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Provisional Measures in the International Tribunal for the Law of the Sea

Peter Tomka and Gleider I. Hernández

On the occasion of Judge and Professor Rüdiger Wolfrum's 70th birthday, it gives us great pleasure to contribute to this *Festschrift* in his honour with a chapter on provisional measures in the International Tribunal for the Law of the Sea. Judge Wolfrum, as a Member of that Tribunal since 1996 and its President from 2005 to 2008, has greatly contributed to the evolution of the practice of the Tribunal and the development of its jurisprudence. Moreover, from both his judicial office in Hamburg and his academic office as Director of the Max-Planck Institute for Comparative Public Law and International Law in Heidelberg, he has made a great contribution to the international law of the sea and to international law more generally. The topic of our piece is thus perhaps a fitting tribute.

A. General Comments on Provisional Measures

The essence of provisional measures is to protect the rights at issue of either party in a case *pendente litis*, and to prevent the extension or aggravation of a dispute. Such measures were designed to remedy the problem which can arise from the complex, sometimes time-consuming nature of international judicial proceedings, and avoid an eventual judgment becoming meaningless in whole or in part once it is delivered.¹ What is so interesting about a request for provisional measures is that the court or tribunal seised of such a request, in examining the causes prompting it, does not examine the nature of the dispute or the facts or law underlying it; instead, it aims to study emerging or existing events external to the proceedings, such as the conduct of the parties in general or with respect to the subject-matter of the dispute, and determines whether the non-indication of measures would seriously impair the rights to be determined later on in the eventual judgment. A strong component of judicial

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¹ One of the classic statements justifying the indication of provisional measures was given by the International Court of Justice in *Fisheries Jurisdiction* (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports 1972, 16, para. 21, and 34, para. 22: "Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has its objective to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings, and that the Court's judgements should not be anticipated by reason of any initiative regarding the measures which are in issue ...".

discretion therefore permeates the very nature of provisional measures, although, in the case law of the International Court of Justice (ICJ) at least, some criteria have been articulated which help to define objectively the exercise of the power to indicate provisional measures.²

ITLOS is not in a formal relationship with the ICJ, as both bodies stand independent of and separate from each other; yet in substance, there is a relationship between the two which follows from the fact that the substantive competences of both institutions are broadly situated in the field of the peaceful settlement of international disputes through judicial means.³ There are of course differences in competence *ratione materiae* between the ICJ and the Tribunal. The ICJ has wider material jurisdiction over legal inter-state disputes in all areas of international law, whilst the Tribunal's jurisdiction is confined to the interpretation or application of UNCLOS or an international instrument related to the purposes of UNCLOS.⁴ However, when establishing the UNCLOS regime, negotiating states were certainly influenced by the law and practice of the International Court.⁵ In the light of both this and the Court's extensive practice in the area of provisional measures, coupled with the fact that the Tribunal's procedure was designed in the light of that experience, the Tribunal's provisional measures proceedings may rightly – and usefully – be compared to those of the Court.

B. Structure of ITLOS and its Relationship with UNCLOS

I. Article 290 of the United Nations Convention on the Law of the Sea and Annex VI thereof

The creation of the International Tribunal for the Law of the Sea, a tribunal specifically designed to resolve disputes relating to the United Nations Convention on the Law of the Sea,

² S. Rosenne, *Provisional Measures in International Law* (2005), provides the most comprehensive and thorough study of provisional measures at the two institutions; see also S. Torres Bernárdez, *Provisional Measures and Interventions in Maritime Delimitation Disputes*, in: R. Lagoni/D. Vignes (eds.), *Maritime Delimitation*, 33, at 41 et seq (2006).

³ C.-A. Fleischauer, *The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg*, 1 *Max Planck Yearbook of United Nations Law* 327, at 330 (1997).

⁴ Article 288, paras. 1 and 2, of the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, hereinafter "UNCLOS".

⁵ S. Rosenne (note 2), at 46, explains in detail how, for example, the concept of *prima facie* jurisdiction over the merits was introduced into the Convention following the development of that notion by the ICJ. He also expresses the view that Article 290, paras. 1 to 4, of UNCLOS represents a codification or a codification/restatement of the ICJ's law and practice. See also B. H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 *European Journal of International Law* 353, 367 (1996); D. L. Morgan, *Implication of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 *Harvard Journal of International Law* 541, at 542-543 (2002).

was an important innovation in the area of international dispute settlement for a number of reasons. The first reason is the compulsory dispute settlement mechanism on the interpretation or application of UNCLOS put in place by part XI, section 5,⁶ and part XV, section 2,⁷ of that Convention. Together, they provide a series of specific mechanisms ranging from conciliation to arbitration to judicial recourse to ITLOS for the compulsory settlement of disputes; the panoply of choice, announced as the Convention's "first principle",⁸ was the result of the much-heralded "package deal" embodied within the Convention.⁹ Interestingly, ITLOS is only one of several specific mechanisms applicable to settling disputes under UNCLOS, alongside recourse to the International Court of Justice as well as conciliation and arbitral mechanisms of varying shades.¹⁰ With respect to the ICJ at least, the parallel possibility of the seising of that court or ITLOS bespeaks of the structural similarities between the two judicial institutions.

Another interesting point is that non-state entities are also accorded procedural standing in connection with activities in the international seabed area, for which a separate chamber exists within the ITLOS system.¹¹ This is an important distinction as compared to the system of the ICJ, where only states may be parties to disputes;¹² and, in fact, it is one of the main reasons why the main rules, both substantive and procedural, relating to ITLOS were specifically embodied in UNCLOS.

The special nature of ITLOS transcends the jurisdiction conferred thereupon by UNCLOS and derives primarily from the specific part it plays in the entire UNCLOS system; besides hearing cases over which it has jurisdiction on the merits, it was also designed as "the ultimate safeguard always available for all purposes to ensure that recourse to the compulsory dispute settlement procedures under the Convention would not be frustrated on technical

⁶ Articles 186-191 UNCLOS.

⁷ Articles 286-299 UNCLOS, together with Annexes V (conciliation), VI (ITLOS), VII (arbitration) and VIII (special arbitration).

⁸ C. F. Amerasinghe, *Jurisdiction of Specific International Tribunals*, at 257 (2009).

⁹ S. Rosenne (note 2), at 44.

¹⁰ Article 287 UNCLOS. The arbitral tribunals can be constituted under Annex VII ("arbitral tribunal") or Annex VIII ("special arbitral tribunal"); S. Rosenne (note 2), at 45, explains that the main approach in UNCLOS is based on the "principle of the freedom of choice of dispute settlement procedure embodied in Articles 33 and 95 of the Charter".

