

Establishing the existence of a ‘dispute’ under UNCLOS at the provisional measures stage: the *Enrica Lexie* case

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1. Introduction: The *Enrica Lexie* ‘dispute’

Article 290 of the United Nations Convention on the Law of the Sea¹ empowers an international court or tribunal having jurisdiction under Part XV to prescribe provisional measures pending the final decision of a dispute on the merits.² In addition, under Article 290(5) UNCLOS, the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) has jurisdiction to prescribe provisional measures in case an ad hoc arbitral tribunal is competent to settle the merits, but has not yet been constituted.³ In the latter scenario, ITLOS plays an anticipatory function by acting as a compulsory forum for the preservation of

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¹ United Nations Convention on the Law of the Sea, 1833 UNTS 3 (UNCLOS or the Convention).

² Under art 290(1) UNCLOS, ‘[i]f 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’.

³ Under art 290(5) UNCLOS, ‘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’. On provisional measures before ITLOS, see TA Mensah, ‘Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)’ (2002) 62 ZaöRV 43; R Wolfrum, ‘Provisional Measures of the International Tribunal for the Law of the Sea’ (1997) 37 Indian J Intl L 420.



the rights *pendente lite* when the judicial organ under Part XV UNCLOS requires time to be constituted.

This was the situation in *Enrica Lexie*. Pending the constitution of the arbitral tribunal, Italy requested ITLOS to prescribe provisional measures, namely that India refrain from exercising jurisdiction over the incident and that restrictions on the liberty, security and freedom of the marines who were involved be lifted during the arbitral proceedings.⁴ In its order of 24 August 2015, ITLOS prescribed 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’.⁵

In accordance with Article 290(5) UNCLOS, ITLOS addressed the question of whether there were grounds for it to find that *prima facie* the arbitral tribunal to be constituted would have jurisdiction over the merits of the case. In its order, the Tribunal limited its examination to reiterating the views that Italy⁶ and India⁷ had expressed in their submissions, and reached the conclusion that, ‘having examined the positions of the Parties, [...] a dispute appears to exist between the Parties concerning the interpretation or application of the Convention’.⁸

The question arises whether ITLOS’s brief examination of the existence of a dispute under UNCLOS is in line with the Tribunal’s jurisprudence, as well as with the case law of the International Court of Justice (ICJ or the Court). The present paper focuses on that issue, which is at the core of the most basic requirement for the prescription of provisional measures under UNCLOS, namely *prima facie* jurisdiction. The paper first addresses some general points on provisional measures under UNCLOS, as well as the test for determining the existence of a dispute. Secondly, the paper discusses ITLOS’s jurisprudence on the de-

⁴ *Enrica Lexie Incident (Italy v India)* (Provisional measures, Order of 24 August 2015) para 29, at <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf>.

⁵ *Ibid.*, para 141

⁶ *Ibid.*, paras 35-42.

⁷ *Ibid.*, paras 43-50.

⁸ *Ibid.*, para 53.



termination of the existence of a dispute. Thirdly, the paper turns to Italy's claims in *Enrica Lexie*, analysing them from the perspective of the existence of a dispute. Fourthly, the paper conducts an appraisal of the situation as it presents itself after *Enrica Lexie*.

2. *Provisional measures and the definition of a 'dispute' under UNCLOS*

The Convention sets forth a number of cumulative requirements to be met in order for provisional measures to be prescribed under Article 290, thus laying down a detailed test relating to the prescription of provisional measures. The wording of paragraphs 1 and 5 of Article 290 is not identical, but the test enshrined in both paragraphs is, in essence, very similar.⁹ The differences between the two provisions are due to the fact that while in the former case the organ prescribing provisional measures is the same as the one deciding the merits, in the latter case the organ deciding the merits is not the one prescribing provisional measures. In fact, under Article 290(5), ITLOS has compulsory jurisdiction for the prescription of provisional measures pending the constitution of an Annex VII arbitral tribunal. Accordingly, while under paragraph 1 measures are prescribed 'pending the final decision', under paragraph 5 they are prescribed '[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted'. A consequence of such a distinction is that one of the requirements for the prescription of provisional measures, that of *prima facie* jurisdiction, must be assessed with reference to different organs. Under Article 290(1), the organ having jurisdiction to hear the merits ascertains its own *prima facie* jurisdiction; under paragraph 5, ITLOS has to establish *prima facie* that an Annex VII arbitral tribunal would have jurisdiction on the merits.

Beyond *prima facie* jurisdiction, other requirements must be met in order to prescribe provisional measures. Under paragraph 1, provisional measures may be prescribed 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment'; while this specification is not mentioned in paragraph 5, it is

⁹ S Rosenne, *Provisional Measures in International Law – The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2005) 44-51.



nonetheless implied in it.¹⁰ Similarly, the requirement of urgency is referred to in paragraph 5, but it is considered implied in paragraph 1.¹¹ Moreover, ITLOS has introduced, by way of its case law, the requirement of plausibility of the rights claimed on the merits, both under Article 290(1)¹² and Article 290(5).¹³ Overall, the tests set forth in Articles 290(1) and 290(5) are similar. The main difference, as underscored, concerns *prima facie* jurisdiction.

Prima facie jurisdiction, the focus of this paper, is established by ascertaining the existence of a dispute between the parties under the Convention. According to Article 288(1) UNCLOS:

‘[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part’

It emerges that the necessary and sufficient condition for the exercise of jurisdiction under UNCLOS is the existence of a dispute ‘concerning the interpretation or application of this Convention’. Therefore, a dispute under UNCLOS is limited *ratione materiae* to the interpretation and application of the Convention itself. In *Mavrommatis*, the Permanent Court of International Justice (PCIJ) formulated the classic definition of a dispute in international law:

‘[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’.¹⁴

In *South West Africa*, the ICJ further held that ‘[a] mere assertion is not sufficient to prove the existence of a dispute any more than a mere

¹⁰ S Rosenne, LB Sohn (eds), *United Nations Convention on the Law of the Sea – A Commentary*, vol V (Martinus Nijhoff 1989) 58.

