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## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

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# **ROLE OF ITLOS IN DISPUTE SETTLEMENT WITH SPECIAL EMPHASIS ON URGENT PROCEDURES**

AUTHORED BY - DR. M. BIRUNTHADEVI

Assistant Professor

Chennai Dr.Ambedkar Government Law College,  
Pudupakkam

## **Abstract**

Each region prioritizes expansion to optimize the use of both its natural and human-made resources. If everyone on Earth had equal access to global resources, there would be no incentive for conflict among individuals. Even a state entirely surrounded by others can still possess abundant resources. Ideally, governments would allow their citizens unrestricted access to these resources. When business is conducted respectfully, without greed or coercion, conflict resolution becomes unnecessary. However, this is not the case in all countries. The “providing state,” which shares responsibility for costs, should bear the expenses associated with the benefits given to the “receiving state.” Fairly distributing resources can be challenging, and the potential for rising tensions is undeniable. As international law has developed, numerous methods have emerged for resolving disputes and conflicts, found across various legal systems.

The United Nations Convention on the Law of the Sea (UNCLOS) provides a legal framework for mediating disputes between states. There are non-violent methods for settling disagreements alongside those that may involve force. The author emphasizes the innovative and distinctive processes included in UNCLOS III compared to earlier agreements. Additionally, the author examines the unique features of the International Tribunal for the Law of the Sea (ITLOS), such as the swift release of vessels and the implementation of short-term solutions. This essay guides readers through the necessary requirements for activating emergency procedures. Within this context, the author strives to promote ITLOS as a viable venue for addressing disputes.

Keywords: UNCLOS, ITLOS, Prompt Release, Provisional Measures, Marine Environment, and Reasonable bond

## Introduction

The UNCLOS III is a significant international treaty in modern international law as it addresses a variety of economic issues that have either been overlooked in recent years or are not thoroughly regulated by previous agreements. In other words, UNCLOS III plays an important role by bridging gaps in the existing international legal framework. It empowers the International Tribunal for the Law of the Sea (ITLOS) to make decisions on matters presented to it under the convention, as well as on other issues specified in any agreements that confer jurisdiction upon it. This authority enhances the unique nature of the tribunal, allowing states and various organizations to bring their concerns before it. Due to its expedited processes for seeking interim relief, ITLOS is the preferred option for resolving marine law matters. The tribunal ensures quicker proceedings leading up to the establishment of an arbitral panel and facilitates swift vessel releases. The provisions of the Convention titled "Save our Souls" grant greater authority to coastal and flag states.

The tribunal is responsible for executing several urgent processes under the Convention, including I) Prompt Release of Vessels and Crew, and II) Provisional Measures.

### I) Prompt Release Of Vessel And Crew

It is possible to defend coastal states against illegal fishing and other operations carried out by vessels wearing the flag of another nation that violate international accords. These actions include smuggling contraband goods and engaging in other unlawful activities. Following this, the crews of boats flying the flag of another state would be subject to arrest, board, and inspection by the coastal state, as well as possible legal action.

The treaty benefits both flag states and coastal governments by requiring that detained ships and crew be released in exchange for a fair bond posted by the flag state. As a direct result of this convention, coastal states gain various advantages, including those outlined in Article 73. Coastal states are obligated to uphold this requirement, which ultimately benefits those states holding the detained ships and crew. Once the detained vessel and individuals are returned to the holding state, they are presented before that state's court. This approach helps protect the interests of both parties involved. However, the enforcement rights of coastal states can pose challenges for foreign captains, crew members, and shipowners, who often face difficulties due to language barriers and limited access to legal resources. Additionally, these individuals may

be financially strained and separated from their families back home while residing temporarily in another country. Prolonged docking of vessels can lead to significant financial losses for shipowners. Despite UNCLOS being ratified in 1982, some coastal states still detain ships and individuals for extended periods. It wasn't until 1997 that flag states began bringing rapid release cases to the Tribunal's attention. The Tribunal has since handled ten cases involving early release, enabling an assessment of the effectiveness of Article 292 of UNCLOS. This mechanism, regarded as an innovative aspect of UNCLOS, is unique in international law due to its practical and procedural features. This system does not interfere with the merits-based litigation occurring in national courts; if rapid release occurs before a national court's decision, the final judgment will be executed after the domestic authorities review the case's merits. Experts suggest that the distinct nature of the rapid release process may make it one of ITLOS's most popular features, as it has been employed in most of the Tribunal's cases to date.

