Annex LA-8

Rüdiger Wolfrum, “Provisional Measures of the International Tribunal for the Law of the Sea”, 
PROVISIONAL MEASURES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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I. INTRODUCTION

According to Article 290 of the UN Convention on the Law of the Sea (UNCLOS) a court or tribunal dealing with law of the sea disputes may prescribe provisional measures.¹ The reference to “a court or tribunal” is to be understood as a reference to Article 287, UNCLOS and means that provisional measures may be prescribed by the International Tribunal for the Law of the Sea, the International Court of Justice and arbitral tribunals. Article 290, UNCLOS applies to all tribunals and courts having jurisdiction to decide law of the sea disputes.

To the extent Article 290 of the UNCLOS differs from Article 41 of the Statute of the International Court of Justice, the former provision prevails.

¹ Article 290 reads: “1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Sea-Bed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.”
under the principle of lex specialis. However, since Article 290 of the UNCLOS does not cover every aspect of the prescription of provisional measures. Article 41 of the Statute of the ICJ as well as the Rules of the ICJ remain applicable.

Further rules concerning provisional measures concerning law of the sea disputes are contained in Article 25, Annex VI, UNCLOS (Statute of the Tribunal) and in its Rules. They only apply to the International Tribunal for the Law of the Sea. According to Article 25, paragraph 1, of the Statute provisional measures may also be prescribed by the Sea-Bed Disputes Chamber. Although not expressly mentioned in the Statute, chambers dealing with a particular category of disputes or a particular dispute also may prescribe provisional measures since such chambers used by parties to a conflict or formed upon their request act instead of the International Tribunal for the Law of the Sea. Particular provisions are further contained in Article 31 for the Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Convention). This provision again applies to all courts or tribunals having jurisdiction to decide law of the sea disputes.

The International Court of Justice, the Court of Justice of the European Communities, the Inter-American Court of Human Rights and the European

2. Article 90, UNCLOS as well as Article 25 of the Statute of the ITLOS speak of "provisional measures" as does Article 41 of the Statute of the ICJ. The Statute of the Permanent Court of International Justice and the Statute of the ICJ until 1978 referred to "Interim Measures" instead.
3. The International Tribunal for the Law of the Sea has not yet finally adopted its Rules. In the following reference will be made to the Rules provisionally adopted by a working group during the second and third session of the Tribunal (see ITLOS/WG 1/WP 1/Rev. 1 and ITLOS/WG. 1/WP. 2).
4. Established in accordance with Article 15, paragraphs 1 and 2, of the Statute of the Tribunal.
5. See Article 15, paragraph 5, of the Statute.
Court of Human Rights also have the competence to indicate or to prescribe provisional measures. Therefore, the competences of the International Tribunal for the Law of the Sea are, in general, nothing exceptional. However, the rules governing provisional measures in law of the sea disputes to some extent differ from the ones existing so far and are to be seen as a further development of the system of provisional measures in the international settlement of disputes. The present paper will thus give an outline on the rules governing provisional measures in law of the sea disputes and indicate its particularities vis-a-vis the established practice of the international or regional courts referred to above. In doing so the paper will focus on provisional measures of the International Tribunal for the Law of the Sea.

II. PURPOSE OF PROVISIONAL MEASURES

According to Article 41 of the Statute of the ICJ, the power of the Court to decide on provisional measures is a discretionary and exceptional one. This is also true for provisional measures in law of the sea disputes. Article 290, UNCLOS states that court or tribunal may prescribe any provisional measures it considers appropriate. The respective rules of the Court of Justice of the European Communities are wider than Article 290, UNCLOS. According to Article 186, EEC Treaty, the Court may prescribe any necessary interim measures. In comparison the respective powers of the Inter-American Court of Human Rights are limited. Provisional measures, in accordance with Article 63, paragraph 2, of the American Convention on Human Rights, may only be adopted in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons. The rules on provisional measures differ, however, as far as the purpose they serve are concerned.