¹¹ Part XI, section 5, of UNCLOS. Although not a dispute, on 11 May 2010 that Chamber was requested by the Council of the International Seabed Authority to give the first advisory opinion of the Tribunal on the "Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area": see ITLOS Press Release No. 147 (14 May 2010).

¹² Article 35, para. 1, of the Statute of the International Court of Justice, as annexed to the Charter of the United Nations, 26 June 1945, 1 UNTS xvi.

grounds”.¹³ It is against this background that one must understand the highly specific arrangements for provisional measures of protection developed in Article 290 UNCLOS which are applicable to ITLOS. These arrangements were both necessary to cover the variety of courts and tribunals, all vested with jurisdiction under the Convention, as well as to settle without ambiguity the binding nature of such provisional measures laid down in Article 290, paragraph 6, of UNCLOS.¹⁴

An interesting illustration of the cross-fertilization of the jurisprudence of ITLOS with that of the ICJ in matters relating to provisional measures relates to the binding nature of such measures.¹⁵ Article 290 UNCLOS, when read together with Annex VI (hereinafter the “ITLOS Statute”), Article 25, differs markedly from the analogous provision of the ICJ Statute, Article 41, even though provisional measures indicated by the ICJ are also binding, as clarified in the *LaGrand* judgment of 2001.¹⁶ It has been argued that the establishment of ITLOS served to alert the ICJ that another international jurisdiction in the United Nations system had the express authority to order binding provisional measures, which perhaps signalled to the ICJ that it should pronounce definitively on the issue.¹⁷ It bears recalling, however, that as early as 1939 the Permanent Court of International Justice had already stated

¹³ S. Rosenne (note 2), at 45. This particular aspect of its role is most apparent in the power it has under Article 290, para. 5, of UNCLOS to prescribe provisional measures in cases where an arbitral tribunal has yet to be constituted. See *infra* section C.I for further discussion.

¹⁴ S. Rosenne (note 2), at 45, notes that Article 290 was also designed to avoid the ambiguity existing in 1982 regarding the binding force of an order of the ICJ indicating provisional measures, which was finally settled by that court in *LaGrand* (Germany v. United States), Judgment, ICJ Reports 2001, 501-506, esp. para. 102; A. Tzanakopoulos, Provisional Measures Indicated by International Courts: Emergence of a General Principle of International Law, 57 *Revue hellénique de droit international* 53, at 73 (2004), argues that Article 290, para. 6, of UNCLOS represents the “crystallisation” of a general principle as to the binding force of provisional measures.

¹⁵ G. Eiriksson, *The International Tribunal for the Law of the Sea*, at 219 (2000), argued that the binding nature of provisional measures according to UNCLOS is reflected in the term “prescription”, which obviated the doctrinal debate existing before the *LaGrand* judgment at the ICJ as that court has the power to “indicate” provisional measures under Article 41 of its Statute.

¹⁶ See F. Orrego Vicuña, *The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems*, 22 (3) *International Journal of Marine and Coastal Law* 451, at 452-453 (2007), who suggests that Article 290 pointed towards a major shift which would crystallise at the ICJ in the *LaGrand* decision; R. Wolfrum, *Provisional Measures of the International Tribunal for the Law of the Sea*, in: P.C. Rao/R. Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice*, 173, at 180 (2001); T. A. Mensah, *Provisional Measures in the ITLOS*, *Heidelberg Journal of International Law* 43, at 45 (2002); T. Treves, *Provisional Measures Pending the Constitution of an Arbitral Tribunal*, *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz*, 1243, at 1253 (2004), all explain that whatever the position with regard to orders indicating provisional measures under Article 41 of the ICJ Statute might have been before and after *LaGrand*, there has never been any doubt as to the binding nature of provisional measures prescribed pursuant to Article 290, para. 6, of UNCLOS. The same “binding” nature of provisional measures was noted by an ICSID arbitral tribunal in *Emilio Agustín Mafezini v. Spain*, Case no. ARB/97/7, Decision on Request for Provisional Measures of 28 October 1999, 5 ICSID Reports 393.

¹⁷ A. Tzanakopoulos (note 14), at 77.

that Article 41 of its Statute “applies the principle universally accepted by international tribunals ... to the effect that the parties to a case *must* abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute”.¹⁸ The ICJ in *LaGrand* referred to this principle as a “related reason which points to the binding character of orders made under Article 41”.¹⁹

II. The Procedural Framework Established in the Rules of the Tribunal

Although its powers to indicate provisional measures derive from Article 290 UNCLOS and the ITLOS Statute, especially Article 25, the Tribunal was left to frame specific rules for carrying out its functions under Article 16 of its Statute. In particular, the Tribunal was left free to develop its own rules of procedure. Proceeding at the time of its inauguration on the basis of an interim set of Rules prepared by Committee IV of the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea, it adopted its own Rules of the Tribunal on 28 October 1997 and has periodically amended them since.²⁰ The Rules relating to provisional measures, Articles 89 to 95, lay out a detailed procedure inspired by the practice of the ICJ,²¹ but there are some differences of note. The Tribunal’s Rules specifically establish that the Tribunal, unlike the ICJ, shall give priority to Applications for the release of vessels or crews over all other proceedings before it.²² Accordingly, if the Tribunal is seised of an Application for prompt release of a vessel or crew and of a request for the prescription of provisional measures, these two types of proceedings are handled without delay, but separately.²³ Further, under Article 95 of the Rules, parties have an obligation to report to the Tribunal as to their compliance with any provisional

¹⁸ *Electricity Company of Sofia and Bulgaria* (Belgium v. Bulgaria), PCIJ 1939, Series A/B, No. 79, 199 (emphasis added).

¹⁹ *LaGrand* (Germany v. United States), Judgment, ICJ Reports 2001, 503, para. 103.

²⁰ The Rules of the Tribunal, most recently amended on 17 March 2009, are available on ITLOS’ website as Doc ITLOS/8; T. Treves, *The Rules of the International Tribunal for the Law of the Sea*, in: P. C. Rao/R. Khan (eds.), *The International Tribunal for the Law of the Sea*, 135, at 159 (2001), has concluded that the Rules of the Tribunal have their roots in the tradition of the rules concerning proceedings before the International Court of Justice.

²¹ S. Rosenne (note 2), at 76.

²² Article 112, para. 1, of the Rules of the Tribunal.

