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Article 290
Provisional measures

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 Sea-Bed 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.

SOURCES

1. A/AC.138/97, article 8, reproduced in II SBC Report 1973, at 22 (U.S.A.).
2. A/CONF.62/WP.9 (ISNT, Part IV, 1975), article 12, V Off Rec. 111 (President).
3. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), article 12, V Off. Rec. 185 (President).
4. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 12, VI Off. Rec. 144 (President).
5. A/CONF.62/WP.10 (ICNT, 1977), article 290, VIII Off. Rec. 1, 47.
6. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 290. Reproduced in I Platzöder 375, 493.
7. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 290. Reproduced in II Platzöder 3, 120.
8. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 290. Reproduced in II Platzöder 179, 298.

9. A/CONF.62/L.78 (Draft Convention, 1981), article 290, XV Off. Rec. 172, 219.

Drafting Committee

10. A/CONF.62/L.75/Add.2 (1981, mimeo.).
11. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).

Informal Documents

12. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 12; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 12 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.

COMMENTARY

290.1. Article 290 was discussed thoroughly at several sessions of the Conference by the Informal Plenary, and it was revised considerably as a result of these discussions. While the need for provisional measures was accepted quickly, without any strong dissent, it proved difficult to agree on some of the issues associated with such measures.

290.2. Early in the discussion it was pointed out that the International Court of Justice has the power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."[1] It was also noted that the Rules of the Court provide for indication of interim measures of protection not only upon the request of a party but also upon the Court's own initiative (*proprio motu*);[2] that these Rules authorize the Court to indicate measures of protection "that are in whole or in part other than those requested" by a party;[3] and that there was some doubt whether the interim measures indicated by the Court were binding.

290.3. The informal working group which prepared the 1975 working paper in Geneva (see Source 12) decided to depart from the wording of the Statute of the International Court of Justice because it considered:

(a) that the word "indicate" was insufficient, did not clearly convey the binding character of the provisional measures, and as a result it had not only led to some disputes about the obligation to comply with those measures, but also resulted in non-compliance by States with the indicated measures;

(b) that, consequently, the word "prescribe" should be used instead, and there should be an explicit provision that the prescribed measures "shall be binding upon the parties to the dispute";[4]

[1] ICJ Statute, Article 41.

[2] ICJ, Rules of Court (1978), Article 75, paragraph 1.

[3] Ibid., paragraph 4.

[4] The idea of "binding interim orders" had already appeared in a 1973 proposal by the U.S.A. (Source 1, article 8, paragraph 1).

(c) that in any case in which the International Court of Justice has jurisdiction under the Convention, "any provisional measures indicated by that Court shall be binding on the parties to the dispute";

(d) that provisional measures should not be prescribed by a tribunal *proprio motu*, but should be considered by the tribunal only upon the request of a party to the dispute, and only after giving the parties to the dispute an opportunity to be heard;

(e) that the provisional measures should not only preserve the respective rights of the parties, but also minimize damage to any party pending final adjudication; and

(f) that special arrangements need to be made if the dispute is submitted not to a permanent tribunal but to an *ad hoc* one.[5]

290.4. In his initial draft (Source 2), President Amerasinghe took into account certain criticisms of the informal group's approach, but in general he accepted most of its suggestions. He made it clearer than it was in the earlier draft:

(a) that the provisional measures can be granted either by the International Court of Justice or the Law of the Sea Tribunal, or by some other permanent tribunal;

(b) that the tribunal or the International Court of Justice "as the case may be" shall have the power "to indicate or prescribe" provisional measures;

(c) that any provisional measures indicated by the International Court of Justice or prescribed by a tribunal "shall be binding upon the parties to the dispute";

(d) that the prescribed measures are intended to "preserve the respective rights of the parties to the dispute" while at the same time preventing "serious harm to the marine environment"; and

(e) that if the dispute has been submitted to a procedure for the settlement of disputes under the Convention and the tribunal has not yet been constituted or does not have the power to prescribe provisional measures, and if the parties to the dispute disagree as to the need for provisional measures or as to the content of such measures, a party may request the Law of the Sea Tribunal to step in and to prescribe temporary measures[6] until the other organ can take over and itself review the need for such measures (and if necessary revise or terminate them).[7]

290.5. During the 1976 and 1977 discussions in the Informal Plenary,

[5] See the 1975 report of the informal working group (Source 12).