Generally speaking, in international adjudication provisional measures are meant to safeguard the rights of parties to a conflict or to prevent irreparable damage until the final decision. The wording of Article 41 of the Statute of the ICJ seems to reflect this objective by stating that they are meant “to preserve the respective rights of either party” — pending final deci-

12. Jacobs note 8, p. 44.
13. Buergenthal note 9, p. 69.
14. The French and the English versions of Art. 41 of the Statute of the ICJ differ substantially. Whereas the French version speaks of “droit de chacun”, the English version uses the words “respective rights of either party”. According to the Dissenting Opinion of Judge Thierry in the Arbitral Award of 31 July 1989, Provisional Measures, Order of 2 March 1990, ICJ Reports 1990, p. 64 (pp. 79-80), the French version goes further and invites the Court “to exercise, in adopting provisional measures, its judicial function in full.”
Hence, provisional measures are meant to ensure the possibility of the execution of whatever judgment may finally be rendered.\textsuperscript{15} The competence of the International Court of Justice to indicate provisional measures received further specification through its Orders and Judgments. In an order concerning the Fisheries Jurisdiction cases the Court stated:

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 judgments should not be anticipated by reason of any initiative regarding the measures which are in issue.\textsuperscript{16}

This definition contains three elements. The provisional measure is meant to preserve the respective rights of parties; irreparable prejudice should not be caused to disputed rights and the Court's judgment should not be anticipated.

As far as the objective of provisional measures is concerned, the wording of Article 290, paragraph 1, UNCLOS differs from the one of Article 41 of the Statute of the ICJ. Apart from referring to the preservation of the respective rights of the parties it also mentions the prevention of serious harm to the marine environment. This particular competence mirrors the importance Part XII of UNCLOS attaches to the protection of the marine environment. According to Article 31, paragraph 2, Straddling Stocks Convention, provisional measures may also be prescribed to prevent damage to fish stocks in question. Referring to such justification for provisional measures adds a new element to their objective one, which is not directly linked to the interests of the parties to the dispute and thus makes the tribunal or court a mechanism working not only in the interest of the parties involved but in the one of the community of states. This reflects the change of international law from a mechanism providing for the co-ordination of states' activities to one which also recognizes and seeks to preserve common values of the community of states.

The notion of "preservation of rights" as used in Article 290, UNCLOS or Article 41, Statute of the ICJ may lead to some misinterpretation. Rights cannot, or can at least only in rare cases, be destroyed. Rights are rather violated or infringed and they continue to exist in spite of their violation. Taking the term literally would, in consequence, limit the prescription of provisional measures to exceptional cases. On the other hand, a reading of

\textsuperscript{15} Sztucki note 5, p. 70.
\textsuperscript{16} ICJ Reports 1972, p. 16, para. 21; p. 34, para. 22.
the term "preservation of rights" rather as "infringement of rights" would widen the application of provisional measures in an unacceptable way. In particular, it would make it nearly impossible that a provisional measure would not anticipate the final decision of the court. The Permanent Court of International Justice was faced with this problem in the South-Eastern Greenland case and followed a restricted approach. The Court refused the indication of provisional measures, amongst others, on the ground that the rights were not in danger of being damaged.\(^{17}\)

To more clearly identify the cases in which provisional measures may be indicated, the International Court of Justice developed the notion of prevention of irreparable prejudice in the Fisheries Jurisdiction cases.\(^{18}\) The application of this notion in later cases by the International Court of Justice or its judges has not always been fully consistent.\(^{19}\) Several objectives are to be distinguished. The objective of the provisional measure may be to prevent the aggravation of the dispute,\(^{20}\) or to preserve the exercise by the Court of its judicial function by preventing the parties from anticipating the subsequent decision of the Court on the merits,\(^{21}\) or to prevent irreparable damage.\(^{22}\) Interpretative problems arise at least in respect of the latter. The