Given the urgent nature of the issue, the Tribunal prioritizes cases involving the immediate release of vessels and individuals over other maritime law matters. Once an application is received, the Tribunal must initiate proceedings within 15 calendar days. After the hearing concludes, the Tribunal has a limited timeframe to issue a ruling, typically within 14 days after the final hearing on the application. This expedited process results in much quicker resolutions compared to other cases presented to international tribunals and forums. If the Tribunal determines that immediate release is warranted, it will assess whether the bond amount set by the coastal state is appropriate based on the offense committed by the flagged vessel. In situations where no prior arrangements exist, the Tribunal has the authority to establish one.

The Tribunal has not set specific criteria for what qualifies as a reasonable bond. The link cannot be reestablished until the Tribunal has rendered its decision. Generally, several factors should be considered, including the severity of the action taken, its impact on the coastal state, the laws governing fines in that state, and the value of the vessel and its cargo. These factors can vary and are not uniform. While the Tribunal is deliberating on whether to detain vessels and crew members, it cannot issue a "no bond" or "symbolic bail." However, in the cases of the *Volga* and the *Juno Trader*, the ownership of the ship by the arresting state was deemed irrelevant. The Tribunal does not consider the specific facts and circumstances of each case when assessing the appropriateness of the bond. Additionally, the structure of the bond arrangement is also important. Bonds often include guarantees from banks. In the *Monte Confurco* case, the Tribunal rejected cash or a security certificate as acceptable forms of

payment. In the Volga case, the Tribunal determined that non-financial release conditions, such as revealing the identities of the ship's owner and ultimate beneficial owners, were impractical.

### **Prompt Release Procedure**

If a coastal state detains a vessel and its crew, the flag state or its representative can file a petition with the ITLOS for an order mandating their immediate release. This provision is outlined in Article 292 of the Convention and applies only when the coastal state has apprehended both the ship and all crew members. According to Article 292, only the flag state or a recognized organization can request a fast release. This organization may include the ship's owner, captain, a maritime organization, or another company. If only states were allowed to make these requests, the overall number would likely decrease significantly. Many nations are hesitant to utilize their legal systems to safeguard the rights of their citizens. Typically, a state's Ministry of Foreign Affairs will, when possible, encourage ship owners and captains to resolve their disputes through the domestic courts of their countries. Even if one state has a valid claim against another, it may choose not to pursue it for fear of jeopardizing diplomatic relations or disrupting negotiations. Consequently, it can be challenging for states to permit private access in cases involving rapid release.

### **Admissions Challenges**

An application's admissibility can be contested by the state that is holding the individual on any number of grounds that follows:

### **Jurisdiction**

Article 292 of the Convention grants the authority to exercise the right to request the release of a vessel and its crew detained by a state for unauthorized fishing in the coastal state's exclusive economic zone (EEZ). This means that the detaining state can hold the vessel and crew accountable for illegal fishing activities. If the ship and crew have posted the required bail amount, the detaining state is obligated to release them according to Article 73. If the detaining state continues to refuse release despite a reasonable bond being provided, the matter can be brought before a court or tribunal to seek a resolution acceptable to all parties. If no forum has been agreed upon within ten days of the vessel's detention, the flag state may petition the ITLOS for the vessel's release. The Tribunal's jurisdiction only applies if the governments are unable to reach an agreement. This does not affect the options available to either the flag state or the detaining state under Article 287. If immediate release is warranted, personnel authorized

by the flag state can also summon the Tribunal. The Tribunal serves as a check on the coastal state by reviewing the custody of the vessel and the bail offered to determine whether the coastal state appropriately exercised its sovereign rights. Of the nine cases before ITLOS, only three—those involving the *Volga*, *Hoshinmaru*, and *Tomimaru*—were presented by the states for urgent release. There are currently two new strategies available for expedited resolution.

Initially, the vessel that is arrested may be owned or chartered by an individual who is a citizen of a different state than the flag state. Secondly, according to paragraph two of Article 292 of the agreement, those qualified to represent the flag state are individuals connected to it through the nationality of the vessel. If the detained vessel has caused significant financial harm to the flag state, this provision empowers the flag state to request the release of the vessel and its crew. Even if the private party is acting solely in their own interests, the phrase "on behalf of" ensures that the matter is still treated as an international issue.

