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Finland v. Denmark: A Call to Clarify the International Court of Justice's Standards for Provisional Measures

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Finland v. Denmark: A Call to Clarify the International Court of Justice's Standards for Provisional Measures

Patricia A. Essoff

Abstract

This Comment argues that a prima facie showing of the existence of a right on the merits is an implicit factor that must be met by a party requesting interim relief before the Court will fully examine a request for provisional measures. Part I of the Comment discusses the Court's adjudicatory power to indicate provisional measures and examines the Court's three-part test for provisional measures. Part II sets forth the factual and procedural background and holding of *Great Belt*. Part III argues that *Great Belt* demonstrates the Court's unspoken reliance on a prima facie showing of the existence of a right on the merits when considering request for provisional measures. This Comment concludes that the Court should affirmatively clarify the test for provisional measures in order to establish a uniform and predictable rule of public international law.

COMMENT

*FINLAND v. DENMARK: A CALL TO CLARIFY THE INTERNATIONAL COURT OF JUSTICE'S STANDARDS FOR PROVISIONAL MEASURES**

INTRODUCTION

As the principal judicial organ of the United Nations, the International Court of Justice (the "ICJ" or "Court") is the sole international judicial body accessible to all U.N. Member States and whose jurisdiction extends to the entire field of international law.¹ The Court's jurisprudence, therefore, has a significant impact on the development of international law by providing guidance to Member States contemplating the Court's intervention.² Thus, as a matter of sound judicial practice and in order to avoid subsequent interpretative problems, the Court must ensure that its opinions are predictable.³

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1. See U.N. CHARTER art. 7, ¶ 1 (establishing International Court of Justice); SHABTAI ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, at ix-x (1979) (discussing demise of Permanent Court of International Justice, previously formed under League of Nations, and establishment of International Court of Justice in 1945 as principal judicial organ of United Nations); JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT, at ix (1983) (discussing accessibility of Court to U.N. Member States).

2. See LOUIS HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 601 (1987) (indicating that many Court judgments have major significance for clarification and development of international law); SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 5 (1958) (discussing importance of Court's contribution to development of international law); SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 100 (1983) (discussing attitude of Member States toward Court and indicating their willingness to accept Court's intervention as evidence of their conception that Court's jurisprudence represents embodiment of international law); Torsten Thiele, *A Report from the Hague: The 1984 Session on Public International Law*, 9 A.S.I.L.S. 159, 168 (stating that jurisprudence of Court remains common denominator in structure, development and application of international law in world order).

3. See LAUTERPACHT, *supra* note 2, at 13-14 (discussing Court's reliance on its jurisprudence in subsequent cases). Sir Hersch Lauterpacht states that

[i]t is not suggested that in pursuing the practice of relying upon and following its previous decisions the Court has adopted the common law doctrine

In the area of provisional measures, however, the Court's jurisprudence remains ambiguous, as demonstrated most recently by its decision in *Concerning Passage Through the Great Belt (Finland v. Denmark)*.⁴ In *Great Belt*, the Court employs the three standard criteria of its provisional measures determinations,⁵ but also implicitly recognizes an additional requirement: a *prima facie* showing of the existence of the rights on the merits.⁶ By failing to explicitly acknowledge this showing as a fourth criterion, however, the Court's jurisprudence in this area remains uncertain and unsettled.⁷

This Comment argues that a *prima facie* showing of the existence of a right on the merits is an implicit factor that must be met by a party requesting interim relief before the Court will fully examine a request for provisional measures. Part I of the Comment discusses the Court's adjudicatory power to indicate provisional measures and examines the Court's three-part test for provisional measures. Part II sets forth the factual and procedural background and holding of *Great Belt*. Part III argues that *Great Belt* demonstrates the Court's unspoken reliance on a *prima facie* showing of the existence of a right on the merits when considering requests for provisional measures. This Comment concludes that the Court should affirmatively clarify the test for provisional measures in order to establish a uniform and predictable rule of public international law.

of judicial precedent. The Court has not committed itself to the view that it is bound to follow its previous decisions The Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are the essence of the orderly administration of justice.

Id.

4. 1991 I.C.J. 12 (Provisional Measures Order of July 29).

5. *See id.* at 15-17, ¶¶ 14, 16, 23. The three criteria employed by the Court are substantive jurisdiction, risk or likelihood of irreparable prejudice, and urgency.

6. *See id.* at 17, ¶¶ 21-22.

7. *See id.* at 28 (opinion of Judge Shahabuddeen) (discussing how Court's jurisprudence suggests requirement for *prima facie* showing of existence of rights on merits although standard is unclear).

