

The Jurisdiction to Prescribe Provisional Measures by the International Tribunal for the Law of the Sea: Evolving Jurisprudence and Aspects of the Implementation

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Abstract

This article aims to unveil various features of provisional measures, especially under the ITLOS jurisdiction. The jurisprudence of other international courts and tribunals are very essential to understand how ITLOS deals with a request for provisional measures. Therefore, comparing the jurisdiction and jurisprudence of the ITLOS with other courts and tribunals will help to reveal various aspects of the provisional measures.

Keywords: ITLOS, international courts and tribunals, provisional measures, jurisdiction.

Introduction

1982 Law of the Sea Convention (LOSC), has four different dispute settlement methods in application or interpretation of Convention. These methods have been listed in article 287 in order; International Tribunal for the Law of the Sea (ITLOS), International Court of Justice (ICJ), Annex VII arbitral tribunal and Annex VIII special arbitral tribunal. While the order of listing in article 287 paragraph 1 has no importance, several attempts were made to change the order. At the beginning of the drafting process, the Annex VII arbitral tribunal option was listed in the first rank. Later the first rank was given to the ITLOS. Netherlands and Switzerland had suggested giving first place to the ICJ, but this suggestion could not find sufficient support.¹

ITLOS has particular importance in the dispute settlement system of LOSC because of its compulsory jurisdiction under the special procedures. Prompt release of vessels and crews under

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1 Shabtai Rosenne and Louis B. Sohn, **United Nations Convention on the Law of the Sea 1982: A Commentary** (Myron H. Nordquist Ed.), Volume V, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989, p. 44.

article 292 of LOSC is one of the crucial missions of the ITLOS among others. Another significant role of the ITLOS is prescribing to the provisional measures under article 290 of LOSC. As McLachlan emphasized, modern international litigation has an urgent character. We can see this reality in both of the provisional measures and prompt release procedures.² In this regard, article 90 paragraph 1 and article 112 paragraph 1 of the Rules of the ITLOS regulate that to give priority to applications for release of vessels or crews and requests for the prescription of provisional measures.

So far, nine prompt release cases out of in twenty-five cases have come before to the ITLOS.³ The frequency of the use of prompt release proceedings may be explained by the prevalence of fishery disputes as a contemporary issue in the law of the sea.⁴ The article 292 of the LOSC provides that an application for the prompt release of a vessel and its crew may be submitted to the Tribunal in a case of where the vessel of a State Party and its crew have been arrested or been detained by another State Party. As it is well known, certain provisions of the LOSC authorize the coastal or port States for arresting a foreign vessel.⁵ According to the *Virginia Commentary*, relevant provisions of LOSC in respect of the prompt release procedure are the article 73 paragraph 2, article 220 paragraph 7 and article 226 paragraph 1 (b).⁶ Another provision that might relate to the prompt release procedure is article 218 paragraph 2.⁷

In the *M/V Saiga (No.1)* case, Saint Vincent and the Grenadines relied on the non-restrictive interpretation of article 292. Pursuant to this interpretation, the applicability of the article 292 to the arrest of a vessel in case of the violation of international law can also be argued without reference to a specific provision of the Convention for the prompt release of vessels or their crews.⁸ ITLOS decided that the “argument of Saint Vincent and the Grenadines relied on article 73 of LOSC is well-founded. So it is unnecessary for the Tribunal to adopt a position on the non-restrictive interpretation of article 292 of the LOSC”.⁹ Despite the Tribunal’s approach, *Virginia Commentary* explicitly points out that the title of the article 292 was changed from “detention of vessels” to the “prompt release of vessels” and the draft text of this article’s first paragraph make it clear that this provision would not apply to all cases regarding with the detention.¹⁰ Hence, the *travaux préparatoires* does not support the view that broad interpretation of article 292 to

2 Campbell McLachlan, “Reflections from the Practice of International Litigation” (pp.15-20) in **International Law**, Malcolm D. Evans (Ed.), First Edition, Oxford: Oxford University Press, 2003, p. 19.