The *Grand Prince* case prompted the Tribunal to conduct a proprio motu examination since there were uncertainties concerning the vessel's nationality when the application was made. When a nationality link is established at the relevant stages of a procedure, the Tribunal gains jurisdiction over the matter, allowing a private party to intervene on behalf of the flag state to present their case. A considerable number of private parties participate in the process following the adjudication, hoping that the bond or other required security demanded by the forum will be covered by the shipowner or an insurance policy. Although it involves nations, this process is quite similar to those occurring at the transnational level, as it safeguards the commercial interests of shipowners and the legal rights of flag states. If the legal standing of the flag state is questioned, the burden of proof rests on the individual who initially filed the complaint. In this particular case, the vessel was registered in Belize, but the provisional patent of navigation had expired when the dispute arose. The Tribunal determined that it could not exercise its authority because the application lacked sufficient evidence to support its claims and there was no agreement in place. The Tribunal concluded that the state that conducted the arrest and requested the suspect's immediate release should be regarded as the applicant state.

In the case of the *Camouco*, the Tribunal determined it could have jurisdiction if the coastal state did not object to the flag state of the vessel. This was a crucial factor in the decision. Based on the evidence presented, the court is not obligated to assess the merits of the case; however, it cannot entirely dismiss the possibility of incidents conflicting with the protection

and exploitation of the maritime environment. If it did, it would undermine the very purpose of the established laws.

In the Juno Trader case, the Tribunal found that the humanitarian and legal requirements for the prompt release of vessels and crew had been met. In the Tomimaru case, the Tribunal ruled that a flag state cannot detain a fishing vessel to upset the balance of power among nations as outlined in the Convention. The Tribunal stressed that a confiscation judgment "must not be issued in a manner that prevents the shipowner from accessing existing domestic legal remedies or prohibits the flag state from utilizing the speedy release mechanism outlined in the Convention."

### **Bond Reasonableness**

When deciding whether or not a bond was reasonable, the Camouco Case Tribunal took into account "the gravity of the alleged offences, the penalties imposed or imposable under the detaining State's laws, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State, and its form." Specifically with regard to the Volga, "It is permissible to use "the sanctions that may be imposed for the alleged conduct in compliance with the Respondent's regulations" as a way to demonstrate the gravity with which the allegations are to be taken into consideration. The equilibrium of interests, which is derived from articles 73 and 29, respectively, is what the Tribunal would use as its guiding principle to decide cases." An opinion was handed out by the Tribunal regarding the Monte Confurco Case.

### **Pending**

A request made in accordance with Article 292 raises the question of whether or not a case can be admitted under *lis pendens* while proceedings in the domestic court are still ongoing. In order to establish *lis pendens*, there needs to be some sort of connection between the parties, the claims, and the reason why the action is taking place. *Lis pendens* cannot be applied uniformly in cases that are brought before a domestic court or a speedy release court because the parties and claims involved are too diverse..

### **Exhaustion Of Local Remedies**

Before a person's home state can file an international claim on their behalf, they must first exhaust all available domestic remedies. Article 245 of the Treaty stipulates that any dispute between states regarding the interpretation or application of this convention must have fully

utilized all domestic remedies before it can be referred to these mechanisms. This requirement ensures that the convention is understood and applied consistently. Since the objectives of Article 292 are fulfilled when the crew members are released from their domestic obligations, the stipulation requiring a ship's crew to exhaust local remedies does not apply to cases of rapid release.

Instead of appealing to a national court, individuals can seek an independent remedy under Article 292, as this provision allows. It is crucial that Article 292 is not interpreted in a way that contradicts its original goals. Even if a person has not explored all available options in their home state, they can still submit a request for speedy release under Article 292 while in detention.

