

The Rules of the International Tribunal for the Law of the Sea: A Commentary by P CHANDRASEKHARA RAO AND PH. GAUTIER [(eds) (Martinus Nijhoff Publishers, 2006; ISBN-13: 978-9004152403, 521 pp, hb)]

The Rules of the International Tribunal for the Law of the Sea: A Commentary is a significant examination of the working of the International Tribunal for the Law of the Sea ('ITLOS' or 'Tribunal') by those who are most intimately familiar with its operation. The contributors to the volume are limited to the judges (past and present) of the Tribunal, as well as the Registrar, Philippe Gautier (also a co-editor), and a Legal Officer of the Tribunal (Ximena Hinrichs) (ix). Each contributor is responsible for the commentary for specific articles in the Rules. As the authors of the *Commentary* are those who were nearly all involved in the drafting of the Rules themselves and will be the primary interpreters of those provisions, the authoritative nature of this work cannot be doubted.

In the Preface, the editors indicate that the task of the Tribunal in formulating the Rules has been to seek a balance between the well-accepted aspects of international judicial procedure and ensuring the efficient and speedy function of the Tribunal (vii). The importance of these key themes is highlighted throughout the *Commentary*. The Preface further acknowledges that the commentaries to the rules of the International Court of Justice ('ICJ') and the Permanent Court of International Justice ('PCIJ'), as well as the rules of those institutions themselves, served as especially useful precedents (vii–viii).

I. Overview of the Commentary

The table of contents of the *Commentary* provides a clear guide for finding particular Rules, and helpfully annexed to the volume are the key documents, including a full set of the Rules and the Statute of the ITLOS. As many of the Rules need to be read in conjunction with the Statute, the inclusion of the latter is indispensable. Also contained in the Annexes are the Resolution on the Internal Judicial Practice of the Tribunal and the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal. The provisions of the Resolution are summarized in the commentary to Article 40, and the use of a separate Resolution allows the Tribunal to update or alter its practices with relative ease. The Guidelines are anticipated in Article 50 of the Rules and permit further elaboration on procedure in a separate document. The inclusion of such minutiae in separate documents ensures that the currency of the Rules, and hence the *Commentary*, will continue for a reasonable length of time.

The potential utility of the *Commentary* is further enhanced by the inclusion of the bibliography, index of case references and a clear general index to the volume. A particularly useful tool for researchers is the inclusion of a list of page references for articles of the UN Convention on the Law of the Sea ('UNCLOS'), the Statute and Rules of the Tribunal, as well as the Statute and Rules of the ICJ.

The Rules themselves are divided into three Parts: Use of Terms, Organization and Procedure. Part I consists of Article 1, which sets out the definitions of terms in the Rules; the latter two Parts then comprise the bulk of the Rules.

In addressing Organization in Part II, the Rules encompass the selection and functions of the Tribunal itself (including an elaboration on the election of judges, their powers and roles in different situations), Chambers of the Tribunal (including the Seabed Disputes Chamber and Special Chambers), the Registry, the internal functioning of the Tribunal and the official languages of the Tribunal.

Part III of the Rules deals with Procedure. An innovation of the ITLOS Rules was to include an initial Section in Part III that sets forth General Provisions, most of which are elaborated on in subsequent Sections. Several of the General Provisions (such as Article 47 on joinder and Article 49 on avoiding unnecessary delay or expense) reflect the key themes of the operation of ITLOS, including transparency, cost-efficiency and showing due regard to the views and wishes of the parties. The other Sections of Part III address: proceedings before the Tribunal; incidental

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proceedings; proceedings before Special Chambers; prompt release of vessels and crew; proceedings in contentious cases before the Seabed Disputes Chamber; judgments, interpretation and revision; and, advisory proceedings.

II. Aspects of the Substance of the Rules and their Commentaries

Various features of the Rules set forth in the *Commentary* are worth further reflection in light of their potential contribution to the development of international law and procedure.