3 <https://www.itlos.org/en/cases/list-of-cases/> (8.1.2019)

4 Yoshifumi Tanaka, **Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence**, Netherlands International Law Review, 2004, p. 239.

5 Thomas Mensah, **The Tribunal and the Prompt Release of Vessels**, The International Journal of Marine and Coastal Law, Vol. 22, No. 3, 2007, p. 426.

6 See Rosenne and Sohn, *Virginia Commentary*, p. 67, footnote 1.

7 Tanaka, Prompt Release in the United Nations Convention on the Law of the Sea, p. 245.

8 *M/V “SAIGA” (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, **ITLOS Reports 1997**, p. 26, paragraph 53.

9 *Ibid*, paragraph 73.

10 Rosenne and Sohn, *Virginia Commentary*, p. 68.

provide Tribunal's competence for determining all detentions of ships which made a violation of international law rules.¹¹

So far, all prompt release cases before the ITLOS were regarding the violation of article 73 paragraph 2 of the LOSC. This reality stresses the seriousness of illegal fishing.¹² But it does not mean that the protection and preservation of the marine environment have no importance in the jurisprudence of the ITLOS. This issue has been examined by the Tribunal in the provisional measure cases under the article 290 paragraph 5 of LOSC rather than prompt release cases under the article 292 of LOSC.

I. THE JURISDICTION TO PRESCRIBE PROVISIONAL MEASURES

Pursuant to the article 290 paragraph 1 of LOSC, "a court or tribunal which considers that it has *prima facie* jurisdiction under Part XV or Part XI, section 5 of Convention, this 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". As it is seen, there are various elements in the provision. *Virginia Commentary* summarizes these elements as follows: a) *prima facie* jurisdiction, b) urgency of the situation and c) preserve the respective rights of parties or prevent serious harm to the marine environment.¹³ Firstly, we are going to analyze the prevention of serious harm to the marine environment.

A. PREVENTION OF SERIOUS HARM TO THE MARINE ENVIRONMENT

The international law of the sea gives special attention to the protection and preservation of the marine environment. We can see this fact in the 1982 LOSC which has been given a particular part to the marine environment matter in its structure.¹⁴ Reference to the protection of the marine environment in the article 290 paragraph 1 is related to the Part XII of the LOSC. Thus, the prevention of serious harm to the marine environment is different from the protection of the respective rights of the parties in the procedure of provisional measures.¹⁵

The *MOX Plant* case has particular importance concerning the assertion of breaching marine environment provisions in the LOSC. In this case, Ireland claimed that its rights under the articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 of the LOSC will be irrevocably violated if the MOX Plant commences its operations before the United Kingdom fulfills its duties under

11 Malcolm D. Evans and Vaughan Lowe, **The M/V Saiga: The First Case in the International Tribunal for the Law of the Sea**, *International and Comparative Law Quarterly*, Volume 48, Issue 01, January 1999, p. 195.

12 Yoshifumi Tanaka, **The International Law of the Sea**, Second Edition, Cambridge: Cambridge University Press, 2015, pp. 446-447.

13 Rosenne and Sohn, *Virginia Commentary*, p. 58.

14 See, Part XII of 1982 LOSC.

15 Shabtai Rosenne, **Provisional Measures in International Law**, Oxford, New York: Oxford University Press, 2005, p. 47.

the Convention.¹⁶ These allegations were considered by the ITLOS and the Tribunal decided that “duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.¹⁷ This justification led to the prescription which “Ireland and the United Kingdom should cooperate and enter into consultations to devise appropriate measures to prevent pollution of the marine environment which might result from the operation of the MOX Plant”.¹⁸

The *Land Reclamation* case might be given as another example of the protection and preservation of the marine environment. The *MOX Plant* and *Land Reclamation* cases are both relating to the interpretation and application of Part XII of the LOSC including its provisions on the prevention of pollution, environmental impact assessment, co-operation, and consultation.¹⁹ As a fisheries dispute, the *Southern Bluefin Tuna* case is relating to Part VII of the LOSC but the ITLOS considered living resources of the sea as an element in the protection and preservation of the marine environment.²⁰

In the *Southern Bluefin Tuna* case, ITLOS applied the precautionary principle implicitly. The Tribunal not mentioned the “precautionary” principle or approach but emphasized the situation of “scientific uncertainty”²¹ in the current conflict. In his separate opinion, *Judge Laing* indicated that the Tribunal adopted the precautionary approach for the purposes of provisional measures. In view of *Judge Laing*, adopting an approach rather than a principle appropriately imports a certain degree of flexibility and tends.²² In this sense, the *Southern Bluefin Tuna* Order might give us an idea about to provide the required discretion to the Tribunal as a result of this flexibility.

