

SEPARATE OPINION OF JUDGE KULYK

1. While I have voted in favour of the Order of the Tribunal, I wish to explain my reasoning with respect to several questions, in particular those related to the *dispute* and *prima facie jurisdiction* in this case on provisional measures.
2. Pursuant to article 290, paragraph 1, of the 1982 UN Convention on the Law of the Sea (“the Convention”), the International Tribunal for the Law of the Sea (“the Tribunal”) may prescribe provisional measures if a dispute has been duly submitted to it and if it considers that *prima facie* it has jurisdiction under Parts XV and XI of the Convention. Thus, existence of a duly submitted dispute and *prima facie* jurisdiction are two prerequisites for the Tribunal to prescribe provisional measures.
3. Although the Tribunal may prescribe any provisional measures, its discretionary authority in this regard is nevertheless limited by a further requirement, laid down in the same paragraph, that such provisional measures must be “appropriate under the circumstances to preserve the respective rights of the parties to the dispute or prevent serious harm to the marine environment”.
4. The Convention does not provide a specific definition for what constitutes a dispute. However, guidance can be drawn from various judicial interpretations. In the *Southern Bluefin Tuna Cases*, the Tribunal offered a valuable elucidation by referencing earlier judicial precedents. It stated that “a dispute is a ‘disagreement on a point of law or fact, a conflict of legal views or of interests’ (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11*), and ‘[i]t must be shown that the claim of one party is positively opposed by the other’ (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328*)”.¹
5. Thus, according to the Tribunal, a dispute, as understood through these judicial precedents, is essentially characterized as a tangible disagreement or conflict over legal matters or interests. It pertains to a situation where opinions differ

¹ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at p. 293, para. 44.*

on how a law should be interpreted, whether a particular fact is accurate or relevant to the case, whether a certain provision of the Convention grants specific rights or whether those rights are applicable in the given context. Moreover, for a situation to qualify as a dispute, it is not enough for one party to merely assert a claim; it is crucial that there be an opposition between the claims of the parties involved.

6. Pursuant to article 288, paragraph 1, of the Convention, for the Tribunal to have jurisdiction, the dispute must specifically “concern[] the interpretation or application of th[e] Convention”. This provision outlines the jurisdictional basis for the Tribunal, emphasizing that not all disputes fall within its remit.

7. The phrase “concerning the interpretation or application of” implies that the dispute must relate to how the Convention is understood or implemented. Interpretation involves clarifying the meaning of the Convention’s terms and provisions, and application pertains to how its provisions are put into practice in specific situations. This can involve an assessment of whether the actions of a State Party (or entity) are in compliance with the obligations set forth in the Convention.

8. The definition of a dispute and the requirement of the existence of jurisdiction, read together, mean that a “disagreement on a point of law or fact, a conflict of legal views or interests” and demonstration that “the claim of one party is positively opposed by the other” must concern the interpretation or application of the Convention. Therefore, for the Tribunal to accept jurisdiction, the dispute must lie within these parameters. It is moreover widely accepted in the international jurisprudence, including by the Tribunal, that this requirement must be satisfied at the time the application is filed. In the *M/V “Norstar” Case*, the Tribunal recalled that, “for it to have jurisdiction *ratione materiae* to entertain a case, a dispute concerning the interpretation or application of the Convention between the Parties must have existed at the time of the filing of the Application (see *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, at p. 46, para. 151).²

² *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 84.

9. In the present case, the Applicant contends that “the international dispute between Luxembourg and Mexico concerns the lawfulness of the detention, taxation and confiscation of the *Zheng He*”³ and is about the rights and obligations of the flag State relating to its ships and the rights and obligations of coastal States relating to foreign ships, including in its internal waters, maritime ports and territorial sea. It submits that “the dispute with Mexico concerning the vessel *Zheng He* concerns the interpretation and application of the Convention, in particular articles 2, 17, 18, 19, 21, 58, 87, 90, 92, 131 and 300 thereof”⁴ and claims that Mexico has breached a number of these provisions, including those relating to the jurisdiction of a State over its internal waters, the right of innocent passage and prohibition of discrimination of landlocked States.

