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THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE DEVELOPMENT OF THE CURRENT INTERNATIONAL LAW OF THE SEA, WITH SPECIAL REFERENCE TO THE POLAR REGIONS

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Gabriela A. Oanta

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INTRODUCTION

The International Tribunal for the Law of the Sea (ITLOS) is a universal, independent and specialized court. It was created by the United Nations Convention on the Law of the Sea (UNCLOS), signed in Montego Bay on 10 December 1982 and entered into force on 16 November 1994. This court started its work on 1 October 1996 once the Agreement relating to the implementation of Part XI of the UNCLOS (adopted on 28 July 1994) began to produce legal effects. The provisions of this Agreement are complemented both with Part XV of the UNCLOS regarding the mechanism of disputes settlement that may arise in relation to the interpretation or application of the provisions of this Convention and with Annex VI of the UNCLOS containing the Statute of the ITLOS.

Similar to the International Court of Justice (ICJ), the ITLOS was established as a permanent court that serves for the international community as a whole. However, unlike the ICJ, the ITLOS has a more limited jurisdiction as it is a specialized court. We

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2 United Nations Treaty Series vol. 1833, p. 3. At present there are 166 Parties, including the European Union, to the UNCLOS. For a detailed presentation of the UNCLOS, see JOSÉ ANTONIO DE YTURRIGA BARBERÁN, ÁMBITOS DE SOBERANÍA EN LA CONVENCIÓN DE LAS NACIONES UNIDAS SOBRE EL DERECHO DEL MAR: UNA PERSPECTIVA ESPAÑOLA (1993); LESLIE-ANNE DUVIC-PAOLI, LA CONVENTION DES NATIONS UNIES SUR LE DROIT DE LA MER: INSTRUMENTS DE ÉGULATION DES relations INTERNATIONALES PAR LE DROIT (2012).
consider that the work of the ITLOS reflects the changes on the international stage of
the sea over the last decades. Article 20(2) of the Statute of the ITLOS foresees to
receive claims or to be asked for an advisory opinion not only by States Parties to the
UNCLOS, but also by all other States that have not ratified this international treaty and
even by legal entities other than States. As the former ITLOS President, Judge
Chandrasekhara Rao, stated, the ICJ is a world court generally speaking, while the
ITLOS “is a world court on the law of the sea”.

In the last years the ITLOS has made a great contribution to the current
international law of the sea, mainly through the dispute settlement mechanism. This is
an innovative mechanism under the UNCLOS that has been considered one of the most
advanced and complex set forth by contemporary international law. Thus, Article 287
of UNCLOS provides that the parties to a dispute concerning the interpretation or
application of this Convention have full freedom to choose, by written declaration
deposited with the Secretary General of the United Nations, among one or more of the
following solution oriented approaches or dispute settlement institutions: (1) the
ITLOS; (2) the ICJ; (3) an arbitral tribunal constituted in accordance with the provisions
of Annex VII of the UNCLOS; or (4) a special arbitral tribunal established under Annex
VIII of the UNCLOS. Therefore, the ITLOS is only one of the four specific
mechanisms of marine dispute settlement.

The ITLOS mechanism has been widely used since it started its activity in 1996
and has received, during this period, the highest number of cases of all the judicial
bodies listed in the Article 287 of UNCLOS so far. In relation to this, it should be

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5 Tuerk, supra note 4, 181.
mentioned that some authors, such as Judge José Luis Jesus, former President of the ITLOS, have pointed out that, although Article 287 of UNCLOS does not give any special treatment to the ITLOS over the other international judicial bodies, other provisions of the Montego Bay Convention grant the ITLOS a relatively preferential position regarding certain legal and maritime issues, such as: the exclusive jurisdiction of the Seabed Disputes Chamber regarding disputes and requests for advisory opinions with respect to the international seabed regime (Articles 187 and 191 of UNCLOS); the residual compulsory jurisdiction of the ITLOS in prompt release cases (Article 292(1) of UNCLOS); the jurisdiction of the ITLOS regarding the requests for provisional measures pending the constitution of an arbitral tribunal under Annex VII of the UNCLOS (Article 290(5) of UNCLOS); and the authority of the ITLOS’s President to appoint arbitrators to an arbitral tribunal at the request of a party and in consultation with both parties (Article 3 of Annex VII of the UNCLOS).

The two polar regions face the same global problems as other regions, however in different ways. For example many threats to the ecosystem of the polar regions are originally exogenous. Hence, despite the different legal regimes that are applicable to the Arctic and the Antarctica, the answers that the international law of the sea could give to the specific problems that these areas are facing, are particularly important. We believe that precisely the ITLOS has a huge potential in order to play an important role regarding the governance of the polar regions, in particular. And it can do so not only through its decisions and advisory opinions, but also through the development and analysis of the international law on the protection of the marine ecosystem.

In addition, it is also important to mention that at present there are different opinions on the boundaries of these areas. It is generally considered that the Arctic and

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7 Id., 159-160.
9 Regarding the legal position of the two polar regions, see Duncan French, Regime integrity qua Antarctic security. Embedding global principles and universal values within the Antarctic Treat System, in ANTIARCtic SECURITY IN THE TWENTY-FIRST CENTURY. LEGAL AND POLICY PERSPECTIVES 51-69 (Alan D. Hemmings, Donald R. Rothwell & Karen N. Scott, 2012); DONALD R. ROTHWELL, THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW (1996); Donald R. Rothwell % Stuart Kaye, Law of the sea and the polar regions. Reconsidering the traditional norms, 18 (1) MARINE POLICY 41, 41-58 (1994); Tamburelli, supra note 8, 1-26.
the Antarctica Circle delimit the two areas, occupying 11% of the total marine area of the planet. Thus, from a geographical point of view, it is generally considered that the Arctic is the area north of the Arctic Circle (66°32'N), that is to say the area between North America, Europe and Asia. Antarctica, in turn, not only includes the Antarctic continent governed by the Antarctic Treaty System, but also those waters south of the 60º parallel in the Southern Hemisphere up to the Antarctic Convergence. So far, no claim regarding the polar region as a whole has been brought before the ITLOS, but in some way they have been present – implicitly or explicitly – in the activity of this judicial body, as we’ll have the chance to see throughout this paper.

In order to examine the role that the ITLOS has played and/or could play regarding the polar areas, this paper is divided into three main parts. First, we will briefly make an approach to the ITLOS jurisdiction. Second, we will deepen the analysis of the present and future activities of the ITLOS regarding the Arctic. And, finally, the issues referring to the Antarctic raised brought to the ITLOS will be examined.