[6] Such a reference to the Tribunal was first suggested in slightly different circumstances in the 1973 U.S. proposal (Source 1, para. 1). It was elaborated, in a form similar to that proposed by President Amerasinghe, in the 1975 report of the informal working group (Source 12, para. 2), but the group could not agree whether this special task should be entrusted to the International Court of Justice or to the Law of the Sea Tribunal. President Amerasinghe opted for the Tribunal.

[7] ISNT, Part IV, article 12 (Source 2.) There were only minor changes in the ISNT, Part IV/Rev.1, article 12 (Source 3).

President Amerasinghe's successive proposals concerning provisional measures were criticized on several grounds:

(a) It was argued that the International Court of Justice had no authority to prescribe provisional measures and that, when such measures were indicated by the Court, they were not binding. In reply, it was pointed out that the General Act for the Pacific Settlement of International Disputes provided that the Court or an arbitral tribunal "shall lay down within the shortest possible time the provisional measures to be adopted," and that the "parties to the dispute shall be bound to accept such measures."[8] If this could have been done in one case, without any objections, it is not likely that the Court would refuse to exercise the additional powers conferred upon it by the Law of the Sea Convention. As far as the binding character of the decision was concerned, it was agreed to adopt the formula that "[a]ny provisional measures prescribed or modified under this article [290 in the final text] shall be promptly complied with by the parties to the dispute."[9]

(b) A question was raised with respect to the provision that a request of the party would be required before the forum to which the dispute was submitted would be authorized to prescribe provisional measures. It was suggested that Article 75 of the Rules of the International Court of Justice should be followed, and that the court or tribunal should be able to act *proprio motu*, especially should there be a danger to the marine environment. While it was conceded that the Convention cannot preclude the International Court of Justice, acting under its Statute and Rules, to take action *proprio motu*, it was considered that the various tribunals which might be established under the Law of the Sea Convention should be restricted to prescribing provisional measures only when a party should explicitly request them. President Amerasinghe made this clear in his next text by specifying that this restriction applies only to measures "under this article,"[10] and was thus inapplicable to measures under any other agreement.

(c) Another objection related to the priority accorded to the Law of the Sea Tribunal in cases where provisional measures become necessary in a dispute submitted to some other arbitral or special tribunal not yet in existence. There were three problems. The first one was connected with the inflexibility of the formula, as it did not allow the parties to utilize any tribunal or court other than the Law of the Sea Tribunal. This was easily remedied by inserting in the next text a provision that in such a case the

[8] This Act was adopted in 1928 (in Geneva) and revised slightly by the General Assembly of the United Nations in 1949 (see article 33, para. 1), 93 LNTS 345 (1928); 71 UNTS 101 (1950); IOI, Vol. IA, at I.A.7.a.ii.

[9] This formula was inserted first in the RSNT, Part IV, article 12, paragraph 5 (Source 4). It was repeated in article 290, paragraph 5, of the ICNT (Source 5), and it survived without modification in the later versions of the ICNT. It was slightly modified in the 1981 Draft Convention (Source 9), and it appears in that form in the final text of the Convention.

[10] See the RSNT, Part IV, article 12, paragraph 2 (Source 4). This provision was retained in the ICNT, article 290 (Source 5), and in later versions of that article.

question of provisional measures should be referred to "any court or tribunal agreed upon by the parties," and that only if the parties failed to reach such agreement within two weeks, the jurisdiction would devolve to the Law of the Sea Tribunal.[11]

Secondly, fear was expressed that the Law of the Sea Tribunal might interfere unnecessarily in some cases, asserting its allegedly superior authority over other tribunals. To restrict the Tribunal's intervention, it was provided that the Tribunal should prescribe provisional measures only "if it considers that the urgency of the situation so requires."[12] This change did not prove sufficient, however, as some delegations contended that the Tribunal might act even if the tribunal to which the dispute was submitted obviously had no jurisdiction. To prevent this occurrence, another provision was added that the Law of the Sea Tribunal should prescribe provisional measures only "if it considers *prima facie* that the tribunal to which the dispute has been submitted would have jurisdiction."[13]