However, the position of ITLOS about the precautionary approach or principle changed in the *MOX Plant* case. The Tribunal concluded that under the facts of this case, the precautionary principle has no ground for the application.²³ The joint declaration of judges explicates that why the tribunal did not apply the precautionary principle:

“Under these circumstances of scientific uncertainty, the Tribunal might have been expected to have followed the path it took in the Southern Bluefin Tuna cases to prescribe a measure preserving the existing situation. In its wisdom, it did not do so. It decided, in the

16 *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, **ITLOS Reports 2001**, p. 102, paragraph 36.

17 *Ibid.*, p. 106, paragraph 82.

18 *Ibid.*, p. 107, paragraph 89/1.

19 Alan Boyle, **The Environmental Jurisprudence of the International Tribunal for the Law of the Sea**, *The International Journal of Marine and Coastal Law*, Volume 22, No. 3, 2007, p. 372.

20 *Ibid.*, p. 373.

21 See, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, **ITLOS Reports 1999**, p. 293, para. 79. See also, Separate Opinion of Judge Laing, *ITLOS Reports 1999*, para. 13; Boyle, p. 373.

22 Separate Opinion of Judge Laing, *ITLOS Reports 1999*, para. 19.

23 *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 106, paragraph 75.

*circumstances of the case, that, in the short period before the constitution of an arbitral tribunal under Annex VII to the United Nations Convention on the Law of the Sea, the urgency of the situation did not require it to lay down, as binding legal obligations, the measures requested by Ireland”.*²⁴

It seems that the urgency condition in provisional measures procedure prevailed the precautionary principle in this case.²⁵ However, *Sands* considers that this provisional measure order has a certain precautionary character.²⁶ Protection of the marine environment not only based upon the precautionary principle. Another example from the jurisprudence of ITLOS about this legal issue is the dispute between Ghana and Côte d’Ivoire in the Atlantic Ocean. In this case, the Special Chamber of ITLOS applied the *plausibility test*. The Special Chamber considered that Côte d’Ivoire did not adduce evidence to support its allegations that the activities conducted by Ghana in the disputed area are such as to create an imminent risk of serious harm to the marine environment.²⁷ Although this conclusion, the Special Chamber found that Côte d’Ivoire presented enough material to show that its rights to protect in the disputed area are plausible.²⁸ This reasoning led to prescribing to ensure that no new drilling either by Ghana or under its control takes place in the disputed area. Besides that, the Special Chamber prescribed to the parties that they shall take all necessary steps to prevent serious harm to the marine environment.²⁹

B. PRESERVING THE RESPECTIVE RIGHTS OF THE PARTIES

Understanding the term “preservation of rights” is depends on the jurisprudence of the International Court of Justice (ICJ) and treaties about this topic. According to the leading scholars, this term which is used in article 290 of LOSC and article 41 of the Statute of ICJ, may lead to misunderstanding. Taking the term “preservation of rights” literally would limit the prescription of provisional measures to very few cases.³⁰

Thus, the ICJ conceived the notion of “prevention of irreparable prejudice” in the *Fisheries Jurisdiction* case. According to the related part of the Order “the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the

24 MOX Plant (Ireland v. United Kingdom), Provisional Measures, Joint Declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson, and Jesus, ITLOS Reports 2001.

25 See, MOX Plant (Ireland v. United Kingdom), Provisional Measures, Separate Opinion of Judge Wolfrum, ITLOS Reports 2001.

26 Philippe Sands, *International Environmental Law*, Second Edition, Cambridge University Press, 2003, p. 276.

27 Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire), Provisional Measures, Order of 25 April 2015, *ITLOS Reports 2015*, p. 160, para. 67.