I. AN APPROACH TO THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

According to the provisions of Article 288 of UNCLOS and Articles 21 and 22 of the Statute of the ITLOS, the jurisdiction of this judicial body located in Hamburg covers all dispute settlement mechanisms concerning the interpretation and application of the UNCLOS or of an international agreement regarding the purposes of the Convention. However, this jurisdiction is subject to certain limitations set forth in Article 297 of UNCLOS and certain optional exemptions provided by Article 298 of UNCLOS.

Article 297 of UNCLOS specifies the discretionary powers of the coastal State regarding its sovereign fishing rights in its exclusive economic zone (EEZ). Article 298

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11 See Richard Barnes, International Regulation of Fisheries Management in Arctic Waters, 54 GERMAN YEARBOOK OF INTERNATIONAL LAW 193, 196-197 (2011); CLAUDIA CINELLI, EL ARCTICO ANTE EL DERECHO DEL MAR CONTEMPORÁNEO 43-48 & 118-204 (2012).
of UNCLOS determines the possibility that States make written statements on sea boundary delimitations, historic bays or titles, military activities, and certain enforcement activities in the exercise of sovereign rights in the EEZ. Furthermore, the same article refers to the Security Council of the United Nations that may exercise the functions entrusted under the provisions of Chapter VII of the Charter of the United Nations.\textsuperscript{14}

Against this background, and in conformity with Article 19 of the Vienna Convention on the Law of Treaties, each state party to the UNCLOS may make at the moment of the signature, ratification, acceptance, approval or accession to this Convention some reservations. At present, 33 of the 166 parties to the Montego Bay Convention have already made a statement in relation to this provision expressly excluding, therefore, the compulsory jurisdiction of the ITLOS in certain areas.\textsuperscript{15}

The ITLOS jurisdiction can be contentious and advisory; depending on the general acceptance of its jurisdiction by the parties to a dispute under the provisions of Article 287 of UNCLOS concerning the choice of means of dispute settlement or a special agreement concluded when a dispute has arisen.\textsuperscript{16} Firstly, with regard to the contentious jurisdiction, it should be mentioned that, in principle, the ITLOS has \textit{ratione materiae} jurisdiction over any dispute concerning the interpretation or application of the UNCLOS (Part XV of UNCLOS, Article 288(1) of UNCLOS; Article 21 of the Statute of the ITLOS; within the limits provided by Articles 297 and 298 of UNCLOS) and over any dispute referred to the interpretation or application of other agreements (Article 288(2) of UNCLOS, Article 21 of the Statute of the ITLOS; multilateral agreements so allowed).

Moreover, the ITLOS has jurisdiction through the Seabed Disputes Chamber (Articles 1 and 288(3) of UNCLOS) to decide on any matter referred to its jurisdiction

\textsuperscript{14} For a detailed study of the provisions of Articles 297 and 298 of UNCLOS, see MIGUEL GARCÍA GARCÍA-REVILLO, EL TRIBUNAL INTERNACIONAL DEL DERECHO DEL MAR. ORIGEN, ORGANIZACIÓN Y COMPETENCIA 345-420 (2005); Tullio Treves, \textit{The Jurisdiction of the International Tribunal for the Law of the Sea}, in P. Chandrasekhara Rao and Rahmatullah Khan (eds.), \textit{supra} note 4, 118-122.

\textsuperscript{15} It is about the following states: Angola, Argentina, Australia, Belorussia, Canada, Cabo Verde, Chile, China, South Korea, Cuba, Denmark, Slovenia, Spain, the Russian Federation, Equatorial Guinea, France, Gabon, Ghana, Guinea-Bissau, Island, Italy, Mexico, Montenegro, Nicaragua, Norway, Palau, Portugal, the United Kingdom, Thailand, Trinidad and Tobago, Tunisia, Ukraine and Uruguay. For more details, see http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp =mtdsg3&lang=en#13

(Article 288(4) of UNCLOS, Article 58 of the Rules of the ITLOS), to prescribe the provisional measures that it considers appropriate (Article 290 of UNCLOS, Article 25(1) of the Statute of the ITLOS) and in relation to the prompt release of vessels and crews (Article 292 of UNCLOS). At the same time, the ITLOS may issue advisory opinions under Articles 159(10) and 191 of UNCLOS and also in accordance with the provisions of other international agreements (Article 138(1) of the Rules of the ITLOS).

In relation to the issues referred to the compulsory jurisdiction of the ITLOS, as we have mentioned before, this judicial body has residual compulsory jurisdiction with regard to, on the one hand, the prescription of provisional measures under Article 290(5) of UNCLOS and, on the other hand, the prompt release of vessels and crews in accordance with the provisions of Article 292 of UNCLOS.\(^\text{17}\) The two areas of residual compulsory jurisdiction of the ITLOS will receive a special attention when addressing the activities performed by the ITLOS regarding the waters around the Arctic and Antarctica, respectively.

We consider that this residual jurisdiction has allowed the ITLOS to develop an important judicial corpus in this field. In this regard, it is worth to mention that until now twenty-two cases have been brought before the ITLOS of which sixteen are related to provisional measures and prompt release of vessels and crews; seven of those sixteen are concerning provisional measures and nine cases referred to the prompt release of vessels and crews.\(^\text{18}\)

Finally, we briefly refer to those international agreements that give jurisdiction to the ITLOS in relation to disputes arising from the interpretation and application of the provisions of the UNCLOS. It is a relatively recent way of extending the jurisdiction of this judicial body that is related with the negotiation of the 1995 New York Agreement on straddling fish stocks and highly migratory fish stocks.\(^\text{19}\) In addition, it has to be


\(^{18}\) See the ITLOS’s web site http://www.itlos.org/index.php?id=35&L=0

\(^{19}\) Miguel Arenas Maza, El Tribunal Internacional del Derecho del Mar ante la pesca ilegal, no declarada y no reglamentada, in PROTECCIÓN DE INTERESES COLECTIVOS EN EL DERECHO DEL MAR Y COOPERACIÓN INTERNACIONAL 213, 230 (Julio Jorge Urbina & Teresa Ponte Iglesias coords., 2012).
mentioned that there is the possibility that the ITLOS is consulted by those states that agree on that the Tribunal addresses a particular dispute; in this case, these states may take a decision to that effect, becoming a party to an agreement or expressly conferring the ITLOS the power to address a particular dispute.\textsuperscript{20}