¹¹ Rosenne (n 9) 135.

¹² *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) para 58, at <www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/C23_Order_prov.measures_25.04.2015_orig_Eng.pdf>.

¹³ *Enrica Lexie* (n 4) para 84.

¹⁴ *Mavrommatis Palestine Concession (Greece v United Kingdom)* (Judgment of 30 August 1924) PCIJ Series A No 2, 11. See also R Kolb, *The International Court of Justice* (Hart 2013) 305.



denial of the existence of the dispute proves its non-existence',¹⁵ and concluded that, in order to prove the existence of a dispute, it must be shown that 'the claim of one party is positively opposed by the other'.¹⁶ Moreover, in *Interpretation of Peace Treaties* the ICJ held that 'whether there exists an international dispute is a matter for objective determination'.¹⁷ The *Interpretation of Peace Treaties* test has become a *locus classicus* in international dispute settlement, as demonstrated by the fact that subsequent cases have consistently reiterated it.¹⁸ ITLOS upheld the ICJ's jurisprudence in relation to the existence of a dispute in *M/V Louisa*,¹⁹ where it held that:

[t]o enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines'.²⁰

Certainly, this statement holds true in relation to the manner in which the jurisdictional issue is treated when deciding the case on the merits. On the other hand, one may doubt whether the same test is used at the provisional measures stage, where all the Convention requires is for ITLOS to make a *prima facie* finding on jurisdiction. As conceived for the first time by Sir Hersch Lauterpacht in *Interhandel*, *prima facie*

¹⁵ *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections, Judgment of 21 December 1962) [1962] ICJ Rep 319, 328.

¹⁶ *Ibid.*

¹⁷ *Interpretation of Peace Treaties* (Advisory Opinion of 30 March 1950) [1950] ICJ Rep 65, 74. See also C Tomuschat, 'Article 36' in A Zimmermann et al (eds), *The Statute of the International Court of Justice – A Commentary* (OUP 2012) 633, 642.

¹⁸ See *East Timor (Portugal v Australia)* (Judgment of 30 June 1995) [1995] ICJ Rep 90, 100, para 22; *Fisheries Jurisdiction (Spain v Canada)* (Judgment of 4 December 1998) [1998] ICJ Rep 432, 448, para 30; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Preliminary Objection, Judgment of 24 September 2015) para 26, at <<http://www.icj-cij.org/docket/files/153/18746.pdf>> (accessed 19 October 2015). See also J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 694.

¹⁹ *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)* (Judgment of 28 May 2013) 157 ILR 432, 461-473, paras 93-155.

²⁰ *Ibid.*, 462, para 99. See also *ARA Libertad (Argentina v Ghana)* (Provisional Measures, Order of 15 December 2012) [2012] ITLOS Rep 326, 366-369, paras 11-21 (Sep Op Wolfrum and Cot).



jurisdiction is a very low threshold of jurisdictional certainty,²¹ which does not require a full enquiry into the jurisdiction of the organ seised of the request of provisional measures. The following section explores the approach taken by ITLOS to the establishment of the existence of a dispute in its case law.

3. ITLOS's jurisprudence on the existence of a 'dispute' under UNCLOS

ITLOS has taken two different approaches to establishing a dispute in order to make a finding on *prima facie* jurisdiction: on the one hand, it sometimes simply states that, based on the parties' opposing arguments, there is a dispute between them; on the other hand, it sometimes develops its reasoning further, by addressing the controversial provisions of the Convention and asking whether they afford a basis on which jurisdiction could *prima facie* be established. The following analysis addresses this question, and deals first with provisional measures cases under Article 290(1) UNCLOS, and second with cases under Article 290(5) UNCLOS.

In *M/V Saiga (No 2)*, no question on the existence of a dispute arose: the parties had in fact submitted the case to ITLOS by means of a special agreement,²² which meant the parties were in agreement that a dispute existed between them. The jurisdiction of the Tribunal was nevertheless contested, albeit for a different reason, relating to whether the claim of Saint Vincent and the Grenadines' fell within the purview of Article 297 UNCLOS. A similar situation also existed in the recent case between Ghana and Côte d'Ivoire, which was also introduced by special agreement, and where the special chamber of ITLOS found that the parties had both 'recognized the existence of a dispute concerning

²¹ *Interhandel (Switzerland v US)* (Provisional Measures, Order of 24 October 1957) [1957] ICJ Rep 105, 118-119 (Sep Op, Lauterpacht).

²² *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* (Provisional Measures, Order of 11 March 1998) 117 ILR 111, 122, para 28. See V Lowe and MD Evans, 'The M/V Saiga: The First Case in the International Tribunal for the Law of the Sea' (1999) 48 ICLQ 187, 196.



the maritime boundary between the two States and the existence of opposing claims of the Parties to the disputed area'.²³

In *M/V Louisa*, ITLOS was faced with a more complex situation. In that instance, Saint Vincent and the Grenadines argued that a dispute existed concerning the interpretation and application of Articles 73, 87, 226, 245, 290, 292 and 303 UNCLOS; Saint Vincent claimed that Spain had breached its UNCLOS obligations relating to the inspection of foreign vessels, the archaeological objects found at sea and marine scientific research. The claim was opposed by Spain, which underscored that no provision invoked by Saint Vincent was relevant.²⁴ ITLOS made a quick assessment of the parties' arguments, and, without any addition on its part, declared that 'it appears *prima facie* that a dispute as to the interpretation and application of provisions of the Convention existed between the parties on the date on which the Application was filed'.²⁵ ITLOS's reasoning was very brief, and entirely based on the parties' contentions. The Tribunal's assessment was criticised by the dissenting opinions attached by four judges, who all shared the view that the Tribunal had no *prima facie* jurisdiction due to the lack of a dispute on the interpretation or application of the Convention.²⁶ In particular, Judge Cot wrote that the Tribunal's reasoning was:

[...] somewhat succinct. I would have expected the Tribunal to examine each of the provisions invoked by the Applicant in support of its claim. If there is no article of the Convention to be interpreted, there is no possible interpretation and no plausible right under the Convention'.²⁷

Judge Cot critically underscored the Tribunal's *glissando* on the existence of a dispute. ITLOS's appraisal of the jurisdictional bases invoked

²³ *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (n 12) para 59.

²⁴ *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)* (Provisional Measures, Order of 23 December 2010) [2010] ITLOS Rep 58, 66-67, paras 46-54. See Y Tanaka, 'The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain, 23 December 2010: Request for Provisional Measures)' (2011) 26 *Intl J Marine and Coastal L* 481.

²⁵ *M/V Louisa* (Provisional Measures) (n 24) 67, para 56.

²⁶ *Ibid* 77 (Diss Op Wolfrum); *ibid* 87 (Diss Op Treves); *ibid* 93 (Diss Op Cot); *ibid* 100 (Diss Op Golitsyn).

²⁷ *Ibid* 96-97, para 19 (Diss Op Cot).

by Saint Vincent and the Grenadines at the provisional measures stage could also be criticised in light of the subsequent decision of the Tribunal that it lacked jurisdiction on the merits.²⁸ It is not possible to be certain of the reason why ITLOS upheld *prima facie* jurisdiction at the provisional measures stage, only to find there was no jurisdiction when deciding the merits. The parties provided no new information that would justify a final decision that contradicts the provisional measures findings. Moreover, the composition on ITLOS's bench did not change dramatically. It is possible to suggest that ITLOS made a mistake in the order on provisional measures; perhaps, had it further developed its reasoning on *prima facie* jurisdiction, it could have found that no provision invoked by Saint Vincent could be a valid jurisdictional basis.

The first request for provisional measures under Article 290(5) UNCLOS was in the case concerning the *Southern Bluefin Tuna*. In that instance, ITLOS recalled the parties' opposing arguments,²⁹ but then further analysed such arguments in order to establish whether a dispute existed. While Australia and New Zealand contended that a dispute existed concerning the interpretation and application of Articles 64 and 116-119 UNCLOS, ITLOS added that:

'48. *Considering* that under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

49. *Considering* that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*.³⁰

The Tribunal appeared to conduct a more thorough examination of the existence of a dispute, and reached the conclusion that a dispute ex-

²⁸ See *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)* (n 19) 472, para 151. See Y Tanaka, 'A note on the M/V "Louisa" Case' (2014) 45 *Ocean Development & Intl L* 205.

²⁹ *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)* (Provisional Measures, Order of 27 August 1999) 117 *ILR* 148, 161, paras 45-47. See B Kwiatkowska, 'The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases' (2000) 15 *Intl J Marine and Coastal L* 1.

³⁰ *Southern Bluefin Tuna (Provisional Measures)* (n 29) 161, paras 48-49.



isted, confirming that the Annex VII tribunal would have jurisdiction on the merits.³¹ In particular, ITLOS did not seem to content itself with the parties' assertions that there existed a dispute concerning Articles 64 and 116-119 UNCLOS. On the contrary, the Tribunal explored what the reading of such articles suggested, which was linked to the Australian and New Zealand contention concerning Japan's breaches of the Convention. However, and similarly to *M/V Louisa*, the case was subsequently dismissed by the Annex VII arbitral tribunal for want of jurisdiction. However, the reason for the dismissal was not the non-existence of a dispute, but the fact that the dispute settlement mechanisms of the Convention for the Conservation of Southern Bluefin Tuna³² took precedence over that under Part XV UNCLOS.³³

In both *MOX Plant* and *Land Reclamation by Singapore in and around the Strait of Johor* there was no opposition of views as to the existence of a dispute under UNCLOS.³⁴ In *ARA Libertad*, however there was a difference of views as to the existence of a dispute. Argentina argued that the dispute concerned the interpretation and application of Articles 18(1)(b), 32, 87(1)(a) and 90 UNCLOS,³⁵ which related to passage in the territorial sea, warship immunity and freedom of navigation. Ghana denied that any dispute existed, and thus the Annex VII tribunal would lack jurisdiction.³⁶ ITLOS discussed the existence of a dispute at some length. It first dismissed that *prima facie* jurisdiction could be based on Articles 18(1)(b), 87(1)(a) and 90 UNCLOS,³⁷ and then dedicated four paragraphs to the analysis of whether Article 32 could pro-

³¹ Ibid 161, para 52.

³² Convention for the Conservation of Southern Bluefin Tuna, 1819 UNTS 359.

³³ *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)* (Jurisdiction and Admissibility, Judgment of 4 August 2000) 119 ILR 508, 553-554, paras 63-65. See C Romano, 'The *Southern Bluefin Tuna* Dispute: Hints of a World to Come... Like It or Not' (2001) 32 *Ocean Development & Intl L* 313.

³⁴ See *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) 126 ILR 259, 271-274, paras 35-53. See RR Churchill, J Scott, 'The *MOX Plant* Litigation: The First Half-Life' (2004) 53 *ICLQ* 643, 647. See also *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) 126 ILR 487, 498, para 36. See T Koh, J Lin, 'The Land Reclamation Case: Thoughts and Reflections' (2006) 10 *Singapore YB Intl L* 1.

