Annex LA-9

INTERIM MEASURES OF PROTECTION BEFORE THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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INTRODUCTION

As a preliminary remark to the present topic concerning interim measures of protection, it may be interesting to note that, of the seven cases that have so far been submitted to the Tribunal, three proceedings have been instituted by a request for the prescription of provisional measures under article 290 of the United Nations Convention on the Law of the Sea (hereinafter the Convention). In fact, two of these cases were joined, but if we take into account the number of judicial decisions (six) rendered by the Tribunal, two of them, two orders, have been made to prescribe provisional measures. This shows that this subject is of interest not only from the point of view of the legal doctrine but also for practitioners.

The purpose of this paper is not to give a comprehensive and systematic overview of provisional measures proceedings before the International Tribunal for the Law of the Sea, but rather to make some comments on selected issues that may be of interest to international tribunals, the subject matter of this panel. To that end, I intend to focus on the differences existing between the procedures for provisional measures before the Tribunal and the corresponding procedures before the International Court of Justice. It may be added that this task is greatly facilitated by the fact that several articles on the legal doctrine have already underlined the main differences between the two courts with regard to questions of procedure.

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PRESCRIPTION OF PROVISIONAL MEASURES

The first difference between the two courts may be encapsulated in three words: *indicate* or *prescribe*. Indeed, contrary to the International Court of Justice, which indicates provisional measures, the Tribunal prescribes them. The latter term expresses without any doubt the binding character of such measures, while the binding value of the measures indicated by the Court is a matter for discussion. Incidentally, we may note that this ambiguity is to some extent reflected in a difference between the French and English versions of article 41 of the Statute of the Court. While the English version states: "indicate . . . any provisional measures . . . which ought to be taken," the French says "indiquer . . . quelles mesures conservatoires . . . doivent être prises à titre provisoire" [indicate any provisional measures . . . which must/shall be taken]. The difference is also reflected in the French and English versions of certain Orders of the Court. This is perhaps an example of what is usually described as constructive ambiguity. From the point of view of the registry, it demonstrates the difficulty of dealing with different official languages and the importance to be attached to questions of drafting and translation in the official languages of the Tribunal.

While the binding character of the provisional measures prescribed by the Tribunal is undisputed, it should be noted that the Tribunal has decided in some cases not to use this power but to recommend certain measures. This approach was taken in the Orders adopted by the Tribunal in the *M/V "SAIGA"* (No. 2) case and the *Southern Bluefin Tuna* cases. In the *M/V "SAIGA"* (No. 2) case, the Tribunal "recommended" that the parties ensure that no action be taken that could aggravate the dispute, and this recommendation was not part of the provisional measure prescribed under paragraph 1 of the operative part of the Order. In the declaration appended to this Order, Judge Vukas took the view that the Tribunal should have prescribed the measure, given the importance to be attached to the obligation of parties to refrain from actions that might aggravate or extend the dispute. He was also of the opinion that under the Convention, the Tribunal was
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Indeed, indicates the term if such is of the French ent être rés . . . d in the t. This tractive measures ed that r but to in the 2) case (No. 2) that no id this measure d. In re view ven the refrain he was al was only competent to “prescribe provisional measures” and not to recommend them. In the Southern Bluefin Tuna cases, another technique was used. Of the six measures introduced by the expression “prescribes,” two were drafted in a non-mandatory form by using the word “should” instead of “shall.” These two measures concerned the duty to resume negotiations between the parties and efforts to be made to reach agreement between the parties and other States and entities engaged in fishery activities.

The fact that the measures are binding also explains why article 95 of the Rules of the Tribunal imposes on each party the obligation to report on steps taken in order to comply with the measures prescribed. In this respect, article 78 of the Rules of Court is less mandatory. It provides that the Court “may request information from the parties” in the matter of implementation of provisional measures.