### **Domestic Courts Have Determined Merits.**

Another issue is whether a decision made by a domestic court regarding the merits of a case can hinder the enforcement of Article 292. The Grand Prince raised an important point, but the Tribunal was unable to address it due to its lack of authority. The Grand Prince is currently in the custody of law enforcement officials. After an 11-day trial, the criminal court determined that the Grand Prince had broken the law, leading to penalties against the vessel and its impoundment. The judge also mandated that prompt action be taken. Belize submitted a petition to ITLOS under Article 292, claiming that France violated Article 73 by "quickly seizing" the ship, which was against the terms of the agreement. France argued that since a local court had taken control of the ship, Article 292 did not allow Belize to request assistance within its jurisdiction. At the time of the application, Belize was not a constituent state of any flag state. The instruction did not receive any response from the target. Once domestic courts have made their determination, an international court cannot issue an order for the immediate release of a vessel under Article 292.

### **Confiscation**

A coastal state is permitted to utilize its ability to seize property in order to demonstrate its sovereignty so long as the rights of the state that flies the flag are not violated. The seizure of vessels is not authorised in any form by Article 73 of the UNCLOS 1982. Article 73 makes it possible to carry out a conviction by the use of confiscation. Because of this law, the coastal state has the authority to arrest the vessel and keep it in custody. This approach does not utilise either physical or incarceration forms of punishment.

It was ruled in the Tomimaru Case that capturing a ship does not affect the ownership of the vessel or the flag state of the vessel. On the other hand, expropriation has the effect of changing these characteristics of the ship. The Tribunal strongly advised coastal states not to detain a ship in a manner that would throw off the delicate power dynamic that the Convention seeks to maintain between different countries. This notice of caution has been issued by the Tribunal. Even though legal proceedings in the domestic jurisdiction that is holding the people are still ongoing, the Tribunal has stated that "a decision to seize a vessel does not prohibit the Tribunal from considering an application for immediate release." This statement was made in response to an argument that "a decision to seize a vessel does prohibit the Tribunal from considering an application for immediate release." It is expected that the state that is flying the flag will respond immediately while taking into consideration the specifics of Article 292.

### **Assessing The Bond's Reasonableness**

The Convention requires that an appropriate surety bond or another form of security be provided. However, the term "reasonable" was never defined in any context during the convention. Each situation is assessed based on its specific circumstances. Article 73 permits the possibility of a vessel being released on bail under certain conditions. If there is no agreement in place and no bond has been posted—or if the bond amount is excessively high—the flag state may request tribunal intervention. The Tribunal will then determine how the bond should be addressed. Since the Tribunal lacks defined criteria for what constitutes a reasonable bail, it cannot provide any guidance on the matter. The connection cannot be restored until the Tribunal reaches its decision. Key considerations often include the seriousness of the behavior, any restrictions imposed by the coastal state regarding fines, the value of the detained vessel and its cargo, as well as the extent of damage caused to the coastal state. These factors can vary significantly from case to case. While the Tribunal is deliberating on the potential arrest of vessels and crew members, it cannot issue a "no bond" or "symbolic bail."

In the Camouco Case, the court reiterated the criteria from the M/V Saiga Case while listing the factors necessary to determine the appropriate bond amount: (1) the severity of the alleged offenses; (2) the penalties applicable under the detaining state's laws; (3) the value of the detained vessel and cargo; and (4) the amount of bail demanded by the detaining state. Although the expedited release process aims to balance the interests of both states, two factors tend to favor the coastal state. The flag state or its representative has two options: they can

utilize the immediate release authority granted by ITLOS, or they risk significant financial losses when their flag state is unwilling to take legal action against the coastal state. Additionally, since UNCLOS does not expressly prohibit the confiscation of ships, this poses a threat to shipowners. If the flag state fails to pursue the case or causes delays, the coastal state's domestic forum may make the final decision regarding confiscation. It is clear from any perspective that fulfilling the requirements of Article 292 necessitates prompt action from the flag state.

## **II) Prescription Of Provisional Measures**

This is another aspect that state parties share within the ITLOS framework. Generally, interim measures are utilized both nationally and internationally. The implementation of these measures protects the rights of the involved parties by preserving the current situation temporarily. A single shift in the focus of the investigation could potentially render the entire legal or administrative process ineffective, highlighting the importance of this point. The opposing party cannot proceed due to the potential impact of the interim solutions. While one party may benefit from these measures, the other may incur significant costs as a result. When developing a temporary solution, it is crucial to ensure that all parties are treated fairly and equitably.