³⁵ *ARA Libertad* (Provisional Measures) (n 20) 341, para 39.

³⁶ Ibid 342, para 51.

³⁷ Ibid 343-344, para 61.



vide a basis on which the Annex tribunal's jurisdiction might be founded.³⁸ ITLOS devoted some effort to establishing the existence of a dispute under the Convention, and thus the Annex VII tribunal's *prima facie* jurisdiction. The question of the scope of application *ratione loci* of Article 32 UNCLOS, disputed between the parties, was also analysed in some detail in two separate opinions appended to the order.³⁹ Similarly to the decision in *Southern Bluefin Tuna*, in *ARA Libertad* ITLOS conducted an examination of whether the articles invoked by the applicant could afford a basis on which the jurisdiction of the Annex VII tribunal might be founded. ITLOS did not simply rely on the parties' arguments, but canvassed its own reflections on the provisions invoked by the applicants, in order to justify a finding of *prima facie* jurisdiction.

Arctic Sunrise, on the other hand, marked a different approach by ITLOS to the determination of the existence of a dispute. Russia, the respondent in the provisional measures proceedings, did not appear before ITLOS, sending a note to the Tribunal and setting forth its position that the Annex VII tribunal would lack jurisdiction pursuant to a declaration made by Russia itself upon ratification of UNCLOS.⁴⁰ One might expect that Russia's non-appearance would have meant a longer reasoning concerning the existence of a dispute between the parties; however, that was not the case. The Tribunal contented itself with stating the position of the parties concerning the *prima facie* jurisdiction of the Annex VII tribunal,⁴¹ and reached the conclusion that:

'a difference of opinions exists as to the applicability of the provisions of the Convention in regard to the rights and obligations of a flag State and a coastal State, notably, its articles 56, 58, 60, 87 and 110, and thus the Tribunal is of the view that a dispute appears to exist between these two States concerning the interpretation or application of the Convention'.⁴²

³⁸ Ibid 344, paras 63-66.

³⁹ Ibid 365-376, paras 10-51 (Sep, Wolfrum and Cot); ibid 383-384, paras 8-13 (Sep Op, Lucky).

⁴⁰ *Arctic Sunrise (Kingdom of the Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013) 53 ILM 603, 612, para 42. See D Guilfoyle, CA Miles, 'Provisional Measures and the MV *Arctic Sunrise*' (2014) 108 AJIL 271.

⁴¹ Ibid 614-615, paras 59-67.

⁴² Ibid 615, para 68.



It has been suggested that the enquiry on jurisdiction in *Arctic Sunrise* was due to ITLOS's intention to 'punish' Russia for its non-appearance.⁴³ On closer examination it appears that ITLOS correctly envisaged the existence of a dispute between the parties: both the Netherlands and Russia referred to the same UNCLOS provisions when expressing their positions in respect of jurisdiction.⁴⁴ Although, it seems that relying only on the parties' contentions does not correctly follow the *Interpretation of Peace Treaties* test, whereby ITLOS should make its own objective assessment of the existence of a dispute.

4. *Italy's claims in Enrica Lexie and the existence of a dispute under UNCLOS*

One could wonder whether the establishment of the existence of a dispute between Italy and India in the *Enrica Lexie case* follows the patterns established by ITLOS on the matter. As held by the ICJ in *Nuclear Tests*, the starting point of an enquiry into the existence of a dispute is the statement of the claims set forth by the applicant.⁴⁵ Similarly, in order to appreciate the effects of the *Enrica Lexie case* on the ascertainment of the existence of a dispute by ITLOS at provisional measures stage, it is necessary to analyse Italy's claims before the Tribunal and how they relate to the existence of a dispute under UNCLOS.

In the request for the prescription of provisional measures, Italy claimed *inter alia* that India had breached its UNCLOS obligations concerning criminal jurisdiction on board of a foreign ship,⁴⁶ freedom of navigation,⁴⁷ duties of coastal states and flag states in the EEZ,⁴⁸ and jurisdiction over incidents of navigation.⁴⁹ The Italian claim on the merits boils down to the question of which state can exercise jurisdiction over

⁴³ Guilfoyle, Miles (n 40) 277.

⁴⁴ See *Arctic Sunrise* (Provisional Measures) (n 40) 614-615, paras 64 and 67.

⁴⁵ *Nuclear Tests (Australia v France)* (Judgment of 20 December 1974) [1974] ICJ Rep 253, 260, para 24. See also JJ Ruiz, 'Mootness in International Adjudication: the Nuclear Tests Cases' (1977) 20 German YB Intl L 358.

⁴⁶ Art 27 UNCLOS.

⁴⁷ Art 87 UNCLOS.

⁴⁸ Arts 58 and 94 UNCLOS.

⁴⁹ Art 97 UNCLOS.

the marines in accordance with UNCLOS. Since the question of jurisdiction is intimately linked to that of sovereign immunity,⁵⁰ immunity appears to be the basis of the Italian claim. In fact, Italy submitted to ITLOS that the marines ‘are agents and officials of the Italian State. At the time of the events that led to their arrest, they were exercising official functions as members of a Vessel Protection Detachment deployed by the Italian Navy on a counter-piracy operation’.⁵¹

However, UNCLOS does not contain any rule on immunity of state officials, the so-called functional immunity. Before the Tribunal, India correctly noted that, apart from the provisions on the immunities of ITLOS and the International Seabed Authority, Article 32 UNCLOS is the only rule on immunity.⁵² That article does not address the immunity of state officials, but only the immunity of warships, and therefore does not apply in *Enrica Lexie*. Accordingly, Italy could only ground the immunity of the marines either in Article 97 UNCLOS or in customary international law. Each is addressed in turn. Under Article 97 UNCLOS:

‘[i]n the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national’.