Thus the power conferred on the Tribunal to order binding provisional measures is an important prerogative given to an international court. That is why this power is limited. Unlike the Court, the Tribunal cannot act proprio motu and will only prescribe provisional measures at the request of a party. But, according to article 89, paragraph 5, of the Rules, once a request has been made, the Tribunal may prescribe measures different in whole or in part from those requested. That is what it did in the Southern Bluefin Tuna cases by inserting measures concerning the duty of parties not to aggravate the dispute and directing them to seek agreement with other States engaged in fishing activities. In his separate opinion appended to this Order, Judge ad hoc Shearer expressed the view that article 89, paragraph 5, of the Rules should be applied in a cautious manner. According to him, if this rule purports to give a power to the Tribunal to act beyond the bounds of what has been requested (ultra petita), then . . . that rule is not authorized by the Convention . . . If, on the other hand, it is properly to be interpreted as meaning only that the Tribunal may, in addition to the alternatives of
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acceding completely to, or rejecting completely, the requested measures, prescribe measures that represent a partial grant or a modified version of the requested measures, the rule would be within power.

However, he considered that the Tribunal had not exceeded its powers in prescribing the two additional measures that had not been formally requested by the parties. As regards the non-aggravation clause, he considered that this measure was part of provisional measures that may be prescribed "by tradition" and that the other measure, directing the parties to seek agreement with other States and entities engaged in fishing activities, was "closely related to other measures sought by the parties" and, therefore, its validity was not questioned.

**PROVISIONAL MEASURES AND JURISDICTION OF THE TRIBUNAL**

It is important to mention that the competence of the Tribunal to prescribe provisional measures may be activated in two different ways. The first relates to the ordinary meaning of provisional measures and is contemplated under article 290, paragraph 1, of the Convention. It arises when provisional measures are requested by a party as proceedings incidental to the main proceedings dealing with a dispute submitted to the Tribunal. The other procedure represents an innovation introduced by the Convention under article 290, paragraph 5. It confers on the Tribunal compulsory jurisdiction in the following circumstances: pending the constitution of an arbitral tribunal to which a dispute is submitted, a request for the prescription of provisional measures may be unilaterally brought before the Tribunal if the parties do not agree on another court or tribunal within a period of two weeks following the request for provisional measures. As regards this time-limit of two weeks, the question could arise concerning to which authority this initial request needs to be addressed. This question has been answered by article 89, paragraph 2, of the Rules of the Tribunal, which identifies the other party as the addressee of the request. In other words, the time-limit of two
weeks is calculated from the date of the notification to the other party of a request for provisional measures. Under article 290, paragraph 5, the Tribunal has a residuary but compulsory jurisdiction and, in these circumstances, is likely to become the regular forum used by parties in such a case. It is, therefore, not fortuitous that the two requests for provisional measures that have so far been submitted to the Tribunal were both, at least initially, based on this provision.

As is the case for other disputes brought before the Tribunal, provisional measures proceedings may be dealt with by a chamber of the Tribunal if so agreed by the parties. In addition to this option offered to parties, the Statute of the Tribunal gives a particular role to the Chamber of Summary Procedure, formed annually and composed of five judges. Article 25 of the Statute provides for the prescription of provisional measures by this Chamber “[i]f the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum.” It may also be added that the Seabed Disputes Chamber of the Tribunal is competent to prescribe provisional measures in matters falling within its jurisdiction under the Convention.

