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The Prescription of Provisional Measures under Article 290 of the Law of the Sea Convention

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Table of Contents

Abbreviations	i
1 Introduction	1
1.1 Objective and topicality	1
1.2 Structure.....	2
1.3 Legal sources and methodology	2
1.4 Scope and outline.....	3
2 LOSC Part XV	5
2.1 Dispute settlement under LOSC	5
2.1.1 The function of provisional measures in litigation.....	6
2.2 Preconditions in Part XV and <i>prima facie</i> jurisdiction.....	7
2.2.1 Part XV, Section 1 - General Provisions	8
2.2.2 Part XV, Section 2 - Compulsory Procedures Entailing Binding Decisions	9
2.2.3 Part XV, Section 3 - Limitations and Exceptions to Applicability of Section 2	11
3 Provisional measures under Article 290.....	12
3.1 Paragraph 1	12
3.1.1 A dispute has been duly submitted.....	13
3.1.2 ‘May prescribe any provisional measures which it considers appropriate’ – Discretion of the court or tribunal	13
3.1.3 Pending the final decision	14
3.1.4 The rights of the parties or the marine environment	14
3.1.5 Urgency	14
3.2 Modification or revocation under paragraph 2	15
3.3 Paragraph 3	15
3.4 The court or tribunal shall give notice to the parties	15
3.5 Provisional measures under paragraph 5	15

3.5.1	The <i>prima facie</i> consideration.....	16
3.5.2	The urgency of the situation.....	16
3.5.3	The arbitral tribunal may revoke, modify or affirm the measures	16
4	Preconditions for the prescription of provisional measures – a case law analysis.....	17
4.1	<i>Prima facie</i> jurisdiction	17
4.1.1	The notion of ‘ <i>prima facie</i> ’	18
4.1.2	Seek settlement of the dispute by a peaceful means of their own choice	18
4.1.3	Procedures to apply in lieu of the procedures of Part XV	21
4.1.4	The obligation to exchange views	23
4.1.5	A dispute concerning the interpretation or application of the Convention	24
4.1.6	The distinction between article 288 and 293.....	29
4.1.7	Article 294 – Abuse of legal process	29
4.1.8	Article 295 - Exhaustion of local remedies	30
4.1.9	Exclusion by section 3.....	30
4.2	Preserve the respective rights of the parties to the dispute.....	32
4.3	Prevent serious harm to the marine environment	34
4.4	The urgency of the situation	37
4.4.1	A different threshold for urgency under paragraph 1 and 5?	43
5	Additional observations.....	43
5.1	Do provisional measures facilitate disputes?.....	43
5.1.1	Concluding remarks on the facilitative role	47
5.2	The closing effect of provisional measures	48
5.3	Does the absence of a party prevent the prescription of provisional measures?	50
5.4	What is the implication of non-compliance with provisional measures?.....	51
6	Conclusion.....	52
	Bibliography	ii
	Appendix	iii

Abbreviations

CCSBT	Convention for the Conservation of the Southern Bluefin Tuna
EEZ	Exclusive Economic Zone
ICJ	The International Court of Justice
ITLOS	The International Tribunal for the Law of the Sea
LOSC	The United Nations Convention on the Law of the Sea
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	The Permanent Court of Arbitration
PCIJ	The Permanent Court of International Justice
UN	United Nations
UNTS	United Nations Treaty Series

1 Introduction

1.1 Objective and topicality

The United Nations Convention on the Law of the Sea of 1982¹ constitutes in its Part XV, a compulsory dispute settlement mechanism with the aim of settling disputes between States Parties to the Convention. Accordingly, it has been important in international litigation, and a large body of case law has grown on matters related to the Law of the Sea.

As part of this dispute settlement mechanism a party to a dispute may request provisional measures of protection (also known as ‘*interim*’ measures) under article 290. The provision allows for the prescription of such measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending any hearing on the merits or pending the constitution of an arbitral tribunal to which a dispute is being submitted.

The objective of this thesis is to examine the jurisprudence on orders for provisional measures with the aim of explaining the purpose(s) of provisional measures, assess how the respective preconditions of article 290 are interpreted by the courts and tribunals under LOSC, and whether it is possible to identify a consistent pattern in the orders, and thus, an established threshold for granting a request. The thesis also aims to assess the implications of provisional measures from a wider perspective and thus to examine if provisional measures orders may also serve to facilitate settlement of disputes.

A case law analysis will always be timely as the settlement of disputes is an everlasting topic and the field is in constant development. The number of provisional measures orders has increased in recent years, and there is nothing to suggest that this trend will be reversed in the near future.² The research questions are as follows:

- What is the context for provisional measures orders within the compulsory dispute settlement regime in Part XV of LOSC?
- What are the preconditions for prescribing provisional measures and how are they interpreted in the relevant case law?

¹ United Nations General Assembly, United Nations Convention on the Law of the Sea (LOSC), Adopted 10 December 1982, Entry into force 16 November 1994, 1833 UNTS 397

² As of August 2018, ITLOS has dealt with 25 cases, nine of which have concerned a request for provisional measures, five of which have been ordered since 2010, taking into consideration the first one of 1998, notwithstanding orders by other courts and tribunals. List of cases available at: <https://www.itlos.org/cases/list-of-cases/>

- What are the implications of provisional measures?

1.2 Structure

This thesis consists of six chapters.

Chapter 1 is the introductory chapter, providing the objective of the thesis, the legal sources and methodology used, and the scope and outline of the thesis.

Chapter 2 gives an overview of provisional measures and the system of compulsory dispute settlement in LOSC.

Chapter 3 provides a textual overview of article 290.

Chapter 4 gives an analysis of how the case law has interpreted article 290.

Chapter 5 provides a review of some additional observations from the legal sources used in the research, i.e. issues that are not addressed in article 290 and the implications of provisional measures.

Chapter 6 consists of a brief summary of the thesis and conclusions.

1.3 Legal sources and methodology

Article 38 of the Statute of the International Court of Justice ('ICJ') is directed at the ICJ but is also generally understood to codify the sources of international law.³ It provides that the ICJ shall apply "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

This thesis places special focus on the United Nations Convention on the Law of the Sea, the case law related thereto and the teachings of scholars and publicists in the field. Custom is rarely referred to in discussion of article 290.

³ United Nations, Statute for the International Court of Justice (ICJ), Enacted 26 June 1945, Entry into force 24 October 1945. See also James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012, 8th edition) p 20

The thesis uses a legal descriptive and analytical research approach, taking into account the general rules of interpretation as provided for in article 31 and 32 of the Vienna Convention on the Law of Treaties.⁴ Chapter 2 is a descriptive analysis of Part XV of LOSC in light of the normal rules of interpretation of treaties, taking into account judicial decisions and the academic literature (including books and journal articles) in order to understand the rationale behind Part XV. Chapter 3 gives a descriptive textual overview of article 290. In chapter 4, a descriptive analysis of the case law on article 290 is supplemented by critical normative thinking. To give a better perception of the case law, the thesis utilizes dissenting and separate opinions and declarations by the judges as part of the analysis. Chapter 5 reviews the case law and supplements it with relevant literature from scholars who have assessed and commented on it, with a view to outline the implications of provisional measures and to address other issues that are not evident in the wording of article 290. The conclusion in chapter 6 is a personal review and summary of the results of the research.

1.4 Scope and outline

The scope of this thesis is limited to an assessment of Part XV and in particular article 290 (and especially paragraphs 1 and 5) of LOSC and the judicial decisions and legal theory to that end. The thesis only touches upon other provisions of LOSC and other agreements (*inter alia*, treaties and conventions) insofar as they are part of the context of any request for an order of provisional measures.

In spite of the jurisdiction conferred to the International Court of Justice (ICJ) and a special arbitral tribunal under article 287, paragraph 1, letters (a) and (d), there are currently no existing orders for provisional measures from either under Part XV of LOSC. The thesis therefore assesses orders from the International Tribunal for the Law of the Sea and the Annex VII arbitral tribunals. Cases from other judicial bodies or cases that do not involve a request for provisional measures are infrequently referred to, limited to where it is considered necessary to give a better understanding of the context.

Article 290 allows a court or tribunal to operate on the basis of *prima facie* jurisdiction under Part XV or Part XI, section 5 of LOSC (dealing with dispute settlement in relation to the Deep Seabed (the Area)). The latter is not considered in this thesis since there have been no

⁴ Vienna Convention on the Law of Treaties, Adopted 23 May 1969, Entry into force 27 January 1980, 1155 UNTS 331

provisional measures orders under this part. Such cases could be very different as well, since they may private parties.

State practice is not evaluated due to the time frame afforded to a small master thesis and the different research methodology required.

2 LOSC Part XV

This part provides an overview of the dispute settlement system established by LOSC Part XV. It also aims to locate the regime of provisional measures within the litigation context.

2.1 Dispute settlement under LOSC

LOSC is described as ‘the most important source’ for matters related to the law of the sea insofar as it purports to regulate the majority of such matters.⁵ The preamble emphasizes its constitutional nature when it suggests that it is establishing a “legal order for the seas and oceans”.⁶ LOSC was negotiated and adopted as a package deal to prevent States Parties to derogate from parts of the Convention unless expressly permitted.⁷ Part of the package deal was the compulsory dispute settlement mechanism in Part XV, an innovation in international law insofar as dispute settlement is generally subject to the principle of consent.⁸ Historically, this was also the case with respect to the law of the sea insofar as the 1958 Conventions on the Law of the Sea only included optional dispute settlement provisions.⁹

Part XV of LOSC on ‘Settlement of Disputes’ is divided into three sections: general provisions in section 1, compulsory procedures in section 2, limitations and exceptions to the applicability of section 2 in section 3. In addition to Part XV, the Convention includes several annexes concerning dispute settlement; Annex V, VI, VII, and VIII dealing respectively with Conciliation, the Statute of ITLOS, Arbitration and Special Arbitration.

The compulsory dispute settlement system contained in Part XV is binding on the contracting parties to the Convention. As part of this dispute settlement system, the regime of provisional measures orders located in section 2 on compulsory procedures is also binding. Article 290, paragraph 1 and 5, use the term ‘prescribe’, and paragraph 6 obliges States Parties to comply

⁵ Robin Churchill, *The 1982 United Nations Convention on the Law of the Sea*, in Donald Rothwell et. al (eds), *The Oxford Handbook of the Law of the Sea*, (Oxford University Press, 2015), Vol. 1, para [1]

⁶ LOSC, Preamble, Fifth Recital

⁷ LOSC, Article 309 provides that “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”

⁸ The Virginia Commentary describes the phenomenon this way: “One of the significant achievements of the Third United Nations Law of the Sea Conference was the development of a comprehensive system for the settlement of the disputes that may arise with respect of the interpretation or application of the 1982 UN Convention on the Law of the Sea.”, UN Convention on the Law of the Sea Commentary 1982 Online, Center of Oceans Law and Policy, University of Virginia, Brill Nijhoff, “Part XV”, para XV.1

⁹ J.G. Merills, *International Dispute Settlement* (Cambridge University Press, 2011, fifth edition) p 169 and Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005) p 44

with the measures ordered.¹⁰ There is thus no doubt that provisional measures under LOSC are binding.

LOSC does afford States Parties, when signing, ratifying or acceding to the Convention or at any time thereafter, the opportunity to freely choose, by a declaration, one or more of the available forums for the settlement of disputes concerning the interpretation or application of LOSC; (a) ITLOS; (b) The ICJ; (c) An arbitral tribunal constituted in accordance with Annex VII or; (d) A special arbitral tribunal constituted in accordance with Annex VII.¹¹ Under paragraph 3 and 5 of article 287, the default choice of forum is arbitration in accordance with Annex VII when a party to a dispute has not made a declaration, and when the parties have not accepted the same procedure for the settlement of the dispute.

2.1.1 The function of provisional measures in litigation

Litigation, including international litigation, is frequently a long and time-consuming process from the initial submissions through to final judgment on the merits of the dispute. There is a general principle in international law that the parties to a dispute should refrain from aggravating the dispute and from taking measures that might have a prejudicial effect on the final decision in the case.¹² This is to ensure that the object of the litigation will be protected and maintained in the state as it existed at the initiation of the proceedings.¹³ As noted by Rosenne, “the institution of proceedings is itself a ‘measure of protection’ [...] pending the settlement of the dispute”.¹⁴

In addition to this general principle, international courts and tribunals typically have jurisdiction to order provisional or interim measures of protection. The primary objective of provisional measures is to “protect the rights at issue of either party in a case *pendente litis*, and to prevent the extension or aggravation of a dispute”. *Pendente litis* means pending the litigation or until the case is tried, and demonstrates that provisional measures may be ordered

¹⁰ LOSC article 290 (1), (5) and (6)

¹¹ LOSC article 287 (1)

¹² Shabtai Rosenne, n. 9, p 3-4. See also *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* (Award on the merits) [Award of 12 July 2016], An Arbitral Tribunal constituted under Annex VII of LOSC, where the Tribunal confirmed it as a general principle (in that regard to apply under disputes related to LOSC) by reference to, *inter alia*, case law from ICJ, its inclusion in several multilateral conventions, the United Nations General Assembly's Friendly Relations Declaration, and as inherent in the central role of good faith in the international legal relations between states, para 1166-1173

¹³ *Ibid* Rosenne

¹⁴ *Ibid* p 3

at the early stages of the proceedings. They are constructed to “remedy the problem which can arise from the complex, sometimes time-consuming nature of international judicial proceedings”.¹⁵ Provisional measures seek to avoid a party suffering the risk of irreparable damage pending a final adjudication on the merits of the dispute.

The legal basis for provisional measures may be express or implied.¹⁶ Article 290 of LOSC expressly addresses the availability of provisional measures. Article 290 stipulates that a competent tribunal may make a provisional measures order, either to protect the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.¹⁷

These provisional measures provisions demonstrate that the drafters of LOSC and its later implementing agreement chose to protect the marine environment as well as rights of the parties to the dispute. This is consistent with a more significant global trend of international law to protect common goods as well as State interests.¹⁸ This new element can potentially justify provisional measures absent any threat to a specific right of a party. This is a significant innovation.

2.2 Preconditions in Part XV and *prima facie* jurisdiction

A court or tribunal may only act if it has jurisdiction. In the case of dispute settlement, the notion of ‘jurisdiction’ refers to whether a court or tribunal has the power to decide a dispute with binding effect for the parties to that dispute.¹⁹ Jurisdiction must be assessed against the terms of the LOSC. A court or tribunal may prescribe provisional measures under article 290 (1) provided that it considers itself to have *prima facie* jurisdiction under Part XV or part XI, section 5. Exceptionally, Article 290, paragraph 5, contemplates that pending the constitution of an arbitral tribunal to which a dispute is being submitted, an agreed court or tribunal, or failing such an agreement within two weeks from the date of the request for provisional

¹⁵ Peter Tomka and Gleider I. Hernández, “Provisional Measures In The International Tribunal for the Law of the Sea”, in Holger P. Hestermeyer et al., *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum vol. II* (Brill Nijhoff, 2011, electronic version) p 1763

¹⁶ Rudiger Wolfrum, “Interim (Provisional) Measures of Protection”, in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006, Electronic version), para [A.1]

¹⁷ Under the related UN Highly Migratory and Straddling Fish Stocks Agreement a competent court or tribunal thereunder may also order provisional measures to prevent damage to the stocks in question.

¹⁸ Wolfrum, n 16, para [B.9]

¹⁹ Shabtai Rosenne, “International Courts and Tribunals – Jurisdiction and Admissibility of Inter-State Application”, in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006, electronic version) [A.1]

measures, ITLOS, may prescribe provisional measures if it considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction.

