PROVISIONAL MEASURES IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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On the occasion of Judge and Professor Rüdiger Wolfrum’s 70th birthday, it gives us great pleasure to contribute to this Festschrift in his honour with a chapter on provisional measures in the International Tribunal for the Law of the Sea (ITLOS). Judge Wolfrum, a Member of that Tribunal since 1996 and its President from 2005 to 2008, has greatly contributed to the evolution of the practice of the Tribunal and the development of its jurisprudence. Moreover, from both his judicial office in Hamburg and his academic office as Director of the Max-Planck Institute for Comparative Public Law and International Law in Heidelberg, he has made a great contribution to the international law of the sea and to international law more generally. The topic of our piece is thus perhaps a fitting tribute.

A. General Comments on Provisional Measures

The essence 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. Such measures were designed to remedy the problem which can arise from the complex, sometimes time-consuming nature of international judicial proceedings, and avoid an eventual judgment becoming meaningless in whole or in part once it is rendered.1 Particularly interesting about a request for provisional measures is that the court or tribunal seised of such a request, in examining

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1 One of the classic statements justifying the indication of provisional measures was given by the International Court of Justice in Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports 1972, 16, para. 21, and 34, para. 22: “Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has its objective to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings, and that the Court's judgements should not be anticipated by reason of any initiative regarding the measures which are in issue ….”
the causes prompting the request, does not examine the nature of the dispute or the facts or law underlying it; instead, it aims to study emerging or existing events external to the proceedings, such as the conduct of the parties in general or with respect to the subject-matter of the dispute, and determines whether the non-indication of measures would seriously impair the rights to be determined later on in the eventual judgment. A strong component of judicial discretion therefore permeates the very nature of provisional measures, although, in the case law of the International Court of Justice (ICJ) at least, some criteria have been articulated which help to define objectively the exercise of the power to indicate provisional measures.2

ITLOS is not in a formal relationship with the ICJ, as both bodies stand independent of and separate from each other; yet in substance, there is a relationship between the two which follows from the fact that the substantive competences of both institutions are broadly situated in the field of the peaceful settlement of international disputes through judicial means.3 There are of course differences in competence 
ratione materiae
between the ICJ and the Tribunal. The ICJ has wider material jurisdiction over legal inter-state disputes in all areas of international law, whilst the Tribunal’s jurisdiction is confined to the interpretation or application of UNCLOS or an international instrument related to the purposes of UNCLOS.4 However, when establishing the UNCLOS regime, negotiating states were certainly influenced by the law and practice of the International Court.5 In the light of both this and the

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2 S. Rosenne, Provisional Measures in International Law (2005), provides the most comprehensive and thorough study of provisional measures at the two institutions; see also S. Torres Bernárdez, Provisional Measures and Interventions in Maritime Delimitation Disputes, in: R. Lagone/D. Vignes (eds.), Maritime Delimitation, 33, at 41 et seq. (2006).


5 S. Rosenne (note 2), at 46, explains in detail how, for example, the concept of 
prima facie
jurisdiction over the merits was introduced into the Convention following the development of that notion by the ICJ. He also expresses the view that Article 290, paras. 1 to 4, of UNCLOS represents a codification or a codification/restatement of the ICJ’s law and practice. See also B. H. Oxman, The Rule of Law and the United Nations Convention on the Law of the Sea, 7 European Journal of International Law 353, 367 (1996); D. L. Morgan, Implication of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases, 43 Harvard Journal of International Law 541, at 542–543 (2002).