Article 97 cited also applies to the EEZ by virtue of Article 58(2) UNCLOS,⁵³ and is therefore applicable to the *Enrica Lexie* case, where the incident took place 20.5 nautical miles from India’s coast.⁵⁴ The main question concerning Article 97 UNCLOS is whether the killing of

⁵⁰ The link between jurisdiction and immunity was underscored by Italy, which argued that the question is to establish ‘who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account is to be taken of the immunity of State officials’. See ITLOS/PV.15/C24/3 (Italy), 1. See also H Fox, *The Law of State Immunity* (OUP 2008) 75.

⁵¹ Request for the prescription of provisional measures, para 18, at <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Request_of_the_Italian_Republic_r.pdf>.

⁵² ITLOS/PV.15/C24/3 (India) 15-16.

⁵³ SN Nandan and S Rosenne (eds), *United Nations Convention on the Law of the Sea – A Commentary*, vol III (Martinus Nijhoff 1995) 169.

⁵⁴ *Enrica Lexie Incident*, paras 36-43.



the two Indian fishermen qualifies as an 'incident of navigation' in the sense of Article 97 UNCLOS. While Italy argued that Article 97 applies to *Enrica Lexie* because it concerns an 'incident of navigation',⁵⁵ India stated that 'there was in reality no "incident of navigation", [...] Article 97 of the UNCLOS – which is vital for Italy's case – is irrelevant by any means'.⁵⁶ On the basis of the opposition of the Italian and Indian views, it cannot be denied that a dispute between them exists; further, that dispute relates to the 'interpretation or application' of Article 97 UNCLOS.⁵⁷ As argued on behalf of Italy:

'it is clear from India's Written Observations that there is a dispute concerning the interpretation and application of the provisions of the Convention; it sets out its position on the interpretation and application of Article 97 which is in opposition to that of Italy'.⁵⁸

It could be safely concluded that there existed a dispute over which the Annex VII tribunal would have jurisdiction. Accordingly, ITLOS, at the provisional measures stage, could certainly conclude that the Annex VII tribunal would have *prima facie* jurisdiction in accordance with Article 290(5) UNCLOS, as it did.⁵⁹

In addition to Article 97 UNCLOS, Italy based the immunity of the two marines on customary international law. Unlike immunity pursuant to Article 97, a claim of immunity under customary international law is based on a theory of functional immunity. Immunity under Article 97 is not immunity *ratione materiae* of state officials, deriving from the sovereign immunity enjoyed by the state under international law,⁶⁰ but a stand-alone case of immunity created by UNCLOS. If Italy had based the marines' immunity only on customary international law, that could have proven problematic for the jurisdiction of ITLOS and the arbitral

⁵⁵ Request for the prescription of provisional measures (n 51) para 35.

⁵⁶ Written observations of the Republic of India, para 1.8, at <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Response/VOL_1.pdf>.

⁵⁷ See *Certain Property (Liechtenstein v Germany)* (Preliminary Objections, Judgment of 10 February 2005) [2005] ICJ Rep 6, 19, para 25.

⁵⁸ ITLOS/PV.15/C24/1 (Italy) 22.

⁵⁹ *Enrica Lexie* (n 4) para 54.

⁶⁰ See A Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 ICLQ 193, 200; Z Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 BYIL 281, 288.



tribunal, as ‘a dispute concerning the interpretation and application of a rule of customary law [...] does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention’.⁶¹ Italy could have argued that the customary rules of international law on functional immunity have been incorporated in the Convention; however, it did not do so, probably on account of its stronger case on the existence of a dispute in respect of Article 97 UNCLOS. It is not possible to state with certainty what ITLOS would have decided if such an argument had been made. In any event, it seems that such an argument, due to its complexity, would more likely be set out in the merits phase.

Enrica Lexie exemplifies the ICJ statement, that ‘[o]ne situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures’.⁶² In the *Enrica Lexie case*, besides a dispute concerning UNCLOS there also seems to be a dispute about functional immunity under customary international law. While it could be argued that the ‘real’ subject-matter of the dispute is the marines’ functional immunity, it seems that Article 97 UNCLOS affords a solid basis on which the jurisdiction of the Annex VII tribunal might be founded. The determination of the ‘real’ subject-matter of the dispute requires a comprehensive enquiry into the Annex VII tribunal’s jurisdiction, and, accordingly, it is a matter for the further phases of the dispute; it does not concern ITLOS at the provisional measures stage, where it is only necessary to establish *prima facie* jurisdiction.⁶³ As a consequence, Judge Koroma’s warning in *Georgia v Russia* that ‘States could use [...] compromissory clause[s] as a vehicle for

⁶¹ *ARA Libertad* (Provisional Measures) (n 20) 365, para 7 (Sep Op Wolfrum and Cot). See N Peiris, ‘Provisional Measures in *ARA Libertad*: On the Margins of Jurisdictional Discourse’ (2014) 28 *Ocean YB* 134.

⁶² *Application of the International Convention for the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections, Judgment of 1 April 2011) [2011] ICJ Rep 70, 85-86, para 32. See also *ibid*, 326, para 9 (Sep Op Greenwood).

⁶³ On the determination of the ‘real’ subject-matter of the dispute, see *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of 18 March 2015, paras 203-221, at <www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899>. See also *Fisheries Jurisdiction (Spain v Canada)* (n 18) 449, para 31; *Certain Property* (Preliminary Objections), above n 57, 49-50, para 8 (Diss Op, Owada).



forcing an unrelated dispute with another State before the Court⁶⁴ is of no application in the case of provisional measures, both under UNCLOS and under general international law.