At present, there are eleven agreements of this nature, but so far only half of them are in force, namely: the 1993 FAO Compliance Agreement;\textsuperscript{21} the 1995 New York Agreement on straddling fish stocks and highly migratory fish stocks;\textsuperscript{22} the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;\textsuperscript{23} the 2000 Convention on the conservation and management of highly migratory fish stocks in the Western and Central Pacific Ocean;\textsuperscript{24} and the 2001 Convention on the conservation and management of fishery resources in the South-East Atlantic Ocean.\textsuperscript{25}

The jurisdiction of the ITLOS may be expanded in the future as currently there are other six international agreements that establish it as one of the disputes settlement mechanisms that may be used in relation to the application and interpretation of their own provisions. It is expected that these agreements will come into force shortly such as the Framework Agreement for the conservation of the living marine resources on the high seas of the South-Eastern Pacific;\textsuperscript{26} the Convention on the protection of the underwater cultural heritage;\textsuperscript{27} the Convention on future multilateral cooperation in the

\begin{itemize}
\item This possible scenario has been pointed out by the legal doctrine. \textit{See} Ted L. McDorman, \textit{An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea}, 40 CANADIAN YEARBOOK OF INTERNATIONAL LAW 119, 126 (2002); Treves, \textit{supra} note 14, 122-123.
\item 33 ILM 969 (1994). This international treaty was adopted by the FAO through 15/93 Resolution during the 27\textsuperscript{th} session of the FAO Conference that took place in November 1993, and started to be a part of the Code of Conduct for Responsible Fisheries when it was adopted in 1995. It entered into force on 24 April 2003. \textit{See} Article IX.
\item It was signed on 8 September 1995 (UN Doc. A/CONF.164/37) and entered into force on 11 December 2001. Two international conferences for revision of this treaty took place on 22-26 May 2006 and on 24-28 May 2010. \textit{See} Articles 30-32.
\item 40 ILM 278 (2001). This Convention was adopted in Honolulu on 5 September 2000 and entered into force on 19 June 2004. \textit{See} Article 31.
\item 41 ILM 257 (2002). This Convention was adopted in Windhoek on 20 April 2001 and entered into force on 13 April 2003. \textit{See} Article 24.
\item 41 ILM 40 (2002). It was adopted on 2 November 2001 in the framework of the Plenary Session of the XXXI General Conference of the UNESCO. \textit{See} Article 25.
\end{itemize}
North-East Atlantic Fisheries;\textsuperscript{28} the Southern Indian Ocean Fisheries Agreement;\textsuperscript{29} the Nairobi International Convention on the removal of wrecks;\textsuperscript{30} and the Agreement on port state measures to prevent, deter and eliminate illegal, unreported and unregulated fishing.\textsuperscript{31}

\section{II. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE ARCTIC}

Until very recently, the ITLOS has not been requested to rule specifically on issues related to the Arctic. We believe that this situation will change substantially in the near future as this polar area could become subject of very diverse disputes regarding different aspects provided by the UNCLOS and other international agreements that grant jurisdiction to the ITLOS, namely: the requirements of environmental protection, the conservation and management of living fishing resources, the delimitation of the distinct maritime areas, the freedom of navigation, etc. Undoubtedly, all these aspects will become even more important on the international maritime scenario due to, \textit{inter alia}, the environmental changes, the rising prices of raw materials and natural resources, and new security concerns. Along these lines we would like to emphasize especially three issues that have already gained significance and where the jurisdiction of the ITLOS has already been raised: (1) the delimitation of maritime areas; (2) the legal status of fisheries in the Arctic; and (3) the issue of freedom of navigation.

Firstly, in relation to the delimitation of the different marine areas in the Arctic, it should be mentioned that at present, except the case of the Hans Island,\textsuperscript{32} there are no dispute with respect to the territory in the Arctic region. However, there are various other disputes and/or potential disputes over the maritime borders and the possible

\textsuperscript{28} It was adopted in London on 11 November 2004 by the 23rd Annual Meeting of the North East Atlantic Fisheries Commission. \textit{See} Article 18 \textit{bis}.

\textsuperscript{29} It was signed in Rome on 7 June 2006 by the following States: Comoros, France, Kenya, Mozambique, New Zealand, Seychelles and the European Union. \textit{See} Article 20.

\textsuperscript{30}IMO document LEG/CONF.16/19, 23.05.2007. It was adopted in Nairobi on 18 May 2007 in the framework of the International Conference on the Removal of Wrecks. \textit{See} Article 15.

\textsuperscript{31} It was signed in Rome in the framework of the 36th meeting of the FAO Conference of 22 November 2009. At present it has been signed by 26 States and the European Union. Concretely, it has been ratified by Chile, Norway and Uruguay, accepted by Gabon and Oman, approved by the European Union and Myanmar, Seychelles and Sri Lanka adhered to it. \textit{See} Article 22(3).

\textsuperscript{32} Which is a small island of only 1.3 km\textsuperscript{2}, being located between Greenland and Ellesmere Island (that belongs to Canada), and which is claimed by Canada and Denmark. For an overview of the dispute between Denmark and Canada in relation to the Hans Island in the Arctic, see Claudia Cinelli, \textit{supra} note 11, 111-115; Christopher Stevenson, \textit{Hans off!: The struggle for Hans Island and the potential ramifications for international border dispute resolution}, 30 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 263, 263-275 (2007).
international straits that are appearing nowadays as a result of the melting of the Arctic ice. To our knowledge, the advisory opinion of the ITLOS delivered in case no. 17 on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Seabed Area, issued on 1 February 2011, could serve as an example for a future delimitation of the continental shelf beyond the national jurisdiction of each of the Arctic States.

It should also be noted that despite the various issues which are particular for the Arctic region and where the ITLOS, hypothetically, could have an important role to play, in practice, this international judicial body has a limited jurisdiction due to reservations made by several Arctic states at the time of signature, ratification, acceptance and approval of the UNCLOS or the accession to this multilateral treaty. In this regard, one of the Arctic states, i.e. the United States of America, has not ratified the Montego Bay Convention yet. Furthermore, states like Denmark, Sweden or Norway expressed reservations to the UNCLOS in relation to the Article 287 of UNCLOS. Hence, they elected the ICJ and not the ITLOS as the unique mechanism for resolving disputes that might arise with respect to the interpretation or application of the provisions of the UNCLOS. Canada and the Russian Federation have excluded the jurisdiction of the ITLOS regarding the disputes either on the interpretation or application of the Articles 15, 74 and 83 of UNCLOS (on the delimitation of the territorial sea, the EEZ and/or the continental shelf between States with opposite or adjacent coasts) or on those involving bays or historic titles. The Russian Federation has also decided, according to Article 298(1)(b) and (c) of UNCLOS, not to recognize the jurisdiction for the ITLOS in relation to the disputes concerning military activities, as well as "disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations". Nevertheless, Russia, at the time of signing the treaty, expressly recognized the jurisdiction of the ITLOS in matters relating to the prompt release of vessels and crews under the provisions of Article 292 of UNCLOS. Iceland stated that, applying Article

