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# THE DEVELOPMENT OF UNCLOS PART XV BY 'HYPOTHETICAL' JURISDICTIONAL DETERMINATIONS

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**The Development of UNCLOS Part XV**
**by 'Hypothetical' Jurisdictional Determinations**

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## Abstract

The purpose of this research is to assess the contributions of *prima facie* jurisdictional findings in provisional measures proceedings to the development of the dispute settlement system of the United Nations Convention on the Law of the Sea ('UNCLOS').

UNCLOS regulates the compulsory dispute settlement system through its Part XV for resolving a dispute concerning the interpretation or application of UNCLOS. The Part XV system must be subject to a continuous process of evolution and development as the conclusion of UNCLOS was not the end of its development process. Based on many authors' arguments that international adjudication can be a major channel for the development of international law, this research construes that international courts and tribunals may also take a significant role in developing UNCLOS Part XV.

However, this research does not believe that only the judicial decisions made within the merits phase can contribute to the development of the Part XV system. Instead, it focuses on the *prima facie* jurisdictional findings given in the provisional measures proceedings. *Prima facie* jurisdictional findings are 'hypothetical' determinations as the final judgment on the merits can revoke the jurisdictional decisions given in the provisional measures proceedings. Nevertheless, this paper argues that attention should also be paid to these hypothetical jurisdictional determinations and that they may contribute to the development of the Part XV system. Thus, it aims to assess contributions that remain less noticed, believing that they deserve more attention and further study. Accordingly, this research mainly addresses and discusses how UNCLOS Part XV has been developed by the *prima facie* jurisdictional findings of the tribunals in past and pending cases.

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## 1. Introduction

There is much room for judicial development in the dispute settlement system regulated in Part XV of the United Nations Convention on the Law of the Sea ('UNCLOS' or 'Convention'). UNCLOS Part XV was the outcome of a lengthy negotiation process.[1] Different views of the parties on the introduction of compulsory dispute resolution mechanisms as an integral part of UNCLOS needed to be reconciled during the Third UN Conference on the Law of the Sea.[2] As this process inevitably produced some unclear or ambiguous wordings,[3] the concluded texts of Part XV themselves cannot always give an explicit answer to questions concerning how this system should work and function in reality. Given the significant role that Part XV takes in maintaining the overall balance struck by the drafters to reconcile the different interests raised during the negotiation process, [4] such gaps can never be negligible. Thus, much remains to be clarified and developed in UNCLOS Part XV.

This research maintains that judicial bodies seised of jurisdiction under Part XV ('Part XV tribunals') can develop this system while they are resolving disputes submitted thereunder. Many authors have shared the view that international courts and tribunals may develop international law by clarifying necessary legal points and elaborating on uncertain norms in fulfilling their judicial function.[5] When a treaty's procedural provisions regarding judicial action – like UNCLOS Part XV – is at issue, their role in clarifying the regulated norms becomes more significant. That is because international courts and tribunals enjoy an authoritative status over other subjects of international law on the implementation of procedural

[1] See Anthony Giustini, 'Compulsory Adjudication in International Law: the Past, the Present and Prospects for the Future' (1985) 9 Fordham International Law Journal 213, p. 214.
[2] Yoshifumi Tanaka, *The International Law of the Sea* (Third edn, Cambridge University Press 2019), p. 534; Igor V. Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff 2012), p. 6.
[3] See Anthony Aust, *Modern Treaty Law and Practice* (Third edn, Cambridge University Press 2013), p. 205.
[4] James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011), pp. 50-51.
[5] See Hugh Thirlway, 'Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013), p. 311; Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958), p. 5; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994), p. 202.

law.[6] Hence, in interpreting and applying the rules within it, Part XV tribunals can do more than simply uncover the meaning of something that already exists.[7]

This research further argues that Part XV tribunals have contributed to the development of UNCLOS Part XV even in determining jurisdiction *prima facie* for prescribing provisional measures within a case. The existence of *prima facie* jurisdiction is the first requirement that international judicial bodies examine when ordering provisional measures.[8] A dictionary definition of '*prima facie*' is "at first sight" or "on the face of it."[9] Hence, finding *prima facie* jurisdiction means determining whether a dispute appears at first sight to afford a possible basis for a judicial body to have jurisdiction over the merits.[10] Article 290 of UNCLOS also mentions that a court or tribunal may prescribe provisional measures if that judicial body considers that *prima facie* it has jurisdiction.