10. Luxembourg argues that “[t]he penalties imposed on the *Zheng He* are clearly ... disproportionate”, and also that “[t]his is an unprecedented situation for both the flag State and the shipowner”.⁵ In this regard, Luxembourg asserts that the confiscation of the vessel, the value of which exceeds the customs duties claimed for the temporary importation of the vessel by a factor of several thousand, is completely out of proportion. It alleges “the abusive and discriminatory manner, in infringement of certain rights guaranteed by the Convention, in which this legislation has been applied to the specific situation of “*Zheng He*” since 2023.”⁶

11. The Respondent claims that the submitted case does not relate to the interpretation or application of the Convention but rather to a subject matter outside of its scope. Mexico argues that this case “is about internal waters and the situation of a ship, the “*Zheng He*”, ...which has infringed Mexican customs and tax laws,”⁷ and that the provisions of the Convention referred to by Luxembourg either do not regulate internal waters or do not apply to the present circumstances. It rejects any notion of discriminatory treatment against landlocked States or its ships.

³ See Request for provisional measures at para. 41.

⁴ See statement by Luxembourg at hearing on 11 July 2024.

⁵ See Request for provisional measures at para. 29.

⁶ See statement by Luxembourg at hearing on 11 July 2024.

⁷ See statement by Mexico on 11 July 2024.

12. A disagreement between the Parties can indeed be identified concerning the interpretation of the law and the specific facts surrounding the detention of the vessel “Zheng He” on the date the Application was filed. From the evidence presented by the Parties, this dispute ostensibly encompasses not just the immediate circumstances of the detention but also potentially broader issues of legal interpretation and administrative practice within the customs framework at the Port of Tampico. Thus, this situation clearly meets the criteria for a dispute, characterized by a substantive disagreement over legal and factual matters.

13. The relevant question, then, is whether that dispute concerns the interpretation and application of the Convention.

14. Although the Parties disagree on this question and have devoted a substantial part of their written and oral pleadings to addressing the relevant issues, the reasoning provided in the Order appears somewhat succinct. The brevity of the Order leaves aside certain important aspects, in particular those regarding how the Convention’s provisions, invoked by the Applicant, could preliminarily be interpreted and applied to the facts of this case for the consideration of the *prima facie* jurisdiction of the Tribunal. The extensive arguments presented by both Parties indicate that this is a complex issue. Even though a thorough analysis of the arguments of the Parties in this regard is expected at the merits stage, issues of jurisdiction should not be treated lightly in the proceedings on provisional measures.

15. In line with the *M/V “Louisa” Case*, in order for the Tribunal to determine whether a dispute between the two Parties concerns the interpretation or application of the Convention, it must establish a link between the facts advanced by the Applicant and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted.⁸ This necessitates a demonstration that these provisions are indeed relevant and substantial enough to uphold the claim or claims.

⁸ See *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, at p. 32, para. 99.

16. At the provisional measures stage of the present case, the Tribunal's establishment of *prima facie* jurisdiction involves a consideration of whether the circumstances in connection with the seizure of the vessel "Zheng He" by the Mexican authorities appear to require interpretation or application of the provisions of the Convention referred to by the Applicant. This consideration is important for determining whether the Tribunal has the authority to proceed with the case on the basis of the preliminary provided evidence.

17. In this context, I would have expected the Tribunal to examine the provisions invoked by the Applicant in support of its claim. This would have involved a preliminary analysis of how these provisions relate to the facts at hand to conclude that at first sight the claims can possibly be grounded in factual evidence and supported by the legal framework established by the Convention.

18. Although I agree with the well-established view that the threshold of *prima facie* jurisdiction is rather low, I have doubts that the provisions invoked by the Applicant warrant consideration that *prima facie* the Tribunal has jurisdiction in the present case.

19. The notion of *prima facie* jurisdiction requires that the Tribunal, after an initial examination, accept that it might have jurisdiction. This does not mean definitive jurisdiction but rather an arguable case. The standard for establishing *prima facie* jurisdiction is intentionally low to avoid the dismissal of potential claims at an early stage, ensuring that the Tribunal can proceed to a full hearing at which the parties would have the opportunity to fully present their arguments and evidence. This low threshold is meant to allow the Tribunal to consider the merits of the case more comprehensively once the initial jurisdictional hurdle is cleared. However, even within this framework, there must be a reasonable basis for the Tribunal to assert jurisdiction, and not all the provisions invoked may meet this standard.