17. "Whereas, having regard to the character of the alleged rights in question, considered in relation to the natural characteristics of the territory in issue, even "measures calculated to change the legal status of the territory" could not, according to the information now at the Court's disposal, affect the value of such alleged rights, once the Court in its judgment on merits had recognized them as appertaining to one or other of the Parties", Legal Status of the South-Eastern Territory of Greenland, P.C.I.J Series A/B, No. 48, p. 288; see also Thirlway note 7, p. 7.
18. See note 16.
20. This argument has been used frequently in the practice of the International Court of Justice, see for example Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984, p. 187, para. 41B (3); Frontier Dispute. Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 9, para. 18; Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993, p. 24, para. 52 B; also in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996. I.C.J. Reports 1996, p. 13 (p. 18) the application for the indication of provisional measures by Cameroon was based upon this rationale.
22. In the Fisheries Jurisdiction case the Court noted that according to the Government of Iceland, to "freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation" (Fisheries Jurisdiction (United Kingdom v. Iceland), Order of 12 July 1973, I.C.J. Reports 1973, p. 303. In the United States Diplomatic and Consular Staff in Teheran case the United States sought to protect the rights of its nationals to life, liberty, protection and security (I.C.J. Reports 1979, p. 19, para. 37).
The prescription of provisional measures does not depend upon the existence of irreparable damage, but it is intended to counter the risk of any irreparable damage occurring. The findings of the International Court of Justice on this point are quite limited. This is not the place to analyze the practice of the International Court of Justice. The International Tribunal for the Law of the Sea and the Sea-Bed Disputes Chamber will have to develop their own jurisprudence. In doing so they will have to bear in mind the purpose of provisional measures namely to ensure that the final judgment is in a position to decide the dispute and that such judgment can be implemented to the full extent. Apart from that, provisional measures may serve as a means to prevent an aggravation of the situation. These two objectives have to be implemented from the point of view that the provisional measure in question has to protect the right of either party to the dispute or the interest of the state community in the preservation of the marine environment.

Under Article 41 of the Statute of the ICJ, provisional measures may be applied for by either party of the dispute. The same is true for law of the sea disputes under the UN Convention on the Law of the Sea. This reflects the equality of parties, although, by its very nature, provisional measures primarily serve the applicants.

III. CONDITIONS FOR THE PRESCRIPTION OF PROVISIONAL MEASURES

A. Jurisdiction

It is generally agreed that in respect of provisional measures two different forms of jurisdiction are to be distinguished; the court must have jurisdiction to take a decision in the matter and it must have jurisdiction to implement the measure.

23. Case concerning the Denunciation of the Treaty of 2 November 1865 between China and Belgium (P.C.I.J., Series A. No. 8, p. 7); Fisheries Jurisdiction case, I.C.J. Reports 1972, p. 16; in his Dissenting Opinion (note 14) Judge Thierry qualifies the requirement of the existence of irreparable damage as a condition for the indication of provisional measures as an absurdity.

24. In the Anglo-Iranian Oil Co. case (I.C.J. Reports 1981, p. 89) the risk for irreparable damage was seen in the danger that certain quantities of oil belonging to that company might have been removed or sold.

25. In the Fisheries Jurisdiction cases the I.C.J. just stated: “Whereas the immediate implementation by Iceland of its Regulation would, by anticipating the Court’s judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour” (I.C.J. Reports 1972, p. 16, para. 21).

indicate provisional measures.\textsuperscript{27}

Under the Statute of the ICJ it may have been doubtful to what extent the ICJ had to establish its jurisdiction. Theoretically two extreme positions might have been taken, namely either the International Court of Justice had to decide positively upon its jurisdiction before indicating provisional measures or to disregard whether it had such jurisdiction when deciding on provisional measures.\textsuperscript{28} Evidently there is no full conformity of views as far as the International Court of Justice is concerned.\textsuperscript{29}

In this respect the wording of Article 290, UNCLOS offers some clarification. Under its rules it is not necessary to establish that the courts or tribunals have jurisdiction to decide upon the merits before provisional measures may be prescribed. It is sufficient, however also necessary, that the party to a dispute requesting the prescription of provisional measures


\textsuperscript{28} The issue has been raised in the separate opinion of Judge Hersch Lauterpacht in the \textit{Interhandel} case: “However, it is one thing to say that action of the Court under Article 41 of the Statute does not in any way prejudge the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable; it is another thing to affirm that the Court can act under Article 41 without any regard to the prospects of its jurisdiction on the merits and that the latter question does not arise at all in connection with a request for interim measures of protection ... The Court, cannot, in relation to a request for indication of interim measures disregard altogether the question of its competence on the merits.” (\textit{I.C.J. Reports} 1957, p. 118).