Non-State Actors

Unlike the ICJ, the Rules of the Tribunal had to address the implications of non-state actors participating in proceedings before the ITLOS. In particular, international organizations or parties from 'sponsoring States' may appear before the Tribunal and their right to appoint *ad hoc* judges needed to be addressed (as seen in Article 22). Article 52 of the Rules further takes account of special procedures needed for non-state actor parties in relation to communications between the Tribunal and these participants. The Tribunal opted to make the State the main conduit responsible for transmitting information, which may seem counter to the distinct feature of ITLOS in being accessible to non-state entities. The rationale given in the *Commentary* for this preference in communicating through the State is that it is the approach followed in Article 44 of the ICJ Statute (154). It may be questioned whether Article 44 was an appropriate benchmark given the differences between the ITLOS and the ICJ in relation to non-state actors, but it is an approach that will most likely facilitate the working of the Tribunal.

The commentary to Article 84 addresses the question of participation by non-governmental organizations, and notes that this involvement is distinct to that of intergovernmental organizations unless called on by one of the states parties to the case (236). While some international courts and tribunals have confronted the issue of submission of *amicus curiae* briefs (most notably the dispute settlement panels of the World Trade Organisation), the *Commentary* merely notes that it may be called upon to deal with this issue in the future (p. 237). The views of all the judges may not be completely aligned on this issue, however, as it is subsequently noted in the commentary to Article 133 that '[i]n this day and age, the important role of some non-governmental organizations deserves to be recognized by the Tribunal' (385).

Chambers

One Section of the Rules addresses the Seabed Disputes Chamber, and it is noted that although during the negotiations of the UNCLOS, this Chamber had been envisaged as an entity independent of ITLOS, the Tribunal decided to integrate it fully in organizing its work. To this end, the Rules anticipate that the Seabed Disputes Chamber will generally operate consistently with the processes set out for the Tribunal with distinct Rules being set out to the extent required given its specific jurisdiction and role under the UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS.

The Rules on Proceedings before Special Chambers (Section D of Part II) largely corresponds to the rules and practice of the ICJ. Section C of Part II of the Rules deals with Special Chambers, and the (relatively) lengthy introduction to this section highlights the comparability of using Chambers with *ad hoc* arbitration, especially in relation to the smaller number of tribunal members and the parties' control in selecting who will sit on the Chamber. It is noted in the *Commentary* that ITLOS has established two special Chambers: The Chamber of Fisheries Disputes and the Chamber for Marine Environment Disputes (75). ITLOS has now also established a Chamber for Maritime Delimitation Disputes.¹ Beyond designated Special Chambers,

¹ ITLOS/Press 108, 'The Tribunal forms a standing special chamber to deal with maritime delimitation disputes', March 16, 2007.

states parties also have the option of an ad hoc Chamber being established for a specific dispute (as per Article 15(2) of the Statute).

ITLOS has established a Chamber of Summary Procedure, in accordance with Article 15 of its Statute. The *Commentary* provides some indication as to what purposes this Chamber will serve, although it is noted that in the two instances that a party has sought to access this Chamber, the other party has not consented (67). It is perhaps the novelty of this aspect of the organization of the Tribunal that has resulted in parties resisting its use and the *Commentary* rightly allows for some flexibility in the possible uses of this Chamber in the future.

Registry

The Section in the *Commentary* on the Registry notes at the outset that the broad meaning of the 'Tribunal' encompasses not only the elected judges but also the secretariat affiliated with the organization. The operation of the ITLOS Registry is modeled on that of the ICJ, though again with some modifications to reflect the different work of the ITLOS (notably in relation to the possible appointment of an Assistant Registrar). The provisions in the Rules that deal with the Registry not only elaborate on the Statute's articles on this body, but also provide the framework for more detailed regulations that are set out in the Staff Regulations and Staff Rules of the Tribunal and the Instructions for the Registry. Even Article 36, which provides quite a detailed list of the functions of the Registrar, still anticipates that other tasks may be assigned to the Registrar.

