Annex LA-10

PROVISIONAL MEASURES BEFORE THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Tafsir Malick Ndiaye*

In the various legal systems, the road that leads to jurisdictional settlement can be a true obstacle course before the final decision of a jurisdiction is reached. That decision may not only take time but may be emptied of its content when one party to a dispute adopts a unilateral and arbitrary attitude. The role of provisional measures is to prevent those unfortunate consequences, to ensure the effectiveness of the decision-making process, and to help maintain the status quo with regard to situations contested pendente lite.

In its order of August 17, 1972, in the Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), the International Court of Justice set out the purpose of provisional measures. It said:

Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object 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 judgment should not be anticipated by reason of any initiative regarding the measures which are in issue [§ 22].

Thus, the Court identified three elements:

a) Preserving the rights of each party;
   b) Preventing irreparable prejudice; and
   c) Not anticipating the decision of the Court.


We shall briefly discuss the legal basis for the prescription of provisional measures by ITLOS (I); the conditions under which provisional measures may be prescribed by the Tribunal (II); and, finally, the effects of the provisional measures prescribed (III).

I. LEGAL BASIS

The United Nations Convention on the Law of the Sea (the Convention) confers upon ITLOS jurisdiction to prescribe, modify, or revoke provisional measures following a prima facie consideration of the jurisdiction of the arbitral tribunal to be established and an assessment of the urgency of the situation (article 290 § 5).

One may see this as concurrent jurisdiction in the sense that the Tribunal that prescribes the provisional measures will not be the forum that will deal with the merits, as is the case at the ICJ. From this perspective, the character of the incidental proceedings becomes doubtful. This is a point worth discussing.

Articles 89 to 95 of the Rules of the Tribunal, adopted on October 28, 1997, contain the provisions concerning procedures for submission of requests; the timing thereof; the measures requested and the grounds upon which the request is based; the possible consequences of rejection of the request for preservation of the respective rights of the parties; the grounds upon which the arbitral tribunal to be constituted would have jurisdiction; the urgency of the situation; the possibility of making a fresh request following rejection; and other procedural safeguards, such as the possibility afforded to the parties to present observations.

These provisions also provide for notification of the measures prescribed, modified, or revoked not only to the parties but also to other States Parties if the Tribunal considers it appropriate. Moreover, each party must inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party must submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed. Finally, the Tribunal may request further information from the parties on
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II. REQUIREMENTS

With regard to the requirements that must be satisfied for the prescription of provisional measures, the Tribunal must find that the parties have failed to reach agreement within two weeks following the date of the request. It is then that the Tribunal may prescribe measures if it considers that, prima facie, the arbitral tribunal to be constituted would have jurisdiction and that it is warranted by the urgency of the situation.

Jurisdiction of the Tribunal

To do so, however, the Tribunal must first satisfy itself as to its own jurisdiction to entertain the application before it. This task is relatively straightforward, since the Tribunal derives its authority to prescribe provisional measures from the Convention itself (article 290 §5) and from the Statute (article 25 §1), not from the request submitted by a party to the dispute.

Prima Facie Jurisdiction of the Tribunal

By contrast, the jurisdiction of the arbitral tribunal to entertain the merits of the case must be clearly established before the prescription of provisional measures; such jurisdiction arises only if it is reasonably probable that the arbitral tribunal would have jurisdiction on the merits. This review, even prima facie, is mandatory.

The determination of the law applicable to the dispute makes it possible to do so. Thus, ITLOS took the view that the provisions of Part XV, section 2, of the Convention were prima facie applicable to the dispute concerning Southern Bluefin Tuna (Australia and New Zealand v. Japan). Consequently, it should

any matter connected with the implementation of any provisional measures it has prescribed.

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exercise the jurisdiction conferred on it by article 290 §5 of the Convention by prescribing provisional measures for the parties.

**Urgency**

Provisional measures, as we know, are essentially intended to preserve the rights of the parties and to prevent irreparable harm. The harm must be probable and imminent.

Preservation of the rights of the parties pending constitution of the arbitral tribunal is an embodiment of the principle of the equality of States and the equality of parties before the tribunal from a procedural perspective. The rights to be preserved are those that are capable of adjudication on the merits. From this requirement there arises a need to establish a link between rights requiring protection and those that are capable of being adjudicated as to the merits, without anticipating the final decision. With regard to irreparable harm, it is well-established practice that measures should not be prescribed unless the irreparable harm is imminent.

This establishes a close link between the harm and the urgency: if the irreparable harm is not imminent, there is no urgency.

Urgency was defined by the ICJ in the *Case concerning Passage through the Great Belt* as follows:

Whereas provisional measures under Article 41 of the Statute are indicated “pending the final decision” of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given [Order of 29 July 1991, ICJ Reports 1991, 9].