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33 Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10.
34 Throughout this paper the following eight states will be considered by us as “Arctic States”: Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation and United States of America.
35 Belorussia and Ukraine have the same position. “Upon signature: 1. […] It recognized the competence of the International Tribunal for the Law of the Sea, as provided for in article 292, in matters relating to the prompt release of detained vessels and crews”. See http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en
298 of UNCLOS, it would elect conciliation as a mechanism for any interpretation of the Article 83 of UNCLOS regarding the delimitation of the continental shelf between States with opposite or adjacent coasts. And finally, Finland is in a different situation as at the time of the ratification of the UNCLOS it declared that it chose both the ICJ and the ITLOS to settle potential disputes concerning the interpretation or application of this Convention and also of the Agreement relating to the implementation of Part XI of the UNCLOS.

Secondly, regarding the issue of the conservation and management of fishery resources in the Arctic, we would like to mention that this ocean faces similar phenomena such as overfishing, or Illegal, Unreported and Unregulated (IUU) fishing, etc. We consider that cases will be brought before ITLOS because of, for example, the prescription of provisional measures under Article 290(5) of UNCLOS and the prompt release of vessels and crews in accordance with Article 292 of UNCLOS. As we stated in the First Part of our paper, in the two scenarios the ITLOS would have a residual compulsory jurisdiction. But once again, it appears the problem of the reservations that each polar state declared in relation to the jurisdiction of the ITLOS to deal with.

Unlike Antarctica where there is, as we shall present in the next Part of our paper, a general system for the conservation of fishery resources based on the Antarctic Treaty System, the Arctic region is characterized by the existence of a multiplicity of different legal regimes that were established by multilateral treaties or by bilateral agreements between coastal states and the fishing nations of long distance such as the Agreement signed in 1988 by the United States of America and the former Soviet Union on mutual fishery relations that since then has been regularly renewed, or the Agreement signed in 1992 by Greenland and the Russian Federation on mutual fishery relations, or the different cooperation Agreements on fishing signed between Norway and the former Soviet Union/the Russian Federation, etc.

36 See Gemma Andreone, “Fisheries in the Antarctic and in the Arctic” in Tamburelli (ed.), supra note 8, 77-78.
39 We are referring to the Agreement on Cooperation in the Fishing Industry, 11 April 1975, Norway-Union of Soviet Socialist Republics, United Nations Treaty Series 983, 7; supplemented by the Agreement Concerning Mutual Relations in the Field of Fisheries, 15 October 1976, Norway-Union of Soviet Socialist Republics, United Nations Treaty Series 1157, 146; and the Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the
And thirdly, with respect to the freedom of navigation in the Arctic waters, it should be noted that the first claim was brought before the ITLOS. On 21 October 2013, the Netherlands submitted a request for provisional measures according to the provisions of Article 290(5) of UNCLOS in relation to its dispute with Russia following the arrest and detention of the ship *Arctic Sunrise* and its crew by the Russian coastal authorities. This request has represented the Case No. 22 of the ITLOS and also the seventh time that this international judicial body has had to rule on the prescription of provisional measures.

In connection with this dispute, we must mention that on 18 September 2013 various activists of the NGO *Greenpeace* tried to climb the oil platform of the Russian consortium “Prirazlomnaya” – that is in the EEZ and the continental shelf of Russia in the Pechora Sea – from its ship *Arctic Sunrise* flying the flag of the Netherlands in order to protest against the exploitation and production of hydrocarbons in that part of the Arctic. That same day, *Greenpeace* activists were arrested by the Russian authorities, and the next day the ship was captured by these authorities, too. All of them were taken to the Russian port of Murmansk, being accused of piracy. While later this accusation was changed by acts of hooliganism and each of the activists were sentenced to two months in jail that they served in a St. Petersburg prison.

In this context, on 4 October 2013, the Netherlands submitted a request for the establishment of an arbitral tribunal under the provisions of the Annex VII of the UNCLOS. But, as Russia did not reply to it within two weeks as it is provided by the Article 290(5) of UNCLOS, on 21 October 2013 the flag State of the ship *Arctic Sunrise* filed a request for provisional measures to the ITLOS, including the release of both, the ship and its crew. The next day, Russia rejected the constitution of an arbitral tribunal according to the provisions of the Annex VII of the UNCLOS and informed the

Arctic Ocean, 15 September 2010. See Barnes, supra note 11, 222-223. See also Geir Hønneland, *Enforcement co-operation between Norway and Russia in the Barents Sea fisheries*, 31 (3) OCEAN DEVELOPMENT AND INTERNATIONAL LAW 249, 249-267 (2000).


41 Article 290(5) CNUDM stipulates: “Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures […]”. 
ITLOS that it would not participate in the proceedings started by the Netherlands the day before. Russia considered that at the time of the ratification of UNCLOS in 1977 it had rejected the arbitration proceedings whose decisions would bind it in relation with the exercise of sovereign rights and jurisdiction.\(^{42}\)

Hence, the residual compulsory jurisdiction of the ITLOS in the cases referred to the prescription of provisional measures provided by the Article 290(5) of UNCLOS represents a novelty of the Montego Bay Convention that seeks that the rights of the parties to a marine dispute are not left unprotected until an arbitral tribunal is constituted, according to the provisions of the UNCLOS.\(^{43}\) This arbitral tribunal shall have full freedom to confirm, change or revoke the provisional measures, if any, decided by the ITLOS.\(^{44}\)

In its Order issued on 22 November 2013, the ITLOS estimated that Russia had to release immediately both the ship Arctic Sunrise and its crew that was on board on 18 and 19 September 2013, once the Netherlands would post a bond of 3,600,000 euros.\(^{45}\) The ITLOS stated that the reservation made by Russia at the time of its ratification of the UNCLOS in relation to the possible mechanisms for disputes settlement referred to the marine scientific research and fisheries, and therefore, not to the freedoms and rights of navigation in its EEZ of the vessels flying the flag of another state. This was precisely the case of this dispute.\(^{46}\)

The ITLOS also considered that the Russian denial to participate in the proceeding initiated by the Netherlands did not constitute an impediment in order to impose provisional measures as the parties had equal opportunities to submit comments thereon. This positioning of the ITLOS is nothing new in international case law as the

\(^{42}\) See Rusia rechaza el arbitraje en el caso del Arctic Sunrise solicitado por Holanda, RIA NOVOSTI, Moscow, 23 October 2013. See also Press Release: Tribunal orders the release of the Arctic Sunrise and the detained persons upon the posting of a bond, ITLOS/PRESS 205, 22 November 2013.