The commentary to the articles on the Registry tends to provide more substance to the Rules under discussion, compared to some of the other commentary on the Organization of the Tribunal. In this regard, information is provided on the practice of the Tribunal to consider candidates for the Registrar's position who had responded to public notices for the position, as well as persons actually known to Members (only the latter being the avenue articulated in the Rules) (90). One conspicuous feature of the commentary on the Registry is that it is the only part of the volume (including the Rules themselves) to use gender-neutral language.

Oral Proceedings

The text on oral proceedings (Articles 69 to 84) in the *Commentary* is especially useful, as information as to reasons behind the drafting of the Rules is provided, and the connections to and divergences from the ICJ and the work of the Preparatory Commission are articulated. For example, in the commentary to Article 71 (addressing the production of documents after the closure of the written proceedings), the *Commentary* explains deviations from the ICJ Rules as being either a question of style or because of the efficiency imperative motivating the Rules generally (206). Further, in discussing the Tribunal's power to authorize production of a document 'if it considers production necessary', the commentary explains that 'Necessary' is a sterner test than 'desirable', but no doubt the Tribunal would adopt a flexible approach and pay regard to the interests of both justice and procedural fairness' (207).

In addressing the running of the hearings, the *Commentary* refers to the practice of the ITLOS in relation to the questioning of counsel, witnesses and experts. Similarly to the ICJ, the ITLOS experience reflects quite a passive bench. The lack of interaction between bench and bar is justified in the *Commentary* in terms of the availability of the initial deliberations providing a forum for judges to raise questions for discussion and to refer certain questions to the President to raise with the parties (218). Also, the requirements imposed on the parties to focus on points of disagreement in their pleadings provides a means for the issues to be narrowed to the key areas of differences and so reduces the need for the judges to manage the case from the bench (see 218). This approach is ultimately the most realistic given the size of the membership of the ITLOS (as noted in the *Commentary*, 227).

Provisional Measures

The commentary on the Rules relating to provisional measures proceedings provides some insight into the standards to be met for the prescription of provisional measures. Of particular interest is

the commentary to Article 89 on the prescription of provisional measures, which claims that there is a need for 'urgency', although not specifically required under the UNCLOS, the ITLOS Statute or even the Rules, as 'such obligation follows from the nature of provisional measures' (250). A distinction is thus drawn between 'urgency' as implicit in the nature of provisional measures and the 'urgency' explicitly required in relation to provisional measures for Article 290(5) in that there is a difference between the urgency of the situation and 'the necessity to make a decision before the arbitral tribunal is constituted' (250).

Article 90 of the Rules anticipates the possibility of a provisional measure: 'Pending the meeting of the Tribunal, the President of the Tribunal may call upon the parties to act in such a way as will enable any order the Tribunal may make on the request for provisional measures to have its appropriate effects'. This power was accorded to the President to allow for situations where there may be irreparable or significant damage to the marine environment. Although a significant grant of authority, '[i]t is evident that the President will make use of this power only in exceptional cases.' (253).

A particular feature of the ITLOS in issuing orders for provisional measures has been the inclusion of a requirement on the parties in Article 95 of the Rules to provide reports, or potentially further information, to the Tribunal in relation to the steps taken, or proposed to be taken, in complying with the provisional measures. It is explained in the *Commentary* that the 'Tribunal may thus take a proactive role to ensure the implementation of the provisional measures it has prescribed' (261).²

Preliminary Proceedings and Objections

An unusual aspect of the dispute settlement procedure set out in the UNCLOS is the inclusion of Article 294, which entails preliminary proceedings to determine if the reference of a dispute under Article 297 of the UNCLOS constitutes an abuse of legal process or whether prima facie it is well-founded. The Tribunal sets forth the procedure for this type of application in Article 96 of the Rules and does not purport to provide an interpretation of Article 294 of the UNCLOS, although acknowledging that its interpretation 'is not devoid of difficulties' (265). The detailed commentary on this provision nonetheless seeks to explain the procedure in such a way as to elucidate several of the difficult decisions to be resolved by the Tribunal in addressing such an application.