28 *Ibid.*, p. 159, para. 62.

29 *Ibid.*, p. 167, para. 108/1 (a)-(d).

30 Rüdiger Wolfrum, “Provisional Measures of the International Tribunal for the Law of the Sea” (pp. 173-186) in *The International Tribunal for the Law of the Sea Law and Practice*, P. Chandrasekhara Rao and Rahmatullah Khan (Ed.), The Hague, London, Boston: Kluwer Law International, 2001, p. 176; H.W.A. Thirlway, “The Indication of Provisional Measures by the International Court of Justice” (pp. 1-36), in *Interim Measures Indicated by International Courts*, Rudolf Bernhardt (Ed.), Berlin, Heidelberg: Springer-Verlag, 2010, p. 7.

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”.³¹ Application of this notion in later cases by the ICJ has not always been consistent.³²

When we examine the jurisprudence of the ITLOS, the parties of disputes frequently have invoked this notion as their arguments. For instance; in the *ARA Libertad* case, Ghana maintained that “there is no real or imminent risk of irreparable prejudice to Argentina’s rights caused by the ongoing docking of the vessel at the port of Tema”.³³ The *Enrica Lexie* case can be shown as another example. In this case, India and Italy conflicted about whether the dispute has a risk of irreparable prejudice.³⁴ In this regard, the Tribunal had bear in mind with a reference to the *M/V Louisa* case that it “may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which implies that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute”.³⁵

Besides these, the ITLOS prescribed in some provisional measure cases to parties of the disputes that to ensure no action is taken by each one of them which might aggravate or extend the disputes.³⁶ Although the Tribunal ordered in this way, it emphasized that any action or abstention by either party in order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute.³⁷ This is a crucial point because unless the Tribunal does not guarantee that any kind of action like this does not be construed as a waiver of the right, such action would be considered within the *estoppel* principle.

C. URGENCY

Urgency appears in two forms. The *substantial urgency* can be found in the article 290 paragraph 1 of the LOSC. However, this provision does not mention about “urgency”, but it implicitly has

31 Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, **I.C.J. Reports 1972**, p. 16, para. 21.

32 Wolfrum, *Provisional Measures of the ITLOS*, p. 177; Thirlway, *The Indication of Provisional Measures by the ICJ*, p. 8.

33 “ARA Libertad” (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, **ITLOS Reports 2012**, p. 346; para. 79.

34 “Enrica Lexie” Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, **ITLOS Reports 2015**, p. 195, 199; para. 70, 91.

35 ITLOS Reports 2015, p. 198; para. 87; M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, **ITLOS Reports 2008-2010**, p. 69, para. 72.

36 See, Southern Bluefin Tuna, ITLOS Reports 1999, p. 294, para. 90/1(a); MOX Plant, ITLOS Reports 2001, p. 107, paragraph 85; “Arctic Sunrise” (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, **ITLOS Reports 2013**, p. 251; para. 98.

37 M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, **ITLOS Reports 1998**, p. 39, para. 44; M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), ITLOS Reports 2008-2010, p. 70, para. 79; “Arctic Sunrise” ITLOS Reports 2013, p. 251; para. 99.

this meaning.³⁸ The *substantial urgency* finds its character in the preservation of the parties' rights or protection of the marine environment from serious harm.³⁹ Because under article 290 paragraph 1 of the LOSC, provisional measures are prescribed by the same tribunal or court which has jurisdiction over the merits. On the other hand, the *procedural urgency* which can be found in article 290 paragraph 5 of the LOSC, examined by the ITLOS when pending the constitution of an arbitral tribunal which has jurisdiction over the merits of the dispute.⁴⁰ The *procedural urgency* is designed to preclude the ITLOS about asserting itself superior authority over the arbitral tribunals dealing with the merits in matters relating to provisional measures.⁴¹ Judge *Treves*, points out that the requirement of urgency is stricter when provisional measures are requested under paragraph 5 than it is when they are requested under paragraph 1 of the article 290.⁴²

