Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)

*Thomas A. Mensah**

Provisional measures (or "interim measures") are a common feature in national and international judicial proceedings. The main rationale for these measures is that a party to a dispute before a court or tribunal is entitled to a reasonable assurance that the subject matter of the dispute will not be so altered as to make it impossible for it to enjoy the right or interest it is claiming, if its claim is upheld.[1] A variation of this rationale, stated from the point of view of the court or tribunal, is that the parties to a dispute should be prevented from taking actions in relation to the subject matter of the dispute that could have the effect of rendering nugatory or of no effect the final decision to be rendered by the court or tribunal.[2]

On the other hand the imposition of provisional measures on a party before the merits of the various claims (and, where appropriate, preliminary objections to jurisdiction or admissibility) have been fully considered and decided necessarily involves the risk that a party may be prevented from taking action that may eventually be found to be within its rights. In such a case the party that is restrained may in fact suffer some damage as a result of its inability to take the action that was the subject of the restraint.[3] For this and other reasons, courts and tribunals have found it necessary to develop a number of conditions and requirements that need to be satisfied before provisional measures are ordered prior to the determination of the merits of a dispute. Many of these conditions have been articulated in dicta or applied in practice with such consistency, that they have become crystallized into a clear and well-established body of jurisprudence.[4] These include:

1. Provisional measures constitute an exceptional form of relief in the sense that they are not to be ordered as a matter of course but only in those cases where such special measures are considered necessary and appropriate.

---

* Judge, International Tribunal for the Law of the Sea.

[1] "The immediate implementation by Iceland of its regulations would, ... prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgement in its favour." *Fisheries Jurisdiction* case, ICJ Reports 1972, para. 21.

[2] Case Concerning Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J., Series A, No. 8, 7. Also Separate Opinion of Judge Weeramantry in the *Genocide Convention* (No. 2) case, ICJ Reports 1997, 379.

[3] In the *Fisheries Jurisdiction* case one of the objections of Ireland to provisional measures was that "to freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation". Order of 12 July 1973, ICJ Reports 1973, 303.

[4] These have been outlined in many learned writings, for example, J. Sztucky, Interim Measures in the Hague Court, 1983. Also R. Wolfrum, Provisional Measures of the International Tribunal for the Law of the Sea, in: P. Chandrsekhara Rao/R. Khan, The International Tribunal for the Law of the Sea: Law and Practice, 2001, 173.

2. The granting of a request for provisional measures is a discretionary decision, in that it is for the court or tribunal that is considering the request to determine whether, on the facts of the case, such measures are needed to achieve results that cannot otherwise be achieved.

3. A court or tribunal should not order provisional measures in a case before it unless it is satisfied at least that, *prima facie*, it would have jurisdiction to deal with the main dispute. This is both necessary and logical. Since provisional measures are intended to regulate matters pending a decision on the merits of the dispute itself, it stands to reason that the court or tribunal should not impose restraints on the parties unless there is some plausible likelihood that it will in fact be in a position to deal with the merits of the dispute.

4. Provisional measures should aim at preserving the respective rights of the parties. This means that there should be a measure of equity and justice to all the parties in the dispute, both in the nature of the measures ordered and in the effect of their application on the claims of the parties. In particular, care should be taken to ensure that, in seeking to preserve the rights of one party to the dispute, serious and avoidable prejudice is not done to the rights or interests of the other party.

5. Provisional measures are appropriate only where there is a measure of urgency in the situation. In other words, a court or tribunal may order provisional measures only in the cases where there is a reasonable risk that rights of one or other of the parties are in danger of serious and irreversible prejudice (irreparable damage), and the urgency of the situation is such that the risk cannot be averted otherwise than by ordering provisional measures.

These general rules and principles regarding the provisional measures are applicable to the International Tribunal for the Law of the Sea when it exercises its jurisdiction with regard to provisional measures under article 290 of the Convention on the Law of the Sea. Indeed, most of them are expressly provided for, or are necessarily implied, in the wording of paragraph 1 of that article.[5] This article states that the Tribunal (as well as any of the other courts or tribunals referred to in article 287 of the Convention) has the power to prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute". The use of the expression "which it considers appropriate" underlines the fact that the decision to grant or refuse a request for provisional measures is one for the judicial discretion of the Tribunal. The words "appropriate under the circumstances" stress the need for the Tribunal to take account of the particular circumstances of each case before determining what, if any, provisional measures are appropriate. Finally, the provision emphasizes that provisional measures are intended not only to preserve the rights of the party requesting provisional measures, but "the respective rights of the parties to the dispute".