\textsuperscript{29} See, for example Judge Schwebel in the \textit{Nicaragua v. United States} case (\textit{I.C.J. Reports} 1984, p. 207) that “the Court gives the defendant the benefit of the doubt”. Vice-President Oda suggested in the \textit{Lockerbie} case that “if the Court appears \textit{prima facie} to possess jurisdiction, it may (if it thinks fit) indicate provisional measures” (\textit{I.C.J. Reports} 1993, p. 18). In the case \textit{Cameroon v. Nigeria} note 25, p. 21 Nigeria raised preliminary objections to the jurisdiction of the International Court of Justice and in the proceedings on provisional measures expressed the opinion that the Court did not even have \textit{prima facie} jurisdiction over the substantive issue. The Court rejected this objection merely by stating that on a request for the indication of provisional measures the Court had no need, before deciding whether or not to indicate them, to finally satisfy itself that it had jurisdiction on the merits of the case. Critical Separate Opinion, Judge Ajibola note 27, p. 45 who argues that an international court should not attempt to widen its jurisdiction. See also Sir Hersh Lauterpacht, \textit{The Development of International Law by the International Court} (London, 1958), pp. 110-111. The whole issue is discussed at length by Sztucki note 7, pp. 221 et seq.
establishes the jurisdiction of the court or tribunal to decide on the merits **prima facie**. The justification for being satisfied with the **prima facie** establishment of jurisdiction on the merits only derives from the fact that the parties to the dispute have agreed to the competence of the court or tribunal to prescribe provisional measures under the UN Convention on the Law of the Sea. Since Article 290, UNCLOS is applicable to all courts and tribunals having jurisdiction to decide law of the sea disputes, this applies also to the International Court of Justice. Although this only concerns disputes decided under the UN Convention on the Law of the Sea, Article 290, UNCLOS may in fact harmonize the practice of the International Court of Justice in general.

In respect of the law of the sea disputes one further issue has to be taken into consideration. According to Article 290, paragraph 5, UNCLOS, pending the establishment of an arbitral tribunal any court or tribunal agreed upon between the parties, or failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea may prescribe provisional measures. In such a case the court of tribunal before dealing with the provisional measure has to establish whether, **prima facie**, the arbitral tribunal which is to be constituted would have jurisdiction. This provision harmonizes with article 290, paragraph 1, UNCLOS with the exception that the court or tribunal does not establish **prima facie** its own, but the jurisdiction of the arbitral tribunal. According to article 83, paragraph 3, of the Rules, such a request for the prescription of provisional measures shall indicate the legal grounds upon which the future arbitral tribunal would have jurisdiction and the urgency of the situation. For the request of provisional measures under Article 290, paragraph 1, UNCLOS such requirements have not been established as clearly in the Rules of the Tribunal. This may be misinterpreted. In any case the party requesting the prescription of provisional measures has to provide the International Tribunal for the Law of the Sea with such information which enables it to establish **prima facie** its jurisdiction and the necessity for prescribing a provisional measure.

### B. Request for the Prescription of Provisional Measures

According to Article 290, paragraph 3, UNCLOS, provisional measures

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31. Note 3.

32. According to Article 83, paragraph 2, of the Rules which covers the request for the prescription of provisional measures under Article 290, paragraphs 1 and 5, UNCLOS the request shall specify in writing the reasons for provisional measures and the possible consequences if such request were denied. Such provision partly overlaps with paragraph 3 of the same article.
may be prescribed, modified or revoked only at the request of a party to the dispute. This principle is reiterated in Article 25, paragraph 2, of the Statute and Article 83, paragraphs 1 and 2, of the Rules of the Tribunal.

The rules governing the procedure of the International Court of Justice are less clear in this respect. Article 41 of the Statute of the ICJ does not refer to a request of a party, although it is stated that such measures are taken to preserve the respective rights of either party. Article 73, paragraph 1, of the Rules of the ICJ rules that a party may request the indication of provisional measures whereas article 75, paragraph 1, of the Rules of the ICJ states that the Court 'may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures.'