Prompt Release of Vessels

The commentary on the Rules for the 'Prompt release of vessels and crews' draws extensively on the existing jurisprudence of the Tribunal in addressing applications under Article 292 of the UNCLOS. In this regard, the *Commentary* goes beyond simply setting out and explaining the particular Rules themselves but incorporates discussion of various issues and claims raised and resolved (or not) by the Tribunal in its earliest cases. The commentary to Article 110 of the Rules sets out the jurisdictional requirements that may be drawn from the ITLOS jurisprudence and the commentary to Article 113 provides a handy synopsis of the admissibility arguments and each of the determinations of the Tribunal.

Helpfully, the *Commentary* also discusses requirements around an entity presenting a claim 'on behalf of the flag state'. The authorizing agents in previous cases are identified and so provide some example of what will be acceptable in this situation (309–310). It is further noted:

The Tribunal has adopted instructions to the Registrar in order to permit him to ensure that an authorization to submit an application on behalf of a flag State is duly delivered by a competent authority of that State and to assist interested parties, in this regard, if necessary (310).

² See also Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2004), p. 79.

Prompt release proceedings of their nature require that the Tribunal respond quickly. To this end, Article 112 of the Rules establishes a strict timetable to be followed by the parties and the Tribunal. It is noted in the *Commentary* that the initial timetable followed for prompt release proceedings had proved impractical and unrealistic in its operation (requiring the judges to work weekends!) and small adjustments were made (319). These changes were tested in the *Volga* case and demonstrated that the Tribunal could still operate efficiently and did not necessarily need to take all of the additional time that had been allocated under the Rules if possible to proceed otherwise (319).

Advisory Proceedings

Section H of Part III deals with advisory proceedings and the introduction to this subsection notes the indebtedness of the Tribunal to the earlier rules and practice of the PCIJ and the ICJ (reference to earlier decisions of the ICJ is the most extensive in this part of the *Commentary*). Although it is acknowledged that the instances where the Tribunal may be able to give an opinion are in fact quite limited, the *Commentary* suggests that the power of the Tribunal should be interpreted quite broadly (394).

III. Conclusion

The *Commentary* is mostly written in a very neutral style, and does not often engage in excessive speculation or explanation as to why a rule was included or phrased in a particular way. In some places, the *Commentary* adds very little to the text of the rule (eg 190), or does not explain why changes were made to the Rules during the drafting process (eg 163). By contrast, the commentary to Article 73 (on oral proceedings) is an archetype for what a commentary to particular court rules should comprise: the earlier draft of the rules, the original source of the rules (from the ICJ or the PCIJ), what changes were made during the drafting and why those changes were made. It further places the operation of the Rule in context by discussing how it has been interpreted and applied in the work of ITLOS thus far, which provides some indication to parties before the Tribunal as to what approach may be taken in future cases. The *Commentary* often includes references to the early decisions of the Tribunal, most commonly by way of footnote but occasionally in the text itself (for example, in Article 19 in relation to the appointment of ad hoc judges). In addition, the *Commentary* notes where certain Rules have not yet been put to the test in any of the decided cases. Fortunately, this exemplary approach has been followed throughout much of the *Commentary*, even though it is apparent that what each writer perceived as important for a commentary to particular Rules was not always consistent.

Even if more detail or explanation may have been desirable on occasions, it must still be acknowledged that a predominantly non-controversial articulation is appropriate for a commentary on court rules, especially one written by the judges who were involved in drafting the Rules and will likely be involved in their interpretation in the immediate future. It will remain to be seen what future contests about the meaning of the Rules will arise, and whether the *Commentary* will provide the solution to the contest or whether its neutrality will diminish its usefulness in this regard.