²³ S. Rosenne (note 2), at 79, explains that at the ICJ it would fall on the Court in consultation with the parties to ensure this.

measures prescribed by the Tribunal;²⁴ such reporting is in the form of a report upon the steps a party has taken or proposes to take in order to ensure prompt compliance.²⁵

Interpretation of the Rules by the Tribunal has been relatively sparse. In *M/V "SAIGA" (No. 2)* the Tribunal recalled Article 95, paragraph 2, and considered that it would be appropriate to authorize the President of the Tribunal to request further information on the implementation of the provisional measures prescribed in that order.²⁶ It has followed a similar practice since,²⁷ suggesting that ITLOS considers such provision a matter of routine. Rosenne has hinted that it is open to question whether Article 290 of the Convention intended the Tribunal to have *carte blanche* to request reports from parties in cases before it as to their implementation of orders prescribing provisional measures,²⁸ and has suggested that it is rather unclear what the Tribunal can do with the reports it receives, as provisional measures may be prescribed, modified or revoked only at the request of a party to a dispute and after the parties have been given an opportunity to be heard.²⁹

III. Jurisdiction *Ratione Materiae*

Given that proceedings on a request for the indication of provisional measures may have to be considered *before* a court or tribunal is fully satisfied that it has jurisdiction over a given case, these requests necessarily proceed in a manner different from other incidental proceedings. Accordingly, the special rules of jurisdiction governing requests for provisional measures tend

²⁴ This is in contrast with Article 78 of the ICJ Rules of Court, according to which the Court “may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated”. A recent, and rare, example of the ICJ asking the Parties to inform the Court about compliance with its order may be found in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Order, ICJ Reports 2008, 399, para. 149 (D); S. Rosenne (note 2), at 79, recalls that Article 85 of the draft Rules of ITLOS foresaw a similar provision for ITLOS.

²⁵ S. Rosenne (note 2), at 79, explains that this provision was of the Tribunal’s initiative (section 3.8). See also ITLOS, *Reclamation of Land by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Order on Provisional Measures of 8 October 2003, ITLOS Reports 2003, 10, hereinafter “*Land Reclamation*”, 26, para. 104, where the Tribunal extended the duty to report to include reporting to the Annex VII arbitral tribunal unless that tribunal should decide otherwise.

²⁶ ITLOS, *M/V “SAIGA” (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Order on Provisional Measures of 11 March 1998, ITLOS Reports 1998, hereinafter “*M/V ‘SAIGA’ (No.2)*”, 2, 24. It was included in the operative provision, 39 (para. 50).

²⁷ See ITLOS, *Southern Bluefin Tuna Case* (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures of 27 August 1999, ITLOS Reports 1999, 280, 297, hereinafter “*Southern Bluefin Tuna*”; ITLOS, *MOX Plant Case* (Ireland v. United Kingdom), Order on Provisional Measures of 3 December 2001, ITLOS Reports 2001, 91, hereinafter “*MOX Plant*”; and *Land Reclamation* (note 25), 28.

²⁸ S. Rosenne (note 2), at 80.

²⁹ *Id.*

to be tailored to a particular judicial organ and to the manner in which its jurisdiction is to be established. In this regard, the settlement of disputes under UNCLOS is highly specific and somewhat more regulated than the relatively unsystematic character of the general law relating to the settlement of international disputes.

The basic conditions for prescribing provisional measures under Article 290 UNCLOS must be read against the requirement that the court or tribunal must have jurisdiction in accordance with part XV of that Convention, and that compulsory proceedings must already be brought under Article 286 UNCLOS. It goes without saying that any finding as to the *prima facie* jurisdiction in a given case in no way prejudices the question of jurisdiction on the merits and leaves unaffected the right of the other party to submit arguments against such jurisdiction. As regards the Tribunal specifically, its powers to prescribe provisional measures are described under Articles 21 and 25 of its Statute.

A dispute may be submitted to ITLOS under a specific title of jurisdiction; however, if no such agreement is invoked, the Convention itself can serve as a title of jurisdiction permitting unilateral applications to the Tribunal.³⁰ This may prove complex if, under UNCLOS, some other compulsory dispute settlement mechanism is also competent, as in that case the Tribunal must also take into account the specific procedural requirements of that mechanism.

If the parties to a dispute cannot agree as to a mode of settlement by recourse to section 1, section 2 (Articles 286-296) establishes the mechanisms which may be designated for dispute settlement. Under Article 286, the dispute may be submitted at the request of any party to any of the bodies listed under Article 287 (the ICJ, ITLOS, an *ad hoc* arbitral tribunal under Annex VII, and a special arbitral tribunal under Annex VIII).³¹ Article 288, described earlier, defines the jurisdiction of whichever court or tribunal may eventually be seised, as being over the interpretation or application of UNCLOS or an international instrument “related to the purposes of [UNCLOS]”.³²

³⁰ *Id.*, at 88.

³¹ Should the parties have each chosen a different procedure or neither of them made a choice arbitration under Annex VII becomes obligatory. A detailed history of this provision may be found in S. Rosenne, UNCLOS III - The Montreux (Riphagen) Compromise, in: A. Bos (ed.), *Realism in Law-Making, Essays on International Law in Honour of Willem Riphagen*, 169 (1986).

³² Article 288, para. 1, of UNCLOS.

It may thus be said that the Tribunal can safely adjudge disputes on the issues falling within the above provisions, and certainly ITLOS would have jurisdiction over disputes relating to the delimitation of maritime spaces as described above. An unresolved question relates to whether the Tribunal would also have jurisdiction over cases, submitted to it by States, having a mixed subject-matter which encompasses both maritime delimitation and land delimitation or other territorial questions.³³ Because such mixed territorial/maritime disputes are disputes involving the determination of sovereignty or other territorial rights over continental or insular territory, the question remains open whether the maritime aspects of the delimitation retain an exclusively maritime character or whether these would be inextricably intertwined with territorial questions falling outside UNCLOS (and ipso facto outside the competence of the Tribunal).³⁴

IV. The Operation of Jurisdiction *Ratione Materiae* in Relation to Article 290 UNCLOS

Under Article 288 UNCLOS, jurisdiction *ratione materiae* for ITLOS may exist over two types of disputes: under paragraph 1 a dispute concerning the interpretation or application of the Convention;³⁵ and under paragraph 2 a dispute concerning the interpretation or application of an international agreement relating to the purposes of the Convention which is submitted to the competent court or tribunal in accordance with the agreement.³⁶ Accordingly, Article 290 envisages two distinct types of proceedings for provisional measures which are relevant for ITLOS.³⁷ Article 290, paragraph 1, of UNCLOS, which is applicable to all judicial bodies empowered under Article 287 (the ICJ, ITLOS, *ad hoc* arbitral tribunal and a special arbitral tribunal under Annexes VII and VIII), envisages what Rosenne terms “normal” provisional measures proceedings, modelled on the general practice of the ICJ and intended to afford protection to the rights of all parties so long as the proceedings are in progress.³⁸ Proceedings under Article 290, paragraph 1, of the Convention may be submitted at any time during the

³³ See S. Torres Bernárdez (note 2), at 39-40. This would be especially relevant in matters submitted through agreements “related to the purposes of UNCLOS”.