Such jurisdictional findings are described as 'hypothetical' since the final judgment on the merits can revoke the jurisdictional decisions given in the provisional measures proceedings. Nevertheless, they are still judicial determinations which may provide authoritative pronouncements on how the Part XV system should work and function in practice. However, while other jurisdictional decisions given in the phase of the merits have attracted much attention, the contribution of *prima facie* jurisdictional determinations has been insufficiently noted. Albeit temporal or provisional, this research argues that *prima facie* jurisdictional determinations can clarify legal uncertainty by interpreting and applying jurisdictional provisions. Thus, it aims to examine how *prima facie* jurisdictional determinations have developed Part XV of UNCLOS by focusing on their contributions found in these hypothetical decisions.

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[6] Ingo Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013), pp. 240-245.

[7] Ingo Venzke regards that international courts and tribunals deliberately aim at influencing the development of international norms by way of their interpretive practice (see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012), p. 136).

[8] Lando, 'Provisional Measures and the Link Requirement', p. 184.

[9] Oxford English Dictionary, '*prima facie*' < https://www-oed-com.ezproxy.lib.gla.ac.uk/view/Entry/151264?redirectedFrom=prima+facie#eid ; last visited – 28.02.2023>.

[10] See *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. 12*, para. 17; Tafsir Malick Ndiaye, 'Provisional Measures Before the International Tribunal for the Law of the Sea' in Myron H. Nordquist and John Norton Moore (eds), *Current marine environmental issues and the International Tribunal for the Law of the Sea* (Martinus Nijhoff Publishers 2001), p. 97.

To that end, first, this research will address the doubts over the role of *prima facie* jurisdictional determinations. Here, we will examine what makes these *prima facie* findings hypothetical. The next section will highlight the contribution of *prima facie* decisions to the development of the Part XV system by clarifying ambiguous legal norms. This section will look into the case law of provisional measures proceedings concerning Article 283 of UNCLOS as an example. Article 283 provides the following:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Then, it will be suggested that these hypothetical determinations have been involved in the continuous process of building a convergent jurisprudence on the rules of Part XV applied to other judicial forums. This section will show that a contribution can be made through such interactions with other judicial decisions beyond the confinement of provisional measures proceedings.

## 2. What Makes Jurisdictional Findings at the Provisional Measure Stage 'Hypothetical'?

Jurisdictional determinations made within the provisional measures proceedings can be superseded by the subsequent jurisdictional decisions given in the merits phase. In contrast, the continuity in judicial practice on the same legal issue is crucial for the development of international law.[11] States normally follow and refer to the decision of international courts because they expect the courts to act consistently when they encounter the same legal issues.[12] Thus, if two different or even contradictory interpretations of the same provision of Part XV

[11] ICJ, *Handbook* (2019) < https://www.icj-cij.org/sites/default/files/documents/handbook-of-the-court-en.pdf; last visited – 28.02.2023>, p. 14; Vera Gowlland-Debbas, 'The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties', in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2014), p. 26.
[12] Higgins, *Problems and Process: International Law and How We Use It*, pp. 202-203.

exist, it would be difficult for states to know which judicial decision represents the authoritative pronouncement on the law at issue.

The threshold for determining jurisdiction *prima facie* is much lower compared to when a judicial body determines its jurisdiction in the phase of merits.[13] This is due to the innate urgency of proceedings that do not afford enough time for examining all the jurisdictional questions in depth.[14] Within provisional measures proceedings, such requests are made to protect the parties' rights pending the outcome of the case, to maintain, in the meantime, the *status quo* of the situation, or to prevent irreparable harm from happening.[15] Thus, if there is nothing which manifestly excludes the jurisdiction of a court or tribunal, the requirement of the existence of *prima facie* jurisdiction can be easily satisfied.[16]

In this respect, determining jurisdiction for imposing provisional measures entails it being hypothetical.[17] As *prima facie* jurisdictional determinations are not made in a definitive manner, they do not prejudice the final judgement of a court or tribunal on the merits reached after having conducted a full examination of jurisdiction issues.[18] Therefore, *prima facie* jurisdictional determinations are inevitably temporary and revocable decisions.[19] Judge Greenwood of the International Court of Justice ('ICJ') has noted that any ruling in the