I. ICJ ADJUDICATORY POWER AND PROVISIONAL RELIEF STANDARDS

The Court's power to hear a case on the merits is distinct from its power to indicate provisional measures.⁸ The Court's power to settle disputes between Member States is based on the voluntary submission of claims and defenses by Member States to the Court.⁹ The Court's power to indicate provisional measures, in turn, is derived from its statutory authority to entertain *ex parte* applications of Member States and to exercise its jurisdiction *ex proprio motu*.¹⁰ The Court's power to

8. Compare I.C.J. Statute, art. 36(1), 59 Stat. 1055, 1060, 3 Bevens 1153, 1186 (providing that "jurisdiction of the Court comprises all cases which the parties refer to it") with I.C.J. Statute, art. 41(1), 59 Stat. 1055-1061, 3 Bevens 1153, 1188 (stating that "Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party"). See J. Peter A. Bernhardt, *The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran: Fiat Justitia, Pereat Curia?*, 20 VA. J. INT'L L. 557, 567 (1980) (noting that Court's jurisprudence reinforces proposition that article 41 jurisdiction is independent of jurisdiction on merits). Professor Bernhardt observes that "the Court pointed out [that] its power to indicate interim measures derives from the special provisions of article 41, which are entirely different from the general rules laid down in article 36." *Id.* at 567 (citing Court's opinion in *Anglo-Iranian Oil Company (U.K. v. Iran)*, 1952 I.C.J. 93, at 114).

9. See I.C.J. Statute, art. 36(1)-(2), 59 Stat. at 1060, 3 Bevens at 1186; *supra* note 8 (setting forth relevant language of article 36(1)). Article 36(2) provides that "the states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, the relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes." I.C.J. Statute, art. 36(2), 59 Stat. at 1060, 3 Bevens at 1186; I.C.J. Rules of Court 1978, art. 38, 4 I.C.J. Acts & Docs. 119. Article 38(5) of the Rules of Court provides that

[w]hen the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

Id. art. 38(5); see *Corfu Channel (U.K. v. Alb.)*, 1948 I.C.J. 15, 27 (Interim Protection Order of Mar. 25) (stating that consent of parties confers compulsory jurisdiction on Court); ROSENNE, *supra* note 2, at 312. Dr. Rosenne states that "[t]he consent of the parties that an international court may decide a . . . case is sufficient to confer jurisdiction on that tribunal." *Id.*

10. See I.C.J. Rules of Court 1978, art. 73, 4 I.C.J. Acts & Docs. 139. Article 73(1) (*ex parte* application) provides that "a written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made." *Id.* art. 73(1). Article 75(1) provides that

grant provisional measures is contingent on the Court's jurisdiction over a case in which the rights claimed on the merits relate to the rights claimed for interim relief.¹¹ The Court then considers whether "circumstances" involved in the case merit a grant of provisional measures.¹²

A. *The ICJ's Power to Grant Provisional Measures*

Article 36 of the Statute of the Court empowers the ICJ to settle disputes on the merits between Member States.¹³ This jurisdictional power is referred to as the Court's "compulsory jurisdiction."¹⁴ The Court obtains compulsory jurisdiction over parties by virtue of their consent to the Court's jurisdiction.¹⁵

1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

Id. art. 75(1), at 141; see BERNARD H. OXMAN, JURISDICTION AND THE POWER TO INDICATE PROVISIONAL MEASURES 325, 338 (Lori F. Damrosch ed., 1987) (comparing Court's power to indicate provisional measures based on statutory provisions of Statute of Court with power to deal with case on merits based on consent of parties).

11. See I.C.J. Rules of Court 1978, art. 73(1), 4 I.C.J. Acts & Docs. 139; OXMAN, *supra* note 10, at 326. Professor Oxman states that "article 73 of the Rules of Court contemplates a request for provisional measures only if it is made 'in connection with' a case on the merits." *Id.*; see SHABTAI ROSENNE, THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY 326 (1957). Dr. Rosenne notes that "the characteristic feature of incidental jurisdiction is that it depends, not upon the consent of the parties, but upon some objective fact, such as existence of proceedings before the Court." *Id.*

12. See I.C.J. Statute, art. 41(1), 59 Stat. at 1061, 3 Bevens at 1188. Article 41(1) provides that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." *Id.*; see OXMAN, *supra* note 10, at 325 (explaining that "circumstances" considered by Court include whether party requesting provisional measures requires immediate suspension of actions taken by other party pending Court's final decision to prevent irreparable harm to rights that are subject of dispute in main proceedings).

13. See *supra* note 9 (setting forth text of article 36(2)).

14. See I.C.J. Statute, arts. 36, 40(1), 50 Stat. 1055, 1060-61, 3 Bevens 1153, 1186, 1188. Pursuant to Article 40(1) of the Statute of the Court, parties may bring cases before the Court either by notification to the Court Clerk of a special agreement under which the parties agree to refer a dispute, or by an application of one of the parties founded on a declaratory clause for compulsory jurisdiction.