\(^{44}\) For a detailed presentation of these issues, see “Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea. The Gilberto Amado Memorial Lecture held during the 61\(^{st}\) Session of the International Law Commission”, Geneva, 15 July 2009, 12.

\(^{45}\) “Arctic Sunrise” Case (Kingdom of The Netherlands v. Russian Federation), Prescription of Provisional Measures, ITLOS Reports 2013, paragraph 105.

ICJ had ruled in different occasions in the same way.\textsuperscript{47} Besides this, the ICJ has declared that the State which decides not to take part in a case must accept the consequences of its position and even that it is possible that a case continues without that state participating, but being bound by the judgment pronounced in the case.\textsuperscript{48}

In our opinion, it is interesting to see whether in the near future Russia will change its position regarding this dispute and whether \textit{inter alia} this state will comply with the ITLOS Order in Case No. 22 despite its first negation on 22 November 2013.\textsuperscript{49} We consider that in a not too distant future some of the legal issues raised in this case will be analysed by certain international judicial bodies. Some authors have already found similarities between Russia's position in this dispute with the one of the Netherlands, on the one hand, and China's attitude regarding the problem of the arbitration procedure started by the Philippines in January 2013 in relation to the Spratly Islands located in the South China Sea, on the other hand.\textsuperscript{50}

\textbf{III. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE ANTARCTICA}

\textsuperscript{47} In this regards, the following Orders could be mentioned, amongst others: \textit{Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, 12, paragraph 11;} \textit{Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, 30, paragraph 11;} \textit{Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, 99, paragraph 11;} \textit{Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, 135, paragraph 12; etc. See also “Arctic Sunrise” Case (Kingdom of The Netherlands v. Russian Federation), Prescription of Provisional Measures, supra note 45, paragraph 48.}

\textsuperscript{48} \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, 14, paragraph 28. See also “Arctic Sunrise” Case (Kingdom of The Netherlands v. Russian Federation), Prescription of Provisional Measures, supra note 45, paragraph 52.}

\textsuperscript{49} Daria Liubínskaya, \textit{Rusia no acata el veredicto del Tribunal Internacional del Derecho del Mar sobre Greenpeace, RUSIA HOY, 26 November 2013; available at http://rusiahoy.com}

\textsuperscript{50} See Wim Muller, \textit{Great power v small state: some parallels between the Arctic Sunrise case (Netherlands v Russia) and Philippines v China, SOUTH CHINA SEA. DEVELOPMENTS & SETTLEMENT OF DISPUTES, 30 October 2013; Oude Elferink, supra note 46, 13. For a detailed presentation of the problem of the delimitation of the maritime border in the Sea of China and in the East Asia, see MIN GYO KOO, ISLAND DISPUTES AND MARITIME REGIME BUILDING IN EAST ASIA, BETWEEN A ROCK AND A HARD PLACE (2010); Jon M. Van Dyke, Disputes Over Islands and Maritime Boundaries in East Asia, in MARITIME BOUNDARIES DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 39, 39-75 (Seoung-Yong Hong and Jon M. Van Dyke eds., 2009).}
In contrast to the Arctic, the Antarctic Treaty represents a clear legal framework that has facilitated that four claims regarding the prompt release of vessels and crews according to the Article 292 of UNCLOS have been brought before the ITLOS, namely: “Camouco”, “Monte Confurco”, “Grand Prince” and “Volga”. The ITLOS only ruled on three of them as it considered not having jurisdiction in the "Grand Prince" case concerning Article 292 of UNCLOS. Therefore, a fifth of the total twenty contentious cases brought before the ITLOS so far refers to the Southern Ocean waters, showing the importance of the residual compulsory jurisdiction of the ITLOS in this field.

Even though IUU fishing is a worldwide phenomenon and is recorded in all oceans and seas, illegal fishing was specifically associated with activities carried out in the southern waters, either in the Antarctic or in waters where CCAMLR has recognized enforcement jurisdiction. Especially interesting is the cooperation between France and Australia in the southern waters as both of them are concerned by the protection of their EEZ of IUU fishing around the French archipelagos of Kerguelen and Crozet, and of the Australian islands of Heard and McDonald, respectively. IUU activities carried out especially in the EEZs of France and Australia are mentioned in three cases. However, the ITLOS has not yet assessed whether fishing vessels accused of being involved in IUU fishing activities actually have done this type of illegal fishing. The cooperation between France and Australia in the fisheries sector is already consolidated. This

51 Article IV of the Antarctic Treaty has frozen the demands of the delimitation of the EEZs and continental shelves that states could request regarding this continent. Therefore, the provisions of the UNCLOS do not apply to these situations, and therefore, the ITLOS has no jurisdiction in this field. In addition, under Article XI.2 of the Antarctic Treaty, the ICJ and not ITLOS will have jurisdiction in the case of other issues that could be the subject of a dispute between states with respect to the Antarctic.
52 “Camouco” (Panama v. France), Prompt Release, Judgment, ITLOS Reports 2000, 10.
53 “Monte Confurco” (Seychelles v. France), Prompt Release, Judgment, ITLOS Reports 2000, 86.
56 Stuart Kaye, IUU Fishing in the Southern Ocean: Challenge and Response, in ANTARCTICA. LEGAL AND ENVIRONMENTAL CHALLENGES FOR THE FUTURE 39, 40 (Gillian Triggs & Anna Riddell eds., 2007). See also Erik J. Molenaar, Southern Ocean Fisheries and the CCAMLR Regime, in Oude Elferink & Rothwell (eds.), supra note 12, 293-315.
57 This illicit fishing was introduced in the international agenda in 1997. For more details, see Gemma Andreone, Illegal, Unreported, Unregulated Fishing, in THE ANTARCTIC LEGAL SYSTEM AND ENVIRONMENTAL ISSUES 121, 121-123 (Gianfranco Tamburelli ed., 2006). For an analysis of the evolution of this phenomenon on the international stage, see José Manuel Sobrino Heredia & Adela Rey Aneiros, Plan de Acción Internacional para prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada, LIV (1) REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 481, 481-487 (2002).
58 See RACHEL J. BAIRD, ASPECTS OF ILLEGAL, UNREPORTED AND UNREGULATED FISHING IN THE SOUTHERN OCEAN 21-24 and 161-182 (2006); Jean-Michel Manzoli, La lutte contre la pêche illicite dans la zone économique exclusive des terres australes et antarctiques françaises,
collaboration is not limited to the work done in the framework of the CCAMLR,\textsuperscript{59} but goes further such as facilitating the monitoring and control of the fishing activities in these areas, identifying and pursuing the potential offenders and promoting the exchange of information\textsuperscript{60} in large marine areas where the coastal States have limited capacity when such marine areas must be covered as a whole.\textsuperscript{61}

