

The contribution of ITLOS to the development of the Law of the Sea

OC - (ILA-14162) - ITLOS, PROVISIONAL MEASURES, AND THE PROTECTION OF MARINE ENVIRONMENT

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Abstract

According to Article 290 of the United Nations Convention on the Law of the Sea (UNCLOS), the International Tribunal for the Law of the Sea (ITLOS) has the competence to “prescribe any provisional measures which it considers appropriate under the circumstances to ... prevent serious harm to the marine environment, pending the final decision.” Such competence can be exercised in cases before the ITLOS and, for cases submitted before an UNCLOS arbitral tribunal (Article 290(1)), prior to the establishment of the tribunal (Article 290(5)). To date, among the cases brought before the ITLOS, eleven of them involve requests for provisional measures, and five concern the protection of marine resources or environment.

While ITLOS’s provisional measure competence is grounded on the UNCLOS, its decisions appear to demonstrate consideration and application of environmental rules and approaches beyond what has been codified in the UNCLOS. Through detailed study and analyses of the five provisional measure orders and the relevant subsequent decisions by the ITLOS or arbitral tribunals, the paper seeks to answer the following questions: a) what environmental law instruments and principles inform the ITLOS in its jurisprudence and how the extent of potential harm to the marine environment is assessed; b) how the ITLOS determine the appropriate measures to be taken by the parties; c) whether the ITLOS’s approach differs in proceedings pursuant to Article 290(1), regarding cases before itself, and those pursuant to Article 290(5), regarding cases before an UNCLOS arbitral tribunal; and d) what further insights can be gained from observing subsequent development involving the parties concerned or the relevant arbitral tribunal.

As the UNCLOS contain sparse and mostly abstract provisions concerning the protection of the marine environment, the ITLOS’s jurisprudence can play a crucial role in elucidating what States’ obligations are vis-à-vis the environment. In particular, the ITLOS’s provisional measure orders might shed a light on what needs to be done in urgent cases. Thus, the paper would also evaluate the effectiveness of provision measures as a tool to protect the marine environment, as well as the ITLOS’s contribution in this regard.

Palavras-chave : provisional measures, marine environment, itlos