Prima facie jurisdiction refers to a something less than final jurisdiction. The concept requires that a court or tribunal must at least establish that it might have jurisdiction over the merits of the dispute. It enables a court or tribunal to deal with a request for provisional measures even before the final jurisdiction over the substantial merits of the case has been established.²⁰ The term itself derives from the jurisprudence developed by the ICJ. It establishes a lower threshold to allow the court or tribunal to proceed than is required before the court or tribunal can pronounce a judgment on the merits.²¹

LOSC Part XV stipulates a number of preconditions to the jurisdiction of a section 2 court or tribunal. In particular, section 1 establishes general preconditions that apply to any dispute related to the interpretation or application of LOSC, while section 3 imposes limitations and exceptions to the applicability of section 2. All the provisions in sections 1 and 3 are therefore relevant to the *prima facie* test. However, some of the provisions under these sections tend to be more obvious obstacles to establish jurisdiction than others, and they will accordingly be given attention in the following.

2.2.1 Part XV, Section 1 - General Provisions

An applicant for provisional measures must persuade the court or tribunal that the circumstances of the case are not covered by section 1, and thus that the section does not present any obstacles to establish *prima facie* jurisdiction. Primarily, States Parties are under the obligation to settle any dispute between them concerning the interpretation or application of the convention by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations or by any peaceful means of their own choice.²² This objective is also evident in the second paragraph of the preamble, namely to settle all issues related to the law of the sea through a mutual understanding and cooperation, and to maintain peace, justice, and progress for peoples of the world. Typically, this might involve negotiation or diplomatic proceedings. Compulsory LOSC dispute settlement is precluded if the parties choose to settle

²⁰ S. Rosenne, n 19, [D.21]

²¹ Tomka and Hernández, n 15, p 1776

²² LOSC article 279 and 280

the dispute by peaceful means of their own choice.²³ Likewise, if states parties to a dispute over the interpretation or application of LOSC have agreed through a general, regional or bilateral agreement, that disputes shall be submitted to a procedure that entails a binding decision, that procedure shall apply for the dispute in lieu of section 2 of LOSC.²⁴ It is thus implied in article 281 and 282 that peaceful means selected by the parties shall be the main objective, and compulsory settlement as a secondary means in the absence of an agreement.

Pursuant to article 283, the applicant for relief must be able to show that the parties have proceeded expeditiously to an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means. A natural interpretation of the term “exchange of views” must mean that the parties must express their opinion on the matter, for instance in a *note verbale*. Consequently, it does not entail a high threshold. It follows from the Virginia Commentary on The Law of the Sea Convention that the obligation is not only limited to the commencement of the dispute, but entails a continuous obligation at all stages.²⁵ Paragraph 2 of article 283 implies that where a settlement has been reached but the circumstances require further negotiations on its implementation, or the procedure to reach one has been terminated, the obligation to exchange views exists all the same. The purpose of the provision is to ensure that a state would not be taken entirely by surprise by the initiation of the proceedings, to encourage negotiation, reduce tension and contribute to an exhaustion of alternative means of dispute settlement before court proceedings.²⁶

2.2.2 Part XV, Section 2 - Compulsory Procedures Entailing Binding Decisions

The title of section 2 turns the focus towards third-party settlement: “compulsory procedures entailing binding decisions”. Section 2 lays the ground rules for the procedure of the court or tribunal. The applicant for provisional measures in this regard must persuade the court or tribunal that the provisions of section 2 do not present any obstacles for the *prima facie* jurisdiction and the continuation of the proceedings.

²³ LOSC article 281 (1). See the Annex VII arbitral tribunal in the *Southern Bluefin Tuna cases (New Zealand v Japan, Australia v Japan)* (Award on Jurisdiction and Admissibility) [Decision of 4 August 2000], paragraph 56, where the arbitral tribunal calls this a ‘requirement for the applicability’ of the procedures provided for in Part XV, i.e. compulsory procedures entailing binding decisions.

²⁴ LOSC article 282

²⁵ *United Nations Convention on the Law of the Sea Commentary*, n 8, “Article 283 - Obligation to Exchange Views (V)”, p 29 [283.3]

²⁶ See Nigel Bankes, “Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention, *Ocean Development & International Law*, vol 38, issue 3-4, 2017, pp 239-268, p 254, where this finding is based on a variety of case law

According to article 286, section 2 applies to disputes concerning the interpretation or application of the Convention. It is only available where no agreement has been reached under section 1, and where one of the parties to the dispute has submitted a request to the court or tribunal having jurisdiction under section 2. Article 286 is also subject to the provisions of section 3 which may further limit and exempt the applicability of section 2.

Article 287 affords the parties the choice of judicial third-party settlement bodies.²⁷ The judicial bodies referred to shall have jurisdiction over the interpretation or application of LOSC, and may also have jurisdiction over the interpretation or application of an international agreement related to the purposes of LOSC, submitted to it in accordance with LOSC.²⁸ The court or tribunal examining a request for provisional measures, where the application is made in respect of a dispute referred to in article 297 ('Limitations on applicability of section 2'), may also preliminary have to deal with the question whether the claim constitutes an abuse of legal process, either based on a request of a party or determine it *proprio motu* – act on its own initiative.²⁹

Article 293 provides that the applicable law under section 2 is “this convention and other rules of international law not incompatible with it”. When several provisions in section 1 and section 2, for instance article 279 or 288, provide that Part XV applies to disputes concerning the “application and interpretation of the Convention”, it may be questioned if article 293 could expand the scope of jurisdiction and go beyond that. Section 4.1.6 discusses this.

Finally, in accordance with article 295, the applicant must persuade the court or tribunal that local remedies are exhausted where international law requires this.³⁰ This gives States an opportunity to resolve the dispute at a domestic level before proceeding to international litigation, and as such, the effect of a decision under LOSC is not in danger of being modified or revoked by a later decision of a domestic court. It also supports the idea that provisional measures are exceptional. Finally, article 296 entails that decisions under section 2 are final and shall be complied with, but only binding for the parties to the dispute and in respect of that particular dispute.

²⁷ LOSC article 287 (1), (a) – (d)

²⁸ LOSC article 288 (1) and (2)

²⁹ Jonathan Law and Elizabeth A. Martin, *A Dictionary of Law* (Oxford University Press, 7. Ed, 2014), on-line: <http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-1498>

³⁰ LOSC article 295

2.2.3 Part XV, Section 3 - Limitations and Exceptions to Applicability of Section 2

An applicant for provisional measures under article 290 must also be able to convince the court or tribunal that *prima facie* jurisdiction under section 2 is not subject to one or more of the express limitations and exceptions of section 3. The section consists of two provisions, article 297 and 298, entitled respectively ‘Limitations on applicability of section 2’ and ‘Optional exceptions to applicability of section 2’.

Article 297 regulates which types of disputes are subject to the compulsory dispute settlement procedure in section 2, and on the contrary, which types of disputes may not be subject to section 2. In short, according to paragraph 2, (a), (i) and (ii), a coastal State may opt out of two types of submission to section 2 procedures in disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction with regard to marine scientific research.³¹ According to paragraph 3, (a), the same applies to certain types of fisheries disputes.³² Thus, article 297 may render section 2, and therefore article 290, inapplicable, and it is for the Applicant to prove that the dispute does not concern one of the specific exemptions.

Article 298, paragraph 1, provides that States may, when signing, ratifying or acceding to LOSC or anytime thereafter, without prejudice to section 1, declare that it does not accept any one or more of the procedures provided for in section 2 with respect to the categories of disputes in the following letter a to c. That includes, *inter alia*, disputes concerning the interpretation or application of several provisions relating to sea boundary delimitations or historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service; disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3; disputes in

³¹ LOSC article 297 (2) (a) (i) and (ii) provides that a coastal State is not obliged to accept a section 2 procedure with regard to marine scientific research when it arises out of, (i) the exercise by a coastal State of a right or discretion in accordance with article 246, or (ii), a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253. Rather, the provision forwards such disputes to conciliation under Annex V, see paragraph 2 (b)

³² LOSC article 297 (3) (a) provides that the coastal state shall not be obliged to accept the submission to section 2 procedures when the dispute relates to its sovereign rights with respect to the living resources in the EEZ or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations. The provision also refers such disputes to conciliation under Annex V, see paragraph 3 (b)

respect of which the Security Council of the United Nations is exercising its functions assigned to it by the Charter of the United Nations.

3 Provisional measures under Article 290

Part 3 of this thesis provides a textual overview of Article 290. The provision reads as follows:

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 Seabed 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.

3.1 Paragraph 1

The provision states that the judicial bodies in section 2 of Part XV have jurisdiction to prescribe provisional measures where certain preconditions are met.

3.1.1 A dispute has been duly submitted

The first precondition of paragraph 1 is that a ‘dispute has been duly submitted to a court or tribunal’ under Part XV. A natural interpretation of the term ‘dispute’ is that two or more states disagree on a matter, i.e. opposing views on facts or law. As noted above, the dispute must concern matters related to the interpretation or application of the Convention. The criteria ‘duly submitted’ must mean that the dispute must be submitted in accordance with any formal filing requirements.³³

The concept of *prima facie* jurisdiction has been explained above. It is, however, worth mentioning that the party requesting provisional measures under paragraph 1 is under the obligation to indicate the legal grounds upon which ITLOS may establish *prima facie* jurisdiction.³⁴ While Wolfrum in making this point refers only to the rules of ITLOS, it must be assumed that the obligation also applies to the other relevant courts or tribunals.

3.1.2 ‘May prescribe any provisional measures which it considers appropriate’ – Discretion of the court or tribunal

Paragraph 1 gives the court or tribunal the power to ‘prescribe’ provisional measures which it ‘considers appropriate’. The drafters chose ‘prescribe’ rather than the term ‘indicate’ as used in the Statute of the ICJ thus clarifying the binding nature of these provisional measures, a conclusion which is also confirmed by paragraph 6. In the event that the ICJ gets a submission in which the issue of the dispute relates to matters regulated under its Statute and LOSC, article 290 must prevail under the principle of *lex specialis*.³⁵

The provision underlines the discretion of the court or tribunal to prescribe any provisional measures that it finds suitable in the circumstances of the case. While the notion ‘any’ is very broad it must be bound to what ‘it considers appropriate’. Furthermore, the provisions prescribed must be related to the application, since they are merely “an accessory element of

³³ For instance form and time

³⁴ Rüdiger Wolfrum, “Provisional Measures of The International Tribunal for the Law of the Sea”, in P. Chandrasekhara Rao and Rahmatullah Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, 2001) p 179-180

³⁵ Ibid p 172-173. Noticeably, the ICJ has also concluded that provisional measures under article 41 of its Statute are binding, see *LaGrand Case (Germany v United States of America)*, Judgment, I.C.J. Reports 2001, p 466, para 109

the main procedure”.³⁶ Only when the circumstances justifying provisional measures have changed or ceased to exist may the court or tribunal modify or revoke them.³⁷

3.1.3 Pending the final decision

Paragraph 1 provides that a court or tribunal may prescribe provisional measures ‘pending the final decision’. The final decision is the judgment on the merits (the substance) of the case, or an order concluding that the court or tribunal does not have jurisdiction to rule on the merits. This indicates that the circumstances of the case must make provisional measures necessary during this period, i.e. between the examination and until the judgment on the merits. Otherwise, a request for provisional measures shall not be granted.

3.1.4 The rights of the parties or the marine environment

Under paragraph 1, the court or tribunal may prescribe measures to preserve the respective rights of the parties or to prevent serious harm to the marine environment. Although the two alternatives are separated by an ‘or’, it is clear that measures can be prescribed to protect both interests in the same dispute, and hence that the prescription of one alternative does not exclude the other.³⁸ The contrary would not be reasonable when both interests may be present in the same dispute.

As regards the first precondition, the drafters chose the plural form of ‘parties’ to assure some degree of equity in the measures, taking into consideration the rights of both parties to a dispute. The inclusion of measures to protect the marine environment is an important innovation in the regime of provisional measures.

Since these two preconditions will be thoroughly discussed in chapter 4, they will not be discussed any further here.

3.1.5 Urgency

Paragraph 1 of Article 290, unlike the more specialized paragraph 5, does not refer to urgency. The travaux do not reveal why urgency was included in the one paragraph but not the other. While this might lead to the conclusion that urgency should not be required for an

³⁶ Rüdiger Wolfrum, n 34, p 183

³⁷ LOSC article 290, paragraph 2

³⁸ Francisco Orrego Vicuna, “The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems”, 22 *Int'l J. Marine & Coastal L.* 451 (2007), p 457

order under paragraph 1, scholars take the view that urgency is inherent in the term of ‘under the circumstances’ and from the very nature of provisional measures.³⁹

This conclusion is also supported by article 90 of ITLOS’ Rules, which provides that a request for the prescription of provisional measures has priority over all other proceedings – implying the need for urgency in such cases.⁴⁰

3.2 Modification or revocation under paragraph 2

Article 290, paragraph 2, provides that provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist, an example being that the measures no longer serve a purpose. Modification is merely to alter the content of the measures, while revocation is cancellation or nullification.

3.3 Paragraph 3

Article 290, paragraph 3, entails that provisional measures may be prescribed, modified or revoked under article 290 only at the request of a party to the dispute and after the parties have been given the opportunity to be heard. The latter assures a fair process and decision.

3.4 The court or tribunal shall give notice to the parties

Under paragraph 4, the parties to the dispute – and other States Parties as the court or tribunal considers appropriate – shall be informed of the prescription, modification or revocation of provisional measures. The term ‘forthwith’ must mean that the notification shall be forwarded immediately after the decision to prescribe, modify or revoke the provisional measures.

3.5 Provisional measures under paragraph 5

Paragraph 5 deals with a special class of cases, namely the situation in which, by agreement or by default, the chosen forum is an arbitral tribunal. In such a case and pending the constitution of that tribunal, the parties may turn to an agreed court or tribunal - or failing such agreement within two weeks from the date of the request for provisional measures, to ITLOS to seek an order for provisional measures. In such a case ITLOS or the agreed court or tribunal may make an order “in accordance with this article” if it considers that the arbitral

³⁹ Tomka and Hernandez, n 15, p 1780. See also R.Wolfrum, n 16, who states that it is the party requesting provisional measures must establish the existence of urgency, para [34]

⁴⁰ The Internatioanal Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8, Adopted 28 October 1997, Amended 15 March and 21 September 2001 and 17 March 2009

tribunal to be constituted *prima facie* would have jurisdiction. Hence, this court or tribunal must also ensure that the preconditions set forth in the other preceding paragraphs are satisfied. When the arbitral tribunal is constituted, ITLOS or the agreed court or tribunal loses its jurisdiction to prescribe, modify or revoke provisional measures. However, the measures prescribed remain in effect until modified or terminated by the arbitral tribunal.⁴¹

3.5.1 The *prima facie* consideration

The section 2 arbitral tribunal referred to in paragraph 5 is the one referenced in article 287, paragraph 1, (c), i.e., one constituted in accordance with Annex VII. The agreed court or tribunal or ITLOS receiving the request for provisional measures must thus establish the *prima facie* jurisdiction for this arbitral tribunal. As regards such requests to ITLOS, the party is also under the obligation to indicate the legal grounds upon which the arbitral tribunal which is to be constituted would have jurisdiction.⁴² As noted under section 3.1, it must be assumed that this obligation applies *mutatis mutandis* to a request to any court or tribunal ‘agreed upon’ by the parties.

3.5.2 The urgency of the situation

Another precondition under paragraph 5 is that ‘the urgency of the situation [...] require[s]’ the prescription, modification or revocation of provisional measures. The requirement of urgency relates to the necessity and hurry for relief in the situation, and must be addressed individually on a case-by-case basis. The urgency of the situation is closely related to maintaining the *status quo* of the rights of the parties or the marine environment when the delay of the litigation poses a threat.