20. At this stage of the proceedings, the provisions invoked as establishing the legal basis of the claims must not straightforwardly relate to the facts of the case. As noted earlier, it would be enough for the Tribunal to find that the Applicant could make an arguable case for jurisdiction on the merits. In practice, this requires a link

that connects the provisions of the Convention to the facts of the case. The standard of appreciation in this regard – a requisite strength of a link and how it must be ascertained in order to establish the existence of a dispute concerning the Convention – often depends on the circumstances of the case.

21. In light of the foregoing, in my view, beyond the provisions related to the allegedly unequal treatment of the “Zheng He” in the Port of Tampico and the disproportionate (unreasonable) penalty, most of the articles of the Convention, as invoked by the Applicant at this stage, examined in light of the facts advanced, at first sight do not appear suitable to form a basis to successfully claim that the Tribunal will have jurisdiction on the merits in the present case.

22. I concur with the conclusion of the Tribunal on the matter of “urgency”⁹ and its finding that the circumstances of this case, as they are presented, are not such as to require the prescription of provisional measures. However, I wish to explain my view on the application of a plausibility test in this case.

23. I would have preferred that the Tribunal apply a broad approach in determining the plausibility of the alleged rights that Luxemburg seeks to protect. Instead, the Tribunal limited its consideration in relation to article 131 of the Convention.¹⁰

24. The essence of the plausibility test is to ensure that the rights claimed by the parties are not only within the Tribunal’s jurisdiction but also have a reasonable basis in fact and law. The plausibility test should not be confused with the conditions used to consider whether *prima facie* the Tribunal has jurisdiction. As noted earlier, in ensuring that there is *prima facie* jurisdiction, the Tribunal must make a preliminary assessment of whether at first sight the case concerns a dispute relating to the Convention.

⁹ “The “Zheng He” Case, Provisional Measures, Order of 27 July, 2024, para. 143.

¹⁰ “The “Zheng He” Case, Provisional Measures, Order of 27 July, 2024, paras. 120, 125.

25. In contrast, the plausibility test involves a more substantive analysis. The Tribunal is supposed to examine the arguments invoked in support of the rights and evaluate whether these rights are plausible. The reason for this is that it is only to the extent that a right appears to be plausible that it deserves to be protected. This means that the Tribunal in fact looks beyond mere jurisdictional issues to a certain extent. It is the right sought to be protected which calls for application of the plausibility test.

26. The broad application by the Tribunal of the plausibility test, in my view, is inferred from some earlier cases. Thus, in the “*Enrica Lexie*” case, the Tribunal considered “that both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible”.¹¹

27. In the *Case concerning the detention of three Ukrainian naval vessels*, the Tribunal noted that “the rights claimed by Ukraine are rights ... under the Convention and *general international law*” (emphasis added).¹² It also considered that “[w]hile the nature and scope of their immunity [of the 24 servicemen on board the vessels] may require further scrutiny, ... the *rights to the immunity of the 24 servicemen claimed by Ukraine are plausible*” (emphasis added).¹³

28. The same broad approach was also confirmed in the *M/T “San Padre Pio” Case*,¹⁴ even though the Tribunal had determined that assessing the plausibility of the rights asserted by Switzerland to seek redress for the crew and others involved in vessel operations under the ICCPR and the 2006 Maritime Labour Convention would require further examination of legal and factual issues not fully addressed in the provisional proceedings.¹⁵

¹¹ “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at para. 85.

¹² *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, p. 283, para. 96.

¹³ *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, p. 283, para. 98.

¹⁴ *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019*, p. 375, paras. 106-110.

¹⁵ See: *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019*, p. 375, paras. 109-110.

29. It is clear that the Tribunal, in the above cases did not limit determination of the plausibility of the alleged rights in relation to article[s] of the Convention, which appear *prima facie* to afford a basis to found jurisdiction. The fact that in the referred cases the Tribunal was engaged in accordance with paragraph 5 of article 290, unlike in the present case, in my view is not relevant. The Tribunal, in the present case, should have continued to apply a broad approach to the application of the plausibility test in assessing the rights, which Luxemburg seek to protect.

(signed)

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