Turning now to the ITLOS case law in this field, we would like to mention the "Camouco" Case (Panama v. France) involving the Camouco fishing vessel that was flying the Panamanian flag and that had a Panamanian license to fish Patagonian Toothfish in the south Atlantic international waters On 28 September 1999 the Camouco was boarded by the French surveillance frigate Floréal in the EEZ of the Crozet Islands where France has enforcement jurisdiction. It was accused, among other things, of illegal fishing carried out in the EEZ of these islands and of unreported fishing.\textsuperscript{62} The court of first at Saint-Paul decided on 8 October 1999 a bond of 20 billion French francs to get the vessel released.\textsuperscript{63} This was considered by Panama as unreasonably high.\textsuperscript{64}

In the "Monte Confurco" Case (Seychelles v. France), the Monte Confurco fishing vessel was involved that was sailing under the flag of Seychelles with a license to carry out fishing activities in international waters. On 8 November 2000 this fishing vessel was boarded in the EEZ of the Kerguelen Islands that belong to the French territories of the Southern Ocean, too, by the same French surveillance frigate as in the case above. This fishing vessel was accused, among other things, of illegal fishing and unreported

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\textsuperscript{59} Julio Jorge Urbina, Conservación de los recursos vivos marinos y lucha contra la pesca ilegal, no declarada y no reglamentada en el océano Antártico, in Jorge Urbina & Ponte Iglesias (coords.), supra note 19, 175. For an overview of the CCAMLR efforts in the fight against IUU fishing, see Philip Bender, A State of Necessity: IUU Fishing in the CCAMLR Zone, 13 (2) OCEAN AND COASTAL LAW JOURNAL 233, 233-280 (2008); Alan Brown, Some Current Issues Facing the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), in Gillian Triggs & Anna Riddell (eds.), supra note 56, 85-108.

\textsuperscript{60} For an analysis of the shiprider agreement between France and Australia, see DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 144-146 (2009); Donald R. Rothwell, Law enforcement in Antarctica, in Hemmings, Rothwell & Scott, supra note 9, 142-143.

\textsuperscript{61} This cooperation is reflected in the shiprider agreement signed on 8 January 2007 between France and Australia.

\textsuperscript{62} "Camouco", supra note 52, paragraphs 25-29.

\textsuperscript{63} Id., paragraph 36.

\textsuperscript{64} Id., paragraph 64.
fishing of 158 tonnes of Patagonian toothfish; the bond set by the French judicial authorities was of FF 95,4 millions of French francs plus judicial costs.\textsuperscript{65} In this case, the defendant (France) argued that the bond was reasonable as illegal fishing was involved, i.e. illegal activities that are a threat to the future resources and measures adopted by the CCAMLR in relation to the conservation of the Patagonian toothfish. The ITLOS took note of this argument.\textsuperscript{66}

In the "Volga" Case (Russia v. Australia), the long-line fishing vessel Volga was involved. It was flying the flag of Russia and had a Russian fishing license when it was arrested by the Royal Australian Navy frigate HMAS Canberra on 7 February 2002. The arrest was carried out beyond the limits of the Australian EEZ around the Heard Island and McDonald Islands.\textsuperscript{67} Regarding the fact that the arrest was made outside Australian EEZ, Australia argued that, on the one hand, its navy helicopter had previously adverted the Russian vessel when sailing in its EEZ that it would be arrested. On the other hand, according to some initial calculations it was estimated that the vessel would still have been in the EEZ when it was boarded.\textsuperscript{68} The Australian judicial authorities set a bond for the release of the vessel of 3,332,500 Australians dollars.\textsuperscript{69} The ITLOS affirmed in this case that it understood the international concerns about IUU and also appreciated "the objectives behind the measures taken by States, including the States Parties to CCAMLR to deal with the problem".\textsuperscript{70} However, it pointed out that in this case it only was asked whether the bond set by the Australian judicial authorities was reasonable in the light of the provisions of Article 292 of UNCLOS.\textsuperscript{71} This has led to a part of the doctrine to assert that in this case the ITLOS seemed to suggest that "the problem of continuing illegal fishing in the Southern Ocean" was not an issue covered by Article 292 of UNCLOS.\textsuperscript{72}

In the three cases mentioned above, the main issue was whether Article 292 of UNCLOS permits to ensure prompt release of vessels and crews made after the posting of a reasonable bond or other financial security,\textsuperscript{73} in conformity with Article 73(2) of

\textsuperscript{65} "Monte Confurco", supra note 53, paragraphs 27-36.
\textsuperscript{66} Id., paragraph 79.
\textsuperscript{67} "Volga", supra note 55, paragraphs 30-32.
\textsuperscript{68} Id., paragraph 33.
\textsuperscript{69} Id., paragraph 72.
\textsuperscript{70} Id., paragraph 68.
\textsuperscript{71} Id., paragraph 69.
\textsuperscript{72} In this regard, see Nelson, supra note 17, 971.
\textsuperscript{73} For a detailed analysis of the issue of the reasonable bond in the ITLOS’s case law, see Erik Franckx, "Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea, 32 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 303, 303-342 (2001-2002).
UNCLOS. According to Article 292 of UNCLOS, if the coastal State does not respect the provisions laid down in this article, the dispute shall be brought before a court as agreed by the parties or to the ITLOS, if it had not been reached an agreement within ten days from the detention. The judicial body in question will immediately consider the request for release, without prejudice to the merits of any pending case against the vessel, its owner or its crew before the courts of the State that stopped the ship and its crew. At the same time, the authorities of the boarding State “shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew”.\textsuperscript{74} It has also to be mentioned that Article 73(2) of UNCLOS limits the power of the coastal States to seize and stop those vessels engaged in IUU fishing.\textsuperscript{75}