The feature of *procedural urgency* is being in the provisional measures prescribed by the ITLOS before an arbitral tribunal constituted. However, there is nothing in article 290 paragraph 5 of the LOSC to suggest that the measures prescribed by ITLOS must be confined to the period prior to the constitution of the arbitral tribunal.⁴³ Therefore, provisional measures prescribed by the ITLOS remain applicable beyond that period unless an arbitral tribunal modifies or revokes those provisional measures.⁴⁴

D. THE PRIMA FACIE JURISDICTION

The article 290 paragraph 1 and 5 of LOSC, rules that any court or tribunal before prescribing any measure in a case which has been duly submitted for provisional measures, satisfy itself about the court or tribunal which would examine merits of the dispute has *prima facie* jurisdiction.⁴⁵

The article 290 paragraph 5 is believed to be the first situation on which a standing international tribunal (ITLOS) is given a compulsory jurisdiction to prescribe binding provisional measures before another (arbitral) tribunal has not been constituted which has jurisdiction over the merits of the dispute. However, this idea has old roots.⁴⁶ For instance, in 1932, *Dumbauld* put forward this idea out. For him, "jurisdiction to grant protection *pendent lite* is not dependent upon the

38 Rosenne, *Provisional Measures*, pp. 135-143.

39 Chester Brown, *A Common Law of International Adjudication*, Oxford: Oxford University Press, 2007, p. 144.

40 *Ibid*, p. 143.

41 Rosenne and Sohn, *Virginia Commentary*, p. 56. See also, Separate Opinion of Judge Laing, Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), ITLOS Reports 1999, p. 305, para. 7.

42 Separate Opinion of Judge Treves, Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), ITLOS Reports 1999, p. 316, para. 4.

43 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. 22, para. 67; "Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation), ITLOS Reports 2013, p. 248, para. 84.

44 Rosenne, *Provisional Measures*, p. 144.

45 See recent cases, "Arctic Sunrise" ITLOS Reports 2013, p. 243; para. 58; M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, ITLOS Reports 2008-2010, p. 65, para. 39.

46 Rosenne, *Provisional Measures*, p. 49.

jurisdiction in the principal action. From this one court provide a remedy *pendente lite* in aid of action of which another court has jurisdiction”.⁴⁷

It might thinkable that the possibility of contradiction between the decision of *prima facie* jurisdiction in provisional measures phase and the decision of jurisdiction in merits of a dispute. Indeed, there are several examples of this in the jurisprudence of the ICJ and ITLOS. In the *Anglo-Iranian Oil Co.* case, the ICJ considered that “it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction” and indicated some provisional measures.⁴⁸ However, in the jurisdiction phase, the ICJ decided that it had no jurisdiction over the case and lapsed the related measures.⁴⁹ Another recent example from the jurisprudence of the ICJ is the *Georgia v. Russian Federation* case. At the provisional measure phase of this case, the ICJ decided that it has *prima facie* jurisdiction under article 22 of International Convention on the Elimination of All Forms of Racial Discrimination (CERD) to deal with the case which relates to the “interpretation or application” of the Convention.⁵⁰ After the ICJ indicated some measures, the parties submitted their own arguments at the preliminary objections phase. In its second preliminary objection, Russian Federation argued that the procedural requirements of Article 22 of the CERD for recourse to the Court have not been fulfilled. These requirements include negotiations and other methods of the peaceful dispute settlement. The ICJ admitted this objection and found that it had no jurisdiction over the dispute.⁵¹

Likewise, the ITLOS jurisprudences have similar examples. For instance, in the *Southern Bluefin Tuna* case, ITLOS found that the Annex VII arbitral tribunal would have *prima facie* jurisdiction.⁵² Even though, the Annex VII arbitral tribunal decided that it lacks jurisdiction in the case.⁵³ Arbitral tribunal explained this contradiction in its award as follows:

“It is these holdings of the International Tribunal for the Law of the Sea that were the particular focus of controversy in these proceedings. The Agents and counsel of Australia, New Zealand and Japan plumbed the depths of these holdings with a profundity that the time pressures of the ITLOS processes did not permit. In any event, the ITLOS holdings upheld no more than the

47 Edward Dumbauld, *Interim Measures of Protection in International Controversies*, Martinus Nijhoff Publishers, 1932, p. 186. See also, *Ibid.*, pp. 180-181.