Any party may request provisional remedies from ITLOS as long as both parties have opted for arbitration and are waiting for an arbitral panel to be established, in accordance with Article 290. This applies to parties that have complied with Article 290 of the ITLOS Rules of Procedure and Arbitration. Before imposing temporary remedies, ITLOS requires compelling evidence demonstrating both its jurisdiction over the matter and the urgency of the situation. The party that submitted the complaint to the Tribunal bears the responsibility of proving either that a right was violated or that there was an adverse environmental impact. To apply the provisions of Article 290(5), the following conditions must be met: both parties must agree to submit their dispute to arbitration; the arbitral tribunal must not yet be established; one party must request interim measures; and both parties must be unable to reach an agreement within 14 days of the request. The provisional measures ordered by the tribunal will remain in effect until the appropriate tribunal is constituted. Once the tribunal is established, it will either modify, annul, or uphold the provisional measures based on whether the previously mentioned conditions are satisfied. These measures will continue to be legally binding until that time.

### **Essential Conditions For Prescription Of Provisional Measures**

Before they are allowed to adopt prescription interim remedies, states are required to demonstrate that they have the following three things: a) prima facie jurisdiction; b) urgency; and c) the need to preserve the rights of parties or the maritime environment.

### **Prima Facie Jurisdiction**

Even before another arbitral tribunal gains jurisdiction over the merits of a case, ITLOS has the authority to impose legally binding provisional remedies, as granted by Article 290(5) of the Convention on the Law of the Sea. This holds true even when ITLOS lacks jurisdiction over the case itself. There is a potential for conflict between the rulings of the merits jurisdiction and the interim orders issued.

In the initial stages of both *Georgia v. Russian Federation* and *Anglo-Iranian Oil Co.*, the International Court of Justice (ICJ) issued provisional remedies but ultimately concluded that it did not have the authority to decide the cases on their merits and dismissed them. Prior to ITLOS, similar situations occurred. The Tribunal determined that primary jurisdiction over the dispute concerning southern bluefin tuna had been assigned to the Arbitral Tribunal established under Annex VII. However, the arbitral tribunal set up under Annex VII concluded that it also lacked the authority to hear the case. The incident involving the M/V *Louisa* exemplifies this scenario. At the level of preventative measures, ITLOS determined that it did possess jurisdiction. However, after deliberation, the panel concluded that there were no compelling reasons to grant temporary relief.

### **Urgency**

Article 290(5) is unique in that it grants ITLOS the power to issue temporary orders to parties that have not recognized its jurisdiction. This authority aims to protect their rights or interests and prevent harm to the marine environment while another body, such as a tribunal or court, is determining the merits of the case. As a result, even parties contesting ITLOS's jurisdiction can still seek provisional measures. There is no need for the conflict to be resolved immediately before the Tribunal is established; however, the threat must exist at the time the Tribunal is formed and should have been anticipated beforehand.

Currently, there are two critical issues to consider. The first paragraph of Article 290 outlines the seriousness of the situation. While the term "urgency" may not be frequently used, its implications are well understood. If the interests of the various parties are not safeguarded,

there is a risk of significant damage to the marine environment. According to a requirement of the LOSC, the administration of each temporary remedy must be managed by the same tribunal or court (Article 290, paragraph 1). Meanwhile, ITLOS will assess the procedural urgency of the matter while a tribunal with jurisdiction over the case's merits is being established. ITLOS cannot substitute for arbitral tribunals that are still examining the merits of the dispute, as interim protections remain in place. It is believed that the circumstances described in Article 290(1) are more time-sensitive than those outlined in Article 290(5).

### **Preservation Of Rights**

Article 290 must be invoked when one party's rights have been violated. In such cases, the opposing party will attempt to demonstrate that the applicant state has misunderstood the situation. This requires evidence of both a breach of the agreement and the irreparable harm resulting from that breach.

The concept of "avoidance of irreparable prejudice" was introduced by the International Court of Justice during the Fisheries Jurisdiction case. Applying this concept means that one should avoid making poor decisions. Under Article 41 of the Statute, the Court has the authority to impose interim measures to prevent irreparable harm to rights currently in dispute. While awaiting the court's decision, various measures are taken to protect these legal rights.

In its application to ITLOS, Ghana argued that Argentina's ship docked in Tema does not pose "any actual or impending threat of irreparable loss to Argentina's rights." Nigeria contended that Switzerland's claimed rights in the "M/T San Padre Pio" case were unattainable, asserting that imposing temporary remedies would negatively affect the case's merits. Meanwhile, the *Enrica Lexie* claimed irreparable harm, but India dismissed these claims as unfounded.

