Annex LA-12

The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems*

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ABSTRACT

This presentation describes the system of provisional measures by the International Tribunal for the Law of the Sea under Article 290 of the 1982 Convention on the Law of the Sea. By pointing towards the binding legal nature of provisional measures and the introduction of a duty to report on compliance efforts, he begins his article stressing the system's efficiency. The author then comments on the various prerequisites while drawing comparisons with the prescription of provisional measures by the International Court of Justice. He finally turns towards the problems of the application of Article 290 by focusing on the requirement of a specific demand by a State party for a provisional measure. While admitting the Tribunal's authorization to issue provisional measures with a view to the marine environment and the increasing influence of the precautionary principle in public international law, he also advises against the temptations to exceed the limits of provisional measures in international law. The interplay with other treaties which refer to the Convention's dispute settlement system (especially the Agreement on Straddling and Highly Migratory Fish Stocks) even adds to this danger in the author's eyes. He closes with an appeal for due process, prudence and impartiality.

The Tenth Anniversary of the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) offers us the unique opportunity to review its contribution to the settlement of some major issues concerning provisional measures in international law, as well as to examine some major problems that are still pending under international law generally and the trends of the jurisprudence of the Tribunal in particular.

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Binding Legal Nature of Provisional Measures

The first major contribution that must be noted in respect to provisional measures originates in the United Nations Convention on the Law of the Sea (LOS Convention or the Convention) itself and concerns the binding legal nature of these measures. It is a well-known fact that the Statute of the International Court of Justice (ICJ or the Court) allowed for some element of doubt when referring to the power of the Court to "indicate" provisional measures in Article 41. The same approach was followed by other major international conventions dealing with dispute settlement, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

Yet, when the Convention on the Law of the Sea was adopted in 1982, the reference to the power of the Tribunal to "prescribe" such measures was already pointing towards a major shift that would become quite evident some years later. As the distinguished President of the Tribunal, Judge Wolfrum, noted in a scholarly article, the different wording that the drafters of the Convention chose for Article 290 was clearly pointing to the conclusion that they "wanted to improve the powers of courts and tribunals having jurisdiction over law of the sea disputes," and thereafter the provisional measures adopted by such courts and tribunals "have a binding effect upon the parties to the dispute." ¹

In the same vein, a most interesting recent book on the Tribunal reminds us that Judge Laing noted in his Separate Opinion in the Saiga No. 2 case that "provisional measures under the LOSC are prescribed, not indicated, and therefore are binding, arguably unlike measures under Article 41 of the ICJ Statute." ² It is also a well-known fact that this difference would not persist as it became gradually noticeable in the jurisprudence of the International Court of Justice. The Breard,³ LaGrand⁴ and Avena⁵ cases, among others, offer a quite eloquent expression of this change, just as the Maffezini case shows the same change with regard to ICSID.⁶

The mandatory nature of the provisional measures prescribed by the Tribunal is further confirmed by other provisions and by its subsequent

⁴ ICJ, LaGrand (Germany v. USA) (Judgment of 27 June 2001) [2001] ICJ Rep 466.
⁶ ICSID, Emilio Agustin Maffezini v. Spain, Case No. ARB/97/7, Decision on Request for Provisional Measures of 28 October 1999.
jurisprudence. Article 290 (6) of the Convention provides that the parties “shall comply” with the provisional measures prescribed under that Article. In addition, Article 95 of the Tribunal’s Rules of Procedure establishes the obligation for the parties to inform the Tribunal about the “compliance with any provisional measures the Tribunal has prescribed.”

The fact that provisional measures are normally prescribed for a limited period of time does not appear to have caused any new or difficult problems in the Tribunal’s jurisprudence. The maximum limit will of course be connected with the fact that measures shall be prescribed “pending the final decision” (Article 290 (1)). The measures in question can be modified or revoked as soon as the circumstances justifying them “have changed or ceased to exist” (Article 290 (2)). However, under Article 92 of the Tribunal’s Rules of Procedure, even if a request for a provisional measure has been refused by the Tribunal, this shall not prevent a new request in the same case based on new facts.