5. *Appraisal: more of the same?*

ITLOS's jurisprudence does not seem to highlight any preferred approach to the establishment of the existence of a dispute. As explained above, and excluding *Enrica Lexie*, in four cases neither party contested the existence of a dispute between the parties;⁶⁵ in four other cases the existence of a dispute was debated, and ITLOS twice examined the articles invoked by the applicant,⁶⁶ and twice chose only to reiterate the parties' argument, concluding in both cases that a dispute *prima facie* existed (see table below).⁶⁷

Case	Existence of dispute not debated	Analysis of UNCLOS articles invoked	Reiteration of the parties' arguments	Case under article	
				290(1)	290(5)
<i>M/V Saiga (No 2)</i>	X			X	
<i>Southern Bluefin Tuna</i>		X			X
<i>MOX Plant</i>	X				X
<i>Land Reclamation by Singapore</i>	X				X
<i>M/V Louisa</i>			X	X	
<i>ARA Libertad</i>		X			X
<i>Arctic Sunrise</i>			X		X
<i>Delimitation in the Atlantic Ocean</i>	X			X	

Table 1 – ITLOS's approach to establishing the existence of a dispute

⁶⁴ *Application of the International Convention for the Elimination of all Forms of Racial Discrimination* (Preliminary Objections) (n 62) 185, para 7 (Sep Op Koroma).

⁶⁵ *M/V Saiga (No 2)*; *MOX Plant*; *Land Reclamation by Singapore in and around the Straits of Johor*; *Delimitation between Ghana and Côte D'Ivoire in the Atlantic Ocean*.

⁶⁶ *Southern Bluefin Tuna*; *ARA Libertad*.

⁶⁷ *M/V Louisa*; *Arctic Sunrise*.



One might expect a difference in the Tribunal's approach to cases initiated under Article 290(1) from those initiated under Article 290(5) UNCLOS. In the former instance ITLOS has jurisdiction both to prescribe provisional measures and over the merits; therefore, ITLOS could be less strict in assessing the existence of a dispute than in the case of provisional measures requested under Article 290(5). Since ITLOS is a standing tribunal, the proceedings on the merits would start soon after the provisional measures phase and finish earlier than arbitral proceedings,⁶⁸ which means that: (i) should jurisdiction be found to be lacking, provisional measures would be in force for a shorter period of time; and (ii) should provisional measures be denied, they could be swiftly requested again to urgently prevent irreparable prejudice.⁶⁹ If the case were filed under Article 290(5), ITLOS should arguably be more cautious since: (i) due to the time needed to constitute the Annex VII tribunal, should there be a finding of no jurisdiction over the merits, provisional measures would be in force for a longer period of time; and

⁶⁸ In *M/V Saiga (No 2)*, Saint Vincent and the Grenadines requested provisional measures on 5 January 1998, and the final judgment on the merits was handed down on 1 July 1999 (a year and a half later). In *M/V Louisa*, Saint Vincent and the Grenadines requested provisional measures on 23 November 2010, while the judgment was delivered on 28 May 2013 (two and a half years). In *M/V Virginia G*, which did not include provisional measures, the application instituting proceedings was sent on 4 November 2011, and the judgment rendered on 14 April 2014 (two and half years). By contrast, in *MOX Plant* the arbitration finished around 7 years after the request for provisional measures of 9 November 2001 (6 June 2008). In *Land Reclamation*, provisional measures were requested in 4 September 2003. The tribunal never reached an actual award, as it simply endorsed the parties' settlement on 1 September 2005; proceedings would presumably have taken longer. The same took place in *ARA Libertad*, where provisional measures were requested on 9 November 2012, and the parties reached an agreed settlement 27 September 2013. In *Arctic Sunrise*, the Netherlands requested provisional measures on 21 October 2013, and the award was delivered on 14 August 2015; the short time-span (a year and ten months) is probably due to Russia's non-appearance, and should be regarded as exceptional. Last, in *Southern Bluefin Tuna* the applicants requested provisional measures on 30 July 1999, and the award on jurisdiction was handed down a year later, on 4 August 2000. This last case appears to be an exception, since the parties only discussed the jurisdictional point, and did not address the merits of the case, either in the written or in the oral proceedings, see *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* (2000) 23 RIAA 1, 6, paras 10-15.

⁶⁹ Judge Treves underscored the different standard of urgency under arts 290(1) and 290(5) UNCLOS, see *Southern Bluefin Tuna (Provisional Measures)* (n 29) 178, para 4 (Sep Op Treves). See also Rosenne (n 9) 142-143.



(iii) there is a greater need to urgently prevent irreparable prejudice in light of the fact that months could pass before the Annex VII tribunal could hear a request for provisional measures.

However, such a pattern is not easily discernible. Consistently with the hypothesis formulated above, in both *Southern Bluefin Tuna* and *ARA Libertad*, ITLOS examined the legal provisions invoked by the applicant in order to determine whether a dispute existed, while in *M/V Louisa* it conducted a brief review. However, *Arctic Sunrise* is not consistent with the pattern described above. The same could be said with regard to *Enrica Lexie*, where the Tribunal recalled the parties' arguments and concluded without further ado that a dispute between Italy and India existed. Therefore, it is difficult to find an appreciable pattern in how ITLOS approaches the existence of a dispute based on the provision under which the provisional measures are requested. Nevertheless, it is almost certain that ITLOS would find that a dispute exists when the case is introduced by special agreement.⁷⁰

The order in *Enrica Lexie* does not seem to mark a turning point in the manner in which ITLOS approaches the establishment of the existence of a dispute. On the contrary, the fact that *Enrica Lexie* shows a brief assessment of *prima facie* jurisdiction where, based on the above considerations, a more thorough examination could be expected confirms that there is no difference between assessing the existence of a dispute under Article 290(1) and Article 290(5). One could conclude that ITLOS's approach to establishing that a dispute exists depends on the circumstances of the case, on whether, for instance, the case was brought by special agreement, the parties agree that a dispute exists, and the provisions invoked by the applicant to base the jurisdiction on the merits are interpreted differently by the respondent. One could agree that ITLOS's 'standard for deciding on *prima facie* jurisdiction [in respect of an Annex VII tribunal] is no different from the standard for deciding on its own jurisdiction'.⁷¹

⁷⁰ *M/V Saiga (No 2); Delimitation between Ghana and Cote d'Ivoire in the Atlantic Ocean*.