The Tribunal will prescribe provisional measures only if it considers that “prima facie it has jurisdiction” or, in the case of article 290, paragraph 5, that the arbitral tribunal to be constituted would have jurisdiction. A prima facie approach corresponds to the test applied by the Court in provisional measures proceedings. However, it does not prevent the respondent from questioning the jurisdiction of the Tribunal. We may observe that in the cases brought before the Tribunal, objections to jurisdiction have, in fact, been raised. In the M/V “SAIGA” (No. 2) case, the respondent invoked article 297, paragraph 3 (a), of the Convention (relating to disputes concerning sovereign rights of the coastal State with respect to the living resources in the exclusive economic zone) and argued that the dispute did not fall within the jurisdiction of the Tribunal, while the applicant based the jurisdiction of the Tribunal on article 297, paragraph 1, of the Convention (concerning an
alleged breach of freedom of navigation by the coastal State). The Tribunal simply concluded that article 297, paragraph 1, offered *prima facie* a basis for its jurisdiction. In the *Southern Bluefin Tuna* cases, the respondent disputed the jurisdiction of the arbitral tribunal on several grounds: the dispute was scientific rather than legal; it concerned an agreement on southern bluefin tuna concluded in 1993 and not the Convention and, therefore, should have been submitted to the dispute settlement mechanism provided by that agreement; and, lastly, the parties had not exhausted diplomatic procedures. The Tribunal considered that “the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled.” In particular, it took the view that the existence of another treaty on the same matter did not exclude the right to invoke this provision of the Convention and that its jurisdiction was unaffected by the dispute settlement procedure provided by the agreement of 1993, since that procedure did not entail a binding decision, as required by article 292 of the Convention. The answers provided by the Tribunal on these points are well known and do not need to be commented upon here. I will only add, as a footnote, that while the test of jurisdiction is a *prima facie* one, the Tribunal had to devote a substantial part of its reasoning to the question of jurisdiction. If we disregard the formal part of the judgments (*les qualités*), about half of the legal reasoning of the Tribunal was devoted to this issue in the *Southern Bluefin Tuna* cases and one-fifth in the *M/V “SAIGA”* (No. 2) case. There is probably no reason to be surprised at the importance assumed by objections to jurisdiction in provisional measures proceedings. It must be borne in mind that the cases were submitted by virtue of article 290, paragraph 5, of the Convention, independently of any expression of consent other than the ratification of, or accession to, the Convention. This means that the submission of the dispute was not based on a special agreement or a notification submitted by virtue of declarations made under article 287 of the Convention, but was based directly on the compulsory jurisdiction conferred on the Tribunal by the Convention.
Another comparison between the Court and the Tribunal may be made as regards the rights or legal interests the provisional measures are intended to protect. Both the Tribunal and the Court may adopt provisional measures to preserve the respective rights of the parties, pending a final decision. In addition to this classical function of interim measures of protection, article 290 of the Convention provides that provisional measures may also be prescribed “to prevent serious harm to the marine environment.” This illustrates the importance given to the environment in the Convention. That being said, we may ask, however, whether the prevention of serious harm to the environment is to be considered as completely separate from the protection of the rights of a party to the dispute. Indeed, the fact that a case has been submitted to the Tribunal normally implies that a party to the dispute is alleging that its rights have been violated by an unlawful action of the other party. In this context, when a party requests the prescription of provisional measures to prevent serious harm to the environment, this request is likely to be based on a vested right, or rather a duty, to protect the environment or to ensure the conservation of the living resources of the sea. If this alleged right or duty is, in fact, the subject of the dispute, a provisional measure prescribed to prevent serious harm to the environment will probably not be very different from a provisional measure prescribed to preserve the respective rights of the parties. However, the recognition of protection of the environment in article 290 of the Convention as a separate and independent ground for prescribing provisional measures presents clear advantages in a situation where the rights in dispute do not directly include a duty to protect the environment or where the right to request provisional measures is challenged on the basis that the party concerned would not have locus standi because it would not be “injured” by harm caused to the environment, for example, in areas beyond maritime zones under national jurisdiction.

According to the practice of the International Court of Justice, provisional measures are adopted when the right to be protected is
likely to suffer irreparable damage. It presupposes that in the absence of provisional measures, the prejudice caused to the rights of the party concerned would affect the possibility of their full restoration in the event of a judgment in its favor. It means that full restoration of the rights would be affected. It does not mean that any damage that might occur could not be compensated for or subject to reparation. In the Southern Bluefin Tuna cases, a threat to a fish stock was at stake. Both parties agreed that the stock was severely depleted. While Japan maintained that its experimental fishing program would cause no further threat to the stock, Australia and New Zealand contended that this fishing program “could endanger the existence of the stock.” In its Order, the Tribunal did not itself pronounce on the question of irreparability. Paragraph 80 of the Order refers to the need to take provisional measures “to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.” This reference to the protection of the environment should be noted. Indeed, when provisional measures are prescribed to protect the environment, the Convention provides expressly for a specific standard, that is, “serious harm,” which is different from the concept of irreparable damage.

**PROVISIONAL MEASURES AND THE TIME FACTOR**

Like article 41 of the Statute of the Court, article 290, paragraph 1, of the Convention does not expressly refer to the criterion of urgency. However, time undoubtedly plays an important role in provisional measures proceedings. These proceedings are intended to lead to a “provisional” decision, “pending the final decision” in the case. This is why the International Court of Justice considers that provisional measures “are only justified if there is urgency.” This “procedural urgency” is undisputed, even if views may differ on the extent to which “substantive urgency” is a separate factor to be taken into account in assessing whether provisional measures are appropriate in the circumstances of a case. Urgency is, nevertheless, mentioned expressly in article 290, paragraph 5, of the
Convention. This insistence on the urgency may be explained by the fact that the measures are prescribed pending the constitution of an arbitral tribunal that may subsequently modify, revoke, or affirm the measures taken. In other words, once a request for provisional measures is submitted under article 290, paragraph 5, the Tribunal will not only consider whether the right to be protected is likely to suffer irreparable damage pending a final decision but will also consider whether “the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted.”