Once the final decision is reached either because the Tribunal decides the matter, as in Saiga No. 2,7 or because it decides that it lacks jurisdiction, as in the Southern Bluefin Tuna arbitration,8 the measures will come to an end without express declaration, although in the latter case the arbitral tribunal expressly revoked them.9 It is also interesting to note that even if an order is revoked, its effects might extend beyond the period in which it was in force; the arbitral tribunal in the Southern Bluefin Tuna case expressly clarified that the revocation it made “does not mean that the Parties may disregard the effects of that Order or their own decisions made in conformity with it.”10

The practices of the Tribunal have reaffirmed the obligation of the parties involved in a dispute to inform it on compliance in all the cases concerning the prescription of provisional measures. It has not passed unnoticed that in this respect there is a subtle difference from the ICJ Statute, where the Court shall decide whether to request this kind of information.11

Interesting views have arisen in connection with the provisional measures prescribed by the Tribunal in Saiga (No. 2), since both a provisional measure and a recommendation were made on this occasion. Given that the Tribunal decided that the obligation to inform it on compliance referred to both, the issue was raised whether the Tribunal has the power to decide on mere recommendations and whether it is appropriate to extend the obligation to inform it about such recommendations as well.12 Should the answer to these

8 Southern Bluefin Tuna Annex VII Arbitral Tribunal, Award of 27 August 1999.
9 Southern Bluefin Tuna, Award (n 8) para. 72.2.
10 Southern Bluefin Tuna, Award (n 8) para. 67, and discussion by Silvina S. González Napolitano, Las Medidas Provisionales en Derecho Internacional ante las Cortes y Tribunales Internacionales (Buenos Aires 2004) 202.
11 Garcia (n 2) 502.
questions be negative, the Tribunal could eventually be acting outside the scope of its jurisdiction, but this would hardly be a justifiable conclusion.

**Requirements of Provisional Measures**

The Tribunal’s second major contribution to provisional measures relates to the clarification of a number of aspects concerning the necessary requirements and, again quite subtly, takes advantage of the practice of the International Court of Justice, of either clarifying it or following it.

Article 290 of the Convention, unlike the ICJ Statute, but in conformity with the practice of the Court, expresses refers to the requirement that the court or tribunal seized of a request for provisional measures considers that *prima facie* it has jurisdiction under the pertinent parts of the Convention.

The issue of course is that, like in *Saiga* and *Saiga No. 2*, the jurisdiction of the Court will normally be contested by one of the parties and supported by the other. In this context, the Tribunal will quite rightly avoid a finding in respect of provisional measures that could entail a final jurisdictional decision or provide some clue as to its opinion thereon. Yet there is a close relationship between the *prima facie* decision concerning provisional measures and the jurisdictional choice relating to the merits to be made at a later stage as the judges are in some way expressing their intimate conviction in this respect. This might not be the most desirable judicial policy perhaps, but it is certainly the one in keeping with human nature.

The requirement of urgency in prescribing provisional measures does not appear to raise any particular difficulty in the context of ITLOS, notwithstanding the fact that it is not prominent in the text of Article 290 and is only explicitly addressed in its paragraph 5 in connection with the pending constitution of an arbitral tribunal. Yet, it has been rightly commented that urgency is embodied in the context of the Article in connection with the preservation of the rights of the parties or prevention of environmental harm. This last issue will be addressed separately.

Another contribution the Tribunal has made to the better understanding of provisional measures and their operation concerns the question of the powers of the Tribunal to prescribe these measures. Unlike Article 41 of the ICJ Statute, Article 290 (3) of the Convention allows the Tribunal to prescribe, modify or revoke provisional measures “only” when this is requested by a party.

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15 García (n 2) 485-486.

16 González Napolitano (n 10) 74.
to the dispute and after the parties have been given the opportunity to be heard, thus clearly limiting the powers of the Tribunal in this matter.

Although this aspect at first glance might not appear to be particularly significant, it does indeed entail important definitions. The first is that, unlike the case of the International Court of Justice, such measures could not be prescribed by the Tribunal * proprio motu*. It has to rely on the initiative of the parties. Proposals purporting to grant this power to the Tribunal were not retained at the drafting of the Convention. Further confirmation of this limitation to the Tribunal's powers can be drawn from the fact that a provision similar to that of Article 75 (1) of the Rules of the ICJ has not been retained in the rules governing the procedure of the Tribunal.