The third problem was raised by States which were partisans of special procedures. They felt that their right to select a tribunal of their own choice would be nullified if the matter were first referred to the Law of the Sea Tribunal, which might impose some provisional measures which might become permanent ones. In reply, it was pointed out that the parties could always agree on some other tribunal, and that any use of the Law of the Sea Tribunal would depend on the inability of the parties to refer the matter to any other tribunal. In addition, the text was clarified in the next draft to avoid any fear of permanency of the measures presented by the Tribunal. Once the tribunal to which the case was submitted had been constituted, it would have authority to "affirm, modify or revoke" the provisional measures prescribed by the Law of the Sea Tribunal.[14]

(d) It was noted that the Statute of the International Court of Justice prescribes that a "notice of the measures suggested shall forthwith be given to the parties and to the Security Council";[15] and that the draft by the Geneva informal working group, and the President's draft that followed it, substituted for the notice to the Security Council a notice to "all Contracting Parties."[16] There were some objections to such broad distribution of

[11] See the RSNT, Part IV, article 12, paragraph 3 (Source 4). This formulation was made more precise in the ICNT, article 290, paragraph 3 (Source 5), by making it clear that the period of two weeks would run "from the date of the request for provisional measures"; and it appears in this revised form in the later versions of that article. It became part of article 290, paragraph 5, of the Draft Convention (Source 9).

[12] See the RSNT, Part IV, article 12, paragraph 3 (Source 4).

[13] See the ICNT, article 290, paragraph 3 (Source 5). This provision was retained without change in later drafts. A parallel provision on the need for *prima facie* jurisdiction was also added in the ICNT, article 290, paragraph 1.

[14] See the RSNT, Part IV, article 12, paragraph 3, last sentence (Source 4). This sentence was retained in the ICNT, article 290, paragraph 3, and all later drafts, but in the Draft Convention (Source 9) the order was changed to "modify, revoke or affirm," emphasizing the right to modify.

[15] ICJ Statute, Article 41, paragraph 2.

[16] See 1975 draft, article 12, paragraph 3 (Source 12); ISNT, Part IV, article 12, paragraph 3 (Source 2); and ISNT, Part IV/Rev.1, article 12, paragraph 3 (Source 3).

this notice, and in the next draft the notice was restricted "to the parties to the dispute and to such other Contracting Parties as [the court or tribunal] considers appropriate."[17] Later this requirement was extended to any modification or revocation of the provisional measures.[18]

(e) The provisions relating to modification of provisional measures raised two additional issues. First, objections were raised again to the possibility of a court or tribunal modifying or revoking measures on its own initiative, and the relevant provision was amended to make it clear that any provisional measures under article 12 of President Amerasinghe's draft (later article 290) "may only be prescribed, modified or revoked upon the request of a party to the dispute and after giving the parties an opportunity to be heard."[19] Secondly, several delegations insisted that a provision be added requiring a change in the provisional measures as soon as circumstances justifying such measures have changed. Consequently, President Amerasinghe suggested the insertion of the following new paragraph in article 12 of his text (Source 4):

> 4. As soon as the circumstances justifying the provisional measures have changed or ceased to exist, such provisional measures may be modified or revoked by the tribunal to which the dispute has been submitted or, where such tribunal has not been constituted, by the court or tribunal which prescribed the provisional measures under paragraph 3.[20]

It was pointed out, however, that this provision was ambiguous, as it seemed to allow the court or tribunal dealing with this aspect of the case to act on its own, contrary to the provisions in paragraph 2 of the same article, which required the request of a party to the dispute. Consequently, in the ICNT this provision was simplified to read:

> 4. As soon as the circumstances justifying the provisional measures have changed or ceased to exist, such provisional measures may be modified or revoked.[21]

290.6. As a result of all these changes, article 290 became a rather complex provision, trying to ensure, on the one hand, that provisional measures will be available promptly when needed and, on the other hand, that this special

[17] RSNT, Part IV, article 12, paragraph 2, second sentence (Source 4).

[18] ICNT, article 290, paragraph 2, second sentence (Source 5). At the same time "States Parties" was substituted for "Contracting Parties." The same text appears in the later versions of the ICNT. The order of phrases, but not their substance, was changed in the Draft Convention (Source 9), and this became the final text.