The urgent character of provisional measures proceedings is reflected in the Rules and practice of the Tribunal. According to article 90 of the Rules, a request for the prescription of provisional measures “has priority over all other proceedings,” with the exception of prompt release cases. In the two cases submitted to the Tribunal, the whole procedure took less than two months (fifty-seven days) in the M/V “SAIGA” (No. 2) case and less than one month (twenty-eight days) in the Southern Bluefin Tuna cases. The short duration of these proceedings has consequences, not only for the judges and members of the Registry, who have to work under time constraints, but also for the parties, which need to provide the Tribunal with pleadings and relevant documentation within the time frame available. In these circumstances, compliance with the Rules does not preclude the possibility of adopting a flexible approach, in order, for example, to enable the parties to submit additional documents. This may certainly help the parties to present their arguments in full and contribute, in the interest of international justice, towards alleviating certain difficulties caused by reduced time-limits.
1 The M/V “SAIGA” (No. 2) case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures; Southern Bluefin Tuna cases (New Zealand v. Japan), Provisional Measures; and Southern Bluefin Tuna cases (Australia v. Japan), Provisional Measures.

2 Cases nos. 3 and 4 (Southern Bluefin Tuna cases [New Zealand v. Japan], Provisional Measures; and Southern Bluefin Tuna cases [Australia v. Japan], Provisional Measures) were joined by the Order of the Tribunal of 16 August 1999.


5 See, for example, B. Oxman, op. cit, 331-333; S. Oda, op. cit., 554-556.

6 See, for example, the following Orders where, in the operative parts, the English texts refer to the expression “should” while the French texts use the verb “devoir” in the present tense [shall/must]: Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993; Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998; Vienna Convention on Consular Relations (Germany v. United States of America), Provisional Measures, Order of 3 March 1999. The practice of the Court seems to vary concerning the French texts of the orders; see, for instances, the following Orders, where the French texts use the present tense (“Les deux Parties veillent . . .” [both Parties ensure . . .”]), while the English texts use the conditional (“Both Parties should ensure”): Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984; Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996.

7 It may be noted that in his dissenting opinion, Judge Eiriksson expressed his disagreement with the prescription of such a general measure. In his view, the
measure was "of so general a nature that a party cannot be entirely clear when contemplating any given action whether or not it falls within its scope."

8 In the M/V "SAIGA" (No. 2) case, the request for the prescription of provisional measures of 13 January 1998 was based on article 290, paragraph 5, of the Convention. Subsequently, following the conclusion of a special agreement to submit the main dispute to the Tribunal, the Tribunal adopted its Order of 20 February 1998, by which it decided that the request should be "considered as having been duly submitted to the Tribunal under article 290, paragraph 1, of the Convention...."

9 See para. 61 of the Order.

10 We may refer, for example, to paragraph 80 of the Order of the Tribunal in the Southern Bluefin Tuna cases, where the Tribunal found that provisional measures should be taken "to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock."

11 In this regard, it may be observed that in the jurisprudence of the Court, provisional measures were requested to prevent prejudice to rights of a financial nature, which are more easily compensated. In Interhandel, Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957, 111-112, the Court considered the request to the Government of the United States not to sell the shares of a company claimed by the Swiss Government as the property of its nationals.

12 On this question, see the separate opinion of Judge Treves concerning the Order of the Tribunal of 27 August 1999 (Southern Bluefin Tuna cases).


14 On this question, see separate opinions of Judge Laing concerning the Order of 11 March 1998 (M/V "SAIGA" (No. 2) case) and the Order of 27 August 1999 (Southern Bluefin Tuna cases).

15 Separate opinion of Judge Treves concerning the Order of the Tribunal of 27 August 1999 (Southern Bluefin Tuna cases), para. 4.

16 In the M/V "SAIGA" (No. 2) case, in addition to the request and a statement in response submitted by the parties, each party was able to submit an additional written pleading. In the Southern Bluefin Tuna cases, when additional documents were submitted by one party in the course of oral proceedings, the other party requested also to be authorized to file new documents. This request was granted by the Tribunal.