3.5.3 The arbitral tribunal may revoke, modify or affirm the measures

Paragraph 5 sets out that once the arbitral tribunal has been established, it shall have the power to revoke, modify or affirm the measures ordered either by ITLOS or an agreed court or tribunal. Thus, this may act as an additional assurance for the parties involved because the constituted tribunal is able to assess the measures prescribed.

If the paragraph 5 court or tribunal orders provisional measures, those measures shall apply “pending the constitution” of the arbitral tribunal, during which time the circumstances of the case may have changed and the constituted arbitral tribunal may consider that the prescribed

⁴¹ Bernard Oxman, “Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals”, in Donald Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) [3]

⁴² ITLOS Rules, n 40, article 89, paragraph 4

measures are no longer necessary. This also demonstrates the time frame the court or tribunal must have in mind in considering whether provisional measures are necessary.

4 Preconditions for the prescription of provisional measures – a case law analysis

This section provides an analysis of the case law dealing with the preconditions for the prescription of provisional measures under article 290. As noted above, the ICJ has yet to make a provisional measures order under LOSC. Therefore, all of the cases concerning provisional measures under LOSC involve either ITLOS or an Annex VII arbitral tribunal.

Many of the cases are initiated under paragraph 5 and thus the circumstances of the dispute diverge from those initiated under paragraph 1. Still, the prerequisites of paragraph 1 must be in place in both situations, since paragraph 5 by reference relies on article 290 as a whole. Thus, the preconditions of paragraph 1 are equally applicable to the court or tribunal acting under paragraph 5, and the related case law does not turn on the distinction between the two provisions. To the extent the preconditions that must be in place for both paragraphs do not call for an individual elaboration they will be dealt with together. A table of cases is provided for in the attached appendix. This includes article 290 Orders and under which paragraph they are initiated.

4.1 *Prima facie* jurisdiction

The circumstances of the dispute, and therefore the *prima facie* consideration varies from paragraph 1 to paragraph 5. The key difference separating paragraph 1 cases from those under paragraph 5, is that the court or tribunal examining the request for provisional measures under paragraph 1 is establishing *prima facie* jurisdiction for itself, while in paragraph 5-cases it must establish *prima facie* jurisdiction for another arbitral tribunal to which a dispute is being submitted. This may call for caution and considerations of conformity, respect and comity between judicial bodies, but the *prima facie* considerations are very similar and thus examined together in this thesis.

The following part introduces the notion of *prima facie* before proceeding to consider obstacles to *prima facie* as identified in the relevant case law. For the sake of good order, the presentation begins with section 1 of Part XV.

4.1.1 The notion of ‘*prima facie*’

It is inherent in the notion of ‘*prima facie*’ that the threshold for establishing jurisdiction is lower than at the merits stage of the proceedings; it must be something less than definitive. In ITLOS’ Order for provisional measures in the *M/V “SAIGA” (No. 2) Case*, the Tribunal, referencing the idea of *prima facie* precondition, considered that “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”.⁴³ To demonstrate the difference between that and the requirements of jurisdiction at the merits stage, it is to reference the Annex VII arbitral tribunal’s consideration of jurisdiction in the *MOX Plant*: “[b]efore proceeding to any final decision on the merits, the Tribunal must satisfy itself that it has jurisdiction *in a definitive sense*.”(emphasis added)⁴⁴

4.1.2 Seek settlement of the dispute by a peaceful means of their own choice

States rely on the general provisions of Section 1 in many provisional measures cases since, if successful, the argument serves to exclude the jurisdiction of the court or tribunal pursuant to article 286. In the provisional measures applications in *the Southern Bluefin Tuna Cases*, both before ITLOS and the Annex VII arbitral tribunal, Japan argued that New Zealand and Australia had not exhausted the procedures for amicable dispute settlement under as required by section 1 of Part XV before submitting the dispute to a procedure under section 2. In particular, Japan relied on article 16 of the CCSBT⁴⁵ which offered its own means of dispute settlement to which New Zealand and Australia had not had recourse as required by article

⁴³ *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p. 24, p 37, paragraph 29

⁴⁴ *The Mox Plant Case (Ireland v United Kingdom of Great Britain)* (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures) [Order No. 3 of 24 June 2003], Arbitral Tribunal Constituted pursuant to Article 287, and Article 1 of Annex VII of LOSC, para 14-15

⁴⁵ Convention for the Conservation of the Southern Bluefin Tuna, Adopted 10 May 1993, Entry into force 20 May 1994, Article 16

281, paragraph 1, of LOSC.⁴⁶ Japan also argued that article 16 of the CCSBT excluded any further procedure under Part XV of LOSC, as contemplated by article 281, paragraph 1.⁴⁷

In its Order, ITLOS noted that negotiations and consultations had taken place between the parties, both under LOSC and the CCSBT, and that Australia and New Zealand had invoked the provisions of LOSC in diplomatic notes addressed to Japan, and that negotiations had terminated. ITLOS concluded that “a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted”⁴⁸. The Annex VII arbitral tribunal dealt with the same question. It also found that there is no obligation under article 281, paragraph 1, to “negotiate indefinitely while denying a Party the option of concluding [...] that no settlement has been reached”.⁴⁹ However, the Annex VII arbitral tribunal concluded that article 16 of the CCSBT precluded the compulsory dispute settlement procedures of LOSC, because “the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS”⁵⁰ even though there was no explicit preclusion of other procedures from a pure reading of article 16.⁵¹ Contrary to ITLOS, the arbitral tribunal based its conclusion on the ‘intent’ of the provision rather than its express text.

In the *South China Sea* (Award on jurisdiction), the Annex VII arbitral tribunal had to examine if the Declaration on the Conduct of Parties in the South China Sea (hereinafter ‘DOC’) precluded jurisdiction in accordance with article 281 of LOSC. Although not a case

⁴⁶ LOSC article 281, paragraph 1 provides “1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

⁴⁷ *The Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan)* (Provisional Measures) [Order of 28 August 1999], ITLOS Reports 1999, p 280, para 56

⁴⁸ *The Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, para 56-60

⁴⁹ *The Southern Bluefin Tuna Cases*, Annex VII arbitral tribunal, n 23, para 55

⁵⁰ *Ibid* para 57

⁵¹ In the Separate opinion of Justice Sir Kenneth Keith of the *Southern Bluefin Tuna Case*, Annex VII arbitral tribunal, he disagreed with the majority who concluded that article 16 of the CCSBT precluded recourse to Part XV, section 2, in accordance with article 281, paragraph 1. Sir Kenneth’s key objection related to the wording of article 16 of the CCSBT and what he believed was an absence of explicit *exclusion* of further procedures (para 17-22). He argued with parallels to the structure of Part XV of LOSC, in particular section 3, which requires a need for States to include clear wording in their agreements if they are to remove themselves from their otherwise applicable compulsory obligations under section 2 (para 22). Finally, he referred to the object and purpose of LOSC and how the dispute settlement was not meant to be optional, meaning that third party decisions were to be available only at the request of a party to the dispute (para 23-24), and how the Japanese Delegation to the UNCLOS III had emphasized exactly the necessity of making the general obligation to settle disputes an integral part of what was going to be LOSC (para 28)

involving provisional measures, it does shed light on the interpretation of article 281. The tribunal held that the term ‘agreement’ in article 281 is not to be interpreted strictly, stating that “the form of designation of an instrument is thus not decisive of its status as an agreement establishing legal obligations between the parties”.⁵² Thus, the entitlement of “declaration” did not render the provision inapplicable. However, the Tribunal concluded that the DOC was not an ‘agreement’ in terms of article 281 since the words of the DOC did not suggest the existence of a real agreement but rather reaffirmed existing obligations. Additionally, the DOC was evidently not intended to be a legally binding document with respect to dispute resolution.⁵³ Even if this finding was enough to dispose of the applicability of article 281, the tribunal still proceeded to assess the rest of article 281 to determine whether the DOC excluded ‘any further procedure’. As in *the Southern Bluefin Tuna Cases*, the tribunal had to deal with the issue where the DOC did not contain an express exclusion of recourse to Part XV of LOSC. As support for the conclusion that the DOC did not exclude any further procedure, the tribunal emphasized that there was no provision in the DOC giving exclusivity to the means of dispute settlement therein. It held that it would have been enough to exclude Part XV of LOSC if the DOC simply expressed that only the dispute settlement procedures of the DOC were applicable; But as the tribunal repeated: “It could have, but it does not”.⁵⁴

Singapore also relied on Article 281, paragraph 1 as precluding *prima facie* jurisdiction of the Annex VII Tribunal to be constituted when ITLOS considered a request for provisional measures in the *Land reclamation by Singapore in and around the straits of Johor*. The dispute between Malaysia and Singapore concerned Singapore’s alleged unilateral and excessive land reclamation works in and around the straits of Johor, a strait shared between Malaysia and Singapore. Singapore argued that Malaysia’s agreement to meet and negotiate with Singapore entailed Malaysia’s agreement to seek settlement of the dispute by ‘a peaceful means of their own choice’, rendering section 2 inapplicable. ITLOS rejected this submission on the grounds that Malaysia had already instituted proceedings under Annex VII of LOSC prior to its acceptance of the invitation by Singapore, and, further that the parties had agreed that the meetings would be without prejudice to Malaysia’s right to proceed with the

⁵² *The South China Sea Case (The Republic of the Philippines v The People’s Republic of China)* (Award on Jurisdiction and Admissibility) [Award of 29 October 2015] PCA Case N° 2013-19, Arbitral Tribunal Constituted under the Annex VII to the United Nations Convention on the Law of the Sea, para 214

⁵³ *The South China Sea Case*, Annex VII arbitral tribunal, Award, n 52, para 215-218

⁵⁴ *Ibid* para 222

arbitration pursuant to Annex VII or a request for provisional measures to ITLOS, thus rendering article 281 inapplicable in the circumstances.⁵⁵

These cases suggest that in order to preclude compulsory dispute settlement under section 2 of Part XV, article 281, paragraph 1, requires a legally binding document (agreement) with its own dispute settlement system to which the parties have intended to give their consent, and furthermore, that agreement must explicitly exclude any further procedure under LOSC. If not explicit, there must at least be clear grounds for believing that the intention of the agreement was such as to preclude proceedings under LOSC.

4.1.3 Procedures to apply in lieu of the procedures of Part XV

In the *MOX Plant Case*, a dispute between Ireland and the UK over the latter's authorization of the construction and operation of a 'mixed oxide fuel' plant at Sellafield, located on the UK side of the Irish Sea, Ireland instituted proceedings against the UK under an Annex VII arbitral tribunal and requested ITLOS to prescribe provisional measures under article 290, paragraph 5, pending the constitution of the arbitral tribunal.

Ireland requested measures that would, *inter alia*, require the UK to immediately suspend the authorization of the MOX plant, or take such measures necessary to prevent with immediate effect the operation of the MOX plant.⁵⁶ According to Ireland, the alleged breach of LOSC consisted of a variety of obligations under Part XII ('Protection and Preservation of the Marine Environment'). Before Ireland instituted proceedings under LOSC, it had already instituted proceedings before an arbitral tribunal under the Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter, 'OSPAR Convention'), based on an alleged breach of its article 9. Thus, the UK maintained before ITLOS that the Annex VII arbitral tribunal would not have *prima facie* jurisdiction, by virtue of article 282 of LOSC.⁵⁷ The UK also contended that certain aspects of the dispute were governed by the

⁵⁵ *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures) [Order of 8 October 2003], ITLOS Reports 2003, p. 10, para. 53-57

⁵⁶ *The MOX Plant Case (Ireland v. United Kingdom of Great Britain)* (Provisional Measures) [Order of 3 December 2001] ITLOS Reports 2001, p.95, para. 29. See also Article 282 of LOSC which provides "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

⁵⁷ *Ibid* para 39, the UK argued that "the matters of which Ireland complains are governed by regional agreements providing for alternative and binding means of resolving disputes and have actually been submitted to such alternative tribunals, or are about to be submitted"

Treaty establishing the European Community (hereinafter, ‘the EC Treaty’) or the Treaty establishing the European Atomic Energy Community (hereinafter, ‘the Euratom Treaty’) and its directives. Hence, the question under the *prima facie* consideration for ITLOS was whether the main elements of the dispute were governed by the compulsory dispute settlement procedures of the OSPAR Convention, the EC or Euratom Treaty, and therefore should apply in lieu of Part XV, section 2, procedures.

In its Order, ITLOS recognized that article 282 is concerned with agreements which provide for the settlement of disputes concerning the ‘interpretation or application’ of LOSC, and that the rights and obligations under the OSPAR Convention, the EC Treaty and the Euratom Treaty have a ‘separate existence from those under the [LOSC]’ even if they are similar or identical to the rights of LOSC.⁵⁸ It also emphasized that the application of international rules on the interpretation of treaties to identical or similar provisions in different treaties may not yield the same results and that the case before the Annex VII Tribunal was merely concerned with the interpretation and application of rules of LOSC. Thus, only the procedures under LOSC were relevant.⁵⁹

In *The Southern Bluefin Tuna Cases* (Order for provisional measures), ITLOS also had to deal with Japan’s contention under article 282 that the CCSBT’s procedure, to which all three parties were bound, should apply in lieu of the procedures of Part XV of LOSC because the CCSBT provided for its own dispute settlement procedure.⁶⁰ ITLOS took the position that the mere fact that the CCSBT applied as between the parties did not preclude recourse to the procedures of Part XV, section 2 of LOSC.⁶¹ The Tribunal did not elaborate further on this point, but presumably reached this conclusion on the basis that the CCSBT did not offer a binding dispute settlement procedure which clearly implied that the parties had sought to settle disputes concerning the interpretation or application of LOSC through the procedures of CCSBT.

The implication of the orders of *the MOX Plant Case* and *the Southern Bluefin Tuna Cases* to the extent they deal with article 282, is that article 282 does not preclude *prima facie* jurisdiction if the dispute before a court or tribunal under LOSC concerns an ‘interpretation or

⁵⁸ *The MOX Plant Case*, ITLOS, Provisional measures Order, n 56, para 48 and 49

⁵⁹ *Ibid* para 51 and 52

⁶⁰ *The Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, para 53

⁶¹ *Ibid* para 55

application' of LOSC, even if another agreement entails rights and obligations that cover the same ground as the provisions of LOSC. It seems like the key consideration relates to what *prima facie* appears to be the core of the dispute, and that, if article 282 is to apply, it must be convincing that the parties have in fact *agreed* that such disputes shall be submitted to another procedure, not merely that the agreement applies and has its own dispute settlement procedure and that the entails a binding decision. To reference the words of the Annex VII arbitral tribunal in its Order in the *MOX Plant Case*: it was not persuaded that “the OSPAR Convention *substantially* covers the field of the present dispute so as to trigger the application of articles 281 or 282” (emphasis added).⁶²

4.1.4 The obligation to exchange views

Before the court or tribunal that examines the case can conclude that it has or the arbitral tribunal to be constituted would have, *prima facie* jurisdiction, it has to consider if the obligation under article 283 to exchange views has been satisfied.⁶³

As briefly explained in section 2.1, the threshold under article 283 is rather low. The case law under LOSC confirms this. In the Order for provisional measures in the *M/V “LOUISA” Case* before ITLOS, concerning Spain’s detention of a vessel flying the flag of Vincent and the Grenadines, the Tribunal examined if the communication between the parties satisfied article 283. First, it noted that the obligation applies “when a dispute arises”, meaning that there must have been a dispute over the interpretation and application of provisions of LOSC on the date the application was filed.⁶⁴ What convinced the Tribunal that the parties had satisfied the obligation, was that Spain had not reacted to a Note Verbale issued by the Applicants informing Spain of its plans to initiate proceedings before ITLOS. This was seemingly an indication that the parties were past the point of peaceful negotiations. The Tribunal referred to the *Southern Bluefin Tuna Case* (Order for provisional measures), and reiterated a citation from the *MOX Plant Case* (Order for provisional measures) that “a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted”.⁶⁵ Likewise, ITLOS in the *Land Reclamation*

⁶² *The MOX Plant Case*, Annex VII arbitral tribunal, n 44, para 18

⁶³ Article 283, paragraph 1, of LOSC provides “When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”

⁶⁴ *The M/V “SAIGA” (No. 2) Case*, ITLOS, Provisional measures Order, n 43, para 56

⁶⁵ *The M/V “SAIGA” (No. 2) Case*, ITLOS, Provisional measures Order, n 43, para 60-63. The phrase from the *Southern Bluefin Tuna Order* referenced is that “a State Party is not obliged to pursue procedures under Part XV,

by *Singapore in and around the straits of Johor Case* quoted the same orders in its consideration of article 283.⁶⁶ These cases together clearly establish a pattern, confirming that the threshold required is low in the *prima facie* consideration.