It is also interesting to note that the only situation in which the Tribunal can proceed * proprio motu* is in the context of reviewing provisional measures adopted by the Chamber of Summary Procedure, as envisaged in Article 91 (2) of the Tribunal's Rules. It has been suggested that this limited power will also affect the International Court of Justice when deciding on provisional measures under Article 290 of the Convention.

A second consideration is that this limited power also provides grounds for those who believe that the Tribunal could only prescribe provisional measures and not recommendations, as was the case in *Saiga No. 2* as noted above, since the request of a party only concerns such provisional measures.

The third consequence is more important. The Tribunal is definitely prevented from prescribing *ex parte* provisional measures, where there will be no need to hear the other party if the preservation of rights requested could thereby be hindered. Unusual as this power is, the fact is that it is being actively discussed presently in the United Nations Commission on International Trade Law (UNCITRAL) and other arbitration mechanisms. The implications of this particular aspect for provisional measures concerning the preservation of the marine environment will also be discussed separately.

On other questions the rules governing the Tribunal and its practice confirm what is already evident in the broader practice of international courts and tribunals. This is particularly the case in regard to the broad scope of measures that the Tribunal can adopt and which are encompassed within the reference made by Article 290 (1) of the Convention to the power to prescribe "any provisional measures that it considers appropriate under the circumstances." The requests for provisional measures made to the Tribunal offer a wide variety of examples of what a party might envisage in this respect, ranging from prompt release to put an end to unilateral fishing and other activities, including the construction of a plant or the assertion of territory.

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17 *Commentary*, Article 290.5.b.
18 González Napolitano (n 10) 123.
19 García (n 2) 483, 492.
20 González Napolitano (n 10) 142.
It has also been noted that in the *Southern Bluefin Tuna* case Japan made a "counter-request for provisional measures" that might have influenced the Tribunal's Order for provisional measures addressed to all three litigants.\(^{21}\)

The issue is not so much related to the scope and variety of provisional measures as it is to the requirement that they must be reasonably related to the underlying or prospective dispute. However, this is something that the Tribunal will of course carefully scrutinize before prescribing any measure.

More important is the question whether the Tribunal will be able to prescribe measures that have not been expressly or clearly requested by a party. Given the broad powers of courts and tribunals in respect to provisional measures, it is not surprising that Article 89 (5) of the Rules of Procedure of the Tribunal provide for the power to prescribe measures "different in whole or in part from those requested."

While a number of the measures prescribed by the Tribunal have not been identical to those requested by a party, they have normally had a close relationship to or have arisen from those requested.\(^{22}\) However, in the light of the measures prescribed by the Tribunal in recent cases, with explicit reference to Article 89 (5) of the Rules, a trend appears to be emerging to adopt measures not requested by the parties.\(^{23}\)

The opinion has been expressed that a particular measure adopted by the Tribunal in the *Southern Bluefin Tuna* case, which appeared to exceed the scope of the request made, was still within the scope of Article 290 of the Convention, provided it did not fall under *ultra petita*.\(^{24}\) On the other hand, a learned view has been expressed to the effect that that measure was *extra petita*.\(^{25}\) This issue will be considered further below.

**Preservation of the Marine Environment and the Precautionary Principle**

Besides the contributions noted, the Tribunal's rules and practices have also raised new issues concerning provisional measures. The main question that has been haunting the Tribunal concerns the preservation of the marine environment. Article 290 (1) of the Convention refers to provisional measures not only in respect to the preservation of the rights of the parties but also "to prevent serious harm to the marine environment".

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\(^{21}\) González Napolitano (n 10) 121, 202.

\(^{22}\) M/V "*Saiga*" No. 2 Case, Order (n 2) para. 52.1.

\(^{23}\) *Southern Bluefin Tuna Cases* (New Zealand v. Japan, Australia v. Japan) (Provisional Measures, Order of 27 August 1999) para. 90.1.a, b; MOX Plant Case (Ireland v. United Kingdom) (Provisional Measures, Order of 3 December 2001) para. 89.1; Case concerning *Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore) (Provisional Measures, Order of 8 October 2003) para. 101; and discussion by García (n 2) 496–497.