[13] Guillaume Le Floch, 'Requirements for the Issuance of Provisional Measures' in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (T.M.C. Asser Press 2021), pp. 23 and 25; Karaman, *Dispute Resolution in the Law of the Sea*, p. 115).
[14] Karaman, *Dispute Resolution in the Law of the Sea*, p. 117; Floch, 'Requirements for the Issuance of Provisional Measures', p. 23.
[15] See Shabtai Rosenne, *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005), pp. 3-4; Cameron A. Miles, *Provisional Measures before International Courts and Tribunals*, vol 128 (Cambridge University Press 2017), pp. 1-2; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005), p. 59; Merrills, *International Dispute Settlement*, p. 131; Karaman, *Dispute Resolution in the Law of the Sea*, pp. 95-96; Rüdiger Wolfrum, 'Interim (Provisional) Measures of Protection' (2006) Max Planck Encyclopedias of International Law, para. 7; Thomas A. Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)' (2002) 62 Heidelberg Journal of International Law, p. 43.
[16] See *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p. 24*, para. 29; *MOX Plant Case, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003*, para. 14; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, para. 69.
[17] Karaman, *Dispute Resolution in the Law of the Sea*, p. 117.
[18] Rosenne, *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea*, p. 122; Wolfrum, 'Interim (Provisional) Measures of Protection', para. 16; Karaman, *Dispute Resolution in the Law of the Sea*, p. 97. See also; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, para. 92.
[19] Karaman, *Dispute Resolution in the Law of the Sea*, p. 107.

provisional measures proceedings is "necessarily provisional" as the jurisdictional threshold at this stage is set to be low.[20]

However, the provisional nature of *prima facie* jurisdictional determinations does not mean that the interpretation of the relevant rules of Part XV provided by the tribunal is hypothetical in itself. In other words, what makes them a temporary determination is not a tribunal's interpretation of specific provisions of Part XV provided in an order prescribing provisional measures. Instead, the hypothetical nature lies in the tribunals' consideration of a certain case's given *facts* when applying the jurisdictional provisions of UNCLOS Part XV to them. In provisional measures proceedings, the tribunals are not called to determine definitively whether the substantive rights the parties want to protect exist.[21] In this respect, Judge Paik of the International Tribunal for the Law of the Sea ('ITLOS') said in the *M/V "Louisa"* case that:

> [W]hile the provisions invoked by the Applicant as the legal basis of its claims do not appear to be manifestly related to the facts of the case, the Tribunal does not need to ascertain, at this stage, whether the allegation made by the Applicant are "sufficiently" arguable or plausible.[22]

This shows that the provisional nature of the determination of *prima facie* jurisdiction does not lie in the essence of the interpreted and clarified jurisdictional provisions of UNCLOS Part XV. There have indeed been cases under Part XV where a decision on jurisdiction given in the provisional measures proceedings was revoked at the merits phase, although this is not a common occurrence. For instance, in the *M/V "Louisa"* case, ITLOS found *prima facie* jurisdiction over this case in prescribing provisional measures.[23] However, after examining the facts and circumstances in depth, it concluded that it could not establish a link between the facts and the provisions invoked by the respondent.[24] As this meant that no dispute concerning the interpretation or application of UNCLOS existed, ITLOS determined that it had no jurisdiction *ratione materiae* to adjudicate the dispute. This decision was made not because the earlier interpretation of Part XV was inappropriate or incorrect but because the invoked provisions by the applicant did not apply to the fully determined facts of the case.

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[20] *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. 70, Separate Opinion of Judge Greenwood*, para. 2.

[21] See *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, ITLOS, 22 November 2013*, para. 69; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146*, para. 57.

[22] *M/V "Louisa", Provisional Measures Order*, *Separate Opinion of Judge Paik*, para. 7.

[23] *M/V "Louisa", Provisional Measures Order*, para. 70.

[24] *Ibid*, paras. 93-125.

Although referred to as hypothetical or provisional decisions, when determining *prima* facie jurisdiction, a court or tribunal in charge checks every hurdle raised in the context of the jurisdiction and admissibility of a case. Article 286 says that subject to the limitations and exceptions in Section 3 (Articles 297-299), the compulsory procedures can be applied to a dispute in which no settlement has been reached by recourse to Section 1 (Articles 279-285). Accordingly, for a Part XV tribunal to determine jurisdiction *prima facie* for prescribing provisional measures, it must demonstrate that the procedural preconditions within Section 1 have already been fulfilled and that the dispute does not fall under the limitations and exceptions in Section 3.[25] This indicates that even the provisional measures order can give a hint about a tribunal's thinking on the question of jurisdiction.[26] In this respect, the possibility can be found that Part XV of UNCLOS could become clarified and elaborated while a tribunal interprets and examines jurisdictional clauses to determine *prima facie* jurisdiction.