Article 290 of the Law of the Sea Convention has significant similarities with the equivalent provision in the Statute of the International Court of Justice. Article 41 of the Court's Statute states that the Court "shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". However, two points

[5] On the role of provisional measures in ITLOS see generally Wolfrum, ibid.

of difference appear to be worthy of mention. The first is that the Statute of the Court empowers the Court to "indicate" provisional measures while article 290 of the Convention gives the power to "prescribe" provisional measures. This difference is further reinforced by paragraph 6 of article 290 which states that "the parties to the dispute shall comply promptly with any provisional measures prescribed under this article". The logical implication of these provisions is that the provisional measures under article 290 of the Convention are binding on the parties to whom they are addressed. Such a conclusion is not so obvious in respect of the wording of article 41 of the Statute of the Court. Indeed, until quite recently, there was some controversy regarding the binding nature or otherwise of provisional measures indicated by the ICJ, although any doubts in the matter appears to have been resolved by the recent decision of the Court in the *LaGrand* case to the effect that "orders of provisional measures under article 41 have binding effect".[6] However that may be, the fact remains that there has never been any doubt about the binding force of provisional measures prescribed under article 290 of the Convention. In this connection, it is important to note that, whatever may be the position with regard to provisional measures indicated by the ICJ under article 41 of its Statute, the Court would have the power to "prescribe" provisional measures under article 290 of the Convention, in a case submitted to it under the Convention on the Law of the Sea, that is to say, a case involving States parties to the Convention which have chosen the Court as their accepted dispute settlement mechanism under article 287 of the Convention. In such a case, provisional measures prescribed by the ICJ would be binding on the parties, pursuant to paragraph 6 of article 290 of the Convention, in the same way and to the same extent as any measures prescribed by the ITLOS, or by an arbitral tribunal constituted under Annex VII to the Convention or by a special arbitral tribunal constituted under Annex VIII to the Convention.[7]

The second difference between provisional measures under article 290 of the Convention and provisional measures in general (including those under article 41 of the Statute of the ICJ) is that the purpose of provisional measures under article 290 is not restricted to preserving the rights of the parties to a dispute. In addition to measures to "preserve the respective parties to the dispute", provisional measures may be prescribed under article 290 of the Convention to "prevent serious harm to the marine environment".[8] Hence, ITLOS may be requested to prescribe provisional measures, not necessarily to preserve any identifiable rights of any of the parties to the dispute but mainly or even solely to prevent serious harm to the marine environment. Where evidence is produced to show that serious harm to the marine environment might occur, and ITLOS is satisfied that it is "appropriate

---

[6] ICJ Judgment of 27 June 2001, para. 109.

[7] Under article 290 the power to prescribe provisional measures under the Convention is available to a court or tribunal which has jurisdiction under this part i.e. Part XV of the Convention. This term applies to any of the courts and tribunals mentioned in article 287, para. 1. Article 288 speaks of "a court or tribunal referred to in article 287 ...".

[8] Article 290, para. 1, of the Convention.

under the circumstances" that action should be taken (or measures of restraint must be imposed) to prevent such damage, it will be competent to prescribe provisional measures, even if there is no evidence that any specific right or rights of the party making the request for provisional measures are at risk. Here too, it is pertinent to emphasize that the power to prescribe provisional measures "to prevent serious harm to the marine environment" is also available to the ICJ (and arbitral tribunals) where the Court or any such tribunal exercises jurisdiction under the Convention on the Law of the Sea.