³⁴ S. Torres Bernárdez (note 2), at 39-40, however, considers that the “mere determination of baselines for the purpose of a maritime delimitation does not deprive a dispute of its exclusive maritime character. The same conclusion applies to disputes in which to effect the maritime delimitation concerned account must be taken of the land frontier as existing between the parties”.

³⁵ Articles 279, 286, and 288, para. 1, of UNCLOS.

³⁶ Article 288, para. 2, of UNCLOS.

³⁷ The full commentary on Article 290 UNCLOS may be found in M.H. Nordquist/S. Rosenne/L. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, hereinafter “UNCLOS Commentary”, Vol V, at 52 et seq. (1989).

³⁸ S. Rosenne (note 2), at 46.

course of proceedings. Paragraph 1 of Article 290 goes further than merely protecting the rights of the parties: it also allows for provisional measures “to prevent serious harm to the marine environment”, a wholly distinct purpose, but one which surely makes sense, given that the Convention devotes its part XII entirely to the protection of the marine environment as an integral part of the then-new law of the sea.³⁹

Article 290, paragraph 3, of the Convention also defines the powers of the Tribunal to prescribe provisional measures differently from Article 41 of the ICJ Statute; the Tribunal may prescribe, modify or revoke such measures *only* when this is requested by a party to the dispute and after the parties have been given the opportunity to be heard. This is not a minor point, given that the ICJ may prescribe provisional measures *proprio motu*, even without hearing both parties;⁴⁰ conversely, the Tribunal must rely on the initiative of the parties.⁴¹ Orrego Vicuña suggests that this limited power provides grounds for those who believe that the Tribunal cannot prescribe recommendations but only provisional measures, in contrast to the Tribunal’s decision in *M/V “SAIGA” (No. 2)*, and that the Tribunal is necessarily prevented from prescribing *ex parte* provisional measures, i.e. measures prescribed without having heard the other party.⁴²

The *M/V “SAIGA” (No. 2)* case is particularly interesting since both a provisional measure and a recommendation were made at the same time, and the Tribunal further decided that the obligation to inform it on compliance referred to both. The issue has therefore been raised as to whether the Tribunal has the power to issue mere recommendations and whether it is appropriate to extend the obligation on parties to inform it about the follow-up or

³⁹ As R. Wolfrum (note 16), at 176, notes, reference to such justifications for provisional measures adds a new element to their link with the interests of the parties but also “reflects a change of international law from a mechanism providing for the coordination of States activities to one which also recognises and preserves common values of the community of States”.

⁴⁰ Exceptionally, due to very particular circumstances, the ICJ in *LaGrand* indicated provisional measures without being able to provide the United States, the Respondent in that case, with the opportunity to be heard: see *LaGrand* (Germany v. United States), Provisional Measures, ICJ Reports 1999, 9, esp. 14. The ICJ thus exceptionally departed from Article 74, para. 3, of its Rules, which provide for a hearing which will afford the parties an opportunity to present their views.

⁴¹ Article 290, para. 3, of UNCLOS; however, G. Eiriksson (note 15), at 220, emphasizes the fact that under Article 89, para. 5, of the Tribunal’s rules it may prescribe measures different in whole or in part from those requested, and that “it would not have been in keeping with its judicial function were it to have denied itself the right to act outside of the strict terms of the request”.

⁴² F. Orrego Vicuña (note 16), at 455; T. A. Mensah (note 16), at 48, suggests that such a reading derives necessarily from a joint reading of paras. 1 and 5 of Article 290.

implementation of such recommendations as well.⁴³ Orrego Vicuña has suggested that in so doing, the Tribunal might be acting outside the scope of its jurisdiction, although this “would hardly be a justifiable conclusion”.⁴⁴ Yet, for all this, Article 89, paragraph 5, of the Rules of the Tribunal does provide for the power to prescribe measures “different in whole or in part from those requested”, suggesting that this concern may be misplaced; moreover, the Tribunal has relied upon this provision to adopt measures not requested by the parties in three cases.⁴⁵ Treves has suggested that Article 89, paragraph 5, of the Rules indicates that “the Tribunal interprets Article 290, paras. 1 and 2, of the Convention as meaning that, while the Tribunal cannot initiate proceedings for provisional measures, once provisional measures have been duly requested, the Tribunal is free to decide measures different from those requested”.⁴⁶

Although Article 290, paragraph 1, of UNCLOS outlines the general regime of provisional measures of protection under that Convention, the ITLOS Statute separately addresses the procedural aspects connected with the constitution and operation of ITLOS and the Seabed Disputes Chamber. Article 25 thereof expressly links the procedural rules for ITLOS with Article 290 of the Convention,⁴⁷ thus confirming that the Tribunal’s powers to indicate provisional measures derive from Article 290.

Article 25, paragraph 2 of the ITLOS Statute allows the Tribunal’s Chamber of Summary Procedure, a reserve organ for when the Tribunal is not in session or there is no quorum, to indicate provisional measures; this is a major innovation when compared to the practice of the International Court of Justice.⁴⁸ Measures so prescribed are of course subject to review and revision by the full Tribunal itself, presumably once a quorum of its Members (eleven

⁴³ F. Orrego Vicuña (note 16), at 453, referring to *M/V “SAIGA” (No. 2)* (note 26), Declaration of Judge Vukas, ITLOS Reports 1998, 41-42, paras. 3-4, and S.S. González Napolitano, *Las Medidas Provisionales en Derecho Internacional ante las Cortes y Tribunales Internacionales*, 191 (2004).

⁴⁴ F. Orrego Vicuña (note 16), at 454.

⁴⁵ ITLOS, *Southern Bluefin Tuna* (note 27), para. 90. 1. a, b; *MOX Plant* (note 27), para. 89. 1; *Land Reclamation* (note 25), para. 101.

⁴⁶ T. Treves (note 16), at 1251.

⁴⁷ This was intentional: see UNCLOS Commentary (note 37), Vol V, 389.

⁴⁸ Article 41 of the ICJ Statute, when read together with Article 57 of the current ICJ Rules of Court, requires the Court to be convened forthwith if it is not in session. Although the President had wider powers in past versions of the Rules, today he or she may only “call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects” under Article 74, para. 4, of the Rules. See K. Oellers-Frahm, Article 41, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary*, 923, at 946 (2006).