## 3. Direct Clarification of Part XV Rules Within Provisional Measures Proceedings – The Example of Article 283

As in the phase of the merits, disputing parties' claims regarding a tribunal's jurisdiction and the admissibility of a submitted case are actively raised during the provisional measures proceedings.[27] This shows that Part XV tribunals would also face many procedural questions arising from the ambiguity of jurisdictional clauses, even when determining *prima facie* jurisdiction. In this context, it can be inferred that *prima facie* jurisdictional determinations have also had the chance to develop the Part XV system by directly clarifying the uncertain norms of UNCLOS Part XV.

Such findings have constituted the jurisprudence of *prima facie* jurisdictional determinations on the rules of Part XV; thus far, these have been mainly formed by ITLOS. Under Article 290, provisional measures can be imposed by the chosen forums for the settlement of disputes in

[25] Chester Brown, 'Provisional Measures Before the ITLOS: the MOX Plant Case' (2002) 17 The International Journal of Marine and Coastal Law 267, pp. 276-277.
[26] Rosenne, *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea*, p. 122.
[27] Since a much lower threshold is required for finding jurisdiction *prima facie* compared to the jurisdiction on the merits, the jurisdiction and admissibility are treated identically within the proceedings for prescribing provisional measures (see Shabtai Rosenne, 'Provisional Measures and Prima Facie Jurisdiction Revisited' in Nisuke Andō and others (eds), *Liber Amicorum Judge Shigeru Oda*, vol 1 (Kluwer Law International 2002), p. 540.

each respective case,[28] or by the Annex VII arbitral tribunal in the absence of a mutually agreed forum.[29] However, if the constitution of an arbitral tribunal is pending and if the parties have failed to reach an agreement on a forum to prescribe provisional measures, ITLOS can make an order (Article 290(5)). This indicates that ITLOS is *de facto* a default forum for imposing interim measures. Accordingly, provisional measures have been predominantly prescribed by ITLOS at least until now; 11 proceedings before ITLOS and one case before an Annex VII arbitral tribunal.[30] And in the case of the latter, matters concerning jurisdictional provisions under Part XV were rarely dealt with.

Thus, within the jurisprudence of *prima facie* jurisdictional determinations, mostly formed by ITLOS, we can find hints regarding how the Part XV system should work and function in practice. Such a contribution was evident in the jurisprudence on Article 283 of UNCLOS. This provision regulates state parties' obligation to expeditiously exchange views concerning the pacific means for settling disputes before resorting to compulsory measures. Hence, Article 283 plays a crucial role in the overall functioning of the Part XV system. However, due to the lack of detailed guidance in this provision, questions can be raised as to exactly how the obligation to exchange views must be fulfilled. The jurisprudence of *prima facie* jurisdictional determinations has provided some answers to these questions.

### *3.1. What Must Be Done?*

The first question that may arise when fulfilling the obligation to exchange views under Article 283 would be what to implement. The text of this provision is composed of quite general terms like 'expeditiously' or 'exchange of views and does not provide detailed duties to be fulfilled.[31] For this reason, the *Virginia Commentary* on UNCLOS expects that "this obligation might be difficult to implement in any precise manner". [32] Some even argue that Article 283 requires

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[28] Article 287 of UNCLOS regulates that state parties may choose at any time one or more of the listed forums (ITLOS, ICJ, Annex VII and Annex VIII arbitral tribunals) for the settlement of disputes.
[29] Article 287(3) says "A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII." Article 287(5) says "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree."
[30] As of February 2023. There have been two provisional measures proceedings in the *Enrica Lexie* case, one before ITLOS and the other before the Annex VII arbitral tribunal.
[31] David Anderson, *Modern Law of the Sea: Selected Essays*, vol 59 (Publications on Ocean Development, Martinus Nijhoff Publishers 2007), p. 596.
[32] Myron H. Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nijhoff 1985), para. 283.5

state parties to engage in diplomatic negotiation before resorting to compulsory measures.[33] The term 'negotiation' here indicates one of the actual means for settling disputes, like conciliation or adjudication, not a mere communication or consultation between states. Yet, there is no general rule in international law that settlement must be sought through negotiation before resorting to adjudication.[34] Nevertheless, Article 283's lack of clarity has raised doubts on this issue.