Urgency encompasses procedural and substantive aspects. Thus, article 90 of the Rules provides that a request for provisional measures has priority over all other proceedings before the Tribunal. And the President fixes the date of the hearing as soon as possible.
Urgency also means that the request before the Tribunal must be rapidly and appropriately dealt with. In that sense, urgency is an essential criterion of the request for provisional measures without which the measures cannot be prescribed within the meaning of the Convention. It constitutes, together with irreparable harm, the two fundamental elements for the prescription of provisional measures.

III. EFFECTS OF PROVISIONAL MEASURES PRESCRIBED BY ITLOS

I now come to the effects of provisional measures prescribed by the Tribunal, a matter of some difficulty.

Luis Delbez said that "the only thorny issue of law presented by provisional measures is that of their authority" [L. Delbez, Les principes généraux du contentieux international (Paris, 1962), 118].

In other words, what are the effects of provisional measures? Are such measures binding upon the parties and the Tribunal? The question is highly controversial but, despite appearances, remains unsettled. It might appear at first blush that such measures are binding inasmuch as it is the legal rule that prescribes, prohibits, or permits.

If one refers to the ICJ, one must note from the outset that the text of its statute leans more in favor of treating provisional measures as non-binding. The same is true of the preparatory work, which indicates clearly that provisional measures were to be non-binding. [See Jerzez Sztucki, Interim Measures in the Hague Court (Kluwer, 1983).] The Rules are of little help. Moreover, practice is not conclusive and the different interpretations have developed in the doctrine, which remains split. [See H. Thirlway, "The Indication of Provisional Measures by the International Court of Justice in Interim Measures Indicated by International Courts," R. Bernhardt, ed., Publications of Max Planck (Berlin: Springer Verlag, 1994), 152, specifically 26 et seq.]
The problem is linked to the formulation of the texts but also to the nature of the orders. The preparatory work shows that the framers of the Statute of the Court preferred the verb “indicate” to “order.” The United Nations Convention on the Law of the Sea, for its part, uses the word “prescribe.” This, as we shall shortly see, does not settle the matter.

Advocates of the binding nature of provisional measures argue from a general principle of law pursuant to which States parties to an international dispute are under an obligation to refrain from any act that could nullify the decision of the jurisdiction. Thus, the measures prescribed would simply be the practical application of that principle. [See J. B. Elkind, *Interim Protection: A Functional Approach* (Nijhoff, 1981), 162.]

States, in becoming parties to an international dispute, have expressed their consent to be judged by a competent jurisdiction. This means that the provisional measures are binding if the treaty provisions between the parties so provide. The attendant effect is that violation of the measures prescribed amounts to a violation of an international obligation. But is there under international law an obligation to refrain from any act that nullifies the final decision? And can one seek reparation in the event of violation of such an obligation? In truth, the general principle outlined by Professor Elkind comes closer to a “moral obligation” arising from a logical necessity.

One may observe that the non-performance of measures prescribed does not actually hamper the course of procedure or benefit one party in subsequent stages. Nor does it affect the substance of the final decision of the arbitral tribunal.

Therein lies the crux of the matter. Provisional measures emerge as a phase in the decision-making process in which the tribunal notes the existence of rights to be protected but does not declare them. The measures freeze the rights pending a future decision.

The interlocutory and, therefore, provisional character of such orders deprives them of being res judicata because the measures can be modified or revoked. In other words, they can never be
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... binding in the same sense as, for example, a declaratory judgment. Nor are they capable of being invoked as against third parties.

Employing a common legal nomenclature, we might say that provisional measures arise from acts *negotium*, in other words from the process by which the legal rule concerning expression of will emerges, whereas the final decision arises from the legal rule laid down. And it is only the latter that is binding and opposable.

Consideration of the content of measures prescribed leaves one even more skeptical. In the Saiga 2 case, for example, the Tribunal prescribed that one party should refrain from taking or carrying out any judicial or administrative action against the *Saiga*. It "recommended that the two parties endeavour to find an arrangement . . . pending the final decision . . ." [Operative paragraphs 1 and 2].

In the Southern Bluefin Tuna case, the Tribunal prescribed that the parties "ensure that no action is taken which might aggravate or extend the disputes"; and that the two parties "should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna."

The foregoing excerpts show that the measures recommend and admonish the parties to do or not to do. But is there in international law a power to prescribe that is recommendatory or hortatory?

Another problem to be distinguished from that of the binding effect of provisional measures is that of their implementation. Article 95 of the Rules of the Tribunal sets out the applicable rules, but we believe that it is not up to the Tribunal to oversee the application of its judicial decisions because it affects the extra-procedural relations of the litigants.