4.1.5 A dispute concerning the interpretation or application of the Convention

The first prerequisite of article 290, paragraph 1, is that there exists a dispute. There are only a few provisional measures cases in which one of the parties has contested the existence of a dispute. Rather, the contesting views relate to whether it is a dispute concerning the application or interpretation of LOSC. Nevertheless, as the Order in the *Southern Bluefin Tuna* demonstrates, ITLOS will still go through the formal process to establish its jurisdiction on this point generally referencing authority from the PCIJ and the ICJ to the effect that a dispute is a “disagreement on a point of law or fact, a conflict of legal views or of interests” and “[i]t must be shown that the claim of one party is positively opposed by the other”.⁶⁷

Furthermore, the dispute must be ‘duly submitted’ to a court or tribunal. This has not emerged as an issue in the provisional measures jurisprudence. The court or tribunal normally clarifies, through an order at the incidental stage of the proceedings, that the dispute has been duly submitted, implying that it does not pose a bar to the continuation of the proceedings.⁶⁸

4.1.5.1 When does the dispute concern an interpretation or application of LOSC?

The term ‘disputes concerning an interpretation or application of this Convention’ is expressed in nearly all of the provisions of Part XV, and it demonstrates a fundamental precondition for the jurisdiction of a court or tribunal under Part XV. According to article 288, paragraph 1, a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of LOSC and under paragraph 2 jurisdiction with respect to another international agreement related to the purposes of the

section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted”, also rendered in this case.

⁶⁶ *Case Concerning Land Reclamation by Singapore in and around the straits of Johor*, ITLOS, Provisional measures Order, n 55, para 47

⁶⁷ *The Southern Bluefin Tuna cases*, ITLOS, Provisional measures Order, n 47, para 44

⁶⁸ In the *M/V Saiga (No. 2) case*, ITLOS, Provisional Measures Order, n 43, the Tribunal declared for the sake of initializing proceedings for the prescription of provisional measures “[t]hat the request for the prescription of provisional measures, the response, reply, rejoinder, all communications and all other documentation relating to the request for the prescription of provisional measures be considered as having been duly submitted to the Tribunal under article 290, paragraph 1, of the Convention”

LOSC where a dispute has been submitted in accordance with that agreement. Paragraph 1 has been considered in many Part XV cases.

In the *Southern Bluefin Tuna Cases* (ITLOS, Order for provisional measures), Japan argued that the dispute was of a scientific character, or at best that it did not concern rights and obligations under LOSC, but merely under the CCSBT. Australia and New Zealand contended that Japan's unilateral fishing programme violated their rights under articles 64 and 116 to 119 of the Convention.⁶⁹ ITLOS began its consideration by pointing out that the southern bluefin tuna is on the list of highly migratory species contained in Annex I to LOSC, and that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna and their relations with non-parties to that Convention, is "relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the [LOSC]".⁷⁰ More importantly, the Tribunal held that even if the CCSBT applies between the parties, it does not exclude their right to invoke the provisions of LOSC in regard to the conservation and management of southern bluefin tuna.⁷¹ For that reason, the Tribunal concluded that the alleged provisions of LOSC "appear to afford a basis on which the jurisdiction of the arbitral tribunal may be founded".⁷²

In the *MOX Plant Case* (ITLOS, Order for provisional measures), the same argument was raised by the UK: did the dispute concern an interpretation or application of LOSC? ITLOS found that the alleged provisions of LOSC appeared to afford a basis to establish *prima facie* jurisdiction, even when the parties were bound by other agreements with similar or identical provisions, since they had "a separate existence from those under [LOSC]".⁷³ The Annex VII arbitral tribunal agreed, simply stating that "it is apparent that Ireland has presented its claims on the basis of various provisions of the Convention [...] [the] dispute clearly concerns the interpretation and application of the Convention (in that the Parties have adopted different legal positions on that matter)".⁷⁴ Hence, in the view of the arbitral tribunal, it was sufficient that the Parties disagreed on a legal point related to LOSC.

⁶⁹ *The Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, para 28. In short, the alleged provisions concern the duty to cooperate and conserve highly migratory species in both the EEZ and the High Seas

⁷⁰ *Ibid* para 49-50

⁷¹ *Ibid* para 51

⁷² *Ibid* para 52

⁷³ *The MOX Plant case*, ITLOS, Provisional measures Order, n 56, para 50-52

⁷⁴ *The MOX Plant case*, Annex VII arbitral tribunal, n 44, para 14

In the *ARA Libertad Case*, the Argentinian frigate “*ARA Libertad*” was seized by order of the High Court of Ghana in the ports of Ghana during a friendly visit. Negotiations between the parties to release the vessel proved unsuccessful and Argentina initiated proceedings under Part XV of LOSC before an Annex VII arbitral tribunal in accordance with article 287, paragraph 5, since the parties had not accepted the same procedure for the settlement of the dispute. Additionally, Argentina requested ITLOS to prescribe provisional measures pursuant to article 290, paragraph 5. Argentina maintained that the dispute was one that concerned the interpretation or application of LOSC, namely that Ghana had violated Argentina’s rights of innocent passage of article 18, paragraph 1 (b); the freedom of the high seas of article 87, paragraph 1(a) and article 90; and the immunity of warships as prescribed in article 32. In response, Ghana contended that none of the alleged provisions were applicable to acts occurring in its internal waters (where the seizure occurred), and thus that there was no dispute on the interpretation or application of LOSC.⁷⁵

ITLOS considered that “the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded”⁷⁶ but that none of the articles 18 nor 87 and 90 were applicable in internal waters. It took a different view with respect to article 32 on the immunity of warships. Here the Tribunal, without taking a final view, concluded that it *may* be applicable to all maritime areas and that since “a difference of opinions exists between [the Parties] as to the applicability of article 32 and thus the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention”.⁷⁷ Again, the mere difference of opinions on a point of law was enough.

It is obvious from the Order of the Tribunal that it was not thoroughly convinced that article 32 afforded a basis to establish *prima facie* jurisdiction, and the majority’s view was criticized by Judges Wolfrum and Cot in their joint separate opinion. Their main objection to the Order was the uncertainty regarding the applicability of article 32.⁷⁸ They acknowledged that warships enjoy immunity in internal waters of other states but only on the basis of customary

⁷⁵ *The “ARA Libertad” Case (Argentina v Ghana) (Provisional Measures)* [Order of 15 December 2012], ITLOS Reports 2012, p. 332, para 39-59

⁷⁶ *Ibid* para 60

⁷⁷ *Ibid* para 64 and 65

⁷⁸ *The “ARA Libertad” Case*, ITLOS, Order for provisional measures, n 75, Joint separate opinion of Judge Wolfrum and Cot, para 45

international law, and held that jurisdiction should have been founded on such a reasoning instead.⁷⁹ This implies that a court or tribunal could not assume jurisdiction unless that rule of customary international law is incorporated into LOSC. The Judges held that the provision did not incorporate customary international law, and therefore the *prima facie* jurisdiction could not be founded on article 32. The point was that the dispute about whether Ghana had violated the immunity of warships in internal waters did not concern the interpretation or application of article 32. This opinion stands out in contrast to other cases where a mere disagreement between the parties over the applicability of a provision has been considered enough to establish *prima facie* jurisdiction. The author's impression is that the Judges' opinion must be held separate from other cases since the Judges believed that the dispute over the immunity of warships in internal waters could not be founded on article 32, and therefore not concerning the applicability of the provision.

ITLOS dealt with a similar question in the "*Enrica Lexie*" incident, a dispute between Italy and India over India's jurisdiction with regards to its domestic criminal proceedings over two Italian Marines. In short, two Indian fishermen were shot dead by two Italian Marines onboard the Italian flagged oil tanker "*Enrica Lexie*". The two marines were subsequently arrested and detained by Indian authorities. Italy instituted proceedings under Annex VII to LOSC and requested ITLOS to prescribe provisional measures pursuant to article 290, paragraph 5, pending the constitution of the Annex VII arbitral tribunal. India maintained before ITLOS that *prima facie* the arbitral tribunal would not have jurisdiction, underlining that "[t]he only legal issue is to know what State...has the jurisdiction to try the perpetrators of this shooting[...]" and that "[o]n this point the...Convention is silent"⁸⁰. On the contrary, Italy alleged a breach of several provisions of LOSC.⁸¹

⁷⁹ Ibid, Joint separate opinion of Judge Wolfrum and Cot, para 47-50. The Judges agreed with the conclusion of the order, but not the reasoning. Wolfrum and Cot held that the assurances given by Ghana worked as an 'estoppel', precluding the jurisdiction of Ghana in this case, see para 52-68

⁸⁰ *The "Enrica Lexie" incident (Italy v India) (Provisional Measures)* [Order of 24 August 2015] ITLOS Reports 2015, p. 182, para 45-48

⁸¹ Ibid para 38: "Considering that Italy maintains that the dispute with India concerns the interpretation and application of the Convention, including, "in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention";

ITLOS agreed with Italy that the dispute concerned the interpretation or application of LOSC.⁸² It is unclear from the Order which of the alleged provisions persuaded the tribunal to assume jurisdiction due to a lack of specification in the Tribunal's reasons. It appears that it was the mere disagreement over the facts and law between the Parties.⁸³ It seems inappropriate for the Tribunal to establish even jurisdiction on a *prima facie* basis without identifying a specific provision of LOSC.

The ITLOS Order was not unanimous. While some of the dissenting or separate opinions were concerned with the lack of urgency, others based their dissent on the lack of *prima facie* jurisdiction. Judge Ndiaye, for instance, argued that the actual question of which State had jurisdiction over the incident was not solved or regulated by any of the provisions invoked by Italy.⁸⁴ Judge Ndiaye's position is interesting, especially when one considers that the Tribunal failed to specify even one provision on which *prima facie* jurisdiction could be built. In light of the dissenting opinions, it is hard to follow the reasoning in the orders from both ITLOS and Annex VII arbitral tribunal, and even harder to draw a conclusion as to the applicable threshold.

4.1.5.2 Concluding remarks on article 288

Given the dissenting opinions in some of the cases referred to above, it is hard to come to a conclusion on the required threshold under article 288. Nevertheless, in light of the opinion of the majority in the orders, it appears that at the provisional measures stage of the proceedings, the threshold for establishing jurisdiction in regards to article 288 is low. The main impression is that a mere "difference of opinion" over the applicability of LOSC is enough to conclude that the dispute concerns the interpretation or application of the Convention, i.e. if the invoked provisions by one party appear to afford a basis on which jurisdiction might be founded.⁸⁵ This does, of course, imply that a difference of opinion as to the interpretation of a

⁸² *The "Enrica Lexie" Incident*, ITLOS, Provisional measures Order, n 80, para 53, "Considering that, having examined the positions of the Parties, the Tribunal is of the view that a dispute appears to exist between the parties concerning the interpretation or application of the Convention"

⁸³ *Ibid* para 51

⁸⁴ *Ibid*, Dissenting opinion of Judge Ndiaye, para 23-26

⁸⁵ In the *Southern Bluefin Tuna Case*, Award on jurisdiction and admissibility, Annex VII Arbitral tribunal, n 23, the Tribunal noted "[t]hat the Applicants maintain, and the Respondent denies, that the dispute involves the interpretation and application of UNCLOS does not of itself constitute a dispute over the interpretation and application of UNCLOS over which the Tribunal has jurisdiction." The implication of this statement is that there is a distinction between the consideration under article 290, paragraph 5, of LOSC and the following award on jurisdiction by the constituted court or tribunal.

specific provision would certainly be enough. As put by Judge Paik’s declaration in the *Southern Bluefin Tuna Order for provisional measures*, “a rather low threshold of *prima facie* jurisdiction is balanced by more stringent requirements for the prescription of such measures, such as those of urgency and irreparability.”⁸⁶

4.1.6 The distinction between article 288 and 293

The relationship between article 288 and 293, paragraph 1, is that article 288 confers jurisdiction whereas article 293 concerns what law the court or tribunal can apply. Article 293, paragraph 1, provides that a court or tribunal under Part XV, section 2, shall apply LOSC and other rules of international law not incompatible with it. In the *MOX Plant Case* (Annex VII arbitral tribunal), the UK argued that Ireland had avoided the plain meaning of article 288 by referring to article 293 and numerous conventions and treaties with the mere aim of expanding the arbitral tribunal’s jurisdiction.⁸⁷ The Annex VII arbitral tribunal agreed with the UK that “there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand.”⁸⁸, but still considered that Ireland had pleaded a case arising substantially under LOSC.

While the Annex VII arbitral tribunal did not elaborate on what it meant by “a cardinal distinction”, it must be that its jurisdiction is limited to claims arising out of rights and obligations under LOSC, and thus for the applicant to clearly prove in its submission what it considers as the basis for jurisdiction as opposed to applicable law. This recalls the discussion in section 4.1.5 with regards to customary international law: while it may be applicable, it cannot establish jurisdiction unless incorporated by reference in the Convention.

4.1.7 Article 294 – Abuse of legal process

In short, article 294, paragraph 1, provides that a court or tribunal shall ‘take no further action in the case’ if it determines that the claim constitutes an abuse of legal process in disputes referred to in article 297. India maintained before ITLOS in the “*Enrica Lexie*” Incident (Order for provisional measures) that Italy’s claim should be dismissed. According to India,

⁸⁶ See *Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, separate opinion of Judge Paik, para 1

⁸⁷ *The MOX Plant Case*, Ireland v. United Kingdom of Great Britain and Northern Ireland, Counter-Memorial of the United Kingdom, Submitted to the Annex VII arbitral tribunal, 9 January 2003, para 4.23-4.32

⁸⁸ *The MOX Plant case*, Annex VII arbitral tribunal, n 44, para 19

this was because Italy first seized India's supreme court with the dispute and then subsequently turned around and argued that those questions should instead be heard and decided by the Annex VII arbitral tribunal, precluding any further domestic proceedings of the Indian court.⁸⁹ The Tribunal was not convinced, and held that "article 290 of the Convention applies independently of any other procedures that may have been instituted at the domestic level". This shows that a party may have recourse to article 290 even after instituting proceedings at the domestic level.

4.1.8 Article 295 - Exhaustion of local remedies

Article 295 has only been presented as an obstacle to *prima facie* jurisdiction in two cases. The provision precludes the application of section 2 of LOSC if local remedies have not been exhausted where required by international law. Spain contended before ITLOS in the provisional measures Order of *the MV "LOUISA" Case* that the owner of the vessel they had in custody had not exhausted its local remedies. The Tribunal concluded that the issue belonged to a future stage of the proceedings.⁹⁰ ITLOS made the same statement in its Order of the "*Enrica Lexie" Incident*, considering that the issue was one to be decided at the merits stage.⁹¹ Albeit both cases had the same outcome, one must be careful to conclude that the issue is always a matter to be decided at the merits stage. In both of the cases referred to, the exhaustion of local remedies was close to the heart of the dispute and therefore something ITLOS was cautious about deciding in the incidental proceedings.