Members of the Tribunal⁴⁹) has been attained.⁵⁰ Interestingly, the context of reviewing provisional measures so adopted is the only situation in which the Tribunal can proceed *proprio motu*.⁵¹ This surely makes sense: while no one suggests that the Chamber of Summary Procedure would necessarily give a broad interpretation of the measures to be adopted, the fact that they are subject to review illustrates the need for judicial prudence, as measures adopted thereby are “still more provisional than any other provisional measure prescribed by the Tribunal”.⁵²

There are only a few cases in which ITLOS has ordered provisional measures pursuant to Article 290 of UNCLOS. The request for provisional measures in *M/V “SAIGA” (No. 2)* was originally submitted to the Tribunal under Article 290, paragraph 5,⁵³ with the merits of the dispute to be submitted to an arbitral tribunal yet to be constituted under Annex VII to UNCLOS. However, following an agreement by the parties that the dispute be deemed to have been submitted to ITLOS, the request for provisional measures, originally filed under paragraph 5, was considered duly submitted under paragraph 1 of Article 290.⁵⁴ The requests in *Southern Bluefin Tuna*, the *MOX Plant Case* and *Land Reclamation* were all submitted under paragraph 5 of Article 290. These requests were filed in anticipation of an arbitral tribunal eventually being constituted.⁵⁵ These four cases will be referred to in the sections

⁴⁹ Article 13, para. 1, of ITLOS Statute.

⁵⁰ Article 25, para. 2, of ITLOS Statute; S. Rosenne (note 2), at 57; according to Article 91, para. 2, of the Tribunal’s Rules, such review takes place either at the written request of a party within 15 days of the prescription of the measures or at any time when review takes place *proprio motu*: see G. Eiriksson (note 15), at 229-230, for further explanation.

⁵¹ Article 91, para. 2, of the Rules of the Tribunal; M. García García-Revilla, *El Tribunal Internacional de Derecho del Mar*, 483, at 492 (2005), suggests that this limited power would also apply to the ICJ when deciding on provisional measures under Article 290 of UNCLOS.

⁵² F. Orrego Vicuña (note 16), at 462.

⁵³ *M/V “SAIGA” (No. 2)* (note 26), para. 4.

⁵⁴ ITLOS, *M/V “SAIGA” (No. 2)*, Order of 20 February 1998, ITLOS Reports 1998, 2, 10; originally announced in ITLOS Press Release No. 13 (28 February 1998).

⁵⁵ It should be noted that the *MOX Plant* situation was unique in that the arbitral tribunal eventually constituted under Annex VII suspended further proceedings on jurisdiction and merits on 24 June 2003. The Tribunal had observed that certain issues of European Community law were applicable to the present dispute and that, therefore, the European Court of Justice might be the more appropriate forum in respect of some facets of the British-Irish dispute. The arbitral tribunal, “bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States”, considered it inappropriate to proceed further with hearing the parties on the merits of the dispute. See *MOX Plant Case* (Ireland v. United Kingdom), Procedural Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures, 24 June 2003, in the *MOX Plant Case* (Ireland v. United Kingdom), PCA Award Series, 47, 52-55, paras. 20-28 (2010). Similarly, in the *Southern Bluefin Tuna Cases* (Australia v. Japan; New Zealand v. Japan), Award on Jurisdiction and Admissibility, 119 ILR 508, 551-554, paras. 56-65 (2000), the Tribunal observed that the claims of the Applicants, falling primarily under the Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, 1819 UNTS 360, were subject to the jurisdictional limitations imposed by that Convention, which required the consent of all parties to refer a dispute to arbitration. Finding that this was not

which follow to illuminate the relevant treaty provisions and rules so far as the practice of the Tribunal on provisional measures is concerned.⁵⁶

C. The Criteria for the Prescription of Provisional Measures

There are three particular aspects of provisional measures in which the Tribunal has given valuable clarification or made other contributions which may be of interest for other courts and tribunals: the Tribunal's findings on *prima facie* jurisdiction, on urgency, and on the preservation of the marine environment. We will discuss these in turn.

I. *Prima Facie* Jurisdiction

In so far as Article 290 refers to the *prima facie* jurisdiction of ITLOS (or of another competent court or tribunal), broadly speaking, it incorporates the general law as developed by the ICJ regarding its jurisdiction to indicate provisional measures. As discussed earlier, ITLOS' *prima facie* jurisdiction based on both paragraphs 1 and 5 of Article 290 is the same low threshold jurisdiction as that required by the ICJ to exercise its provisional measures jurisdiction. Although it has never done so, it is conceivable that, when considering the *prima facie* jurisdiction requirement in connection with a request *in limine*, ITLOS might conclude as to the existence of a manifest lack of jurisdiction on the merits, thus following the practice of the ICJ on the matter.⁵⁷ Although under paragraph 1 the Tribunal undertakes a judicial function common to that of other courts and tribunals, under paragraph 5 it is considering

the case, the Tribunal concluded that it lacked jurisdiction to proceed to the merits, although it did find, at para. 64, that its holding "does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction".

These findings can be reconciled somewhat with the ICJ's holding in *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgment, ICJ Reports 1952, 93, where the Court first found it had *prima facie* jurisdiction and indicated provisional measures, only to find at the jurisdiction phase that it did not have jurisdiction. See also *Request for Interpretation of the Judgment of 31 March 2004 in the Avena and Other Mexican Nationals (Mexico v. United States of America)*, Order on Provisional Measures of 16 July 2008 and Judgment of 19 January 2009, ICJ Reports 2008, 311, ICJ Reports 2004, 12; therefore, the present authors consider that F. Orrego Vicuña's concern (note 16), at 454, that in examining *prima facie* jurisdiction judges are expressing their "intimate conviction" on the case, is somewhat misplaced.

⁵⁶ Just before this article was submitted for publication, on 24 November 2010, Saint Vincent and the Grenadines instituted proceedings against Spain in a dispute concerning the *M/V "Louisa"*, flying the flag of Saint Vincent and the Grenadines, arrested on 1 February 2006 by the Spanish authorities and held since that date. The Application was accompanied by a request for the prescription of provisional measures under Article 290, para. 1, of the Convention: see ITLOS Press Release No. 154 (24 November 2010).