⁷¹ P Tomka, GI Hernández, 'Provisional Measures in the International Tribunal for the Law of the Sea' in HP Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum, Volume II* (Martinus Nijhoff 2012) 1763, 1778.



The question arises as to whether ITLOS's approach, as identified above, is consistent with the ICJ's approach to the same issue. Under the ICJ Statute the question as to the existence of a dispute is framed in terms different to those under the UNCLOS régime. While under Article 288 UNCLOS jurisdiction is limited to either the 'interpretation or application of the Convention', under the ICJ Statute, jurisdiction may be founded on a range of different titles of jurisdiction. If jurisdiction were based on the optional clause (Article 36(2) ICJ Statute), any dispute could fall within its purview, unless there existed reservations limiting the subject-matter jurisdiction of the Court in respect of certain issues.⁷² The situation could be more complex in cases where the Court's jurisdiction were based on a compromissory clause in a treaty: in that instance, the ICJ's jurisdiction is generally limited to matters relating to the interpretation or application of the treaty invoked.⁷³

These peculiarities of the ICJ Statute paint a picture distinct from the one that has emerged in relation to UNCLOS dispute settlement. Since under UNCLOS, subject-matter jurisdiction is always limited to the 'interpretation or application of the Convention', states are more prone to challenging the competent organ's jurisdiction at the provisional measures phase, arguing for the non-existence of a dispute under UNCLOS. On the contrary, due to a significant number of cases being filed with the ICJ based on the acceptance of the optional clause,⁷⁴ states seem less prone to contending that a dispute does not exist between them at the provisional measures stage.⁷⁵ Such a contention has in

⁷² V Lowe, *International Law* (OUP 2007) 129-131.

⁷³ A Clapham, *Brierly's Law of Nations* (OUP 2012) 421.

⁷⁴ S Rosenne, *The Law and Practice of the International Court – 1920-2005*, vol II (Martinus Nijhoff 2006) 799.

⁷⁵ At the provisional measures stage, the existence of a dispute was challenged in very few cases before the ICJ, and always in relation to a compromissory clause in a treaty. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3, 10, paras 23-24; *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) [1999] ICJ Rep 124, 136-138, paras 34-41; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Provisional Measures) [2002] ICJ Rep 210, 237, para 46 (in respect of the WHO Constitution); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Rep 353, 386, para 110; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures) [2009] ICJ Rep 139, 147-148, paras 44-45.



fact been made infrequently before the ICJ. For instance, the non-existence of a dispute was argued in *Belgium v Senegal*⁷⁶ and in *Georgia v Russia*,⁷⁷ both filed under a compromissory clause in a treaty. In both instances at the provisional measures phase, the ICJ found that a dispute *prima facie* existed based on the parties' arguments and allegations. While in *Georgia v Russia* the ICJ based its conclusion on a mere paragraph, it appeared to be slightly more detailed in *Belgium v Senegal*.⁷⁸ The Court developed an even less detailed reasoning in *Land and Maritime Boundary*, where Nigeria had argued that the non-existence of a dispute with Cameroon made the latter state's request for provisional measures inadmissible: the ICJ rejected that argument outright, with little or no explanation.⁷⁹ The Court's approach seems to be that at the provisional measures stage it need not establish conclusively that a dispute exists, but only needs to conduct a *prima facie* examination of the matter for the existence of a dispute. It stated as much in *Temple (Interpretation)*, when it held that at the provisional measures stage it 'need not satisfy itself in a definitive manner that [...] a dispute exists'.⁸⁰

Concerning the question of the 'real' subject-matter of the dispute, the ICJ recognises that this is a question for the further stages of the proceedings, not to be addressed at the provisional measures phase. This appears implicit in the order in *US Diplomatic and Consular Staff in Tehran*. In that instance, by sending a letter to the ICJ Iran had set forth that:

⁷⁶ *Questions relating to the Obligation to Prosecute or Extradite* (Provisional Measures) (n 75) 143-145, paras 22-30. See A Leandro, 'Sull'accertamento dell'esistenza di una controversia dinanzi alla Corte internazionale di giustizia' (2012) 95 *Rivista di Diritto Internazionale* 1111.

⁷⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Provisional Measures) (n 75) 386-387, paras 110-111.

⁷⁸ *Questions relating to the Obligation to Prosecute or Extradite* (Provisional Measures) (n 75) 148-149, paras 46-47; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Provisional Measures) (n 75) 387, para 112.

⁷⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Provisional Measures) [1996] ICJ Rep 13, 21, paras 32-33.

⁸⁰ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Provisional Measures) [2011] ICJ Rep 537, 542, para 21. Although the Court referred to proceedings of interpretation under art 60 ICJ Statute, the same principle applies to 'normal' contentious proceedings.

‘the Court cannot and should not take cognizance of the [...] case, for the reason that the question of the hostages forms only “a marginal and secondary aspect of an overall problem” involving the activities of the United States in Iran over a period of more than 25 years’.⁸¹

The Court held that ‘no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important’.⁸² While the point made by the Court could also relate to disputes of a political character, it seems to validly apply to disputes arising under different rules of customary international law, whose scrutiny by the Court would depend on the jurisdictional basis of the claim on the merits.