4.1.9 Exclusion by section 3

As noted above in section 2.2.3, article 297 provides that certain disputes related to the exercise by a coastal state of its sovereign rights or jurisdiction shall be excluded from the procedures provided for in section 2 of Part XV. In the submissions to ITLOS in the *M/V "SAIGA" (No. 2) Case* (Order for provisional measures), the parties disagreed as to whether article 297 precluded the Tribunal's jurisdiction. The Applicant, Saint Vincent and the Grenadines, contended that the Tribunal had jurisdiction under paragraph 1, while the Respondent, Guinea, took the contrary view, arguing that the request concerned a dispute covered by paragraph 3 (a), i.e. a dispute relating to the sovereign rights of a coastal state over

⁸⁹ *The "Enrica Lexie" Incident*, ITLOS, Provisional measures Order, n 80, para 70

⁹⁰ *The M/V "LOUISA" Case (Saint Vincent and the Grenadines v Spain)* (Provisional Measures) [Order of 23 December 2010], ITLOS Reports 2008-2010, p. 58, para 66-68

⁹¹ *The "Enrica Lexie" Incident*, ITLOS, Provisional measures Order, n 80, para 67

its living resources, and thereby beyond the procedures of section 2.⁹² The factual background was that the M/V “SAIGA” was an oil tanker, operating as a bunkering vessel supplying gas oil to fishing and other vessels, *inter alia*, off the coast of Guinea where she was subsequently detained and arrested in Guinea’s EEZ.⁹³ ITLOS found that article 297, paragraph 1, appeared *prima facie* to afford a basis for the jurisdiction, reasoning that the parties had agreed to submit the dispute to the Tribunal.⁹⁴ ITLOS found it unnecessary to elaborate on the point made by Guinea, other than noting that it did not have to finally satisfy itself that it had jurisdiction on the merits.⁹⁵ It appears as ITLOS was simply not persuaded of Guinea’s reasoning that the case concerned fisheries when the MV “SAIGA” only operated as a bunkering vessel, especially when ITLOS did not have to definitely satisfy itself as to that question.

Article 298 provides for optional exceptions to the applicability of section 2 by a written declaration of a party to the Convention. Russia’s declaration was alleged to be an obstacle in the *prima facie* consideration of ITLOS in the “*Arctic Sunrise*” Case (Order for provisional measures) between the Russian Federation and the Kingdom of Netherlands, a dispute concerning the bordering, seizure, and detention of the vessel *Arctic Sunrise* and its crew in the EEZ of the Russian Federation.⁹⁶ The Russian Federation’s position was that its declaration upon the ratification of LOSC excluded the compulsory procedures entailing binding decisions for the consideration of disputes concerning, *inter alia*, “law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”.⁹⁷

The Tribunal did not accept Russia’s position. The declaration made under article 298, paragraph 1 (b), *prima facie* applies only to disputes excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.⁹⁸ Paragraph 2 and 3 of article 297 relates to

⁹² See *M/V “SAIGA” (No.2) Case*, Request for provisional measures, Statement in response submitted by Guinea, para 4 and 5

⁹³ *The M/V “SAIGA” (No. 2) Case*, ITLOS, Memorial submitted by Saint Vincent and the Grenadines, Section 1: Factual background

⁹⁴ *The M/V “SAIGA” (No. 2) Case*, ITLOS, Provisional measures Order, n 43, para 28-30

⁹⁵ *Ibid* para 30

⁹⁶ *The “Arctic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation) (Provisional Measures)* [Order of 22 November 2013], ITLOS

⁹⁷ *Ibid* para 41 where reiterated

⁹⁸ *Ibid* para 45. See also article 298, paragraph 1 (b), of LOSC, which clearly states that such a declaration can only be allowed when excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

fisheries and marine scientific research, and the facts of the case *prima facie* did not concern law enforcement in relation to those issues.

4.2 Preserve the respective rights of the parties to the dispute

The text of article 290, paragraph 1, does not give much guidance on the precondition ‘to preserve the respective rights of the parties to the dispute’, except that it must be considered in light of the appropriateness of the circumstances. The relevant jurisprudence suggests that the precondition will not be satisfied unless “there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties” pending the final decision or the constitution of an arbitral tribunal.⁹⁹ ‘Irreparable prejudice’ indicates that if the damage can be compensated by financial reparations, it is not irreparable.¹⁰⁰ The case law also provides that the consideration of whether there exists an imminent risk of irreparable prejudice “can only be taken on a case by case basis in light of all relevant factors”.¹⁰¹ It must be read in conjunction with the urgency of the situation since a lack of urgency will usually not render an irreparable prejudice to the rights at stake. The requirement of urgency is discussed below.

In the *Arctic Sunrise Case*, The Kingdom of Netherlands argued that the consequences of the detention of the vessel and its crew would deprive the crew of their right to liberty and security and that every day spent in detention would be irreversible,¹⁰² i.e. if the decision on the merits were to conclude that the detention was not lawful, the time spent in detention could never be returned. Seemingly - since the Tribunal did not explicitly express its opinion on the point - this argument convinced the Tribunal to prescribe provisional measures.¹⁰³

In light of this decision, it is important to repeat that provisional measures are only temporary. It must be stressed that the court or tribunal dealing with the question must not determine definitely the existence of the rights which are requested to be protected. A formulation that has evolved in recent case law, is that the court or tribunal “need only satisfy itself that the

⁹⁹ See for instance *The M/V “LOUISA” case*, n 90, para 72. Reiterated by ITLOS in its Order for provisional measures in the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire*, para 41

¹⁰⁰ *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)* (Provisional Measures) [Order of 25 April 2015], ITLOS Reports 2015, p. 146, para 89

¹⁰¹ *Ghana v Côte d’Ivoire*, ITLOS, Provisional measures Order, n 100, para 43

¹⁰² *The “Arctic Sunrise” Case*, ITLOS, Provisional measures Order, n 96, para 87

¹⁰³ *Ibid* para 89. Interestingly, the Tribunal concluded that it could prescribe a ‘bond or other financial security’ as a provisional measure for the release of the vessel and the crew, assumingly because it sought to balance the rights of both Parties to the dispute.

rights which [the Party] claims on the merits and seeks to protect are *at least plausible*.”¹⁰⁴(emphasis added) Although it is not specified what is meant by “plausible”, consideration must be given to what *appears* reasonable, and on the contrary what seems unreasonable or with no basis in reality. The following paragraph of the same order (delimitation of the maritime border, *Ghana v. Côte d’Ivoire*) emphasizes that “there is a link between the rights Côte d’Ivoire claims and the provisional measures it seeks”, which implies the obvious - that the provisional measures requested must necessarily be able to protect the claimed rights at risk.

The same case also provides an example of what constitutes ‘irreparable prejudice’ to the rights of a party. Ghana had conducted activities on the continental shelf in a disputed area which Côte d’Ivoire contended belonged to its side of the maritime border, and thus violated its rights over the natural resources of the continental shelf as provided for in LOSC. This is true for drilling activities, since when the rock has been crushed by the drill it cannot be reconstituted.¹⁰⁵ ITLOS agreed with Côte d’Ivoire, that it would “result in a modification of the physical characteristics of the continental shelf” and therefore represented irreparable prejudice if allowed to continue.¹⁰⁶ The Order also provides an example of what shall not be considered as irreparable harm or prejudice: Côte d’Ivoire’s allegation that economic loss from Ghana’s oil production could not be ‘irreparable’ since it could be the subject of adequate compensation.¹⁰⁷ This implies that a party that seeks interim measures must establish that the potential harm that it alleges cannot be compensated by financial means.

If ITLOS was to grant the full suite of provisional measures sought by the Applicant, namely to suspend Ghana’s activities in the area, it would cause prejudice to the rights claimed by the Defendant, Ghana, given that the Annex VII arbitral tribunal could rule in favor of Ghana on the merits. ITLOS took this interest into account by prescribing that there should be no new drilling in the disputed area from the date of the Order but by implication other activities that did not require new drilling could continue. The terms of the Order thus ensure that the rights of both parties were preserved, pending the award on the merits.¹⁰⁸ This shows another

¹⁰⁴ *Ghana v Côte d’Ivoire*, ITLOS, Provisional measures Order, n 100, para 62

¹⁰⁵ *Ghana v Côte d’Ivoire*, ITLOS, Provisional measures Order, n 100, para 78, where ITLOS reiterates Côte d’Ivoire’s argument

¹⁰⁶ *Ibid* para 88

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid* para 100-102

challenge of provisional measures: It is a difficult task for the court or tribunal to prescribe measures that balance the respective rights of *both* parties to the dispute.

4.3 Prevent serious harm to the marine environment

The second alternative that allows for the prescription of provisional measures is “to prevent serious harm to the marine environment”. The obligation to protect and preserve the marine environment is thoroughly laid down in Part XII of LOSC, and arguments of an Applicant for provisional measures and orders of the court or tribunal make frequent reference to this point.¹⁰⁹

A preliminary question related to this alternative precondition is whether the burden of proof should be reversed in cases concerning the marine environment, i.e. should the party whose activities allegedly may pose harm to the marine environment prove that their activities will not? In the *MOX Plant Case* (Order for provisional measures), Ireland contended before ITLOS that the burden of proof was on the UK to demonstrate that the MOX plant at Sellafield would not cause harm from its discharges or its operation.¹¹⁰ The Tribunal did not address this argument in its Order, but the Annex VII arbitral tribunal discarded it, stating that “the Party requesting provisional measures, bears the burden of establishing that the circumstances are such as to justify the measures sought.”¹¹¹

The period for the purpose of the measures in paragraph 1 is “pending the final decision”. Thus, when assessing a request for provisional measures, the court or tribunal shall, as a point of departure, only take into consideration the risk of serious harm to the marine environment during the period between the provisional measures Order and the decision on the merits. The Annex VII arbitral tribunal in the *MOX Plant Case* (Order for provisional measures) expressed that “[h]arm which may be caused thereafter is a matter to be considered in the context of the case on the merits.”¹¹² This reinforces the exceptional nature of provisional measures, in that they can only be prescribed if the need is so urgent that it cannot wait until the merits.¹¹³

¹⁰⁹ See for instance *MOX Plant case*, ITLOS, Provisional measures Order, n 56, para 67, where Ireland’s contention is reiterated, and para 82 where the Tribunal refers to Part XII

¹¹⁰ *The MOX Plant case*, ITLOS, Provisional measures Order, n 56, para 71

¹¹¹ *The MOX Plant case*, Annex VII arbitral tribunal, n 44, para 41

¹¹² *Ibid* para 52

¹¹³ *Ibid* para 53, where the arbitral tribunal expresses that “The Convention clearly identifies the prevention of serious harm to the marine environment as a special consideration”

Article 290, paragraph 1, requires “serious” harm for the precondition to be satisfied, and many of the cases related to the marine environment concern complex scientific data and facts submitted by the parties. At the provisional stage of the proceedings, the court or tribunal must also assure that it does not prejudice the question of jurisdiction or the merits of the court or tribunal that will deal with the case at a later stage. Against this backdrop and the existing orders under LOSC, there is a trend towards less definitive measures in cases concerning the marine environment – especially when there is a lot of uncertainty. This is likely because of the time accorded to provisional measures proceedings. The Order for provisional measures by ITLOS in the *Southern Bluefin Tuna Cases* shows how complex scientific data is dealt with at the provisional measures stage. The Tribunal had to examine lots of scientific data on the sustainability of the SBT stock, where it was difficult to conclude whether Japan’s experimental fishing programme would cause harm to the stock or if it was actually beneficial (which Japan contended). In the event, the Tribunal considered that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna”, perhaps drawing upon the precautionary approach.¹¹⁴ Thus, instead of concluding definitively if the uncertain facts presented by the parties represented a breach of the provisions of LOSC, ITLOS chose the middle way. In doing so it would not prejudice the decision on the merits and at the same time it preserved both parties’ rights and protected the marine environment. This implies that ITLOS is very cautious in its assessment of whether the alleged actions or processes pose a risk of harm when examining cases concerning the marine environment, seemingly so as not to prejudice the final decision on the merits. The Tribunal has expressed itself the same way in subsequent cases and obliged the parties to act with prudence and caution.¹¹⁵

ITLOS has also expressed that the duty to cooperate is an important part of the obligation to prevent harm to the marine environment.¹¹⁶ In the case concerning the maritime delimitation between Ghana and Côte d’Ivoire, the Applicants alleged before a special chamber of ITLOS that Ghana’s oil-related activities had already given rise to pollution incidents, that there was

¹¹⁴ *The Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, para 77

¹¹⁵ See, *inter alia*, *Land Reclamation in and around the straits of Johor* (Order of 8 October 2003), para 99; *MOX Plant case* (Order of 3 December 2001), para 84; *M/V “LOUISA”* (Order of 23 December 2010), para 77; *Maritime delimitation between Ghana and Côte d’Ivoire* (Order of 25 April 2015), para 72

¹¹⁶ *The Mox Plant Case*, ITLOS, Provisional measures Order, n 56, para 82 and measure prescribed No.1; *Ghana v Côte d’Ivoire*, ITLOS, Provisional measures, n 100, para 73 and measure prescribed No. 1

a lack of due diligence to monitor the activities, and that there were shortcomings in Ghana's legislative framework.¹¹⁷ This was obviously contested by Ghana, and the Special Chamber concluded that the evidence provided by the Applicants did not support the claim that Ghana's actions were such as to create "an imminent risk of serious harm to the marine environment"¹¹⁸. In spite of that, the Special Chamber emphasized that the risk of serious harm to the marine environment is of great concern and referred to the State Parties' obligation to protect and preserve the marine environment under article 192 of LOSC.¹¹⁹ In referring to the sovereign right of a State to exploit their natural resources provided for in article 193, it underlined that such a right must be exercised "in accordance with their duty to protect and preserve the marine environment".¹²⁰ Ultimately, it seemed that the Special Chamber, in the absence of convincing evidence, found it more appropriate to reiterate the duty to cooperate as a "fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention".¹²¹

From the cases examined here, ITLOS and Annex VII tribunals seem to have established a high threshold for prescribing measures based on the second alternative precondition, and rather use their power to prescribe their own measures. In such circumstances, the duty to cooperate has often been emphasized. This is, of course, natural when there needs to be a "serious" harm. The main impression of the author is that the court or tribunal is cautious with prescribing measures that may result in great alteration of the current *status quo* of the parties or the situation, and instead has recourse to less definitive measures. Such caution is perhaps appropriate given that alteration of the *status quo* may lead to high economic losses if the final decision concludes in the opposite direction of the Order for provisional measures (notwithstanding that this may again be compensated). Nevertheless, the marine environment is clearly given serious attention in the consideration and design of provisional measures. Even if the measures prescribed are often cautious, it is clearly superior to nothing.

¹¹⁷ *Ghana v Côte d'Ivoire*, ITLOS, Provisional measures Order, n 100, para 65

¹¹⁸ *Ibid* para 67

¹¹⁹ *Ibid* para 68 and 69

¹²⁰ *Ibid* para 70 and 71

¹²¹ *Ibid* para 73

4.4 The urgency of the situation

Lastly, before prescribing provisional measures, the court or tribunal must satisfy itself that the urgency of the situation so requires. While the requirement of urgency is not explicit in paragraph 1, it is still considered as a precondition.¹²² As previously noted, it is inherent in the exceptional nature of provisional measures that they may only be prescribed when there is an urgent need. The extent of the difference between the requirement of urgency in paragraph 1 and 5 is discussed below.

In the Order for provisional measures by ITLOS in the *Southern Bluefin Tuna Cases*, the majority of the court considered that measures “should be taken as a matter of urgency”.¹²³ It considered in the preceding paragraphs that the issue was urgent due to a range of factors; the scientific uncertainty regarding the measures to be taken for the conservation of the stock; that the parties had not reached an agreement as to whether the conservation measures taken so far could improve the stock; lastly, that the stock was at its historically lowest levels.¹²⁴ Given the uncertainty in the case, it is hard to follow the conclusion of the majority that there was urgency pending the constitution of the Annex VII arbitral tribunal when the presented evidence did not really imply that. However, it is arguably so that in cases of uncertainty, the consideration should turn to what is most beneficial for the environment, taking into consideration the precautionary principle.