But, perhaps the most important novel feature of the jurisdiction of ITLOS in relation to provisional measures is the special competence conferred on it under paragraph 5 of article 290 of the Convention. Pursuant to this provision, the Tribunal has competence to prescribe provisional measures in respect of a dispute that is being submitted to an arbitral tribunal under Annex VII to the Convention. In such a situation, article 290, paragraph 5, of the Convention provides that ITLOS may prescribe provisional measures if requested to do so by one of the parties in the dispute, provided that certain conditions are satisfied. These are if:

1. a request for provisional measures has been communicated by one of the parties to the dispute to the other party or parties and they have not agreed, within a period of two weeks after the request was made, on a court or tribunal to which the request is to be submitted; and

2. ITLOS concludes that *prima facie* the arbitral tribunal to which the dispute is to be submitted on the merits would have jurisdiction to adjudicate on the merits of the dispute.

If and when ITLOS determines that these conditions are met, and if it further finds that the urgency of the circumstances of the case so requires, it may prescribe such provisional measures as it considers appropriate, either to preserve rights of one or other of the parties to the dispute or to prevent serious harm to the marine environment. The measures prescribed by ITLOS in such a case will be in force "pending the constitution of the arbitral tribunal to which the case is to be submitted". Once constituted the Annex VII arbitral tribunal has the power to confirm, modify or revoke altogether any provisional measures prescribed by ITLOS.

When it considers a request for provisional measures under paragraph 1 of article 290 ITLOS is undertaking a judicial function that is routinely undertaken by other courts – both national and international.[9] It is considering whether or not to grant a request for provisional measures pending its own final decision on a dispute that has been "duly submitted" to it. However, when it deals with a request for the prescription of provisional measures under paragraph 5 of article 290, ITLOS performs a function that is not normally available to other courts or tribunals. For in that case, it is considering whether it is appropriate to prescribe provisional measures in a dispute whose merits will be dealt with by another body, and the measures it prescribes will be addressed to parties which have not accepted its jurisdiction in respect of the dispute. Moreover, the provisional measures prescribed by

[9] "The competences of the courts and tribunals referred to in article 290 of the UNCLOS are, in general nothing exceptional", Wolfrum, note 4, 174.

ITLOS in the case will be in force, not "pending the final decision on the dispute" as would normally be the case, but only until such time as the setting up of the arbitral tribunal under Annex VII has been completed. This difference in the duration of provisional measures under paragraph 5 of article 290 may be of particular importance in determining the considerations and factors that ITLOS should take into account in responding to a request for provisional measures.

Thus, in dealing with the possibility of prejudice to rights or serious harm to the marine environment under article 290, paragraph 5, ITLOS has to bear in mind that its task is to determine not whether there is a reasonable possibility that a prejudice of the rights of the parties, or serious damage to the marine environment, might occur before a final decision on the dispute, but rather whether such prejudice of rights or harm to the marine environment is likely to occur before the process of constituting the Annex VII arbitral tribunal can be concluded. This has a major bearing on the issue of urgency that is a precondition for the jurisdiction of ITLOS under paragraph 5 of article 290 of the Convention. That paragraph states that provisional measures may be prescribed if "the urgency of the situation so requires". In other words, the Tribunal must conclude, not just that there is the possibility of prejudice to the rights of one or other of the parties (or serious damage to the marine environment) but also that the prejudice or damage would occur before the "constitution of the arbitral tribunal". This means that ITLOS may not prescribe provisional measures unless it is satisfied that some prejudice of rights or harm to the marine environment might occur prior to the constitution of the Annex VII arbitral tribunal, even if there is evidence of some potential prejudice or harm to the marine environment before a final decision is given on the merits of the case itself. And the Tribunal will, of course, not prescribe provisional measures if the prejudice or harm that might occur before the constitution of the Annex VII arbitral tribunal would not be irreversible i.e. that such prejudice of rights or damage to the marine environment would not be "irreparable".[10] In such a situation the Tribunal's decision would be based on the ground that "the urgency of the situation" does not require the prescription of provisional measures in the period covered by article 290, paragraph 5, i.e. the period before the constitution of the Annex VII arbitral tribunal. In many cases, this absence of urgency may be due to the short period that the Tribunal has to take into account. However, this is not always the case; and it is possible for the Tribunal to find that there is urgency even where the time-frame is relatively short. Thus in the *Southern Bluefin Tuna* case, provisional measures were prescribed although the period during which the damage in question could occur was very short. But, whatever the nature of the damage to be prevented or the time-frame in which that damage might occur, a finding that the damage to be prevented might occur before the constitution of the An-