As Judges MENSAH and WOLFRUM expressed in their joint Separate Opinion in the “Juno Trader” Case, the goal of the prompt release procedure laid down in the Article 292 of UNCLOS is to provide the release of that ship pending of a final decision of a national judicial body of the coastal State, even though the involved vessel is still considered an arrested ship until the end of the national proceedings.\textsuperscript{76} At the same time, Judge ad hoc SHEARER stated in the “Volga” Case that these UNCLOS provisions are meant to achieve a fair balance between the interests of the flag States (and especially the flag States of fishing vessels) and the coastal States regarding their right to manage and conserve their respective EEZs.\textsuperscript{77} In this regard, it has to be stressed that Article 292 of UNCLOS introduced a new legal proceeding that had not previously existed in international law and that, in fact, has not known any other subsequent developments in a new international treaty.\textsuperscript{78} Furthermore, it is noteworthy that this proceeding has not been used in other specific areas than fisheries. We believe that these provisions could also be applied to, \textit{inter alia}, marine pollution offenses.\textsuperscript{79} In the case of fisheries there is a clearer formulation of the provision regarding the release of a vessel, while in the case of pollution, provisions are drawn in a more deliberately

\textsuperscript{74} Article 292(4) of UNCLOS.
\textsuperscript{75} Andrew Serdy & Michael Bliss, \textit{Prompt release of fishing vessels: state practice in the light of the cases before the International Tribunal for the Law of the Sea}, in Oude Elferink & Rothwell (eds.), \textit{supra} note 12, 275-276.
\textsuperscript{77} “Volga” (Russian Federation v. Australia), \textit{Prompt Release, Dissenting Opinion of Judge ad hoc Shearer, ITLOS Reports 2002}, 19.
\textsuperscript{79} See Article 220(6) and (7) of UNCLOS and Article 226(1) (b) and (c) of UNCLOS.
As Judge ad hoc SHEARER said, who was dealing with the “Volga” Case, the ITLOS committed the error to be too prudent in the cases of the prompt release of vessels and crews.\(^{81}\) Perhaps this judicial body should have gone further to the bottom of these cases from a legal point of view.\(^{82}\)

As mentioned before, at present the ITLOS has not ruled specifically on IUU fishing. But this tribunal has further developed its position– from not specifically mentioning this illegal type of fishing to took note of the concerns expressed and even that it understood the international concerns regarding IUU fishing. We consider that in the "Volga" Case the ITLOS wanted to convey operators engaged in IUU fishing that it would not be used as a tool to get paying a lower bond for the release of their fishing vessel (and of their crews) that were seized by coastal States for alleged illegal fishing that gave them very high economic benefits. It is in the interest of the ITLOS itself that the provisions laid down in Article 292 of UNCLOS are not used to undermine either the legitimate efforts of the coastal States to preserve and protect their fisheries resources or the global or regional efforts to address this illicit fishing.\(^{83}\)

Moreover, as Judge ad hoc SHEARER said in the "Volga" Case, the ITLOS has to take into account that the serious allegations of illegal fishing refers to the protection of fishery resources that are in danger in a remote and inhospitable part of the oceans where it is difficult for the surveillance vessels of the coastal States to provide monitoring.\(^{84}\) We believe that in the near future this situation may know considerable changes as a consequence of the submission of a request for an advisory opinion on 28 March 2013 to the ITLOS, which is the Case No. 21. This request was submitted by the Sub-Regional Fisheries Commission (SRFC),\(^{85}\) in response to the decision taken in

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\(^{80}\) Tuerk, supra note 4, 199-200.

\(^{81}\) “Volga” (Russian Federation v. Australia), Prompt Release, Dissenting Opinion of Judge ad hoc Shearer, ITLOS Reports 2002, 7.


\(^{83}\) See Serdy & Bliss, supra note 75, 293-294.

\(^{84}\) “Volga” (Russian Federation v. Australia), Prompt Release, Dissenting Opinion of Judge ad hoc Shearer, ITLOS Reports 2002, 10.

\(^{85}\) The Sub-Regional Fisheries Organization (SRFO) is a regional fisheries management organization created on 29 March 1985. It is formed by seven countries: Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leona; its seat is in Dakar (Senegal). For more information, see the SRFC’s web site http://www.spcsrpo.org/
February 2013 in the aftermath of the "Workshop in the fight against IUU fishing" held in Dakar.\textsuperscript{86} The ITLOS was consulted regarding the following four questions regarding IUU fishing phenomenon: (1) the flag State obligations in those cases in which IUU fishing activities are conducted in the EEZ of a third State Party to the UNCLOS; (2) the flag State obligations for IUU fishing by vessels flying their flag; (3) if a fishing license is issued to a ship within the framework of an international agreement with the flag State or with an international agency, if such State or such agency should be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question; and (4) the rights and obligations of the coastal State to ensure the sustainable management of shared stocks or stocks of common interest, especially the small pelagic stocks and tuna.\textsuperscript{87}

In relation to these issues, on 24 May 2013 the ITLOS published an Order by which either the SRFC or other intergovernmental organizations were invited to submit, before 29 November 2013, written statements on the issues raised in this request for an advisory opinion under the provisions of Articles 138(3) and 133(3) of the Rules of the ITLOS.\textsuperscript{88} Later, by Order of 3 December 2013, the ITLOS extended this deadline to 19 December 2013.\textsuperscript{89} Twenty State Parties to the UNCLOS and the European Union (EU), seven international organizations, the United States of America and the WWF International (it submitted an Amicus Curiae) answered to this invitation. And under Article 133(3) of the Rules of the ITLOS, by its Order of 20 December 2013, the ITLOS fixed 14 March 2014 as deadline within which those that had submitted written statements on the issues raised in the request for an advisory opinion might submit written comments on the comments already made within the time-limit prescribed.\textsuperscript{90} In this occasion, four State Parties to the UNCLOS and the EU, one international organization and the WWF International (it again submitted an Amicus Curiae) submitted written statements on previously made statements. Finally, in accordance

\begin{footnotesize}
\begin{enumerate}
\item[86] "Atelier sur la lutte contre les pêches illicites, non déclarées et non réglementées (PINN)", Dakar, 25-26 February 2013; \url{http://www.spcsrp.org/medias/csrp/comm/at_PINN_publication_web.pdf}
\item[87] For more information, see \url{http://www.itlos.org/index.php?id=252&L=0%20and%207%3D2}
\item[88] Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Order of 24 May 2013, ITLOS. For an overview of these issues, see Michael A. Becker, Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion, 17 ASIL INSIGHTS (2013).
\item[89] Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Order of 3 December 2013, ITLOS.
\item[90] Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Order of 20 December 2013, ITLOS.
\end{enumerate}
\end{footnotesize}
with Article 133(4) of the Roles of the Tribunal, by Order of 24 May 2013 the ITLOS fixed 2 September 2014 as the date for the opening of the oral proceedings.\textsuperscript{91}

Despite the doubts expressed about the ITLOS jurisdiction to hear this request for an advisory opinion, we believe that if this judicial body decides to discuss questions raised in the request mentioned above, it has an excellent opportunity to, on the one hand, express its position regarding the interpretation of certain provisions of the UNCLOS regarding fisheries and also on other international treaties relating to the enforcement jurisdiction of the States particularly affected by the phenomenon of IUU fishing. On the other hand, it would have the opportunity to interpret various provisions on fisheries and the responsibility of States for internationally wrongful acts referred to fishing activities. For example, it would have to study, among other issues, the problem of the obligations of the EU and its Member States\textsuperscript{92} in relation to the fishing vessels flying the flag of one of the EU Member States and their possible responsibility for violation of the provisions of the international law of the sea.