[19] See the RSNT, Part IV, article 12, paragraph 2, first sentence (Source 4). This provision became article 290, paragraph 2, first sentence, of the ICNT and of its later versions (Sources 5 to 8), but was slightly rephrased in article 290, paragraph 3 of the Draft Convention (Source 9).

[20] See the RSNT, Part IV, article 12, paragraph 4 (Source 4).

[21] ICNT, article 290, paragraph 4 (Source 5). There were no further substantive changes in this paragraph, but the order of phrases was reversed in the final version of the text that was incorporated in the Draft Convention (Source 9).

power will be exercised with caution and will not interfere too much with the rights of the States concerned. Thus, when the dispute is submitted to a tribunal which cannot act immediately because time is required to constitute it, the parties are given only two weeks (from the date of the request for provisional measures) to reach agreement as to which pre-existing court or tribunal should prescribe such measures. If they do not agree within two weeks on any other court or tribunal, the International Tribunal for the Law of the Sea (or in seabed mining cases its Sea-Bed Disputes Chamber) would be authorized to prescribe provisional measures, if so requested by a party to the dispute and after giving the parties an opportunity to be heard. However, that Tribunal can only act if it considers (a) that the tribunal to which the dispute has been submitted would seem to have *prima facie* jurisdiction over the parties and the subject matter of the dispute; (b) that the urgency of the situation requires provisional measures; or (c) that such measures are needed to preserve the respective rights of the parties to the dispute, or that they are required to prevent serious harm to the marine environment.

290.7. The situation is more straightforward when the dispute is submitted to an existing court or tribunal which can immediately exercise the special jurisdiction to prescribe provisional measures. Apart from the International Court of Justice and the International Tribunal for the Law of the Sea, or any of their preconstituted chambers, the parties might have agreed in advance that some permanent court or tribunal – such as the Court of Justice of the European Economic Community – should decide law of the sea disputes between them (in accordance with article 282 of the Convention). Any such court or tribunal, when exercising jurisdiction under Part XV of the Convention (as distinguished from any other jurisdiction it may exercise under some other international agreement), would have power to prescribe "any provisional measures which it considers appropriate under the circumstances." However, under article 290, any such court or tribunal would also have to comply with the following general conditions for prescribing provisional measures: (a) it can act only upon the request of a party to the dispute and after giving the parties an opportunity to be heard (paragraph 3); and (b) the measures prescribed must be needed "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment (paragraph 1)."

290.8. The decisions relating to provisional measures are by their nature provisional. They are prescribed "pending final adjudication," and the final judgment or award in the case determines their fate. Such judgment or award may terminate them, or continue them for a specified period or permanently, or modify them to fit the terms of the final adjudication. Even before the final decision, circumstances which originally justified the prescription of provisional measures may change or completely disappear. In such a case, the court or tribunal in charge of the settlement of the dispute may modify or revoke the provisional measures. Again this can be done only upon the request of a party, and after giving the parties an opportunity

to be heard. If the circumstances should change before the competent tribunal has been established, the International Tribunal for the Law of the Sea, or any other court or tribunal having special jurisdiction to prescribe provisional measures in accordance with article 290, paragraph 5, would have to decide whether these measures should be changed or revoked. As soon as the tribunal to which the dispute has been originally submitted is constituted, it takes over the question of provisional measures; it can modify, revoke, or affirm such measures, subject to the general conditions specified in article 290, paragraphs 1 to 4. If the provisional measures originally prescribed by the court or tribunal functioning under article 290, paragraph 5, have been revoked by that court or tribunal before the tribunal to which the dispute has been submitted has been constituted, the latter tribunal may, as soon as it is established, reconsider the matter and prescribe the provisional measures which it considers appropriate. It may then either restore the revoked measures or prescribe different ones (subject again to the conditions specified in article 290, paragraphs 1 to 4.

290.9. Article 290, paragraph 6, makes it clear that the parties to the dispute are obliged to comply promptly with any provisional measures prescribed (or modified) under that article. In order to strengthen the pressure of public opinion on the parties with respect to the provisional measures, all the notices of provisional measures, or of their modification or revocation, are sent not only to the parties to the dispute, but also to such other States Parties to the Convention as the court or tribunal considers appropriate (article 290, paragraph 4).