⁵⁷ S. Torres Bernárdez (note 2), at 45.

whether it is appropriate to prescribe provisional measures in a dispute of which the merits will be addressed later by another body; moreover, the measures it prescribes will be addressed to parties which have not accepted its jurisdiction in respect of the dispute.⁵⁸

It is clear that requests for provisional measures are incidental in nature, always confined to the framework of proceedings on the related principal case, and that as such they do not have an autonomous procedural life.⁵⁹ For this reason, it is important for a court or tribunal to satisfy itself that, at least on the *prima facie* level, it would have jurisdiction to decide on the merits of the case. ITLOS shares with the ICJ the notion that it must have *prima facie* jurisdiction over the merits of a case before indicating provisional measures. *Prima facie* jurisdiction does not require that the court or tribunal concerned definitively satisfy itself that it (or in the case of ITLOS, being seised under Article 290, paragraph 5, of UNCLOS, that the arbitral tribunal eventually to be constituted) has jurisdiction on the merits of the case before indicating provisional measures; however, it does mean that the court or tribunal ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the court or the tribunal over the merits of the case might be founded.⁶⁰ In the orders issued pursuant to challenges to the competence of the Tribunal or to that of an eventual arbitral tribunal, ITLOS has used this formulation consistently.⁶¹

Although the findings as to *prima facie* jurisdiction have been unanimous and may be taken to suggest a broad approach to jurisdiction by the Tribunal, on close examination this proves not to be wholly accurate. The low threshold established in the *prima facie* jurisdiction test makes it no surprise; the question to be decided is not whether there is conclusive proof of jurisdiction, but rather whether jurisdiction is not so “obviously excluded” as to make it extremely unlikely that the merits of the dispute will actually be considered by the court or tribunal which will be deciding on the merits.⁶² For example, in *Southern Bluefin Tuna*

⁵⁸ T. A. Mensah (note 16), at 46.

⁵⁹ *Id.*, at 38.

⁶⁰ See e.g. *Fisheries Jurisdiction* (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports 1972, 9, paras. 15, 17, and 30, paras. 16, 18; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Provisional Measures, ICJ Reports 1984, 169, para. 25.

⁶¹ *M/V “SAIGA” (No. 2)* (note 26), paras. 29-30; *Southern Bluefin Tuna* (note 27), para. 52; *MOX Plant Case* (note 27), paras. 61-62; *Land Reclamation* (note 25), para. 59.

⁶² T. A. Mensah (note 16), at 50, citing *Interhandel* (United States v. Switzerland), ICJ Reports 1957, Separate Opinion of Judge Lauterpacht, 105, 118-119.

ITLOS found that *prima facie* the Annex VII Tribunal would have jurisdiction to deal with the merits of the case, yet the arbitral tribunal later constituted finally concluded that it did not have jurisdiction.⁶³ This does not imply that the arbitral tribunal overruled ITLOS, as the two bodies would be applying different jurisdictional tests, and that the arbitral tribunal did not bind itself to ITLOS' preliminary findings, but instead based its award on the more extensive arguments and submissions of the parties on the merits.⁶⁴ Moreover, the arbitral tribunal explicitly noted that the revocation "did not mean that the parties may disregard the effects of the Order or their own decisions made in conformity with it".⁶⁵ In this respect, Judge Wolfrum's warning that "provisional measures should not anticipate a judgment on the merits"⁶⁶ has been heeded. Provisional measures should not constitute an interim judgment in favour of part of the claim.

Article 290, paragraph 5, of UNCLOS contains a unique residual power for ITLOS to prescribe provisional measures of protection in a case in which the competent procedure for the binding settlement of a dispute falls under Article 288, but the request for provisional measures is made before the States concerned have duly constituted an arbitral tribunal. The residual power contained in paragraph 5 has been applied in the *Southern Bluefin Tuna*, *MOX Plant* and the *Land Reclamation Cases*, which confirms that it is not merely a theoretical course of action.⁶⁷ In all of these, the Tribunal confirmed that the standard for deciding on *prima facie* jurisdiction is no different from the standard for deciding on its own jurisdiction.⁶⁸

The first condition for the prescription of provisional measures by ITLOS under Article 290, paragraph 5, of UNCLOS is the filing by a party of a request to that effect; such a request may be submitted: (a) at any time if the parties have so agreed; or (b) at any time after two weeks from the notification to the other party of a request for provisional measures if the parties have not agreed that such measures be prescribed by another court or tribunal.⁶⁹

In such circumstances, ITLOS may prescribe, modify or revoke provisional measures of protection if it considers that *prima facie* the tribunal which is constituted would have

⁶³ The effects of such a finding on the provisional measures will be discussed *infra* in section C. II. ("Urgency").

⁶⁴ T. A. Mensah (note 16), at 50.

⁶⁵ *Southern Bluefin Tuna* (Award on Jurisdiction and Admissibility) (note 55), 555, para. 67.

⁶⁶ *MOX Plant*, (note 27), Separate Opinion of Judge Wolfrum, reflecting his academic writing on this point: see R. Wolfrum (note 16), at 183-184.

⁶⁷ F. Orrego Vicuña (note 16), at 459.

⁶⁸ M. García García-Revilla (note 51), at 502.

⁶⁹ Article 89, para. 2, of the Rules of the Tribunal.

jurisdiction over the merits and that the urgency of the situation so requires. Given that from the outset Applicants to ITLOS have always alleged a breach of one or more of the provisions of the Convention whatever other allegations have been made, the Tribunal has been able to regard itself or the Annex VII arbitration tribunal as having *prima facie* jurisdiction, provided of course that it be satisfied that other conditions of the Convention have been met.⁷⁰ The Tribunal does this even when a dispute exists between the parties as to whether the competent court or tribunal has jurisdiction over the merits, leaving that question for determination by the competent court or tribunal.⁷¹ However, since in these circumstances ITLOS is not seised of the merits of the case, Article 89, paragraph 4, of the Rules of the Tribunal requires a special procedure for the institution of proceedings for provisional measures, as outlined under paragraph 5 thereunder.⁷² That procedure is designed so that ITLOS has a first opportunity for a judicial examination of the claim, even if its conclusions are provisional and are not binding on the court or tribunal seised of the principal claim.⁷³ In *MOX Plant*, *Southern Bluefin Tuna* and *Land Reclamation* the Tribunal exercised this residual power to prescribe provisional measures pending the establishment of the arbitral tribunal to which the dispute was being submitted.⁷⁴

Other examples are illustrative. In *M/V "SAIGA" (No. 2)* (Provisional Measures), the parties disagreed on whether ITLOS had jurisdiction, despite the fact that they had both agreed to submit the case to it and that, once seised, the Tribunal should deal with all aspects of the

⁷⁰ See e.g. *M/V "SAIGA" (No. 2)*, Provisional Measures (note 26), 37, para. 30; *Southern Bluefin Tuna*, Provisional Measures (note 27), 295, para. 63; *MOX Plant*, Provisional Measures, (note 27), 107, para. 62; *Land Reclamation*, Provisional Measures, (note 25), 21, para. 59.

⁷¹ This practice is in accordance with Article 288, para. 4, of UNCLOS, which gives *compétence de la compétence* to the court or tribunal which has been seised once it has been constituted. In the case of ITLOS, the Court first asserted its power to determine its jurisdiction in the case before it in the *M/V "SAIGA" Case*, Case No. 1, ITLOS Reports 1997, 24-26, paras. 37-45.