Judge Vukas disagreed with the majority on the requirement of urgency in his dissenting opinion. He argued that the constitution of the Annex VII arbitral tribunal was expected to commence shortly after the Order by ITLOS and that the Order would be adopted on 27 August 1999, merely four days before Japan’s experimental fishing programme was promised to end. This would imply only a “symbolic value” and “concern only a hundred tonnes or so of tuna to be caught”.¹²⁵ It is hard to disagree with the dissenting opinion. Despite that, Judge Treves made a good point in his separate opinion to explain the urgency: “The urgency needed in the present case does not, in my opinion, concern the danger of a collapse of the stock in the months [until the constitution of the Annex VII arbitral tribunal...] The urgency

¹²² For confirmation, see *Ghana v Côte d’Ivoire*, ITLOS, Provisional measures Order, n 100, para 42 and *The Southern Bluefin Tuna cases*, ITLOS, Provisional measures Order, n 47, Dissenting opinion of Judge Vukas, para 3

¹²³ *The Southern Bluefin Tuna cases*, ITLOS, Provisional measures Order, n 47, para 80

¹²⁴ *Ibid* para 79 and 71.

¹²⁵ *Ibid*, Dissenting opinion of Judge Vukas, para 5

concerns the stopping of a trend towards such a collapse.”¹²⁶ Reading Treves’ reasoning to the requirement of urgency it is easier to accept the Order of the Tribunal. There was never an actual risk that the stock would collapse pending the constitution of the Annex VII arbitral tribunal, but there was a need to stop the deterioration in the southern bluefin tuna stock, because “each step in such deterioration can be seen as “serious harm” because of its cumulative effect towards the collapse”. Treves reasoned that the Tribunal had the precautionary approach in mind albeit not explicitly expressed in the Order.¹²⁷

In the *MOX Plant Case* (Order for provisional measures), where there was also a relatively short time until the constitution of the Annex VII arbitral tribunal, ITLOS considered that the commissioning of the MOX plant did not lead to urgency as required under paragraph 290. What persuaded the Tribunal in this case to deny relief was obviously the temporal factor of the consideration: “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”. It must be noted that the UK had given assurances that it would not export MOX fuel from the plant until October 2002, almost a year after the Order from ITLOS and thus a period in which the Annex VII arbitral tribunal was likely to be constituted, and there was uncertainty as to whether there would be any discharges from the plant in this period.

The temporal element is highly relevant to the consideration of urgency, and while the relevant period in paragraph 1 is pending the final decision, in paragraph 5 it is pending the constitution of an Annex VII arbitral tribunal. In the *Case concerning land reclamation in and around the straits of Johor* (Order for provisional measures), Singapore contended that provisional measures would serve no purpose given the short time remaining until the constitution of the Annex VII arbitral tribunal.¹²⁸ ITLOS rejected Singapore’s argument stating that nothing in article 290 suggests that the measures prescribed are confined to that period.¹²⁹ It underlined that “the said period is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable and that the urgency of the situation must be assessed taking into account the

¹²⁶ *The Southern Bluefin Tuna Case*, n 47, Separate Opinion of Judge Treves, para 8

¹²⁷ *Ibid* para 8

¹²⁸ *Malaysia v Singapore*, ITLOS, Provisional measures Order, n 55, para 66

¹²⁹ *Ibid* para 67

period during which the Annex VII arbitral tribunal is not yet in a position to ‘modify, revoke or affirm those provisional measures’” and that the measures may remain applicable beyond that period.¹³⁰ Therefore, the urgency of the situation must be assessed in light of the particular period for which the provisional measures are to be prescribed.

In the “*ARA Libertad*” Case (ITLOS, Order for provisional measures), concerning the detention of an Argentinian vessel by Ghanaian authorities, Argentina maintained that being left at the mercy of the will of the Ghanaian State – a detention contrary to international law – rendered the situation urgent. ITLOS agreed and referred to an episode in which Ghanaian authorities had boarded the vessel to move it by force to another berth. The possibility that this might be repeated persuaded the Tribunal of the gravity of the situation.¹³¹ The Tribunal seems in part to have been motivated by the risk of violence and use of force.¹³² The Order was unanimous, and the first measure prescribed was to order Ghana to release the frigate and ensure that it and its crew were able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana and to ensure that it was resupplied to that end.¹³³

As seen in the *ARA Libertad Case*, an important factor in the consideration is the nature of the rights or legal interests that are at stake, i.e. when the rights at stake relate to human security the urgency may be more significant than when material values are the subjects of the case. The *Arctic Sunrise Case* concerned a similar issue, namely the detention of a Dutch-flagged vessel and its crew by Russian authorities. The Kingdom of Netherlands contended before ITLOS that the urgency of the circumstances required provisional measures because the general condition of the icebreaker was deteriorating (a risk to its safety and seaworthiness, and thus the environment), and that the crew was deprived of their liberty and security.¹³⁴ ITLOS did not express its opinion but simply stated that the urgency of the situation required

¹³⁰ *Malaysia v Singapore*, ITLOS, Provisional measures Order, n 55, para 68-69

¹³¹ *The “Ara Libertad” Case*, ITLOS, Provisional measures Order, n 75, para 99

¹³² In Judge Paik’s declaration to the case, he made it clear that the “urgency of the situation” consists of three factors; *first* is the nature of the rights or legal interests in respect of which the request for provisional measures is being made; *second* is the temporal element, i.e. that the prejudice to the rights of the parties is likely to occur before an arbitral tribunal has been constituted and become functional; *thirdly*, the existence or otherwise of commitments or assurances given by the parties that an action prejudicial to the rights of the parties will not be taken. Noticeably, he agreed with the Tribunal, but his comments give rise to what is not obvious from a pure reading of article 290 and provide for a better understanding of the consideration. See para 2-4

¹³³ *The “Ara Libertad” Case*, ITLOS, Provisional measures Order, n 75, measure No.1

¹³⁴ *The “Arctic Sunrise” Case*, ITLOS, Provisional measures Order, n 96, para 87 where reiterated by ITLOS

provisional measures.¹³⁵ Seemingly, this was due to the nature of the human rights that were threatened and the need for immediate action.

The majority of ITLOS in *The “Enrica Lexie” Incident* (Order for provisional measures) found that the urgency of the circumstances required the prescription of provisional measures. Italy’s key reasoning focused on the irreversible prejudice to its rights under LOSC (especially that India’s domestic criminal proceedings prejudiced Italy’s jurisdiction) and the rights of the marines (liberty, movement, personal health and well-being).¹³⁶ In short, the first two measures requested by Italy were that;

1. India shall refrain from taking or enforcing any judicial administrative measures against the marines or any other form of jurisdiction;
2. India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable both marines to be in Italy throughout the proceedings before the Annex VII arbitral tribunal.

While ITLOS found that the case called for a prescription of provisional measures, it stated that “the first and second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal”.¹³⁷ Instead, the Tribunal decided to prescribe measures different from those requested, specifically the no.1 to the effect that “Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render”.¹³⁸

It is not easy to identify on what basis the Tribunal reached the conclusion of urgency in the circumstances, especially when it appears that the Annex VII arbitral tribunal was close to being constituted.¹³⁹ Even more so, when the Additional Solicitor General of India stated that the Supreme Court of India had stayed its proceedings and that “there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against

¹³⁵ *The “Arctic Sunrise” Case*, ITLOS, Provisional measures Order, n 96, para 89

¹³⁶ *The “Enrica Lexie” Incident*, ITLOS, Provisional measures Order, n 80, para 89 *et seq.*

¹³⁷ *Ibid* para 126

¹³⁸ ITLOS left out the question regarding the status of the marines, deciding that it was a matter related to the merits of the case, *Ibid* para 132

¹³⁹ *Ibid*, Declaration of Judge Ad Hoc Francioni, para 21

them [the two marines]” pending the constitution of the arbitral tribunal.¹⁴⁰ If one considers the points made in Judge ad hoc Francioni’s declaration, it is easier to follow the reasoning of the Tribunal. He referred to two former orders (*M/V “SAIGA” and “Arctic Sunrise”*) which had emphasized that situations of *deprivation of personal liberty* are matters of urgency, and also underlined the exceptionally long period of custody for the marines.¹⁴¹

Judge Bouguetaia dissented from the Majority on the basis that Italy had already waited three-and-a-half years from the incident before applying for provisional measures, and that no new developments in the case could justify urgency *now* (i.e. at the time of the Order).¹⁴² He also pointed out in his dissenting opinion that the two marines were in good condition – one recovering back home in Italy with his family, the other in the Italian Embassy in New Delhi.¹⁴³ Hence it follows that the humanitarian aspect is not too convincing. Additionally, as dissenting Judge Chandrasekhara Rao put it: “Provisional measures cannot be prescribed merely on a finding that there is a *possibility* of prejudice to the rights in issue. In order for such measures to be prescribed, it is necessary to find that there is ‘a real and imminent risk’ of irreparable prejudice [...] and that [...] such prejudice could occur before the Annex VII arbitral tribunal would be able to deal with rights at issue.”¹⁴⁴

As provided for in section 4.2 and 4.3 – urgency is interrelated to the alternative preconditions of preserving the respective rights of the parties or preventing serious harm to the marine environment. Thus, no imminent harm or prejudice to such rights normally equals no urgency.¹⁴⁵ The Order was not fully reasoned on the issue of urgency and did not demonstrate the actual harm or the change of circumstances requiring immediate action. It is hard not to agree with the minority of the judges in this case. To put it another way, neither the temporal criteria nor the respective rights at stake called for urgent action.

¹⁴⁰ *The “Enrica Lexie” Incident*, ITLOS, Provisional measures Order, n 80, para 129

¹⁴¹ *Ibid*, Declaration of Judge Ad Hoc Francioni, para 23

¹⁴² *Ibid*, Dissenting opinion of Judge Bouguetaia para 19 et seq.

¹⁴³ *Ibid* para 22 and 23

¹⁴⁴ *The “Enrica Lexie” Incident*, ITLOS, Provisional measures Order, n 80, Dissenting opinion of Judge Chandrasekhara Rao, para 6

¹⁴⁵ *Ibid*, Dissenting opinion of Judge Ndiaye, para 29, where he makes a point out of the interrelation between the two, stating that “[t]he rights to be preserved are those subject to adjudication on the merits of the case. And provisional measures may not be prescribed unless irreparable harm is imminent. Thus, there is a close connection between the harm and urgency: if irreparable harm is not imminent, there is hardly any urgency.”

When the dispute came up before the Annex VII arbitral tribunal, that tribunal began its consideration by underlining that there is a requirement of urgency in paragraph 1 and that it is linked to the criterion of preservation of the respective rights of the parties to the dispute.¹⁴⁶ The arbitral tribunal subsequently noted that one of the Marines, Sergeant Girone, was separated from his children under the current situation (in custody in India) and that a situation of social isolation is a relevant factor in the consideration of bail conditions. It then reiterated ITLOS (*The MV "SAIGA" (No.2) Case*, Order for provisional measures) and made it clear that considerations of humanity have a place in the law of the sea.¹⁴⁷ In considering the rights of India, the arbitral tribunal held that it would be without prejudice to its right to exercise jurisdiction over Sergeant Girone if he was able to spend time in Italy as part of his bail until the arbitral tribunal delivered a decision on the merits.¹⁴⁸ The conclusion of the arbitral tribunal was that both parties' rights were appropriately preserved by allowing Sergeant Girone to spend the time of his bail in Italy pending a final decision in the case.¹⁴⁹ It is hard not to agree with the argumentation of the arbitral tribunal that spending time in Italy as part of Girone's bail would be remarkably better for him and that it did not prejudice the rights of India. Yet, the writer has difficulties identifying what de facto constituted urgency in the circumstances. It appears as the issue was avoided by the tribunal's liberal interpretation of paragraph 1 and its recourse to the criterion of preservation of the respective rights of the parties. There can be no doubt that considerations of humanity are important and may often prevail.

A last common pattern that emerges in the orders under paragraph 5, is that pending the constitution of an Annex VII arbitral tribunal, ITLOS justifies its finding of urgency by explicitly referring to the arbitral tribunal's possibility to modify, revoke or affirm the

¹⁴⁶ *The "Enrica Lexie" Incident (Italy v India) (Provisional measures)* [Order of 29 April 2016] PCA Case no. 2015-28, An Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea, para 89-90

¹⁴⁷ *Ibid* para 104

¹⁴⁸ *Ibid* para 105

¹⁴⁹ *Ibid* para 107. See also para 108 and 126-131 where the arbitral tribunal found support for its conclusion in the undertakings by Italy that it would comply with an award of the Annex VII Tribunal requiring the return of the Marines to India.

measures.¹⁵⁰ Even if this is clear from the express language of paragraph 5, it underlines that the measures are only temporary in case the court or tribunal to be constituted would disagree.

4.4.1 A different threshold for urgency under paragraph 1 and 5?

As a point of departure, there is nothing in article 290 explicitly suggesting that there is a difference to the consideration of urgency between paragraph 1 and 5. Of course, paragraph 1 does not contain the term. Having said that, the two situations are quite different when it comes to litigation: in paragraph 5 situations - as Judge Treves puts it - there would be no urgency if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted.¹⁵¹ What he means is that measures prescribed under paragraph 1 apply “pending the final decision” (i.e. a decision on the merits), and measures under paragraph 5 apply until the court or tribunal to be constituted has the opportunity to modify, revoke or affirm the measures – usually a shorter period than pending the final decision. Given this, it is arguable that the requirement of urgency should be interpreted more strict in requests arising under paragraph 1. However, it is the impression of the author that this has yet to be confirmed by an order. In the orders examined there have been no particular suggestions of a distinction between the consideration of urgency in the two paragraphs, at least not express.

5 Additional observations

This chapter addresses additional observations from the research conducted on the topic. These issues are not answered nor evident in article 290 and therefore distinguished in their own chapter of the thesis, including; The implications of provisional measures; How provisional measures orders can have a so-called closing effect on the proceedings; What the absence of a party to the proceedings implies; Lastly, the implications of non-compliance with provisional measures orders.

5.1 Do provisional measures facilitate disputes?

When a dispute arises, it is normally in the wake of a heated conflict over the subject matter. Due to the preliminary nature of provisional measures, the measures ordered tend not to be

¹⁵⁰ See *The Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, para 65; *The “Enrica Lexie” Incident*, ITLOS, Provisional measures Order, n 80, para 88; *The “Arctic Sunrise” Case*, ITLOS, Provisional measures Order, n 96, para 83

¹⁵¹ *The Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, Separate opinion of Judge Treves para 4

definitive. By definition, they cannot resolve the underlying controversy one way or another. That is especially the case when dealing with harm to the environment (the second alternative basis that allows for provisional measures in article 290). It is therefore pertinent to ask if provisional measures provide for more than temporary relief, i.e. can they contribute to facilitating disputes and relieve the tension between the parties?

The *Southern Bluefin Tuna Cases* can serve as an example. As noted in section 4.3, ITLOS was presented with very uncertain data from all parties to the dispute and decided to proceed with caution and adopt the middle way. The result was measures seeking to; (a) ensure that no action was taken that could aggravate or extend the disputes submitted to the arbitral tribunal; (b) ensure that no action was taken that could prejudice the carrying out of any decision on the merits by the arbitral tribunal; (c) in short, ensure that their annual catches did not exceed the annual national allocations as last agreed by the parties; (d) refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except when done against the annual national allocation; (e) resume negotiations to reach an agreement; (f) make efforts to reach an agreement with other States and fishing entities regarding the catch of the southern bluefin tuna.¹⁵² All the measures ordered sought to maintain the status quo or have the parties negotiate.