48 “Anglo-Iranian Oil Co. Case, Order of July 5th, 1951: **I.C.J. Reports 1951**, p. 93. For explanations see also, Yoshifumi Tanaka, **A Note on the M/V “Louisa” Case**, *Ocean Development & International Law*, Volume 45, Issue 2, 2014, p. 209.

49 “Anglo-Iranian Oil Co. Case, (jurisdiction), Judgment of July 22nd, 1952: **I.C.J. Reports 1952**, pp. 114-115.

50 Application of the International Convention on the Elimination of all Forms of Racial Discrimination (*Georgia v. Russian Federation*), Provisional Measures, Order of 15 October 2008, **I.C.J. Reports 2008**, p. 388, para. 117.

51 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Preliminary Objections, Judgment, **I.C.J. Reports 2011**, p. 140, para. 183-185.

52 *Southern Bluefin Tuna*, ITLOS Reports 1999, p. 292, para. 62.

53 *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, **Reports of International Arbitral Awards**, Volume XXIII, pp. 46-49, para. 66-72.

jurisdiction *prima facie* of this Tribunal. It remains for it to decide whether it has jurisdiction to pass upon the merits of the dispute.”

Rosenne points out that both these decisions were correct. So, there is no contradiction between them because they are two entirely different legal concepts unrelated to each other.⁵⁴ We can see this fact in the ICJ and ITLOS decisions as well as in the ICSID tribunals’ decisions.⁵⁵ In the *Bayindir v. Pakistan* case, the tribunal’s decision on the jurisdiction is very useful for explaining this issue. *Bayindir* argued that the record shows that the exercise of the sovereign power, a decision “from the top down”, in which the element of national interest was the driving force for the result of its expulsion and expropriation of its contract.⁵⁶ In support of its allegation, *Bayindir* relied primarily on the three articles published by the Pakistani newspaper “Dawn”.⁵⁷ Pakistan asserted that the international courts and tribunals (such as ICJ decisions in the *Hostage* and *Nicaragua* cases) invariably treat such press reports with great caution and accept them merely as corroborative evidence.⁵⁸ But the tribunal did not support this argument and made a very good explanation of the *prima facie* standard.

“This Tribunal notes that the decisions cited in both the *Hostages* and *Nicaragua* cases were concerned with decisions on the merits, to which the corresponding standard of proof therefore applied. The position is obviously different where, as here, the tribunal is merely applying a *prima facie* standard for the purpose of determining whether it has jurisdiction. Accordingly, irrespective of the evidentiary weight of these press reports on the merits, the Tribunal considers that they constitute a sufficient basis for the purpose of establishing jurisdiction. Additional elements support this *prima facie* basis. (...)”⁵⁹

Above, we mentioned the application of article 290 paragraph 5 of the LOSC. A similar approach can be seen under the article 290 paragraph 1 of the LOSC. The *M/V Louisa* case is a good example of this. At the provisional measure phase of this case, the ITLOS found that it has *prima facie* jurisdiction over the dispute. However, it did not prescribe any provisional measure.⁶⁰ After that, the ITLOS found that it had no jurisdiction over the case in its judgment.⁶¹ As *Tanaka* emphasized, the *M/V “Louisa”* judgment demonstrated the possibility that after having been

54 *Rosenne, Provisional Measures*, p. 51.

55 See, *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures (French), p. 574, para. 8; See also, *Brown*, p. 138.

56 *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, p. 48, para. 182.

57 *Ibid*, p. 55, para. 208.

58 *Ibid*, p. 56, para. 209.

59 *Ibid*, p. 56, para. 210-211.

60 *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, ITLOS Reports 2008-2010, p. 69,70, para. 70,83. This conclusion is consistent with which Spain stated in its Response that, “although there may be a *prima facie* jurisdiction of the Tribunal, there are no reasons compelling it to prescribe the requested provisional measures”. (*Ibid*, p. 66, para. 50).

