See: www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited 17 February 2017).
[18] M. Lodge, *International Seabed Authority and Article 82 of the United Nations Convention on the Law of the Sea*, 21 (3), JMCL, p. 330 (2006). See also ISA, Technical Study No. 12: Implementation of Article 82 of the United Nations Convention on the Law of the Sea (2012), available at: www.isa.org.jm/files/documents/EN/Pubs/TS12-web.pdf (last visited 17 February 2017).

include the transfer of technology to developing States, the protection of human life with respect to activities in the "Area" as well as - one of its most important functions - the protection of the environment from harmful effects that may arise from such activities.[19]

The first major milestone since the establishment of the ISA was the adoption in 2000 of the first set of Regulations on Prospecting and Exploration for Polymetallic Nodules.[20]In 2010, the Authority further adopted Regulations for Prospecting and Exploration for Polymetallic Sulphides, and in 2012 similar regulations relating to cobalt-rich ferromanganese crusts. This achievement can be considered the second major milestone because it opened the door for claims for exploration sites to be made in respect of resources other than polymetallic nodules, which had been the only deep seabed resources discussed during the Conference.[21]

Thus far the ISA has approved 28 contracts for exploration, seventeen of which relate to polymetallic nodules, six to polymetallic sulphides and five to cobalt-rich ferromanganese crusts. Six contracts for exploration of polymetallic nodules which expired in 2016 have been extended for five more years.[22] In 2016 a working draft of the Regulations and Standard Contract Terms on Exploitation for Mineral Resources in "the Area" was released.[23] As the ISA is now moving from the regulation of prospecting and exploration to the regulation of exploitation of deep sea minerals, the prospects for which currently seem much brighter than only a few years ago, it has arrived at a critical juncture of its existence.

In 2015 the Assembly of the ISA for the first time decided to undertake, pursuant to Article 154 UNCLOS, a general and systematic review of the manner in which the international regime of the "Area" has operated in practice.[24] An interim report was submitted in 2016 and the final report together with recommendations designed to improve the operation of the regime will be before the Assembly for

[19] See UNCLOS, Arts. 145-147.
[20] M. Lodge, *The International Seabed Authority and the Exploration and Exploitation of the Deep Seabed,* Belgian Review of International Law, 2014/1, Editions Bruylant, Bruxelles, p. 131.
[21]Idem.
[22] See ISA, Legal and Technical Commission, Status of contracts for exploration in the Area, ISBA/23/LTC/2, 23 January 2017.
[23] A. Jaeckel, *Current Legal Developments, International Seabed Authority*, The International Journal of Marine and Coastal Law 31, 706-719, p. 707 (2016).
[24] See ISA, Decision of the Assembly regarding the first periodic review of the international regime of the Area pursuant to Article 154 of the United Nations Convention on the Law of the Sea, ISBA/21/A/9/Rev.1, 29 September 2015.

approval in 2017.[25]As regards the overall performance of the ISA during the past two decades, this organization can certainly be considered as having been successful beyond the original expectations.

IV. CLCS

The CLCS consists of 21 members who are experts in the field of geology, geophysics or hydrography. They are elected by the States parties for a period of five years from among their nationals, having due regard to equitable geographical representation.[26]

Although the concept of the continental shelf, as enshrined in UNCLOS, is a legal one, the basic points of departure used in the criteria for defining the outer limits of the continental margin are scientific: geodetic, geologic, geophysical or hydrographical.[27]At the Conference it was therefore considered indispensable that an international expert body, namely the Commission, was required to verify the outer limits of the continental shelf beyond 200 nautical miles proposed by States in accordance with Article 76 UNCLOS, and to provide appropriate scientific and technical advice. Only if these limits are established by a coastal State "on the basis" of recommendations by the Commission do they become 'final and binding'[28] on other States as well as on the ISA. In case of disagreement by the coastal State with the recommendation of the CLCS, that State must make a revised or new submission within a reasonable time. The broad mandate of the Commission is thus "to act as a watchdog" to prevent excessive coastal State claims.[29]

A highly important provision regarding the work of the CLCS is Article 9 of Annex II, according to which the actions of the Commission must not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. This is a savings clause with regard to the role of the CLCS, emphasizing that the Commission has no function in determining the continental shelf boundary between States with overlapping claims to entitlements beyond 200 nautical miles nor is it to be involved in matters relating to the delimitation of the

[25] See also A. Jaeckel, *Current Legal Developments, International Seabed Authority*(note 23), p. 708-712.
[26] UNCLOS, ANNEX II, Art. 2 (1) and (5).
[27] Commission on the Limits of the Continental Shelf, United Nations Convention on the Law of the Sea and the Delineation of the Continental Shelf: Opportunities and Challenges for States, 20 April 2000, p. 3.
[28]UNCLOS, ANNEX II, Art. 4.
[29] L.D.M Nelson, *The Continental Shelf: Interplay of Law and Science*, in: Liber Amicorum Judge Shigeru Oda, N. Ando et al. (eds.), p. 1237 (2002).

continental shelf between States. In its practice, the CLCS has strictly adhered to this provision and deferred the consideration of controversial submissions.

To date, 77 submissions, plus 4 revised submissions, have been made to the Commission, which include 41 partial submissions and 7 joint submissions by two or more countries.[30] In addition, 45 preliminary information notes indicative of the outer limits of the continental shelf beyond 200 nautical miles and the intended date of submission have been received. It is currently estimated that the total number of submissions will approach 120.[31]

Although the CLCS has been working well and made substantial progress during the past years dealing with voluminous submissions of considerable complexity, there is still a major backlog as its tremendous workload had been completely underestimated.[32] Thus far, only 26 recommendations on the outer limits of the continental shelf have been adopted. From now on it may perhaps still take two or more decades until the Commission will have more or less completed its work.[33] The UN General Assembly in its resolution on "Oceans and the law of the sea" has been reaffirming the importance of the work of the CLCS for coastal States and for the international community.[34]

[30] G. Carrera, *An Update on the Status of Submissions to the CLCS and Notes relating to Disputes among States*, Global Ocean Regime Conference, Busan Republic of Korea, 10 June 2016, slide 20. See also Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, available at: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm (last visited 17 February 2017).
[31] G. Carrera, *An Update on the Status of Submissions to the CLCS and Notes relating to Disputes among States* (note 30), slide 22.
[32] See also, UNCLOS, Meeting of States Parties, Letter dated 18 April 2016 from the Chair of the Commission on the Limits of the Continental Shelf addressed to the President of the twenty-sixth Meeting of States Parties, SPLOS/298, 18 April 2016.
[33] H. Tuerk, The International Seabed Area, The IMLI Manual on International Maritime Law, Vol. 1, The Law of the Sea, D.J. Attard (gen ed.), M. Fitzmaurice, N.A. Martinez Gutierrez (eds.), p. 279 (2014).
[34] See for instance, UN General Assembly Resolution A/Res/70/235, 23 December 2015, preambular para. 34.