\(^{25}\) García (n 2) 492.
This additional policy objective raises some technical legal questions. It has been rightly commented that the use of the expression "or" in Article 290 (1) does not exclude the possibility that measures concerning the marine environment might be prescribed in addition to measures protecting the rights of the parties. These objectives are not to be understood as excluding one another.\textsuperscript{26}

A more delicate question concerns the issue whether the preservation of the marine environment might be justified not only in the interest of any given party but also in regard to the general interest. While complying with the requirement that provisional measures must be requested by a party, which presumably applies also to the measures concerning the environment, thus far measures of this kind have always been requested by a party, but while also suggesting or claiming that the measures requested are justified in the general interest.\textsuperscript{27}

It should be noted in this context that under Article 290 (4) of the Convention, notice of the provisional measures ordered shall be given quite naturally to the parties to the dispute, but also to such other States Parties as the Tribunal considers appropriate. While there could be a reading of this provision to the effect that such measures might entail an interest broader than that of the parties to the dispute, particularly in respect of the marine environment, a more reasonable reading relates to the need to enforce these measures under the supervised information of other States.\textsuperscript{28}

A complicated scenario would arise if the Tribunal accepts such a request and prescribes a measure that is broader than that requested, which, as noted above, has already been a matter of some debate in the context of the argument that a given measure might be \textit{ultra petita}. The situation turns out to be more complicated yet if the Tribunal, inspired by the general interest, would decide to adopt a measure of this kind \textit{proprio motu} in the understanding that measures of this kind do not require a request by a party, as was suggested during the Law of the Sea negotiations.\textsuperscript{29}

While nothing of the sort has happened or even been suggested thus far, it can be observed that the Tribunal appears to be increasingly interested in the possibility of expanding the provisional measures requested to reach some broader policy objective. This appears to be the case with the \textit{Southern Bluefin Tuna} resource-oriented measures, the monitoring and information system of the \textit{MOX Plant} measures or the appointment of experts in the \textit{Straits of Johor}

\textsuperscript{26} Garcia (n 2) 493.

\textsuperscript{27} \textit{Southern Bluefin Tuna Cases (New Zealand v. Japan, Australia v. Japan)} (Australia, New Zealand Request) para. 1, 14; \textit{MOX Plant Case (Ireland v. United Kingdom)} (Request for Provisional Measures of Ireland) para. 97; \textit{Straits of Johor Case (Malaysia v. Singapore)} (Request for Provisional Measures of Malaysia) para. 18; as cited and discussed by Garcia (n 2) 487–488, 493.

\textsuperscript{28} González Napolitano (n 10) 156.

\textsuperscript{29} Commentary, Article 290.5.b., and discussion by García (n 2) 494, 499, note 1718.
case.\textsuperscript{30} Strangely enough, some of these measures resemble the approach taken by the tribunals in the leading \textit{Trail Smelter}\textsuperscript{31} and \textit{Fur Seals}\textsuperscript{32} cases, only that there the measures were conceived as part of the decision. In this context, a warning signal must sound if the Tribunal appears to be tempted to treat environmentally related provisional measures more broadly than ordinary measures.

In the light of the discussion of the precautionary principle that the parties raised in the \textit{Southern Bluefin Tuna}, the \textit{MOX Plant} and the \textit{Straits of Johor} cases, one cannot fail to see that such a temptation exists. Australia and New Zealand in the first case, like Ireland in the second, have stated the view that today the precautionary principle is part of general or customary international law. Malaysia, in the third case, also referred to the principle in a less dogmatic way.

Such an opinion is to be expected in the arguments of the parties. But the question concerns the reaction of the Tribunal to these arguments. It has been rightly noted that the reaction thus far has been very prudent and that no endorsement of the principle as part of customary international law has in any way been made.\textsuperscript{33} Moreover, various separate opinions have explained that it could not be held today that such customary principle exists, or that it is not yet generally accepted.\textsuperscript{34}

Nevertheless, it has also been noted that references to general international law in respect to matters closely connected to the precautionary principle, such as cooperation in respect of the marine environment, have been made in the Tribunal’s orders.\textsuperscript{35} More specifically still, a reference to “prudence and caution” appears in the \textit{Southern Bluefin Tuna} case, together with a reference to “scientific uncertainty” and its link to “urgency,”\textsuperscript{36} as “prudence and caution” are also present in the \textit{MOX Plant} case.\textsuperscript{37}