Even though the Annex VII arbitral tribunal found that it lacked jurisdiction, and therefore revoked the order by ITLOS in accordance with article 290, paragraph 5, it noted that a revocation did not mean that the Parties may disregard the effects of the Order or their decisions made in conformity with it. In explaining how the Order had already made an impact, the Tribunal stated: “[t]he Order and those decisions [...] have had an impact: not merely the suspension of Japan’s unilateral experimental fishing program during the period that the Order was in force, but on the perspectives and actions of the Parties [...] [para 68] As the Parties recognized [...] they have increasingly manifested flexibility of approach to the problems that divide them; as the Agent of Japan put it, ‘strenuous efforts which both sides have made in the context of the CCSBT have already succeeded in narrowing the gap between the Parties.’ An agreement on the principle of having an experimental fishing program and on the tonnage of that program appears to be within reach.”¹⁵³ The arbitral

¹⁵² See *Southern Bluefin Tuna Cases*, ITLOS, Provisional measures Order, n 47, measures ordered

¹⁵³ *The Southern Bluefin Tuna Cases*, Annex VII arbitral tribunal, Award on Jurisdiction and Admissibility, *Supra*, n 23, para 66-68

tribunal's award also emphasized the enhanced cooperation between the parties, their will to negotiate, that the parties agreed to submit the differences to a CCSBT arbitration pursuant to its article 16, their agreement to establish a mechanism in which experts and scientists could resume consultations on a joint EFP and related issues.¹⁵⁴

The literature supports the claim that the ITLOS Order helped facilitate settlement of the dispute between the Parties. As Tim Stephens put it, "the litigation played a constructive role in helping the Commission to begin functioning again. Both at scheduled and inter-sessional meetings, the founding members of the CCSBT held productive negotiations that ultimately produced a settlement to the specific dispute over the EFP and provided a way forward for cooperation in the Commission on other issues".¹⁵⁵ This facilitative function of the ITLOS Order is also praised by Johnston, who applauds the willingness of a tribunal to assist the parties in resolving their dispute amicably, and that "[t]his *facilitative* function of modern international adjudication should in no way be relegated to a lower position than the more traditional *resolutive* and *declaratory* functions."¹⁵⁶ He also emphasizes that this facilitative and problem-solving approach is one of the most valuable contributions of ITLOS in the *Southern Bluefin Tuna* dispute.¹⁵⁷

According to ITLOS, the urgency of the situation was not such as to require the prescription of the provisional measures requested by Ireland in the *MOX Plant Case*, but the Tribunal nevertheless found it appropriate to prescribe its own measures. This case also dealt with inconclusive environmental data and uncertainty of the possibility of damage to the marine environment. Instead of ordering decisive measures, which for instance could have been a complete lockdown of the plant, the Tribunal ordered the Parties to, *inter alia*, cooperate and enter into consultations forthwith in order to: (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; (b) monitor the risks or the effects of the operation of the MOX plant for the Irish sea; (c)

¹⁵⁴ *The Southern Bluefin Tuna Cases*, Annex VII arbitral tribunal, Award on Jurisdiction and Admissibility, Supra, n 23, para 68. In para 69 the arbitral tribunal refers to Australia's counsel whom also made a point of the significant role that the ITLOS Order had played in encouraging the Parties to make progress on the issue of third-party fishing.

¹⁵⁵ Tim Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, The International Journal of Marine and Coastal Law, vol 19, No 2, Koninklijke Brill NV, 2004, p 186

¹⁵⁶ Douglas M. Johnston, *Fishery Diplomacy and Science and the Judicial Function*, Yearbook of International Environmental Law 33, 1999, p 38

¹⁵⁷ D. M. Johnson, n 156, p 39

devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.¹⁵⁸ The resemblance to the measures ordered in the *Southern Bluefin Tuna Order* is striking. Given the success of that Order, there can be no doubt that the Tribunal had the hope of facilitating the dispute in mind when ordering the measures in the *MOX Plant Case*. From the Annex VII arbitral tribunal examination, it is apparent that the ITLOS Order was accepted by the parties, because Ireland noted that “there had been some improvement in the processes of co-operation and the provision of information”, and the arbitral tribunal pointed out that “there has been an increased measure of co-operation and consultation”.¹⁵⁹ Thus, the ITLOS Order again relieved the tension and provided for amicable problem-solving. One scholar superbly describes how ITLOS used provisional measures as a ‘conflict-reducing device’.¹⁶⁰

The Land Reclamation Case (ITLOS, Order for provisional measures) is also instructive. In that case, which concerned the prerequisite of harm to the marine environment, ITLOS decided to prescribe provisional measures, *inter alia*, demanding the parties to cooperate and enter into consultations forthwith in order to: (a) establish promptly a group of experts to conduct a study to determine the effects of the land reclamation, and as appropriate, propose measures to deal with any adverse effects; (b) exchange, on a regular basis, information on, and assess risks or effects of, Singapore’s land reclamation works; (c) implement the commitments noted in the Order and avoid any action incompatible with their effective implementation, and consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong (one of the disputed areas).¹⁶¹

Following the Order, the parties jointly established a Group of Experts to conduct the study on terms of reference agreed by the Parties and they jointly appointed DHI Water and Environment to carry out detailed studies in order to assist the Group of Experts, in what ultimately resulted in a final report. The Parties reviewed and accepted the recommendations of the report and agreed that the recommendations provided a basis for an amicable, full and

¹⁵⁸ *The MOX Plant Case*, ITLOS Provisional measures Order, n 56, measure prescribed No. 1

¹⁵⁹ *The MOX Plant Case*, Annex VII Arbitral Tribunal, Provisional measures, n 44, para 65-66

¹⁶⁰ Robin R. Churchill, *MOX Plant Arbitration and Cases*, Max Planck Encyclopedia of Public International Law, 2007, accessed on-line at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e176?rskey=K6HZJ1&result=1&prd=EPIL> (20.08.2018), para F.

¹⁶¹ *Malaysia v Singapore*, ITLOS, Provisional measures Order, n 55, Measures prescribed No. 1. See also measure prescribed No. 2, which directed Singapore “not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.”

final settlement of the said dispute, and therefore signed a Settlement Agreement. The agreement provided that the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor* was terminated, but the Parties requested the arbitral tribunal to adopt the terms of the agreement in an Award which is final and binding.¹⁶² The arbitral tribunal accordingly delivered a final award terminating the proceedings.¹⁶³

The settlement agreement was very detailed and even provided to be a “full and definitive settlement” of the dispute.¹⁶⁴ Churchill credits the group of experts for the success, and describes its establishment as “an imaginative use of provisional measures by ITLOS” and that the Tribunal was “able to make a significant contribution to [the dispute’s] resolution”.¹⁶⁵

Plausibly, ITLOS is well aware of the potential positive results of such an approach. At least, the body of jurisprudence legitimizes a suggestion that the Tribunal uses provisional measures as a ‘conflict-reducing device’.

5.1.1 Concluding remarks on the facilitative role

These process rich provisional measures orders referenced above show that less definitive measures have the possibility of providing a superior result. But are there downsides to such an approach? From the outset, the role of judicial bodies is to declare and settle disputes. It is up for discussion if a move away from this role - towards the role of a third-party negotiator – implicates a departure from the fundamental power conferred to judicial bodies, namely settling disputes. One may also question if an obligation to cooperate is uncomplicated in terms of adherence and enforcement.

The Annex VII arbitral tribunal in the *MOX Plant Case* elaborated on the disadvantages of the obligation to cooperate ordered by ITLOS, stating that “the tribunal is concerned that such co-operation and consultation may not always have been as timely or effective as it could have been. In particular, problems have sometimes arisen, both before and after the ITLOS Order, from the absence of secure arrangements, at a suitable inter-governmental level, for all the

¹⁶² *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v Singapore)* (Award on agreed terms and Annexed “Settlement Agreement”) [Award of 1 September 2005], An Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea

¹⁶³ Ibid

¹⁶⁴ See Robin Churchill, “Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2005”, in *The International Journal of Marine and Coastal Law*, vol 24, No. 4, December 2006, p 385, for a comprehensive review of the agreement

¹⁶⁵ Ibid

various agencies and bodies involved.”¹⁶⁶ This underlines one of the problems with an obligation to cooperate; What does it imply and what is expected of the parties?

Stephens also points to another issue in his criticism of an excessive facilitative approach, that “there is a danger that the effectiveness of provisional measures jurisdiction may be undermined”.¹⁶⁷ By this he means that ITLOS makes use of its power to depart from the measures requested and prescribes its own with too much emphasis on cooperation. Thus, the Tribunal, whose main function is to preliminary resolve the dispute on the grounds that it was brought in (i.e. measures requested), acts on its own will and gives itself the role of a diplomatic agent. This brings up concerns over the legitimacy of the orders.

However, provisional measures are by nature different from a final decision or award over the substance and merits, which may justify that the court or tribunal examining the case carries out its role on different premises. The writer is of the opinion that these process rich provisional measures orders success should continue to be used, so long as the measures are clear and concretize what the parties are expected to do and accomplish. A mere reference to cooperation should be avoided.

5.2 The closing effect of provisional measures

Provisional measures are intended to be a preliminary remedy until the final decision in the case and shall therefore not prejudice it. That is not always the outcome, as provisional measures orders may effectively obviate the utility or need of any further proceedings.

To recall the “*ARA Libertad*” Case, it began with an Order under paragraph 5 from ITLOS to release the frigate and let it leave the port of Tema (see section 4.4). Subsequently, the Supreme Court of Ghana gave its opinion on the application of Ghanaian law with regard to the arrest of warships which left Ghana with no legal basis to hold the frigate. Therefore, the parties reached an agreement requesting the arbitral tribunal to issue an order for the termination of the proceedings of the arbitral tribunal.¹⁶⁸ The tribunal acceded to this request.¹⁶⁹ This was fully justified; (1) The frigate was released, which was the purpose of the

¹⁶⁶ *The MOX Plant Case*, Annex VII arbitral tribunal, Provisional measures Order, n 44, para 66

¹⁶⁷ Tim Stephens, n 155, p 193

¹⁶⁸ Agreement between Argentina and Ghana in the matter of an arbitration before an arbitral tribunal constituted under annex VII of the 1982 United Convention on the Law of the Sea, *The “ARA Libertad” Arbitration*, 27 September 2013

¹⁶⁹ *The “ARA Libertad” Case (Argentina v Ghana) (Termination Order)* [Order of 11 November 2013], An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations on the Law of the Sea, p 2-3

Argentinian request for provisional measures; (2) The Ghanaian Supreme Court had ruled that the action violated international law related to the immunity of warships; (3) The detention of the frigate was the key of the merits in the case and it was no longer under Ghanaian detention. A decision from the arbitral tribunal would serve no practical effect.

The Land Reclamation Case may also be reiterated. As provided for in section 5.1 above, the ITLOS Order served the effect that the Annex VII arbitral tribunal did not have to rule on the merits of the dispute. Albeit the resemblance of the facts between *the "ARA" Libertad* and *the Land Reclamation* orders is not striking, they both show how a provisional measures order may terminate the need for further proceedings.

Mootness is another term used to describe the phenomenon that there is no longer an actual dispute or controversy over the subject matter due to a change of circumstances. In the *Southern Bluefin Tuna Cases* (ITLOS, Order for provisional measures), the Tribunal ordered, *inter alia*, that the parties should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of the stock. Australia had proposed a catch limit of 1500 tonnes for Japan's experimental fishing programme in 1999 after the ITLOS Order, and when the case came up before the Annex VII Arbitral Tribunal (Award on Jurisdiction and Admissibility), Japan argued that the dispute had become moot because Japan had accepted the catch limit, as proposed.¹⁷⁰ The arbitral tribunal agreed with the Applicants and held that if the Parties agreed to limit the catch to 1500 tonnes, it would have resolved only that part of the dispute, and even if that was the case (which it was not, since the Applicants did not accept Japan's late acceptance of the catch limit), the dispute also concerned the quality of the programme and would therefore not be moot.¹⁷¹

As observed in the cases referred to, the dispute can be resolved before the main hearing of the dispute through the issuance of provisional measures. In these cases, the Applicants will not even have to persuade the court or tribunal of its jurisdiction, because the *prima facie* jurisdiction was sufficient at the preliminary stage. This demonstrates the effects of provisional measures and how they can act as a shortcut in litigation.

¹⁷⁰ *The Southern Bluefin Tuna Cases*, Annex VII arbitral tribunal, Award on Jurisdiction and Admissibility, n 23, page 28, para (c)

¹⁷¹ *Ibid* para 46

5.3 Does the absence of a party prevent the prescription of provisional measures?

When a court or tribunal examine a dispute between States, it must bear in mind the rights of all the States parties involved. Against this backdrop, one may ask if the refusal of a party to attend to judicial proceedings renders any effect on the examination of the court or tribunal, for instance preventing it to order provisional measures.

In *the Arctic Sunrise Case* (ITLOS, Order for Provisional measures) between The Russian Federation and The Kingdom of Netherlands, Russia refused to participate in the proceedings before ITLOS, seemingly because it believed that the Tribunal did not have jurisdiction pursuant to the Russian declaration made under article 298 of LOSC.¹⁷² The Tribunal considered that “the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject” with numerous references to cases before the I.C.J.¹⁷³ Thus, if the absence of a party is linked to its own choice and the party has been given the opportunity to be heard before the institution of the proceedings but refused, it shall not deprive the court or tribunal of its jurisdiction to order provisional measures.¹⁷⁴ In its elaboration, the Tribunal stated that The Russian Federation was informed that the Tribunal was ready to take into account any observations presented by the parties before the closure of the hearing and that the Russian Federation was given ample opportunity to present its observations, but declined to do so.¹⁷⁵ The Tribunal also held that an absent party is still a party to the proceedings with the associated rights and obligations and bound by the eventual judgment.¹⁷⁶

The Tribunal also confirmed that it still has to take into account the procedural rights of both parties and ensure full implementation of the principle of equality – with regards to “the good

¹⁷² *The “Arctic Sunrise” Case*, ITLOS, n 96, Note Verbale of the Embassy of the Russian Federation in Berlin, 22 October 2013

¹⁷³ *Ibid*, ITLOS Order, para 50

¹⁷⁴ See also article 28 of ITLOS Statute and article 9 of Annex VII of LOSC on Default of appearance, which both make it clear that “[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.”

¹⁷⁵ *The “Arctic Sunrise” Case*, ITLOS, n 96, para 49-50

¹⁷⁶ *Ibid* para 52

administration of justice”.¹⁷⁷ This may be difficult if the court or tribunal does not have the benefit of submissions from one of the parties to the dispute. Nevertheless, the Tribunal held that “the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings” and that it had to identify and assess the respective rights of the parties on the best available evidence.¹⁷⁸

5.4 What is the implication of non-compliance with provisional measures?

A common problem in international litigation is compliance. Occasionally, a state may not accept the order, judgment or award of an international court or tribunal and not comply with it. This section examines the implications of non-compliance with an order for provisional measures. The only guidance provided by LOSC is article 290, paragraph 6, which states that the parties to the dispute shall comply promptly with any provisional measures prescribed under the provision. Additionally, article 296, provides that any decision rendered by a court or tribunal shall be final and shall be complied with by all the parties to the dispute.