[10] On the question whether the possibility of "irreparable damage" is a necessary precondition for the prescription of provisional measures under para. 1 of article 290 of the Convention, see Wolfrum, ibid., 174-177. Also Separate Opinion of Judge Laing in the *M/V SAIGA (No. 2)* case, ITLOS Reports 2, 1988, 62-63.

nex VII arbitral tribunal is necessary before the Tribunal can prescribe provisional measures under paragraph 5 of article 290 of the Convention. In effect, therefore, the urgency requirement for provisional measures under paragraph 5 of article 290 of the Convention is different from the urgency requirement under paragraph 1 of article 290. Provisional measures that may be "appropriate" pending a final decision on the dispute may not necessarily be appropriate in the shorter period before the constitution of the Annex VII arbitral tribunal. Another important feature of the provisional measures under paragraph 5 of article 290 is that, once a request for provisional measures has been made, the nature and scope of the provisional measures to be prescribed will be entirely at the judicial discretion of the court or tribunal to which the request is addressed. Paragraph 3 of article 290 states that "provisional measures may be prescribed, modified or revoked ... only at the request of a party to the dispute". This means that the Tribunal does not have the power, *proprio motu*, to prescribe provisional measures. But neither paragraph 1 nor paragraph 5 of article 290 of the Convention places any limitations on the nature or scope of the provisional measures that can be prescribed by the court or tribunal, once a request for the prescription of measures have been submitted by a party to the dispute. This would appear to be the clear implication of the wording of the two paragraphs, read together. Paragraph 1 states that the Tribunal may prescribe "any provisional measures which it considers appropriate under the circumstances", and paragraph 5 provides that the Tribunal may prescribe "Provisional measures in accordance with this article (i.e. paragraph 1) if it considers that ... the urgency of the situation so requires". From these it would seem to follow that the Tribunal is not restricted to any particular type of provisional measures. In particular, it means that the court or tribunal is not bound to consider only the measures that have been requested by the parties, but may prescribe measures in addition to or different from those requested, provided that it is satisfied that such measures are "appropriate in the circumstances". This interpretation of the provisions has been accepted by the ITLOS, and is incorporated in the Rules of the Tribunal. Paragraph 5 of article 89 of the Rules states: "when a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested ...".[11]

The general and specific requirements for the prescription of provisional measures, as set out in paragraphs 1 and 5 of article 290, have been considered in one form or another in the three cases in which provisional measures were requested of the ITLOS. The first of these cases was a request for provisional measures under paragraph 1 of article 290 of the Convention while the second and third were submitted pursuant to paragraph 5 of article 290. In addition to provisional measures to preserve the rights of the parties, the other two involved consideration of provi-

[11] Judge ad hoc Shearer has suggested that this interpretation could be "unauthorized by the Convention (*ultra vires*) and is thus invalid". Separate Opinion in *Southern Bluefin Tuna* case, Order of 27 August 1999.

sional measures to preserve serious harm to the marine environment. In all three cases, the Tribunal had to address the issues of *prima facie* jurisdiction and urgency.

The first case in which the Tribunal considered a request for the prescription of provisional measures was the *M/V SAIGA (Provisional Measures)* case.[12] This case was originally submitted to the Tribunal under paragraph 5 of article 290, since the merits of the dispute were then being submitted to an arbitral tribunal to be constituted under Annex VII to the Convention. However, the parties later agreed to submit the merits of the dispute to ITLOS. Following the decision of ITLOS to accept the case, the request for provisional measures was converted from an application under paragraph 5 of article 290 to a request under paragraph 1 of the article.[13] This meant that the provisional measures prescribed by ITLOS would be in force until a decision had been reached on the merits of the dispute. The other two cases – the *Southern Bluefin Tuna* case[14]and the *Mox Plant* case[15] – were submitted under paragraph 5 of article 290 of the Convention, and the measures prescribed were stated to be binding only until the constitution of arbitral tribunals under Annex VII to the Convention.