It appears that the ICJ’s and ITLOS’s practice is similar.⁸³ When confronted with opposing claims as to the existence of a dispute at the provisional measures stage, both organs tend to conduct a brief review of the parties’ arguments, based on which they typically decide for the existence of a dispute and, therefore, for *prima facie* jurisdiction.⁸⁴ The in-depth analysis on the existence of a dispute, and hence on jurisdiction, as well as the determination of the ‘real’ subject-matter of the dispute, are left to the later stages of the proceedings. ITLOS and the ICJ may devote a longer part of their order to the existence of a dispute. Nevertheless, one should agree with Judge Abraham that:

⁸¹ *US Diplomatic and Consular Staff in Tebran (United States v Iran)* (Provisional Measures) [1979] ICJ Rep 7, 15, para 22.

⁸² *Ibid*, para 24.

⁸³ Brown points out that the same test is applied by the ICJ and ITLOS. See C Brown, *A Common Law of International Adjudication* (OUP 2007) 137.

⁸⁴ However, depending on the jurisdictional title, the ICJ may be requested to assess, in addition to the existence of a dispute, whether any preconditions to jurisdiction have been met. For instance, certain compromissory clauses may require that the parties conduct negotiations prior to initiating a dispute. This is the case for art 30 of the Torture Convention (1465 UNTS 85), see *Questions relating to the Obligation to Prosecute or Extradite* (Provisional Measures) (n 75) 149-150, paras 49-50. Under UNCLOS, the exchange of views between the parties is required under art 283, see *Land Reclamation by Singapore in and around the Straits of Johor* (Provisional Measures) (n 34) 498, paras 33-51.



'[i]t is enough [...] to find that the two parties hold opposing views on the matters referred to the Court, and this difference may be evidenced in any manner'.⁸⁵

Judge Abraham's view, critical of the Court's approach in *Georgia v Russia*, reiterates the orthodox position in *Interpretation of Peace Treaties* on establishing the existence of a dispute. *Enrica Lexie* did not change this position; it confirmed the already settled method for the assessment of the existence of a dispute at provisional measures stage.⁸⁶ *Enrica Lexie* confirmed that both the establishment of the existence of a dispute and of its subject-matter are only subject to a *prima facie* evaluation, leaving additional enquiries, including that on the 'real' subject-matter of the dispute, for the further phases of judicial proceedings.

However, it should be noted that certain judges did not seem to follow the established jurisprudence on the existence of a dispute. For instance, Judge Jesus wrote in his separate opinion that 'the opposing views of the two Parties [...] confirm that there is, indeed, a dispute concerning the interpretation or application of the Convention'.⁸⁷ Judge Jesus appears to base his conclusion on the appreciation of the parties' contentions, which would be a subjective, and not an objective, method of determining the existence of a dispute. For his part, Judge Bouguetaia linked the question of *prima facie* jurisdiction to that of *fumus boni iuris*, or plausibility of the rights claimed on the merits.⁸⁸ Although the two requirements are inter-dependent, since jurisdiction could *prima facie* be established only if the rights claimed plausibly exist, they should not be conflated. As interpreted in the recent case law, plausibility and *prima facie* jurisdiction remain distinct requirements. In addition, Judge Bouguetaia appeared to go beyond the analysis required at the provisional measures phase, by conducting a deeper analysis of the provisions invoked by Italy to found the Annex VII arbitral tribunal's

⁸⁵ *Application of the International Convention for the Elimination of all Forms of Racial Discrimination* (Preliminary Objections), 228, para 14 (Sep Op, Abraham). See also Rosenne (n 9) 126.

⁸⁶ Judge Bouguetaia expressed the opposite view, see *Enrica Lexie* (n 4) Dissenting Opinion of Judge Bouguetaia, paras 9-14.

⁸⁷ *Ibid*, Separate Opinion of Judge Jesus, para 7.

⁸⁸ *Ibid*, Dissenting Opinion of Judge Bouguetaia, para 11.

jurisdiction.⁸⁹ Although Judge Bouguetaia seemingly followed the *Interpretation of Peace Treaties* objective test, he conducted an analysis which one might have expected at the merits stage.

Concerning the ‘real’ subject-matter of the dispute, *Enrica Lexie* does not seem to incentivise states to request provisional measures in case where there is no dispute under UNCLOS. Such a situation had previously occurred in *ARA Libertad* with respect to sovereign immunity; in both cases, ITLOS solved the jurisdictional question in a similar manner, leaving further determinations for later stages of the proceedings. The risk that provisional measures could be requested from ITLOS in extra-UNCLOS disputes has always existed, and is inherent in the limitation of subject-matter jurisdiction under Article 288 UNCLOS.

6. *Conclusion: A confirmation*

Enrica Lexie appears to confirm the approach previously taken by ITLOS and the ICJ to the establishment of the existence of a dispute. However, it must be noted that such an approach is not always consistent with the test set out in *Interpretation of Peace Treaties*, where the Court held that the existence of a dispute must be objectively assessed. From this perspective, ITLOS should not rely too heavily on the statements by the parties to a case that a dispute between them exists or not, since such an approach would not be an objective, but rather a subjective assessment of the existence of a dispute. For its part, the ICJ may also rely on the statements of the parties, for the same reason explained above with reference to ITLOS. It could be suggested that, since *prima facie* jurisdiction is the most fundamental requirement in the indication of provisional measures, ITLOS should take a strict approach to establishing the existence of a dispute. It has already done so on various occasions, albeit not in *Enrica Lexie*. It is to be hoped that ITLOS will do so in future cases as well.

⁸⁹ Ibid, Dissenting Opinion of Judge Bouguetaia, paras 12-14. See, in particular, the comments on art 87 UNCLOS.