A rational observer could not fail to notice that the temptation again exists, which is further confirmed by several separate opinions that have interpreted the \textit{Southern Bluefin Tuna} Order as adopting the precautionary approach, whether in connection with urgency or some broader matter,\textsuperscript{38} just as criticism has been made because the Tribunal did not fully endorse such a principle.\textsuperscript{39}

\begin{footnotesize}
30 Garcia (n 2) 496–497.
31 \textit{Trail Smelter Arbitration (USA v. Canada)}, Awards of 16 April 1938 and 11 March 1941.
32 \textit{Bering Sea Arbitration (Great Britain v. USA)}, Award of 15 August 1893.
33 Garcia (n 2) 488–489.
35 Garcia (n 2) 488–489, with particular reference to the \textit{MOX Plant Case}, Order (n 23) para. 82 and \textit{Straits of Johor Case}, Order (n 23) para. 92, endorsing the finding noted in the \textit{MOX Plant} Order.
36 \textit{Southern Bluefin Tuna Cases}, Order (n 23) paras. 77, 79.
37 \textit{MOX Plant Case}, Order (n 23) para. 84.
\end{footnotesize}
The issue lies not with the precautionary principle or the more moderate version of a precautionary approach, but rather with the requirement not to prejudge the merits of the case by prescribing certain provisional measures, a matter which Judge Wolfrum clearly addressed in his separate opinion in the MOX Plant case when recalling that “provisional measures should not anticipate a judgment on the merits...”  

While it is understandable that judges would eventually like the Tribunal to address issues of substance, such as the principle discussed, this can only be done in connection with the merits of the case and after having heard the different views that exist on the matter. Otherwise, a fatal blow will be given to the Tribunal’s reputation as an impartial judicial forum which duly safeguards due process.

Jurisdictional Issues

Another major innovation that the Tribunal has introduced concerns the request of provisional measures in a forum different from that which will eventually hear and decide the case. Under Article 290 (5) of the Convention there are three aspects that must be noted. The first is that pending the constitution of an arbitral tribunal to which a dispute is being submitted, any court or tribunal agreed upon by the parties may prescribe provisional measures. It may also modify or revoke such measures. The second is that if such an agreement is not reached within two weeks from the date of the request, the Tribunal becomes the competent forum to this effect. The third is that an identical competence has been given to the Seabed Disputes Chamber with respect to activities in the Area.

All of these competences of course require that there is a finding that prima facie the tribunal which is to be constituted has jurisdiction and that the matter is urgent. The tribunal ultimately established will thereafter be able to modify, revoke or affirm such measures.

Article 290 (5) has been applied in the Southern Bluefin Tuna, the MOX Plant and the Straits of Johor cases, thereby suggesting that this is a practical mechanism of interest to litigants. The standard to decide on the prima facie jurisdiction appears not to differ in those three cases from the standard the Tribunal applies to its own jurisdiction, although it has been commented that eventually the Tribunal would be more inclined to leave the arbitral tribunal to decide on its own jurisdiction. The prima facie finding has been confirmed in the MOX Plant case and denied in the Southern Bluefin Tuna case.

The nature of the required urgency has also met with different interpretations. In the Southern Bluefin Tuna and the MOX Plant cases the Tribunal has

40 MOX Plant Case, Order (n 23) Sep. Op. Wolfrum; García (n 2) 491–492.
41 García (n 2) 502.
42 García (n 2) 503.
qualified the urgency in respect of the period pending the constitution of the arbitral tribunal, thus leaving to that arbitral tribunal the decision of what to do next. In the *Straits of Johor* case a broader time frame was considered as it also took into consideration the period during which the arbitral tribunal may not yet be in a position to decide. While again it might be tempting to stretch the time frame and enlarge the nature of urgency, a clear warning light was lit by Judge Mensah's separate opinion in the *MOX Plant* case.

The interplay of treaties in connection with provisional measures has also been noted as a new area for both opportunities and difficulties. It appears that provisional measures concerning disputes under treaties that refer to the Convention's dispute settlement system would be quite naturally subject to the same regime discussed under the provisions of Articles 21 and 25 of the Statute.

This would also be the case with regard to other treaties that do not expressly refer to the Convention but where it has been agreed by all the parties to confer jurisdiction on the Tribunal under Article 22.