In all three cases, ITLOS had to rule on challenges to its competence to deal with the requests. In the *M/V SAIGA (Provisional Measures)* case, the Respondent contended that ITLOS was not competent to prescribe provisional measures because the dispute itself was not within its jurisdiction.[16] Although the dispute had been submitted to ITLOS by agreement between the parties, the Respondent was able to raise this objection because the Agreement between the parties had specifically reserved the position of the Respondent on the issue of jurisdiction.[17] It was, therefore, necessary for ITLOS to rule on the issue of jurisdiction before it could deal with other questions, including complex issues of admissibility that had been raised by both parties. In the other two cases, the issue of jurisdiction was clearly in the forefront, as one of the essential preconditions for the competence of the ITLOS to prescribe provisional measures under paragraph 5 of article 290.

In all three cases, ITLOS found that the requirement of jurisdiction had been satisfied. In the first case, it found that, on the evidence available at that stage, it would *prima facie* have jurisdiction to adjudicate over the dispute on the merits. In the other two cases where the requests were considered under paragraph 5 of article 290, ITLOS was satisfied that *prima facie* the arbitral tribunals to be constituted pursuant to Annex VII to the Convention would have jurisdiction to deal with the merits of the dispute.

---

[12] ITLOS Reports 2, 1988, 21.

[13] See ITLOS Press Release No. 13 of 28 February 1998. Also S. Rosenne, The International Tribunal for the Law of the Sea: 1996-97, Survey in International Journal of Marine and Coastal Law 13, 1998, 514.

[14] Order of 27 August 1999.

[15] Order of 3 December 2001.

[16] Order of 11 March 1998, para. 22.

[17] Ibid., para. 14, subpara. 2.

The findings on the issue of jurisdiction in all the three cases were by the unanimous vote of the judges. This may not be so surprising considering the relatively low level of appreciation that is needed for ITLOS to find in favour of *prima facie* jurisdiction in these cases. In considering the issue of jurisdiction, ITLOS follows the long established jurisprudence which clearly emphasizes that the question to be decided is not whether there is conclusive proof of jurisdiction but rather whether, on the evidence available, jurisdiction is not so "obviously excluded" as to make it extremely unlikely that the merits of the dispute will actually be considered by the court or tribunal to which the merits of the dispute is being submitted.[18] As ITLOS stated in its Order in the first case, "before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded".[19] Thus the basis for a finding of *prima facie* jurisdiction is very different from what is needed for a court or tribunal to affirm jurisdiction when considering a challenge to jurisdiction on the merits of a case. This point is important in considering and comparing the decisions on jurisdiction reached in the *Southern Bluefin Tuna* cases by ITLOS, on the one hand, and by the Annex VII arbitral tribunal on the other hand. While ITLOS found that *prima facie* the Annex VII arbitral tribunal would have jurisdiction to deal with the merits of the case brought by Australia and New Zealand against Japan, the arbitral tribunal itself concluded that it did not have jurisdiction. However, it would be wrong to consider the finding of the arbitral tribunal as in any way "overruling" the finding of ITLOS in the provisional measures stage. The finding of ITLOS was that, on the evidence and argumentation presented to it at the time, it was satisfied that *prima facie* the arbitral tribunal would have jurisdiction. This is not necessarily in conflict with the decision of the arbitral tribunal itself, after having considered the much more extensive arguments and submissions put before it by the parties, to uphold the contention of Japan that the arbitral tribunal did not have jurisdiction to proceed further with the case. A similar scenario will arise before the arbitral tribunal being constituted to deal with the merits of the *MOX Plant* case. Here too, ITLOS agreed to prescribe provisional measures, after having rejected the contention of the Respondent that it was not competent to prescribe measures because *prima facie* the arbitral tribunal to be constituted under Annex VII would not have jurisdiction to adjudicate on the merits of the dispute. ITLOS found that *prima facie* the Annex VII arbitral tribunal would have jurisdiction to entertain the dispute on merits. The definitive ruling on whether or not there is jurisdiction will be taken by the arbitral tribunal when it is constituted. But whatever conclusion the arbitral

[18] See Judge Hersch Lauterpacht in the *Interhandel* case, ICJ Reports 1957, 105, 118-119. See also S. Rosenne, Provisional Measures and *Prima Facie* Revisited, Festschrift in Honour of Judge Oda, 2002, 515.