The powers entrusted to the International Court of Justice by article 75, paragraph 1, of its rules have become a matter of dispute. Two issues have clearly to be distinguished, namely measures taken *proprio motu* and measures which go beyond those requested. The International Court of Justice, so far, has never indicated measures without request. There are, however, occasionally *obiter dicta* or references that it had such competence. The starting point for deciding whether the International Court of Justice has the competence to indicate provisional measures *ex officio* has to proceed from article 41 of the Statute of the ICJ. This provision identifies as the sole purpose of provisional measures to preserve the rights of either party. This limited purpose might be understood to mean that the parties have to take an initiative before the Court acts for their protection. However, it is possible to make a counter argument. Article 41 of the Statute does not exclude the possibility that provisional measures may be taken by the Court without a request and that it is also the purpose of provisional measures to safeguard the effective functioning of the Court. Further, it may be taken into consideration as to whether provisional measures are binding or not. If they are not binding upon the parties to the dispute, their indication without request of a party seems to be more acceptable.

For dealing with law of the sea disputes the issue becomes more complex. In such disputes provisional measures may not only be undertaken to preserve the rights of a party but also to prevent serious harm to the marine environment. It would have been a matter of consequence to entrust the

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35. See note 9 above on the differences of the French and of the English text.

36. Thirlway note 7, pp. 3-4.

37. Ibid..
tribunals and courts in such a situation with the power to prescribe provisional measures if they consider them necessary. However, the UN Convention on the Law of the Sea follows a traditional approach: only parties to a dispute may trigger the prescription of provisional measures. There is a justification for that approach. Law of the sea disputes, including the ones on the protection of the marine environment, may be brought before the tribunals or courts only by parties to that dispute. Hence, only after the parties have exercised their procedural right to request the prescription of a provisional measure may the tribunal or court decide whether the prescription of provisional measures is called for and which are the ones appropriate.38

As far as the content of provisional measures is concerned, the International Court of Justice is not bound by the request of the party to the dispute.39 Article 83, paragraph 4, of the Rules of the Tribunals follows the same approach.40 This has to be seen as a deviation from the established judicial principle non ultra petita. Such competence of the Tribunal or the International Court of Justice to prescribe a measure independent from the one requested by the parties may become, if used adequately, a major instrument for the protection of the marine environment.

C. Urgency

Neither the Statute nor the Rules of the ICJ directly indicate that the prescription of provisional measures may only be requested in cases of urgency. However, as indicated by Article 74, paragraph 2, of the Rules of the ICJ, it is the underlying presumption of the rules on provisional measures that they shall be invoked only if there was a case of urgency.41 The ICJ expressed the necessity of urgency clearly in the Great Belt case. It stated:

38. Actually these two points of decision have to be distinguished. That the court or tribunal has discretionary powers to decide upon the measure to be taken is evident from the wording of Article 83, paragraph 4, of the Rules of the Tribunal. It is, however, questionable whether the court or tribunal when deciding upon the admissibility of the request for the prescription of provisional measures may only invoke the argument forwarded by the parties to the dispute. The ICJ had to deal with this issue in the Genocide case. It was faced with the question whether it had jurisdiction although neither party to the dispute questioned its jurisdiction and raised that point ex officio (I.C.J. Reports 1993, p. 14, para. 19).

39. Article 75, paragraph 2, Rules of the ICJ.

40. The provision reads: "When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested or indicate the parties which are to take or to comply with each measure."

41. According to article 74, paragraph 1, Rules of the Court a request for the indication of provisional measures shall have priority over all other cases. Paragraph 2 of the same article rules that in case of such a request the Court shall be convened as a matter of urgency. Both provisions are in nearly identical wording contained in the Rules of the ITLOS.
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.\(^{42}\)

Since Article 83, paragraph 3, of the Rules of the ITLOS refers to the "urgency of the situation" whereas Article 83, paragraphs 1 and 2 dealing with provisional measures for a dispute for which the Tribunal has jurisdiction to decide on the merit do not, this reference must have a particular meaning. It does not refer to the urgency of the situation as such but to the necessity to take a decision even before the arbitral tribunal is constituted. Apart from that, in spite of the fact that Article 83, paragraphs 1 and 2, of the Rules of the ITLOS do not refer to urgency as pre-condition for applying for the prescription of provisional measures, such urgency must exist and the party requesting such provisional measure must establish such existence.