ITLOS has issued directives to opposing parties in several cases where interim measures were necessary, instructing them to avoid actions that could prolong or escalate the conflict. These directives were deemed necessary by ITLOS. The arbitration panel concluded that neither party's actions nor failures to act in preventing the dispute from intensifying constituted an acceptance of the other party's claims. This is crucial because any such behavior would invoke the principle of estoppel unless the Tribunal determined otherwise. If the Tribunal did not make this determination, estoppel would indeed apply.

### **Marine Environment Protection**

Part XII of UNCLOS is dedicated to the protection and preservation of the marine environment. It is crucial to highlight that the obligation to safeguard the marine environment is separate from the interests of the parties in implementing temporary restrictions.

It was argued that "Ireland and the UK should collaborate and engage in discussions" to prevent environmental harm caused by the operation of the MOX plant. This assertion was supported by both general international law and the necessity for cooperation, which is a fundamental principle in marine pollution prevention outlined in Part XII of the convention. Together, these legal frameworks provided a strong basis for the argument. The main emphasis of Part XII was on land reclamation, aiming to reduce pollution, assess its environmental impact, collaborate with others, and seek their input. While ITLOS recognizes that preventing the exploitation of marine resources is critical for marine conservation, the provisions of Part VII of the LOSC still apply to fisheries disputes, including the one regarding southern bluefin tuna.

The Tribunal resolved the dispute between Ghana and Côte d'Ivoire concerning the Atlantic Ocean. The panel concluded that Côte d'Ivoire's claim that Ghana's actions were directly damaging the marine ecosystem lacked sufficient supporting evidence. However, the Special Chamber determined that Côte d'Ivoire's evidence was adequate to uphold its claim to the disputed area. Consequently, Ghana was ordered to cease all drilling activities in the contested region. The directive from the Special Chamber charged both parties with the responsibility of protecting the ocean.

### **Provisional Measures' Enforceability**

Article 41 of the ICJ Statute lacks clarity regarding the necessity of interim measures, allowing for varied interpretations. In contrast, Article 290, paragraph 6 of the LOSC provides specific guidelines for interim solutions in maritime disputes. This article mandates that any required interim measures must be implemented promptly by the parties involved. Prior to the ICJ's ruling on the LaGrand case, there was a debate among experts. After examining the English and French versions of the Statute, the Court determined that the interim measures outlined in Article 41 are legally binding.

Between 1997 and 2024, 11 cases presented to ITLOS will require the implementation of interim measures. Recent issues include the seizure of three Ukrainian naval vessels, the detention of Southern Bluefin Tuna, operations related to the MOX Plant, land reclamation in

and around the Straits of Johor, and the detainment of various vessels including the Ara Libertad, Arctic Sunrise, Enrica Lexie, Nordstar, and M/T San Padre Pio, the Zheng He case.

### **Conclusion**

Even though UNCLOS III outlines various dispute resolution mechanisms, the International Tribunal for the Law of the Sea (ITLOS) has processed a significant number of cases since its inception. In fact, more cases have been brought before ITLOS than those submitted to both the International Court of Justice (ICJ) and arbitration tribunals combined. A key reason for this shift from the ICJ and arbitration to ITLOS is the tribunal's ability to handle urgent proceedings. Additionally, there are other factors contributing to this trend. For instance, the provision for quick release benefits the flag state when the coastal state either refuses to release a vessel after bond payment or imposes an excessive bond amount. UNCLOS includes provisions that support the flag state in cases where a vessel is detained and subsequently released upon posting bond. This provision for swift release can be viewed as a crucial advantage in challenging situations for the flag state, acting as a "saviour" in their time of need.

When establishing a tribunal may take time, and the intended purpose of seeking relief could be compromised due to immediate risks, provisional remedies can provide states with temporary relief. This approach, known as the "prescription of provisional measures," is crucial in urgent situations where even a few days can significantly impact outcomes. The provisions relating to urgent processes in both ITLOS and UNCLOS support arguments for their adoption. The tribunal may impose judicial oversight to ensure compliance with its orders, allowing states to engage with each other or to monitor one another. This proactive approach can help prevent violations of the Law of the Sea and facilitate cooperation between the parties involved.

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