[19] *M/V SAIGA(No. 2)* provisional measures, order of 11 March 1998, para. 29.

tribunal reaches on the issue of jurisdiction cannot be considered either as confirming or overruling the finding of ITLOS at the provisional measures stage.[20]

After disposing the issue of jurisdiction, ITLOS had to deal with the issue of urgency in all the three cases. In the *M/V SAIGA* case, the one element of urgency that was clearly present at the beginning of the case became less prominent following the release of the Master and the members of the crew just before the conclusion of the deliberations in the case. As a result, ITLOS did not find it necessary to make an order for their release, although this was in fact the first of the measures requested by the Applicant. The most direct and important measure prescribed was the order to the Respondent to "refrain from taking or enforcing any judicial or administrative measures against the ship, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel ... and the subsequent prosecution and conviction of the Master".[21] ITLOS based its decision to prescribe such a measure on the finding that "the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures ...".[22] Although no direct reference was made to "urgency" as such, this element was clearly implicit in the decision. The Applicant's major concern was to prevent measures by the Respondent that could result in serious harm to its interests (and even to the lives of persons serving on board vessels flying its flag), and this protection was needed until ITLOS had pronounced on the legality or otherwise of the basis on which the Respondent claimed to be acting. Since the final decision on the merits would only be available after a relatively long time, it was necessary that some restraint should be placed on the Respondent in the meantime. Thus, in this case, the length of the period "pending a final decision" made the prescription of provisional measures more appropriate in this case.

The issue of urgency was even more important in the two latter cases dealt with by ITLOS. In the *Southern Bluefin Tuna* case, ITLOS noted that the parties were agreed that the stock of southern bluefin tuna was "severely depleted and (was) at its historically lowest levels and that this (was) a cause for serious biological con-

---

20 "The concept of *prima facie* jurisdiction seems to mean little more than the court's appreciation from the proceedings to date, that it appears that the court might have jurisdiction over the merits. This is sufficient for it to indicate provisional measures of protection. It is a low threshold, nothing more that a hypothesis, and is fundamentally different from a definitive holding that it has or does not have jurisdiction over the merits. The courts finding on this in provisional measures proceedings ... is provisional. It implies no more than that the applicant has made an arguable case for jurisdiction on the merits, so that the court may indicate provisional measures, and in due course and without reference to the earlier decision will decide whether it does have jurisdiction over the merits. In reaching that decision it will then have before it full written and oral arguments that the time pressure in the provisional measures proceedings did not enable the parties to produce. The *prima facie* jurisdiction finding is thus without prejudice to the court's formal decision reached after full argument". Rosenne, note 18.

21 Order of 11 March 1998, para. 21(1)(a).

22 Ibid., para. 41.

cern".[23] It also found that "measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock".[24] Finally, ITLOS pointed to the fact that, whereas Japan had given a commitment that the 1999 experimental fishing programme would end by August 1999, no such commitment had been made regarding the experimental fishing programme after August 1999, at which time the composition of the arbitral tribunal would not have been completed.[25] It was these considerations that led ITLOS to conclude that "provisional measures were appropriate under these circumstances".[26]

The same reasoning was applied in the third case, the *MOX Plant* case, but with different results. Here too, ITLOS emphasized that provisional measures under article 290, paragraph 5, of the Convention are appropriate if the urgency of the situation so requires; and it was, therefore, necessary to determine whether the circumstances were such as to make the prescription of measures necessary or appropriate as a matter of urgency. After considering all the evidence and submissions placed before it, ITLOS stated that it did not "find that the urgency of the situation requires the prescription of provisional measures requested by Ireland".[27] In reaching this decision ITLOS took into account the conflicting contentions of the parties regarding the potential risks posed by the MOX Plant, the assurances given by the United Kingdom in open court regarding the maritime transport of nuclear materials in the period before the constitution of the arbitral tribunal, the technical possibility to decommission the plant even after it has started operation, and above all, the "short period" that would elapse between the commissioning of the *MOX Plant* and the constitution of the arbitral tribunal. [28]