⁷² S. Rosenne, (note 2), at 160-161, describes the procedure succinctly.

⁷³ *Id.*, at 127, Rosenne maintains that the reasoning of ITLOS on *prima facie* jurisdiction "cannot be seen as a hint of the possible decision of the arbitral tribunal after full pleadings".

⁷⁴ *MOX Plant* (note 27), 110, para. 89 (1); *Southern Bluefin Tuna*, (note 27), 297, para. 90 (1); *Land Reclamation* (Provisional Measures), (note 25), 27, para. 106 (1); S. Torres Bernárdez (note 2), at 43-44, wonders whether Article 290, para. 5, left room for the ICJ to exercise a similar residual power to that of ITLOS and indicate provisional measures, but considers that, given that the power of the ICJ to indicate provisional measures is construed in the Statute and Rules of the ICJ on the assumption that the measures requested or indicated relate to a principal case before the Court, this is "difficult to visualise"; see also T. Treves (note 16), at 1245, and R. Wolfrum (note 16), at 174, who concludes that Article 290 of UNCLOS would, if in conflict with Article 41 of the ICJ Statute and to the extent to which it would be applicable, "prevail ... under the principle of *lex specialis*", but that Article 41 of the ICJ Statute and the ICJ Rules would continue to apply to aspects of the prescription of provisional measures not covered under Article 290 UNCLOS; see, generally, T. Treves (note 16), 1255 et seq., on the ICJ and the application of Article 290, para. 5, of UNCLOS.

case, including jurisdictional objections, in a single phase.⁷⁵ The Tribunal found that it was sufficient for it to be satisfied that the provisions invoked by the Applicant appeared *prima facie* to afford a basis on which the jurisdiction of the Tribunal could be founded, and that this was indeed the case.⁷⁶ In *Southern Bluefin Tuna* the Tribunal held similarly, adding that under Article 281, paragraph 1 UNCLOS a State Party is not obliged to pursue procedures under part XV, section 1, when it concludes that the possibilities of settlement have been exhausted.⁷⁷

II. Urgency

Urgency is a matter of procedure, relevant to the convening of the Tribunal if it is not in session when the request is made. However, it is also a matter of substance in so far as it is amongst the circumstances considered by the Tribunal in justifying the indication or prescription of provisional measures.⁷⁸ Although urgency is not mentioned formally in Article 290, paragraph 1, of UNCLOS, it can be said to be implied in the term “under the circumstances” which requires the competent court or tribunal to consider the individual circumstances of the case at hand.⁷⁹ In any event, paragraph 5 of that same Article expressly provides that “the urgency of the situation” is a requirement for the prescription of provisional measures by ITLOS when the merits of the dispute are being submitted to arbitration under Annex VII or Annex VIII and the arbitral tribunal has not yet been constituted. Finally, the Tribunal has formally set the requirement for urgency in Article 89, paragraph 4, of its Rules.

The judges of ITLOS have followed the ICJ in reading in a requirement that there must be a finding that the urgency of a matter justifies the ordering of provisional measures. This urgency seems to be qualified on a case-by-case basis. For example, in *M/V “SAIGA” (No. 2)*, as the facts unfolded, the most direct measure which had been requested (the release of the Master and the crew of the ship) became moot as these people were indeed released. In the end, the most direct and important measure finally prescribed by the Tribunal was an order to Guinea to refrain from taking or enforcing any judicial or administrative measure against the

⁷⁵ *M/V “SAIGA” (No. 2)* (note 26), 37, para. 28.

⁷⁶ *Id.*, paras. 29-30. For further discussion of the *M/V “SAIGA” (No. 2)* case see B. Kwiatkowska, Inauguration of the ITLOS Jurisprudence: The *Saint Vincent and the Grenadines v. Guinea M/V Saiga* Cases, 30 *Ocean Development & International Law* 43 (1999).

⁷⁷ *Southern Bluefin Tuna* (note 27), 295, para. 60. This was confirmed in *MOX Plant*, (note 27), 107, para. 60; *Land Reclamation* (note 25), 19, para. 45.

⁷⁸ S. Rosenne (note 2), at 136, argues that urgency “is the most important of those circumstances”.

⁷⁹ *Id.*, at 135.

ship or the people concerned pending a final decision on the merits.⁸⁰ Although not expressly referring to urgency, the Tribunal was clearly concerned with the protection of the rights of the parties which were at issue there.⁸¹

Urgency is also implicit in the requirement that in the circumstances immediate action is necessary and cannot wait until a final decision in a case, to protect the rights of both parties from irreparable harm.⁸² Thus, the state of proceedings when a request is made and the estimated period likely to elapse before a decision on the principal claim will also be elements relevant to assessing the urgency of a matter. In this respect, urgency has become linked to the gravity of the harm sought to be avoided by a request for provisional measures.

Rosenne has suggested that a particular question regarding the meaning of “urgency” arises in the situation where there are proceedings in ITLOS for the prescription of provisional measures but where ITLOS is not seised of the merits. In such cases, he suggests that it would normally not be known when the court or tribunal to which the case is being submitted would most likely be in a position to act, and thus the question arises how long provisional measures prescribed by ITLOS will remain in force.⁸³

The Tribunal confronted precisely this question in *Southern Bluefin Tuna*, where it recalled that under Article 290, paragraph 5, of UNCLOS, provisional measures may be prescribed pending the constitution of the arbitral tribunal agreed upon by the parties if the Tribunal considers that the urgency of the situation so requires.⁸⁴ It should also be noted that the arbitral tribunal constituted under Annex VII in this case ultimately decided that it lacked jurisdiction, and the measures were “revoked from the day of the signature of [the] Award”.⁸⁵ Indeed, in such circumstances provisional measures indicated by a court or tribunal will have

⁸⁰ *M/V “SAIGA” (No. 2)* (note 26), 39-40, para. 52 (1) (a).

⁸¹ T. A. Mensah (note 16), at 51.

⁸² S. Rosenne (note 2), at 135-141, describes the practice of the ICJ with regard to the criterion of urgency.

⁸³ *Id.*, at 142.

⁸⁴ *Southern Bluefin Tuna* (note 27), 295, para. 63. In his Separate Opinion, Judge Laing termed this “procedural urgency”: *id.*, 305. In his Separate Opinion, Judge Treves argued that the requirement of urgency in para. 5 is stricter than that in para. 1, as there would be no urgency under para. 5 for ITLOS to prescribe provisional measures “if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted”: *id.*, at 316, para. 4. For a fuller commentary on this case see A. Boyle, *The Southern Bluefin Tuna Arbitration* 50 ICLQ 447 (2001).