The difficulty arises under other treaties or agreements that, while referring to the Convention's dispute settlement system, they provide for exceptions or different rules as to some aspects of the Tribunal's jurisdiction generally or concerning provisional measures specifically. This is notably the case with regard to the Agreement on Straddling and Highly Migratory Fish Stocks and its regime for provisional measures under Article 31 and its interaction with Articles 7 (5) and 16 (2) of the Agreement.

It has been rightly noted that in the case of this Agreement provisional measures might be addressed not only to preserve the rights of the parties to the dispute but also "to prevent damage to the stocks in question," a reference which is broader than that of Article 290 (1) of the Convention. Again in this context, the precautionary approach has been associated to the question of provisional measures.

The language of the Agreement appears to deal simultaneously with two questions that might be different depending on the circumstances of a given case. On the one hand, it deals with provisional measures of the kind envisaged by Article 290 of the Convention. These, if submitted, would face no problem when brought before the Tribunal.

On the other hand, the Agreement refers to provisional measures as encompassing "provisional arrangements of a practical nature" (Article 31.1), and refers specifically to Article 7, which addresses compatibility of conservation and management measures generally and, under its paragraph 5, more

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43 Garcia (n 2) 504–505.
45 Garcia (n 2) 505.
46 *Southern Bluefin Tuna Cases*, Order (n 23) Sep. Op. Treves, paras. 7, 8; García (n 2) 507.
specifically the question of such provisional arrangements of a practical nature. This last paragraph then adds that in the event that the parties are unable to agree on such provisional arrangements, any of the States concerned may "for the purpose of obtaining provisional measures" submit the dispute to a court or tribunal under the dispute settlement arrangements of the Agreement. Again, Article 16 (2) deals with provisional arrangements and measures relating to conservation and management.

The question that needs to be addressed is whether the Tribunal, when faced with a request for such provisional measures, can enter into the definition of a regime for the conservation and management of the resources in question, provisional as it may be. This appears to be a matter pertaining more to the merits of the dispute than to the discussion of provisional measures as traditionally understood.

Here again, while the temptation might be great to embark on a broad regime of this nature, this does not seem to be in keeping with the competences of the Tribunal under Article 290 of the Convention. True enough, these competences can be extended under a special agreement, but still it is difficult to think that such a large scope of measures might be justified under the heading of "provisional measures." Judicial prudence seems to be the best choice in this event.

The question becomes more complicated still if the situation is similar to the one the arbitral tribunal faced in the Southern Bluefin Tuna case, where competing and unrelated dispute settlement mechanisms under different treaties are favored by one party or the other. While many scholars who aspired to see in this case a development of the Convention's regime on the substance of the fishing issues may have experienced a natural frustration with the outcome, it is not unreasonable for a tribunal to abstain from pursuing such a course if the parties have not agreed to a particular dispute settlement system that could entail larger competences.

This appears to be the very reason why under Article 31 (1) of the Straddling Stocks Agreement if a party to it is not a party to the Convention, this party may declare that notwithstanding Article 290 (5) of the Convention, the Tribunal shall not be able to prescribe, modify or revoke provisional measures without the agreement of said State.

Provisional Measures Prescribed by the Chamber of Summary Procedure (Art. 25 (2) Statute)

The last question of interest to be mentioned is the procedural innovation contained in Article 25 (2) of the Tribunal's Statute to the effect that if the Tribunal is not in session or lacks the necessary quorum, the provisional measures shall be prescribed by the Chamber of Summary Procedure at the request of any party to the dispute, subject to the review and revision by the Tribunal. While it is not probable that this Chamber could embark on a broad
interpretation of the measures to be adopted, or even less so deal with provisional arrangements relating to conservation measures, the question again helps to illustrate the need for judicial prudence, as these measures, in the light of Article 91 (2) of the Tribunal's Rules of Procedure, are still more provisional than any other provisional measure prescribed by the Tribunal.47

Concluding Remarks

Many temptations are surrounding the Tribunal and its judges. One can only hope, for the sake of due process, prudence and impartiality, that the Tribunal will not follow Oscar Wilde’s famous dictum, “I can resist anything but temptation.”

47 González Napolitano (n 10) 117.