It is also interesting to note that in all cases, ITLOS prescribed measures different, in part or in whole, from those that had been requested. In the *M/V SAIGA* case, one of the measures requested was not prescribed for reasons that were fully set out in the Order; [29]and one measure was in the form of a recommendation (a matter that gave rise to a negative declaration by one Judge).[30] In the *Southern Bluefin Tuna* case, ITLOS prescribed measures regarding the maximum quantities of annual fish catches although no requests had been made on that issue by any of the parties. [31]And in the *MOX Plant* case, ITLOS in effect rejected all the requests submitted by the Applicant, but prescribed instead other measures, mainly in rela-

---

[23] Order of 27 August 1998, para. 71.
[24] Ibid., para. 80.
[25] Ibid., paras. 83-84.
[26] Ibid., para. 85.
[27] Order of 3 December 2001, para. 81.
[28] Ibid., paras. 73-79.
[29] The Tribunal stated that, "following the release of the vessel and its crew, the prescription of provisional measures for their release would serve no purpose", order of 11 March 1998, para. 40.
[30] Declaration of Judge Vukas, para. 3.
[31] Order of 27 August 1999, dispositif (para. 90, sub-para. c).

tion to co-operation, that none of the parties had requested but which ITLOS itself found to be necessary and appropriate in the interest of "prudence and caution".[32]

As stated earlier, two of the cases involved also requests for provisional measures to achieve the additional objective of provisional measures as specified in paragraph 1 of article 290 of the Convention on the Law of the Sea, i.e. "to prevent serious harm to the marine environment". In the *Southern Bluefin Tuna* case, ITLOS considered this aspect of the case on its own initiative, even though it had not been raised by either of the parties. Having stated its view that "conservation of the living resources of the sea is an element in the protection and preservation of the marine environment";[33] ITLOS concluded that "the parties should in the circumstances act with prudence and caution to ensure that the effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna".[34] In the *MOX Plant* case, the prevention of serious harm to the marine environment was one of the main planks of the case of the Applicant and it, accordingly, featured prominently in the proceedings. Thus, even though ITLOS did not find it appropriate to prescribe any of the measures requested in respect of what Ireland described as "its rights",[35] it considered it appropriate to prescribe measures that were related to the need to prevent pollution of the marine environment. In ordering the parties to enter into co-operation, ITLOS stated that "the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law ...".[36] On the basis of this general principle, ITLOS concluded that "prudence and caution require that (the parties) co-operate in exchanging information concerning risks and effects of the operation of the *MOX Plant* and in devising ways to deal with them, as appropriate".[37] Indeed one of the specific measures prescribed was that the parties should devise, as appropriate, "measures to prevent pollution of the marine environment which might result from the operation of the *MOX Plant*".[38]

Concluding Remarks

The prescription of provisional measures is one of the major features of the jurisdiction of the International Tribunal for the Law of the Sea. In addition to its inherent jurisdiction to prescribe such measures in cases that have been "duly submitted" to it (as provided for in paragraph 1 of article 290 of the Convention),

---

32 Ibid., dispositif (para. 89, sub-para. 1).

33 Ibid., para. 70.

34 Ibid., para. 80.

35 "Considering that in the circumstances, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland in the short period before the constitution of the Annex VII arbitral tribunal", order of 3 December 2001, para. 81.

36 Ibid., para. 82.

37 Ibid., para. 84.

38 Ibid., dispositif, para. 89(1)(d).

ITLOS has an additional and residual jurisdiction, under paragraph 5 of article 290 of the Convention, to prescribe provisional measures in cases that are being submitted to arbitral tribunals to be constituted pursuant to Annex VII to the Convention. The importance of this residual jurisdiction is borne out by the fact that two such cases have already been submitted within the first five years of the life of ITLOS.

In dealing with such cases, ITLOS has to take into account the relevant principles and rules that have been established in the long-standing jurisprudence of international judicial institutions. However, while these established principles and practices are relevant in general terms to all cases before it, they have to be applied with due regard to the different objectives of provisional measures prescribed in the context of article 290 of the Convention, and the different requirements for prescribing such measures under the respective paragraphs of that article, i.e. paragraphs 1 and 5 respectively. The differences in objectives and requirements have been highlighted in the three cases that have been dealt with by ITLOS to date. The evidence so far suggests that ITLOS is fully conscious of the need to take due account of them, and that it has made serious efforts to do so.