As indicated in the case law of the International Court of Justice provisional measures are only justified if there is urgency in the sense that action prejudicial to the rights of either party to the dispute is likely to be taken before the final decision is given. When that is the case, cannot be determined in abstractu and in advance. That is why Article 83, paragraph 1, of the Rules of the Tribunal provides for the submission of a request for the prescription of provisional measures "at any time during the course of the proceedings" as does Article 73, paragraph 1, of the Rules of the ICJ.

**IV. CONTENT AND EFFECT OF PROVISIONAL MEASURES**

**A. Content**

As indicated above, the Tribunal may prescribe measures different from those requested. The International Court of Justice has used that competence widely. In the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, Cameroon asked the Court to indicate provisional measures concerning the withdrawal of Nigerian troops, their abstention from all military activities, and the abstention of the parties to the dispute from hampering the gathering of evidence. The provisional measures addressed to both parties called upon the parties to ensure that no action was taken which might prejudice the rights and for a return of military forces to positions held before 3 February 1996. So far, the provisional measure


\(^{43}\) Note 27.
corresponds, at least in general, to the application. However, the provisional measure also called upon the parties to "lend every assistance to the fact-finding mission" proposed by the Secretary-General. This measure being explicitly based upon Article 75, paragraph 2, of the Rules of the ICJ not only clearly goes beyond the request, but it is doubtful whether such measure still relates to the claim put forward in the application. Provisional measures have to be related to the application made. Such limitation derives from the fact that provisional measures are only an accessory element of the main procedure. Although this principle has been emphasized in the jurisprudence of the International Court of Justice, it seems as if the Court does not always enforce this principle strictly.

Provisional measures should not constitute an interim judgment in favour of part of the claim. This limitation derives from the conservatory character of provisional measures. The Permanent Court of International Justice has emphasized this point in the Chorzow case. However, the following jurisprudence is less clear. Although provisional measures of an anticipating nature are common under national law, this does not mean that this should be so under international law. The decisive element as to whether or not an international tribunal may prescribe provisional measures of an anticipatory nature is whether it has been entrusted to do so. Since Article 290, UNCLOS qualifies provisional measures of being of a conservatory nature, it is ruled out that they may have an anticipatory effect.

Additionally, it has been argued that provisional measures should avoid prejudging the merits of the case. This issue has been raised in the Anglo-Iranian Oil Co. case where the International Court of Justice has pointed out that:

"[T]he indication of measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction."

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44. See, for example, Aegean Sea case, I.C.J. Reports 1976, p. 11, para. 34.
45. Sztucki note 7, p. 92.
47. A request for indicating an advance payment of a certain amount, presented beyond controversy, was rejected by the Court since this request could not "be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the application". (P.C.I.J. Series A, No. 8, p. 10).
48. Sztucki note 7, p. 93 et seq.
50. I.C.J. Reports 1951, p. 93.
Two issues have to be clearly distinguished. The international court or tribunal must avoid to take a decision which de facto or de jure cannot be reversed by the final judgment. However, an international court or tribunal cannot avoid prescribing provisional measures to “prejudge” its decision on jurisdiction or admissibility of the application or on some issues of substance at least for the period until the final judgment is rendered. The justification for doing so roots in the two procedures existing in parallel, to which the parties have agreed, namely the procedure on provisional measures and the one on the application. The parallelism of these two procedures comes to an end with the final decision since provisional measures are indicated or prescribed only pending the final decision. This is correctly expressed in the *Anglo-Iranian Oil Co.* case. Any infringement of the rights of either party to the conflict by provisional measures is therefore only a temporary one and justified by entrusting the international court or tribunal in question to issue provisional measures.

**B. Effect**

The rules concerning the effect of provisional measures applicable for the International Tribunal for the Law of the Sea are the most innovative ones. Two issues have to be distinguished: the possibility to have provisional measures reviewed and their effect in a narrow sense.

If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, provisional measures shall be prescribed by the chamber of summary procedure established in accordance with Article 15, paragraph 3, of the Statute. Such chamber consists of five members: the President of the Tribunal and the Vice-President acting *ex officio* and three other Members of the Tribunal selected by the Tribunal upon the proposal of the President of the Tribunal. Such provisional measures are subject to review and revision of the Tribunal. This means that the Tribunal acts in respect of provisional measures prescribed by the chamber of summary procedure as a kind of an appellate body.\(^1\) This is an innovation compared to the system on provisional measures applied by the International Court of Justice. It supplements the possibility of any party to request the modification or revocation of provisional measures.