⁸⁵ *Southern Bluefin Tuna* (Award on Jurisdiction and Admissibility) (note 55), 556, para. 72.2. It has been argued that it could have come to an end without express declaration: see F. Orrego Vicuña (note 16), 453. It seems that this also occurred when the International Court of Justice, in its Judgment of 19 January 2009, decided that there was nothing to be interpreted from its *Avena* judgment of 2004; nevertheless, the Court merely noted the breach by the United States of the provisional measures indicated in its Order of 16 July 2008. It made no pronouncements on the consequences of this breach: see *Avena* Judgment of 19 January 2009 (note 55), paras. 53, 61 (2).

produced their effects from the moment of their notification to the parties and “cease to be operative” upon delivery of a judgment, thus lapsing at the same moment as delivery of the judgment.⁸⁶ The lapse of provisional measures is prospective; they are not invalidated or declared void *ab initio*.⁸⁷

In *MOX Plant*, another case in which the Tribunal was called upon to prescribe provisional measures under Article 290, paragraph 5, the emphasis was again placed on the factual circumstances and whether these made it necessary to determine whether the prescription of measures was appropriate as a matter of urgency, which the Tribunal did not find to exist.⁸⁸

Finally, the question whether the criterion of urgency is assessed differently in requests under Article 290, paragraph 5, arose in *Land Reclamation* where, upon Malaysia’s request for provisional measures, Singapore responded that as the arbitral tribunal was to be constituted only a month later, there would be no need to prescribe provisional measures given the short period of time remaining before that date. ITLOS rejected Singapore’s argument, pointing out that there was nothing in Article 290 of the Convention to suggest that the measures it prescribes must be confined to the period ending with the composition of the arbitral tribunal, and also noted that the provisional measures it prescribes could remain applicable following the constitution of an arbitral tribunal.⁸⁹

III. Prevention of Serious Harm to the Marine Environment

As the objective of preventing serious harm to the marine environment embodied in Article 290, paragraph 1, of UNCLOS is a criterion which distinguishes the practice of courts and tribunals vested with jurisdiction under UNCLOS from that of other comparable bodies such as the ICJ (in its exercise of its general jurisdiction, not its jurisdiction based on UNCLOS), it deserves brief mention.⁹⁰ First, it bears recalling that the prevention of “serious harm” here is

⁸⁶ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, ICJ Reports 1952 (note 55), 114.

⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, Separate Opinion of Judge Tomka, 349, para. 70.

⁸⁸ *MOX Plant* (note 27), 110, para. 81.

⁸⁹ *Land Reclamation* (note 25), 22, paras. 66-69. It is to be noted that the Tribunal also recalled that both parties were under the obligation not to create an irreparable situation: *id.*, 25, para. 90; T. A. Mensah (note 16), at 47, had earlier suggested that the constitution of an arbitral tribunal could be a major factor in determining the urgency of a situation, but that has not proven to be the case.

⁹⁰ Although it can be said that the need to prevent serious harm to the marine environment may sometimes fulfil the condition that there be urgency, as required under Article 290, para. 5: see L. D. Nelson, *The International*

not purely an analogy to the obligation to prevent irreparable harm embodied in the criterion of urgency; it is a Convention-specific aim relating purely to the marine environment. Secondly, the use of the disjunctive “or” in Article 290, paragraph 1, suggests that measures concerning the marine environment may be prescribed *in addition* to measures protecting the rights of the parties; these objectives need not necessarily exclude one another.⁹¹ A more delicate question is, however, whether the preservation of the marine environment may be justified not only in the interest of a party to a specific dispute, but also in regard to a more general interest. Thus far, such measures have always been requested from the Tribunal by one of the parties to a dispute, although it bears noting that the parties have also suggested or claimed that the measures requested are justified in the general interest.⁹² It remains an open question whether the Tribunal will, when faced with a request for provisional measures by a party which does not invoke a general interest, go beyond such a request in ordering such provisional measures as to preserve the general interest.

If the general interest was at issue, according to Article 290, paragraph 4, of UNCLOS the Tribunal would be bound to notify other States Parties to the Convention which it might consider appropriate, but this should not be stretched so far as to suggest that such measures automatically concern a broader, general interest. The better view is that these measures should be enforced under the supervised information of other states.⁹³ Moreover, the Tribunal should studiously ensure that the measures it may give do not exceed the purpose of provisional measures in order to reach a broader policy objective, as it has been criticized for doing in the past.⁹⁴ Whilst certainly the Tribunal has a constructive role to play in the clarification of the law which it is entrusted to apply, the provisional measures phase is certainly not the appropriate stage for the Tribunal – or any other international court or tribunal – to dabble in the development of international law. Issues of substance should

Tribunal for the Law of the Sea: Some Issues, in: P. C. Rao/R. Khan (eds.), *The International Tribunal for the Law of the Sea*, 49, at 56 (2001).

⁹¹ F. Orrego Vicuña (note 16), at 457; T. A. Mensah (note 16), at 46, notes that the ICJ could also prescribe provisional measures to prevent serious harm to the environment.

⁹² *Southern Bluefin Tuna* (note 27), 295, para. 69 (contending that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment); *MOX Plant* (note 27), 99, para. 26 (claiming a violation of the general duty to protect the marine environment embodied in Articles 192-193 UNCLOS); *Land Reclamation*, (note 25), 21, para. 61; J. Barboza, *Provisional Measures, or the Dangers of being Too Exceptional*, in: T. M. Ndiaye/R. Wolfrum/C. Kojima (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* 143, 149-150 (2007), lauds the Tribunal for having taken a “highly preventive” and “cautious” approach in the *MOX Plant* case. However, he may have overreached in claiming that the Tribunal’s order on the prevention of harm to the marine environment embodies a community interest, 153, as Ireland had itself invoked the protection of the environment in Article 290, para. 1, as its own right.

⁹³ F. Orrego Vicuña (note 16), at 457.

⁹⁴ *Id.*, at 457-458.

invariably be treated in connection with the merits of a case in order to allow parties to present their views and for the Tribunal to deliberate properly.

D. Conclusion

By partly drawing inspiration from the International Court of Justice yet adapting the practices of that court to the exigencies of the Tribunal's role under UNCLOS, the International Tribunal for the Law of the Sea has made a valuable contribution to the development of the international law governing provisional measures. Although it has been seised of such requests only four times, it is almost certain that, in an age of increasing recourse to international judicial bodies in order to resolve disputes between states, the Tribunal's contribution will continue to grow. From the vantage point of The Hague and the International Court of Justice, this is surely a development to be welcomed, as it strengthens the confidence of the community of states in the judicial settlement of international disputes and continues to promote the rule of law on the international plane.