Overall, the *Commentary* is undoubtedly an essential tool for practitioners litigating disputes under the UNCLOS and will be of considerable interest for scholars in the law of the sea and international dispute settlement. The authoritative nature of the *Commentary* is recognized, somewhat modestly, by the editors themselves: 'While informed writings concerning the Tribunal and its working by well-known commentators are to be welcomed, academic contributions by judges of the Tribunal also serve a useful purpose' (vii). There is no gainsaying that those individuals who participated in the negotiations of the UNCLOS and who are presently involved in its interpretation when controversies arise relating to its meaning offer vital contributions to a modern understanding of the law of the sea. Also important in undertaking this work is that these diplomats and scholars appreciate that they are establishing a legacy for those who were not involved in the negotiations but are now engaged in reflecting on the present operation of the

UNCLOS and how it will operate in the future. The *Commentary* provides excellent groundwork for the future generations of law of the sea scholars and practitioners in whose hands the evolution of the law of the sea rests.

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International Sales Law: A Critical Analysis of CISG Jurisprudence by LARRY A DiMATTEO, LUCIEN DHOOGHE, STEPHANIE GREENE AND VIRGINIA MAURER [CUP, Cambridge, 2005, 241 pp, ISBN 0521849802, (h/bk) £48.00 (US\$85.00)]

Anyone who wishes to study or work with the 1980 UN Convention on Contracts for the International Sale of Goods (CISG), will find that there are a number of difficulties in trying to understand its application, interpretation and case law. This is mainly due to the fact that it represents a unique form of uniform commercial law, which ideally relies on a form of scholarly and jurisprudential comity to apply it in a uniform manner, something which some scholars of the CISG have labelled a *jurisconsultorium*.

Main reading on the CISG, in the form of some of the major handbooks or commentaries, does not always alleviate this problem or shed much light on it. This is understandable, as main commentaries have much material to cover and cannot afford the luxury of focussing on these aspects. And that is precisely why this is a very useful book to accompany main reading on the CISG.

The CISG is a multi-national instrument, currently representing three-quarters of the world's trade, with the UK being the sole industrialized country not to have ratified it following recent steps by Japan to embrace it. It is a substantial if not an accessible instrument, in terms of understanding, and so a companion book like this one is a welcome sight.

The book is based on an article from 2004 which was very well received in CISG circles when it was published (printed in 34 *Northwestern Journal of International Law and Business*, Winter 2004, 299–440 and available at www.cisg.law.pace.edu). The article has, for the past four years, been a significant contribution to analysing CISG cases and understanding uniform application, and the book has the benefit of printing material which has already been accepted and cited by the vast majority of CISG scholars. The book has revised certain sections of the original article and included some material found elsewhere, and it has the added benefit over the article of being able to reproduce very useful appendixes for authorities, cases and the CISG and its status, making it a much more accessible companion for CISG research, but is in essence a reproduction of the article. As a prominent CISG figure phrased it, when this reviewer asked him his thoughts on the book: "I loved the article – of course I like the book".

The book is primarily aimed at practitioners and scholars who study and use the CISG. But it is of interest to another group as well. The development of certain areas of commercial law into a field of transgovernmentalism, of sharing laws and using foreign laws in domestic courts merely because these uniform laws are shared, is a development which causes understandable interest in circles of comparative law. This book is a very good example of such development, and the way in which the shared law of the CISG is analysed and viewed will be of interest to anyone studying the globalization of private law in a comparative context.

Aside from the sections introducing the CISG and its methodology, and the summary of observations at the end, there are six main topics in the book, logically structured around relevant topics: Formation (Chapters 3 & 4), Obligations of the Buyer (Chapter 5), Obligations of the Seller (Chapter 6), Common Obligations of the Buyer and Seller (Chapter 7), Breaches (Chapters 8 & 9), and Damages, Excuse and Preservation (Chapter 10). Each of these sections contains a highly detailed analysis of the available CISG jurisprudence, analysed from a very

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