Under the law governing the procedure before the International Court of Justice it is a matter of controversy whether provisional measures are binding. Article 41 of the Statute of the ICJ speaks of the power of the Court to “indicate” provisional measures, rather than to order them. This provi-

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\(^1\) According to Article 84 bis of the Rules of the Tribunal note 3, any party to the conflict may within 15 days of the prescription of provisional measures request the Tribunal to review or revise such measures.
sion continues to say that such measures "ought to be taken" and not that they shall or must be taken.52 Nevertheless, there are views in doctrine arguing that provisional measures of the International Court of Justice are binding.53 Those who question the binding effect do so on the basis of the wording of Article 41 of the Statute of the ICJ and the legislative history of this provision. The counter-position is being based on Article 94, paragraph 1, of the UN Charter according to which each member of the United Nations undertakes to comply with the decisions of the International Court of Justice54 and on a functional interpretation of Article 41 of the Statute of the ICJ. The case law of the International Court of Justice is not totally conclusive. The Permanent Court of International Justice stated in the Free Zones case clearly that orders on provisional measures had no binding effect. Such wording has not been reiterated by the International Court of Justice although it has not stated the contrary either.55 Since provisional measures are designed to preserve the respective rights of parties pending the final decision, their indication would be meaningless if they might be disregarded lawfully as being non-binding.56 Members of the International Court have invoked this argument although the Court has never branded the non-implementation of provisional measures as being illegal.57

The terminology in Article 290, UNCLOS is different from the one of Article 41 of the Statute of the ICJ. Article 290, UNCLOS speaks of "prescribe" rather than "indicate". In consequence thereof, Article 83, paragraph 4, of the Rules of the Tribunal refers to the parties which are to take or to comply with each measure. Taking the ongoing dispute on the binding or non-binding nature of provisional measures one cannot but conclude that by the different choice of wording in Article 290, UNCLOS the drafters of that provision wanted to improve the powers of courts and

52. Thirlway note 7, p. 28.
53. See Sztucki note 7, p. 260 et seq. for further details.
54. It has been particularly highlighted that Article 94, paragraph 2, of the UN Charter refers to judgments which may be enforced whereas paragraph 1 speaks of judgments and decisions; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Ajibola, I.C.J. Reports, 1993, p. 401.
55. Whereas in the Nicaragua case the International Court of Justice stated that it was "incumbent on each party to take the Court's indication seriously into account" (Judgment, I.C.J. Reports 1986, 144, para. 289) it demanded their effective implementation in the Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide. Provisional measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 325.
56. Sztucki note 7, p. 286.
57. The judgment in the Teheran hostages case rather expresses its deep regret that the situation had not been rectified (I.C.J. Reports. p. 42, para. 92).
tribunals having jurisdiction over law of the sea disputes. Their provisional measures have a binding effect upon parties to the dispute. This is clearly reflected in the Rules of the International Tribunal for the Law of the Sea. According to Article 88 each party shall submit an initial report upon the steps it has taken in order to ensure prompt compliance with the measures prescribed.

V. CONCLUSIONS

The rules for provisional measures in law of the sea disputes applicable to the International Tribunal for the Law of the Sea contain some moderate, albeit important, innovations compared to the ones applicable to the International Court of Justice. This is in particular true for the creation of a chamber for summary procedure and the establishment that such measures will have binding effect. In particular the creation of a chamber for summary proceedings is to be seen as a contribution a faster and more efficient procedure which can more easily respond to the request of the parties to the conflict. The possibility to have provisional measures prescribed by the chamber for summary proceedings reviewable by the Tribunal strengthens the rule of law which is particularly important since provisional measures have binding effect upon the parties to the conflict.

The effect of the other innovation, namely that provisional measures not only are meant to preserve the rights of the parties to the conflict but to prevent serious harm to the marine environment is difficult to anticipate. It is to be hoped that the International Tribunal for the Law of the Sea will make prudent use of such competence and in doing so contribute to the interest of the community of states in a more efficient protection of the marine environment.