When *the Arctic Sunrise Case* came up before the Annex VII arbitral tribunal, the Netherlands claimed that Russia had violated LOSC by failing to comply fully with the provisional measures prescribed by ITLOS pursuant to article 290, paragraph 5.¹⁷⁹ Before assessing if the Russian Federation had complied with the Order or not, the arbitral tribunal noted that a failure to comply with provisional measures prescribed by ITLOS is an internationally wrongful act, and where a binding judgment of an international court or tribunal imposes obligations on one State party to the litigation for the benefit of another State party, that other State party is entitled to invoke the responsibility of the first State.¹⁸⁰

The arbitral tribunal also made some comments on the promptness requirement under paragraph 6. One of the provisional measures ordered by ITLOS was to let the members of the Arctic 30 to leave Russian territory following the issuance of a bank guarantee by the Netherlands. The members were allowed to leave 27 days after the issuance. The arbitral

¹⁷⁷ *The “Arctic Sunrise” Case*, ITLOS, n 96, para 53

¹⁷⁸ *Ibid* para 56-57

¹⁷⁹ *The “Arctic Sunrise” Case (The Kingdom of the Netherlands v. The Russian Federation)* (Award on the Merits) [Award of 14 August 2015] PCA Case N° 2014-02, An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea, para 334 et seq.

¹⁸⁰ *Ibid* para 337

tribunal found that the delay did not meet the promptness requirement and demonstrated insufficient effort on the part of Russia.¹⁸¹ This does not answer the question of when an act (or lack thereof) shall be categorized as non-compliance, but it does imply that a delay may be classified as such – and therefore an ‘internationally wrongful act’.

In the Judgment on the merits in the *Maritime Boundary dispute* between Ghana and Côte d’Ivoire, ITLOS dealt with an allegation from Côte d’Ivoire that Ghana had violated the provisional measures Order by the Special chamber on two counts, i.e. the obligation not to engage in new drilling activities and the obligation to cooperate.¹⁸² As regards the first obligation, the Special Chamber found that the drilling activities by Ghana only constituted activities on wells that were already drilled, and thus no new drilling.¹⁸³ The Special Chamber neither found that Ghana violated the obligation to cooperate. It noted that Ghana had not immediately provided the information requested by Côte d’Ivoire (which it was obliged to), and only did it after the President of the Special Chamber requested it to comply. However, this was, according to the Special Chamber, not enough to constitute a violation of the obligation to cooperate, and thus not a violation of the provisional measures Order.¹⁸⁴

The latter case seems to suggest that the threshold for what constitutes a violation of a provisional measures order is high. Against this backbone, a reference must be made to the point made in section 5.1 on the vagueness of process rich orders and the duty to cooperate. Although a measure seeking cooperation may facilitate the dispute, it may also entail difficulties in determining when such an obligation is violated.

6 Conclusion

The United Nations Convention on the Law of the Sea establishes a remarkably comprehensive dispute settlement system in Part XV. It provides for compulsory dispute settlement in many cases, including a regime for the prescription of provisional measures under article 290. In some cases it seems clear that article 290 has served the additional function of facilitating the settlement of disputes.

¹⁸¹ *The “Arctic Sunrise” Case*, Annex VII, Award, n 179, para 350

¹⁸² *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana v Côte d’Ivoire)* (Judgment) [Judgment of 23 September 2017], ITLOS, List of Cases: No. 23, para 635 et seq.

¹⁸³ *Ibid* para 651 and 652

¹⁸⁴ *Ibid* para 656

The thesis has shown the complexities of Part XV and how it may cause difficulties for the determination of *prima facie* jurisdiction in article 290 - one of the key elements of the provision. Nearly all provisions in those three sections that compromise Part XV have been the subject to discussion in the case law on the grounds that they may preclude *prima facie* jurisdiction.

As stated by Judge Paik in his separate opinion in *the Southern Bluefin Tuna Order* (see section 4.1.5), confirming the impression of the writer, the precondition of *prima facie* jurisdiction is rather low. With regards to section 1, the perception is that articles 281, 282 and 283 have been the most litigated provisions. This thesis found that article 281 will only serve to exclude jurisdiction when a provision of another agreement explicitly excludes other dispute settlement procedures. Article 282 will only be triggered when the parties have clearly *agreed* that the dispute shall be submitted to another dispute settlement procedure that entails a binding decision, implying that it is not enough that another agreement applies to the dispute. Lastly, article 283 will generally not preclude jurisdiction since the requirement of an exchange of views can be readily satisfied. The provisional measures orders have repeated that the provision is satisfied when there is reason to conclude that further peaceful negotiations are pointless. Article 288 is perhaps the provision related to *prima facie* jurisdiction that has been the most difficult to address, because it draws in all the provisions of LOSC and raises threshold questions of links between law and fact and the plausibility of the legal claims. It is also the provision that has been an obstacle in the majority of provisional measures orders. The case law seems to have established a low threshold, and a mere difference of opinions over the applicability of LOSC is enough to conclude that the dispute concerns the interpretation or application of the Convention. However, the writer is left with the impression that the reasoning is not fully articulated in the relevant decisions and more precision would provide useful guidance.

The thesis also analyzed the case law interpreting the two alternative circumstances that can justify the prescription of provisional measures, i.e. to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. In both situations, the issue must be assessed on a case-by-case basis with regards to the circumstances. For the first alternative, the cases show that the rights which the party claims on the merits and seeks to protect must at least be *plausible*. As regards the second alternative, the case law has seemingly established a high threshold to prescribe measures to prevent serious harm to the marine environment. In both situations, it must be irreversible harm or prejudice, and harm

that cannot be compensated for by financial means. The writer has also observed that in disputes concerning the marine environment, the court or tribunal often makes use of its power to depart from the measures requested and prescribes its own, often less definitive (but procedurally rich) measures, with the implications described as the ‘facilitative effect’. It has also been presented that the courts and tribunals have emphasized the importance of Part XII of LOSC and the marine environment.

The thesis has discussed the differences between paragraph 1 and 5, which has demonstrated that the considerations in both paragraphs are similar. The thesis has also shown how the precondition of urgency applies to paragraph 1 albeit not expressed in its language. This precondition has caused varying reasonings and conclusions from the judges, in which many judges have not agreed with the majority and served their own separate or dissenting opinion – often with very detailed and theoretical elaborations providing this thesis with more substance. It is very hard to draw a conclusion on the consistency and the threshold of the case law, as this varies very much from case to case and depends a lot on the circumstances. Still, two elements have been repeated as leading for the consideration; First, the temporal element showing that a long time until the final decision or the constitution of an Annex VII arbitral tribunal can render the need for provisional measures more urgent; Secondly, the nature of the rights or the legal interests in respect of why provisional measures are requested, e.g. that rights involving human security can make the situation more urgent.

This thesis has also presented how the court or tribunal from time to time reiterates its own earlier decisions but also refers to the decisions of other judicial bodies. It is evident from this procedure and approach that they seek to establish a pattern and maintain consistency for future disputes.

The case law and literature have also shown how provisional measures may have broader implications. For instance, they may facilitate the settlement of disputes and in some cases effectively conclude the dispute. The implications of the absence of a party to the dispute and the implications of non-compliance have also been addressed.

On a final note, the writer is left with the impression that the addition of article 290 and the possibility of requesting provisional measures with a binding effect has been successful. In the majority of the cases, they have been able to provide the parties a solution to disputes and helped obtain protection of the parties’ rights and the marine environment. It is thus safe to

conclude on one of the introductory questions: the measures prescribed are justified on the reasons that article 290 allows for.

It remains to be seen if provisional measures will be kept to a mere exceptionality, or if the number of cases will rise proportionally to the last decade's increase.

BIBLIOGRAPHY

Books

Center for Oceans Law and Policy, University of Virginia, *United Nations Convention on the Law of the Sea Commentary*, (Brill Nijhoff 2013)

Chandrasekhara, P. Rao; Khan, Rahmatullah (eds.), *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, 2001)

Crawford, James, *Brownlie's Principles of Public International Law* (Oxford University Press 2012, 8th edition) ISBN: 978-0-19-965417-8

Hestermeyer, Holger P. et al., *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum vol. II* (Brill Nijhoff, 2011, electronic version), ISBN: 978-90-04-21482-8, pp. 1130

Law, Jonathan; Martin, Elizabeth A., *A Dictionary Of Law* (Oxford University Press, 7th edition. 2014), accessed on-line 28.08.18 at:

<http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-1498>

Merills, J. G., *International Dispute Settlement* (Cambridge University Press, 2011, fifth edition), ISBN 978-0-521-19909-4

Rosenne, Shabtai, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005)

Rothwell, Donald et. al (eds.), *The Oxford Handbook of the Law of the Sea*, (Oxford University Press 2015), Vol. 1

Articles

Banks, Nigel, "Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention, in *Ocean Development & International Law*, vol 38, issue 3-4, 2017, pp 239-368

Churchill, Robin R., "Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2005", in *The International Journal of Marine and Coastal Law*, vol 24, No. 4, December 2006, pp 377-388

Churchill, Robin R., “MOX Plant Arbitration and Cases”, *Max Planck Encyclopedia of Public International Law* (2007, electronic version), accessed on-line 20.08.2018 at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e176?rskey=K6HZJ1&result=1&prd=EPIL>

Johnston, Douglas M., “Fishery Diplomacy and Science and the Judicial Function”, in *Yearbook of International Environmental Law* 33, 1999, pp 38

Oxman, Bernard, “Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals”, in Donald Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015)

Rosenne, Shabtai, “International Courts and Tribunals – Jurisdiction and Admissibility of Inter-State Application”, in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006, electronic version), accessed on-line 03.09.2018 at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e56?rskey=gclwTe&result=2&prd=EPIL>

Stephens, Tim, “The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case”, *The International Journal of Marine and Coastal Law*, vol 19, No 2, (Koninklijke Brill NV, 2004)

Tomka, Peter; Hernández, Gleider I., “Provisional Measures In The International Tribunal for the Law of the Sea”, in Holger P. Hestermeyer et al., *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum vol. II* (Brill Nijhoff, 2011, electronic version)

Vicuna, Francisco Orrego, “The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems”, in *The International Journal of Marine & Coastal Law*, vol 22, pp 451 (2007)

Wolfrum, Rudiger, “Interim (Provisional) Measures of Protection”, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006, Electronic version), accessed on-line 03.09.2018 at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e32?rskey=yODLxt&result=2&prd=EPIL>

Conventions, treaties and agreements

Agreement between Argentina and Ghana in the matter of an arbitration before an arbitral tribunal constituted under annex VII of the 1982 United Convention on the Law of the Sea, The “ARA Libertad” Arbitration, 27 September 2013, accessed on-line 29.08.18 at:

<https://pcacases.com/web/sendAttach/429>

Convention for the Conservation of Southern Bluefin Tuna, Adopted 10 May 1993, Entry into force 20 May 1994

International Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8, Adopted 28 October 1997, Amended 15 March and 21 September 2001 and 17 March 2009

United Nations, Statute for the International Court of Justice (ICJ), Enacted 26 June 1945, Entry into force 24 October 1945

United Nations General Assembly, The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Adopted 4 August 1995, Entry into force 11 December 2001

United Nations General Assembly, United Nations Convention on the Law of the Sea, Adopted 10 December 1982, Entry into force 16 November 1994, 1833 UNTS 397.

Vienna Convention on the Law of Treaties, Adopted 23 May 1969, Entry into force 27 January 1980, 1155 UNTS 331

Cases

Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures) [Order of 8 October 2003], ITLOS Reports 2003, p. 10

Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Award on agreed terms and Annexed “Settlement Agreement”) [Award of 1 September 2005], An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea

Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire) (Judgment) [Judgment of 23 September 2017], ITLOS, List of Cases: No. 23

Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire) (Provisional Measures) [Order of 25 April 2015], ITLOS Reports 2015, p. 146

LaGrand Case (Germany v United States of America) (Judgment) [Judgment of 2001] ICJ Reports 2001

The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation) (Provisional Measures) [Order of 22 November 2013], List of Cases: No. 22, ITLOS

The "Arctic Sunrise" Case (The Kingdom of the Netherlands v. The Russian Federation) (Award on the Merits) [Award of 14 August 2015] PCA Case N° 2014-02, An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea

The "ARA Libertad" Case (Argentina v Ghana) (Provisional Measures) [Order of 15 December 2012], ITLOS Reports 2012, p. 332

The "ARA Libertad" Case (Argentina v Ghana) (Termination Order) [Order of 11 November 2013], An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations on the Law of the Sea

The "Enrica Lexie" Incident (The Italian Republic v The Republic of India) (Provisional Measures) [Order of 24 August 2015] ITLOS Reports 2015, p. 182

The "Enrica Lexie" Incident (The Italian Republic v The Republic of India) (Request for the prescription of provisional measures) [Order of 29 April 2016] PCA Case No. 2015-28, An Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea

The MOX Plant Case (Ireland v United Kingdom of Great Britain) (Provisional Measures) [Order of 3 December 2001] ITLOS Reports 2001, p. 95, para 29

The MOX Plant Case (Ireland v United Kingdom of Great Britain) (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures) [Order No. 3 of 24 June 2003], Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea

The MOX Plant Case (Ireland v. United Kingdom of Great Britain), Counter-Memorial of the United Kingdom, Submitted to the Annex VII arbitral tribunal, 9 January 2003

The M/V "SAIGA" (No. 2) Case (Saint Vincent and The Grenadines v Guinea) (Provisional measures) [Order of 11 March 1998], ITLOS Reports 1998, p 24

The M/V "LOUISA" Case (Saint Vincent and the Grenadines v Spain) (Provisional Measures) [Order of 23 December 2010], ITLOS Reports 2008-2010, p. 58

The South China Sea Case (The Republic of the Philippines v The People's Republic of China) (Award on Jurisdiction and Admissibility) [Award of 29 October 2015] PCA Case N° 2013-19, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea

The South China Sea Case (The Republic of Philippines v The People's Republic of China) (Award on the merits) [Award of 12 July 2016] PCA Case N° 2013-19, An Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea

The Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan) (Provisional Measures) [Order of 28 August 1999], ITLOS Reports 1999, p 280

The Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan) (Award on Jurisdiction and Admissibility) [Decision of 4 August 2000], Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea, Reports of International Arbitral Awards, VOLUME XXIII, pp. 1-57

APPENDIX

<u>CASE NAME:</u>	<u>INITIATED UNDER ARTICLE 290, PARAGRAPH 1:</u>	<u>INITIATED UNDER ARTICLE 290, PARAGRAPH 5:</u>
<i>Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)</i> (Provisional Measures) [Order of 8 October 2003] ITLOS		✓
<i>Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire)</i> (Provisional Measures) [Order of 25 April 2015] ITLOS	✓	
<i>The “Arctic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation)</i> (Provisional Measures) [Order of 22 November 2013] ITLOS		✓
<i>The “ARA Libertad” Case (Argentina v Ghana)</i> (Provisional Measures) [Order of 15 December 2012] ITLOS		✓
<i>The “Enrica Lexie” Incident (The Italian Republic v The Republic of India)</i> (Provisional Measures) [Order of 24 August 2015] ITLOS		✓
<i>The “Enrica Lexie” Incident (The Italian Republic v The Republic of India)</i> (Request for the prescription of provisional measures) [Order of 29 April 2016] PCA Case No. 2015-28, An Arbitral Tribunal Constituted Under	✓	

Annex VII of the 1982 United Nations Convention on the Law of the Sea		
<i>The MOX Plant Case (Ireland v United Kingdom of Great Britain)</i> (Provisional Measures) [Order of 3 December 2001] ITLOS		✓
<i>The MOX Plant Case (Ireland v United Kingdom of Great Britain)</i> (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures) [Order No. 3 of 24 June 2003], Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea	✓	
<i>The M/V “SAIGA” (No. 2) Case (Saint Vincent and The Grenadines v Guinea)</i> (Provisional measures) [Order of 11 March 1998] ITLOS		✓
<i>The M/V “LOUISA” Case (Saint Vincent and the Grenadines v Spain)</i> (Provisional Measures) [Order of 23 December 2010] ITLOS	✓	
<i>The Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan)</i> (Provisional Measures) [Order of 28 August 1999] ITLOS		✓