Undoubtedly, the ITLOS faces delicate and controversial issues. The status of ratification of various international treaties whose provisions could apply in relation to IUU fishing is adding to the complexity of this scenario, too. In this regard, it has to be mentioned that all the members of the SRFC are States Parties to UNCLOS, but only Guinea and Senegal are Parties to the 1995 New York Agreement on straddling fish stocks and highly migratory fish stocks, while Guinea-Bissau and Mauritania have signed it and the other three States of the SRFC have not signed it yet. Furthermore, the 2001 International Plan of Action to prevent, deter and eliminate IUU fishing is voluntary, and the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing has not entered into force yet. It is noteworthy that none of the seven State Parties to the SRFC has ratified, accepted, approved or acceded to the 2009 agreement. We also believe that it will be interesting to know the position of the ITLOS in relation to the international fisheries partnership agreements signed by the EU with

\textsuperscript{91} Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Order of 14 April 2014, ITLOS.
\textsuperscript{92} For an analysis regarding either the international responsibility of the international organizations and of their members or the division of this responsibility for an international wrongful act, see Efthymios Papastavridis, Allocation Responsibility between EU and Member States: The Case of Piracy off Somalia, in INSECURITY AT SEA: PIRACY AND OTHER RISKS TO NAVIGATION 91, 91-100 (Gemma Andreone, Giorgia Bevilacqua, Giuseppe Cataldi & Claudia Cinelli eds., 2013). For a study regarding the relation between the European Union and the ITLOS, see Miguel García García-Revillo, La Unión Europea y el Tribunal Internacional del Derecho del Mar, in Vázquez Gómez, Adam Muñoz and Cornago Prieto (coords.), supra note 4, 413-442.
all the States of the SRFC and regarding the shiprider agreements signed by the United States of America with these African countries in the field of illicit transnational activities off the coast of West Africa.

**FINAL REMARKS**

The ITLOS was established with the aim to provide an effective disputes settlement mechanism regarding issues concerning the oceans and seas and to complement existing mechanisms.

In its eighteen years of existence, the ITLOS has dealt with twenty demands and two requests for advisory opinions. These, although comparatively modest, make it now possible to develop an international significant case-law corpus. Compared to other dispute settlement mechanisms and international judicial bodies, it can be observed that the ITLOS’s activity even stands out. We believe that these developments reflect the intention to answer a number of specific issues that escaped the drafters of the Magna Charta of the Sea, but which characterize the current maritime scenario.

A good example of the importance of the current work and potential of ITLOS is its judicial activity regarding the polar regions. We have shown in this paper that at the end of 2013 the first demand directly concerning the polar area was brought before the ITLOS. The *Arctic Sunrise Case* reflects very well the position of the ITLOS and which can be understood as additional to former decisions which could be perfectly applicable to the Arctic, too.

Regarding the Antarctica, we elaborated on those cases where the ITLOS decided on issues that affect the conservation and management of fishery resources in the Southern Ocean, i.e. about IUU fishing. By discussing three cases - the "Camouco" Case, the "Monte Confurco" Case and the "Volga" Case – we showed that the ITLOS did not assess illicit fishing activities carried out by fishing vessels accused of being practicing this type of fishing directly, but only ruled whether or not the provisions of Article 292 of UNCLOS on the basis of Article 73(2) of this Convention were applicable. Nevertheless, this scenario is currently changing as the ITLOS has to rule on the request for an advisory opinion submitted by the SRFC regarding specifically IUU fishing on 28 March 2013.

In connection with this illicit fishing, it should be mentioned that, in addition to be understood as an international crime against the living marine resources in some
parts of the world, the doctrine\textsuperscript{93} starts to consider it, too, as a new form of transnational organized crime.\textsuperscript{94} This would involve activities such as poaching of marine species where it is considered that transnational organized criminal groups could be involved, or crimes committed by various transnational fishing operators on the living marine resources \textit{inter alia} on the toothfish.\textsuperscript{95} In some cases, these illicit fishing activities are integrated into structures of transnational organized crime that damage the very fabric of society in certain companies and certain countries, increase corruption and contribute to the violation of human rights. Moreover, it also represents a serious threat to the marine biodiversity and fragile ecosystems. Practice has shown that this type of fishing affects, in a unique manner, different species with a higher economic value that are in remote parts of the Southern Ocean, easily escaping the control of the coastal States due to the distance and very difficult weather conditions. Hence, the concerns of the coastal States and of regional fisheries management organizations with competences in these waters and also the importance of the ITLOS that in this way opens its judicial activity to polar waters.

In our opinion, the appearance of organized groups engaged in IUU fishing activities obliges the coastal States to adapt to these new scenarios. We also believe that it would not be possible anymore to apply only the classic rule in international law of the sea according to which the flag State has the responsibility concerning the fight against the various crimes committed on the high seas and the coastal State has responsibility regarding those crimes committed in the different marine areas where it has enforcement jurisdiction. The ITLOS and the international community as a whole face a real challenge from the complexity of the phenomenon of IUU fishing. At present, multiple strategies are needed to address this illicit fishing and this international judicial body is only one of them.

\textsuperscript{93} In this regard, see José Manuel Sobrino Heredia, \textit{Una nueva manifestación de la delincuencia organizada transnacional: las actividades de pesca ilegal, no declarada y no reglamentada}, in DERECHO DEL MAR Y SOSTENIBILIDAD AMBIENTAL EN EL MEDITERRÁNEO 151, 151-179 (José Juste Ruiz & Valentín Bou Franch dirs. & José Manuel Sánchez Patrón coord., 2013).

\textsuperscript{94} For an analysis of the term “organized transnational crime”, see TOM OBOKOTA, TRANSNATIONAL ORGANIZED CRIME IN INTERNATIONAL LAW 1-80 (2010).