Concerning what must be implemented to fulfil this precondition, ITLOS has consistently confirmed that Article 283 requires states only to engage in an expeditious exchange of views concerning pacific means for resolving a dispute. In the *Land Reclamation* case, the respondent, Singapore, argued that the applicant, Malaysia, had not fulfilled its obligations under Article 283 as there had been no real effort to exchange views and reach a settlement of the dispute.[35] However, in finding *prima facie* jurisdiction, ITLOS determined that this article only requires the disputing parties to proceed expeditiously to exchange views regarding the settlement of the dispute by other peaceful means.[36] This was refuting the claim that state parties should make an effort to reach an actual settlement of the dispute through other means. In this respect, ITLOS clarified that the exhaustion of diplomatic negotiation is not required in implementing Article 283.[37]

### *3.2. When Can This Obligation Be Considered Fulfilled?*

The jurisprudence of *prima facie* jurisdictional determinations has also clarified how far the parties are required to exchange views before resorting to compulsory procedures provided by UNCLOS. Including Article 283, Section 1 of UNCLOS Part XV regulates the procedural preconditions to the compulsory procedures entailing binding decisions. This indicates that the prerequisites regulated in Section 1 must be satisfied before unilaterally invoking a compulsory proceeding. Thus, if state parties are required to pursue procedures under Section 1 of Part XV

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[33] See Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 33; Deyi Ma, 'Obligation to Exchange Views under Article 283 of the United Nations Convention on the Law of the Sea: An Empirical Approach for Improvement' (2019) 12 Journal of East Asia and International Law 305, pp. 308-309.

[34] See *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998, p. 275*, para. 56.

[35] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Response of Singapore, 20 September 2003*, para. 71.

[36] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 37.

[37] *Ibid*, para. 52; *M/V "Louisa", Provisional Measures Order*, paras. 57, 64.

indefinitely, it would be a hindrance to the overall functioning of the compulsory measures regulated in Section 2 of Part XV.

According to the jurisprudence of *prima facie* jurisdictional determinations, however, state parties are not obliged to pursue preconditions in Section 1 if they conclude that the possibility of settlement has been exhausted.[38] This finding was also applied to respective provisions comprising Section 1 of Part XV, including Article 283. ITLOS has confirmed that state parties are not obliged to continue with an exchange of views when either party concludes that the possibility of reaching an agreement has been exhausted.[39] In the *M/T "San Padre Pio"* case, for instance, Switzerland claimed that there was no substantive response from the Nigerian authorities to its attempts to exchange views. Switzerland argued that since it was clear that no agreement would have been reached, the obligation to exchange views had been met.[40] ITLOS also confirmed that under such circumstances, Switzerland could reasonably consider that the possibility of reaching an agreement was exhausted. Hence, it concluded that the requirements of Article 283 were satisfied before instituting the case.[41] Likewise, this jurisprudence shows that whenever one of the parties determines that it is no longer likely to reach an agreement about the means for settling a dispute, Article 283 can be regarded as satisfied.

### *3.3. Who Should Participate in the Exchange of Views?*

Finally, the jurisprudence of *prima facie* jurisdictional determinations has clarified who is obliged to engage in the exchange of views concerning the pacific means for settling disputes. One of the functions of Article 283 is to prevent the automatic progression to the compulsory procedures under UNCLOS Part XV.[42] For this reason, it can be construed that this provision confers on the applicant of a case a primary obligation to exchange views with the respondent

[38] *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order, ITLOS, 27 August 1999*, para. 60; *Land Reclamation in and around the Straits of Johor, Provisional Measures Order*, para. 47; *M/V "Louisa", Provisional Measures Order*, para. 63.
[39] *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p.95*, paras. 54-60; *Land Reclamation in and around the Straits of Johor, Provisional Measures Order*, paras. 47-48; *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332*, paras. 71-72; *The "Arctic Sunrise" Case, Provisional Measures Order*, paras. 76-77; *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures, ITLOS, 25 May 2019*, para. 87.
[40] *The M/T "San Padre Pio", Request for the Prescription of Provisional Measures of the Swiss Confederation, 21 May 2019*, paras. 17-18.
[41] *M/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019*, p. 375, paras. 72-73.
[42] *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 382.