61 *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 46, 47, para. 153, 160.

established the *prima facie* jurisdiction at the provisional measures phase of a case, the ITLOS or any international court or tribunal may decide that it does not have jurisdiction to entertain the merits of the case.⁶²

II. THE BINDING NATURE OF PROVISIONAL MEASURES

The binding nature of provisional measures in the law of the sea disputes regulated by article 290 paragraph 6 of LOSC. According to this provision, “The parties to the dispute shall comply promptly with any provisional measures prescribed under this article”. *Orrego Vicuña* defines this provision as a major contribution of the LOSC to the provisional measures procedure of the international law.⁶³ *Wolfrum* elucidates this innovation as a different choice of wording in the article 290 of LOSC by the drafters of this provision through wanting to develop powers of the court and tribunals having jurisdiction over the law of the sea disputes.⁶⁴ Because article 41 of the Statute of ICJ has vague meaning about the binding nature of provisional measures. As *Thirlway* stresses, the wording of the Statute is ambiguous, inasmuch as it uses such mild terms as ‘indicate’ and measures which ought to be ‘taken’ rather than ‘direct’ or ‘order’ and ‘measures which shall be taken’⁶⁵. This ambiguousness had been debated by the scholars until the *LaGrand* judgment delivered by the ICJ. The Court compared the English text of the Statute with the French text and reached a conclusion that the provisional measures which indicated under article 41 of the Statute has a binding nature.⁶⁶

Another issue about the binding nature of provisional measures is whether the ITLOS can make any recommendation under this procedure. In its first provisional measure cases of the ITLOS, like as the *Saiga* and *Southern Bluefin Tuna*, the Tribunal did not only prescribe certain measures but also made some recommendations to the parties.⁶⁷ After these cases, ITLOS changed its approach and did not make any recommendations in the subsequent cases.

CONCLUSION

From the day that it started to work as an international tribunal pursuant to the Annex VI of the LOSC 1982, the ITLOS constantly has been serving for the development of the international law. That effort specifically can be noticeable in the procedures concerning the prescribing

62 Tanaka, A Note on the M/V “Louisa” Case, p. 216.

63 Francisco Orrego Vicuña, **The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems**, *The International Journal of Marine and Coastal Law*, Volume 22, No. 3, 2007, p. 452.

64 Wolfrum, *Provisional Measures of the ITLOS*, p. 185.

65 H.W.A. Thirlway, “The International Court of Justice” (pp. 559-587), in **International Law**, Malcolm David Evans (Ed.), First Edition, Oxford, New York: Oxford University Press, p. 574.

66 *LaGrand* (Germany v. United States of America), Judgment, **I.C.J. Reports 2001**, p. 502-506; para. 100-109.

67 Robin Churchill, “Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade”, (pp.388-416) in, **The Law of the Sea Progress and Prospects**, David Freestone, Richard Barnes and David Ong (Ed.), New York: Oxford University Press, 2006, p. 411; Orrego Vicuña, p. 453.

to the provisional measures. We are of the opinion that the ITLOS has positive effect on the understanding of binding nature of the provisional measures and influenced other international courts and tribunals such as the ICJ and the ICSID tribunals. Unlike the concerns relating to the fragmentation of international law through the proliferation of the international judicial forums, the ITLOS has been proving that its undeniable contribution to the public international law. Consequently, the ITLOS will continue to preserve its legitimacy in the international arena and interrelated with that endeavored for cooperation with other international judicial mechanisms, particularly the law of the sea tribunals which are constituted under the Annex VII of the LOSC.