of the same case before unilaterally initiating the compulsory proceedings. Indeed, there have been several cases in which the respondent state claimed that the requirement of Article 283 had not been satisfied because of the applicant's failure to implement the obligation to exchange views.[43] For example in the *Land Reclamation* case, Singapore pointed out that there was no "real effort" from Malaysia to exchange views, before initiating a third-party dispute settlement procedure.[44]

However, ITLOS has consistently pronounced that the obligation to exchange views does not solely apply to the state instituting the proceedings but applies equally to both the applicant and respondent.[45] Furthermore, the jurisprudence of *prima facie* jurisdictional findings has also suggested that one of the grounds for determining the exhaustion of possibilities of reaching an agreement would be either party's failure to engage in consultation with the other. Therefore, if a respondent fails to comply with Article 283 by not responding to an applicant's suggestion or not engaging in an exchange of views, Article 283 should be seen as being satisfied, since an agreement between the parties cannot possibly be reached.[46] Of course, when neither party engages in the exchange of views, the compulsory procedures in Section 2 of Part XV cannot be invoked as the required obligation under Article 283 has not been fulfilled.

## 4. The Establishment of Convergent Jurisprudence on Part XV Rules Across the Forums

The potential contribution of *prima facie* jurisdictional determinations to the development of the Part XV system is not limited to direct clarification of Part XV rules during the provisional measures proceedings only. Additionally, the possible implications of *prima facie* jurisdiction findings for establishing the overall jurisprudence on the rules of Part XV need to be noted. That is to say, the jurisprudence on the rules of Part XV predominantly formed by ITLOS in

[43] See *Land Reclamation in and around the Straits of Johor, Provisional Measures Order*, paras. 33-34; *Detention of Three Ukrainian Naval Vessels, Provisional Measures Order*, paras. 84-85.
[44] *Land Reclamation in and around the Straits of Johor, Response of Singapore, 20 September 2003*, para. 71.
[45] *Land Reclamation in and around the Straits of Johor, Provisional Measures Order*, para. 38; *M/V "Louisa", Provisional Measures Order*, para. 38; *Detention of Three Ukrainian Naval Vessels, Provisional Measures Order*, para. 88; *M/T "San Padre Pio", Provisional Measures Order*, para. 74.
[46] *Land Reclamation in and around the Straits of Johor, Provisional Measures Order*, paras. 39-48; *M/V "Louisa", Provisional Measures Order*, paras. 59-63; *Detention of Three Ukrainian Naval Vessels, Provisional Measures Order*, paras. 86-88; *M/T "San Padre Pio", Provisional Measures Order*, paras. 70-75.

the provisional measures stage may interact with other Part XV tribunals beyond the provisional measures stage.

Under UNCLOS Part XV, where multiple judicial bodies are set, the forum for determining *prima facie* jurisdiction and the forum for determining jurisdiction at the preliminary objections (or merits) phase will not always be the same. According to Article 290(5) of UNCLOS, ITLOS may prescribe an order for provisional measures pending the constitution of an arbitral tribunal to which a dispute is being submitted. This implies that ITLOS at the provisional measures stage and other Part XV tribunals at the merits phase may come to different conclusions on the same jurisdictional issue. If contradictory legal doctrines are drawn, they can confuse state parties in expecting how the Part XV system may function.

In practice, however, *prima facie* determinations on jurisdictional issues have largely been upheld across the forums under the Part XV system. This indicates that an interpretation or application of a Part XV rule provided in the provisional measures stage was accepted at the merits stage even after a more in-depth examination of jurisdictional matters. For example, the point that Article 283 only requires an expeditious exchange of views concerning the means for settling a dispute was first clarified by a *prima facie* jurisdictional determination. Later, this finding was accepted by other tribunals of different cases in determining jurisdiction for the merits.[47] The finding that Article 283 equally obliges both an applicant and respondent to exchange their views has also been upheld in subsequent cases.[48] These examples prove that the cross-fertilisation between judicial bodies to seek guidance from each other in resolving procedural issues[49] can also be observed between *prima facie* jurisdictional determinations and other subsequent judicial decisions.

Judicial dialogue may take place between *prima facie* jurisdictional determinations and other decisions given in the merits phase of different cases. And by doing so, courts and tribunals may participate in the continuous process of establishing coherent jurisprudence on the rules

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[47] *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), Award on the Merits, 14 August 2015*, para. 151; *M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016*, para. 208; *The "Enrica Lexie" Incident (Italy v. India), Award, 21 May 2020*, para. 247.
[48] *M/V "Norstar" Case, Judgment*, para. 213; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russia), Award on the Preliminary Objections, 27 June 2022*, para. 200.
[49] Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007), pp. 239-240; Chester Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals' (2008) 30 Loyola of Los Angeles International & Comparative Law Review 219, p. 222.

of Part XV with other Part XV tribunals. One such example is the military activities exception regulated in Article 298(1)(b) of UNCLOS. It regulates that states can be exempted from accepting compulsory jurisdiction over disputes concerning military activities. However, since this provision is phrased broadly as a 'dispute concerning military activities', it is difficult to know the extent to which relevant issues can be excluded, and when the military activities exception is applicable. This is compounded by the fact that the term 'military activities' is not used in UNCLOS other than in Article 298(1)(b).

The military activities exception was clarified in detail for the first time in the *South China Sea* arbitration between the Philippines and China. In this case, the tribunal said that the military activities exception is applicable when the dispute concerns military activities, rather than when "a party has employed its military in some manner in relation to the dispute."[50] This showed that the mere presence of military assets or force was insufficient to characterise a dispute as one concerning military activities. By contrast, the tribunal determined the applicability of the military activities exception by focusing on the purpose of the actions at issue.

Accordingly, the tribunal decided that the Philippines' claims about China's island-building over certain maritime features, including military facilities were not disputes concerning military activities.[51] This was due to the circumstances in which China had repeatedly stated that its constructions were for civilian purposes.[52] In contrast, concerning the applicant's claim regarding the standoff situation between the Philippines' armed forces and China's authority, with its military vessels in the vicinity, the tribunal determined that it represented a 'quintessentially military situation' and that the military activities exception could be applied.[53] From the perspective of the tribunal, China's attempts to prevent the resupply and rotation of the Philippines' troops could not be construed as other than for military purposes.[54]

This was a newly crafted way of determining the applicability of the military activities exception in Article 298(1)(b) that had never been provided before. Nevertheless, this approach was followed by the *prima facie* jurisdictional determinations in the *Detention of Three*

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[50] *South China Sea Arbitration (Philippines v. China), Award, 12 July 2016*, para. 1158

[51] *Ibid*, paras. 938, 1028, and 1165.

[52] *Ibid,* paras. 935-936, 1027 and 1164. Please refer to 'Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs', 16.06.2015, < https://www.fmprc.gov.cn/nanhai/eng/fyrbt_1/201506/t20150616_8524913.htm ; last visited – 28.02.2023 >.

[53] *South China Sea Arbitration, Award, 12 July 2016*, para. 1161.

[54] *Ibid.*

*Ukrainian Naval Vessels* case.[55] This arbitration was about an incident in which three Ukrainian naval vessels and 24 naval personnel were detained and arrested by Russia in the Black Sea while they were transiting through the Kerch Strait. In this case, Russia construed the dispute submitted to the arbitral tribunal as concerning military activities since its military was protecting Russia's security interests from the unwarranted presence of foreign military forces.[56] In contrast, Ukraine argued that Russia's detention and arrest concerned law enforcement activities.[57]

In prescribing the provisional measures, ITLOS also determined the applicability of the military activities exception by focusing on the purpose of the activities at issue. ITLOS said that the underlying dispute leading to the arrest concerned the passage of Ukrainian naval vessels through the Kerch Strait. According to ITLOS, the passage was denied by Russian authorities on two grounds: first, the failure of the Ukrainian vessels to comply with Russia's domestic regulations; second, security concerns due to certain weather conditions.[58] These facts showed that the parties' differing views on the interpretation of the regime of passage through this area were at the centre of the dispute.[59] Hence, although the force was used by Russia in the process of arrest, ITLOS determined that the purpose of the activities in question was in the context of a law enforcement operation and, thus, *prima facie* the military activities exception was not applicable.[60] Though not directly mentioned, this decision showed the acceptance of the approach taken by the arbitral tribunal of the *South China Sea* case in that the applicability of Article 298(1)(b) should be determined by examining the purpose of the activities at issue.