BIBLIOGRAPHY

(Books and Articles)

- Alan Boyle, **The Environmental Jurisprudence of the International Tribunal for the Law of the Sea**, The International Journal of Marine and Coastal Law, Volume 22, No. 3, 2007.
- Campbell McLachlan, "Reflections from the Practice of International Litigation" (pp.15-20) in **International Law**, Malcolm D. Evans (Ed.), First Edition, Oxford: Oxford University Press, 2003.
- Chester Brown, **A Common Law of International Adjudication**, Oxford: Oxford University Press, 2007.
- Francisco Orrego Vicuña, **The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems**, The International Journal of Marine and Coastal Law, Volume 22, No. 3, 2007.
- H.W.A. Thirlway, "The International Court of Justice" (pp. 559-587), in **International Law**, Malcolm David Evans (Ed.), First Edition, Oxford, New York: Oxford University Press, 2003.
- H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice" (pp. 1-36), in **Interim Measures Indicated by International Courts**, Rudolf Bernhardt (Ed.), Berlin, Heidelberg: Springer-Verlag, 2010.
- Malcolm D. Evans and Vaughan Lowe, **The M/V Saiga: The First Case in the International Tribunal for the Law of the Sea**, International and Comparative Law Quarterly, Volume 48, Issue 01, January 1999.
- Philippe Sands, **International Environmental Law**, Second Edition, Cambridge University Press, 2003.
- Robin Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade", (pp.388-416) in, **The Law of the Sea Progress and Prospects**, David Freestone, Richard Barnes and David Ong (Ed.), New York: Oxford University Press, 2006.
- Rüdiger Wolfrum, "Provisional Measures of the International Tribunal for the Law of the Sea" (pp. 173-186) in **The International Tribunal for the Law of the Sea Law and Practice**, P. Chandrasekhara Rao and Rahmatullah Khan (Ed.), The Hague, London, Boston: Kluwer Law International, 2001.
- Shabtai Rosenne, **Provisional Measures in International Law**, Oxford, New York: Oxford University Press, 2005.
- Shabtai Rosenne and Louis B. Sohn, **United Nations Convention on the Law of the Sea 1982: A Commentary** (Myron H. Nordquist Ed.), Volume V, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989.
- Thomas Mensah, **The Tribunal and the Prompt Release of Vessels**, The International Journal of Marine and Coastal Law, Vol. 22, No. 3, 2007.

Yoshifumi Tanaka, **Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence**, Netherlands International Law Review, 2004.

Yoshifumi Tanaka, **A Note on the M/V “Louisa” Case**, Ocean Development & International Law, Volume 45, Issue 2, 2014.

Yoshifumi Tanaka, **The International Law of the Sea**, Second Edition, Cambridge: Cambridge University Press, 2015.

Cases

(ITLOS)

M/V “SAIGA” (Saint Vincent and the Grenadines v. Guinea), Prompt Release, Judgment, **ITLOS Reports 1997**.

M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, **ITLOS Reports 1998**.

Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, **ITLOS Reports 1999**.

Separate Opinion of Judge Laing, **ITLOS Reports 1999**.

MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, **ITLOS Reports 2001**.

MOX Plant (Ireland v. United Kingdom), Provisional Measures, Joint Declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson, and Jesus, **ITLOS Reports 2001**.

MOX Plant (Ireland v. United Kingdom), Provisional Measures, Separate Opinion of Judge Wolfrum, **ITLOS Reports 2001**.

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**.

M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, **ITLOS Reports 2008-2010**.

“ARA Libertad” (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, **ITLOS Reports 2012**.

“Arctic Sunrise” (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, **ITLOS Reports 2013**.

Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire), Provisional Measures, Order of 25 April 2015, **ITLOS Reports 2015**.

Enrica Lexie” Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, **ITLOS Reports 2015**.

(ICJ)

“Anglo-Iranian Oil Co. Case, Order of July 5th, 1951: **I.C.J. Reports 1951**.

“Anglo-Iranian Oil Co. Case, (jurisdiction), Judgment of July 22nd, 1952: **I.C.J. Reports 1952**.

Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, **I.C.J. Reports 1972**.

LaGrand (Germany v. United States of America), Judgment, **I.C.J. Reports 2001**.

Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, **I.C.J. Reports 2008**.

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, **I.C.J. Reports 2011**.

(ICSID)

Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan, **ICSID Case No. ARB/03/29**,
Decision on Jurisdiction.

Victor Pey Casado and President Allende Foundation v. Republic of Chile, **ICSID Case No. ARB/98/2**,
Decision on Provisional Measures (French).

(Annex VII of LOSC)

Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), **Reports of International Arbitral Awards**,
Volume XXIII.