Subsequently, this approach to determine the applicability of military activities exception in Article 298(1)(b) was applied again in the case of the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait,*[61] and in the latest award concerning the

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[55] This case was unilaterally initiated by Ukraine against Russia on 31 March 2019, and the dispute was submitted to Annex VII arbitration.
[56] *Detention of Three Ukrainian Naval Vessels, Provisional Measures Order*, para. 51; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Preliminary Objections of Russia, 24 August 2020*, para. 45.
[57] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Written Observations and Submissions of Ukraine on the Preliminary Objections of Russia, 27 January 2021*, paras. 33-47.
[58] *Ibid*, para. 71.
[59] *Ibid*, para. 72.
[60] *Ibid*, paras. 73-77.
[61] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russia), Award on the Preliminary Objections, 21 February 2020*, paras. 327-341.

preliminary objections of the *Detention of the Three Ukrainian Naval Vessels* case. In the latter award, the tribunal divided the events which gave rise to the dispute into three phases, the first of which concerned a confrontation between the militaries of the two states.[62] The tribunal concluded that the actions in the first phase were concerning military activities where Article 298(1)(b) was applicable, unlike the decision of ITLOS in its provisional measures order. However, the arbitral tribunal's decision was made after examining the given facts as well as the contexts and backgrounds surrounding the incident at issue in more detail.[63] This did not mean that ITLOS' approach to the interpretation of Article 298(1)(b) taken in its *prima facie* jurisdictional determinations was itself refuted by the arbitral tribunal. Instead, the arbitral tribunal praised the decision of ITLOS in the provisional measures proceedings as the "correct approach" to take in determining whether the military activities exception to the tribunal's jurisdiction could be invoked in this case.[64]

Now, it is conceivable that the military activities exception is invocable only when an action that causes a dispute is determined based on military purpose, rather than the existence of military assets or use of force. This is due to the convergent jurisprudence of Part XV tribunals on this provision. The establishment of constant judicial practice can contribute to both legal certainty and the development of international law.[65] The convergent jurisprudence of interpreting and applying Part XV rules is particularly crucial to the development of the Part XV system, which is structurally characterised by a multiplicity of forums. In this regard, the treatment of jurisdictional findings for prescribing the provisional measures can show the acceptability of previously created or clarified legal points given by other tribunals in different proceedings. As such, *prima facie* jurisdictional determinations can develop the Part XV system by engaging in the continuous process of building jurisprudence consistently.

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[62] The other two phases were: (2) the time between when Ukrainian vessels began to leave the anchorage area and were ordered to stop until they were boarded and arrested; and (3) the continued detention of the vessels and the prosecution of the servicemen.

[63] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russia), Award on the Preliminary Objections, 27 June 2022*, paras. 110-123.

[64] *Ibid*, para. 109.

[65] ICJ, *Handbook*, p. 14.

## 5. Concluding Remarks

In brief, the compulsory dispute settlement system under UNCLOS was an outcome of lengthy negotiations and delicate compromises among the drafters. As a result, many interpretive ambiguities were left in Part XV. Since the given provisions of Part XV cannot cover all eventualities, the questions derived from its rules rather show room for further development. One author says that the most feasible way to know how the compulsory procedures of UNCLOS Part XV would work is by examining the actual cases submitted thereunder.[66] This is because, under circumstances where answers cannot be found in the concluded provisions, practical questions concerning the functioning of the Part XV system can only be resolved by the courts and tribunals in charge.

Indeed, in determining *prima facie* jurisdiction for prescribing provisional measures, the tribunals have inevitably faced questions regarding those procedural provisions. Therefore, this research argues that judicial development of the dispute settlement system under UNCLOS does not necessarily happen only at the preliminary objections (or merits) stage. Indeed, the case law has shown that *prima facie* jurisdictional findings have directly clarified ambiguous provisions of Part XV and have participated in the continuous process of establishing convergent jurisprudence applied across the forums.

Given the accumulated volume of *prima facie* jurisdictional determinations so far (12 proceedings), this research believes that a study on judicial development of the Part XV system would be incomplete unless *prima facie* findings are also addressed. And the analysis above indicates that the *prima facie* jurisdictional determinations must also be examined to analyse the development of this system, together with other judicial determinations on the rules of Part XV. Thus, although referred to as hypothetical, the contribution of such determinations is not limited to the confinement of a single provisional measures case but continues to manifest across the different forums and stages.

[66] Karaman, *Dispute Resolution in the Law of the Sea*, p. 17.