15. See *id.* at 1060, 3 Bevens at 1186; I.C.J. Rules of Court 1978, art. 38(5), 4 I.C.J. Acts. & Docs. 119.

Article 41 of the Statute of the Court empowers the Court to indicate provisional measures.¹⁶ The Court's power to grant provisional measures is referred to as its "incidental jurisdiction."¹⁷ The Court has expressly stated that incidental jurisdiction involves its jurisdictional power over provisional measures only, and officially requires neither an undisputed consensual jurisdiction over the parties, nor a definitive showing that the Court possesses jurisdiction over the merits.¹⁸ Rather, the Court obtains incidental jurisdiction over the parties either by submission of an *ex parte* application to the Court or by the Court's exercise of its jurisdiction *ex proprio motu*.¹⁹

16. See I.C.J. Statute, art. 41, 59 Stat. at 1061, 3 Bevens at 1188.

17. See SIR GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 533 (1986). Sir Gerald Fitzmaurice notes that

[t]he jurisdiction to indicate interim measures of protection is, so far as the International Court is concerned, part of the incidental jurisdiction of the Court, the characteristic of which is that it does not depend on any direct consent given by the parties to its exercise, but is an inherent part of the standing powers of the Court under its Statute. Its exercise is therefore, governed, not by the consent of the parties . . . but by the relevant provisions of the Statute and of the Rules of Court.

Id.; see SZTUCKI, *supra* note 1, at 238 (emphasizing that "incidental jurisdiction" is intended to convey another form or separate sphere of Court's jurisdiction that is relevant to incidental issues arising in ICJ proceedings).

18. See, e.g., *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1990 I.C.J. 64, 68-69, ¶ 20 (Provisional Measures Order of Mar. 2). The Court in *Arbitral Award of 31 July 1989* stated that

on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie* to afford a basis on which the jurisdiction of the Court might be founded.

Id.; see, e.g., *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99, 101, ¶ 13 (Interim Protection Order of June 22); *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135, 137, ¶ 14 (Interim Protection Order of June 22) (granting provisional measures before definitively ascertaining Court's jurisdiction over France on merits); *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1951 I.C.J. 89 (Interim Protection Order of July 5) (affirming that Court may indicate provisional measures without definitively possessing jurisdiction over parties on merits); IBRAHIM F. I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* 170 (1965) (stating that "[r]ather than being based on . . . consent of the parties, incidental jurisdiction is . . . founded on institutional instruments [Statute or Rules of Court]").

19. See, e.g., *Fisheries Jurisdiction (U.K. v. Ice.)*, 1972 I.C.J. 12 (Interim Protection Order of Aug. 17); *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1972 I.C.J. 30, 31 ¶ 1 (Interim Protection Order of Aug. 17). In the *Fisheries Jurisdiction* cases, the Court, in addition to making an interim order that directed Iceland to refrain from taking any steps to enforce its regulations concerning a 50 mile exclusive fishing zone, ordered protection, *ex proprio motu*, of Icelandic rights. The Court imposed a fish catch limit

B. *ICJ Standards for Provisional Measures*

A grant of provisional measures preserves the rights of the parties until the Court renders a final decision.²⁰ The underlying purpose of provisional measures, therefore, is to ensure that the Court will be able to render an effective judgment on the merits.²¹ The jurisprudence of the Court expressly requires that the parties demonstrate the presence of three criteria before the Court will indicate provisional measures.²² These criteria are the prospect of the Court's substantive jurisdiction, whether the situation requires urgent attention, and the risk or likelihood of irreparable prejudice to one or more

on British trawlers, bearing in mind "the exceptional dependence" of Iceland "upon coastal fisheries for its livelihood and economic development." *Fisheries Jurisdiction (U.K.)*, 1972 I.C.J. at 16, ¶¶ 23, 26; *Fisheries Jurisdiction (F.R.G.)*, 1972 I.C.J. at 34, ¶¶ 24, 26; see Peter J. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258 (1978) (noting that Court may "indicate interim measures *ex proprio motu*, including measures not requested").

20. See, e.g., *Polish Agrarian Reform (Germany v. Pol.)*, 1933 P.C.I.J. (ser. A) No. 58, at 175 (Interim Protection Order of July 29). The Court stated that "the essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures, should circumstances require them, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court." *Id.* at 177; see SZTUCKI, *supra* note 1, at 89. Professor Sztucki observes that

interim measures under Article 41 are . . . only conservatory of the rights in dispute, namely that they must be strictly related to these rights as claimed in the main submissions, and that they must not go beyond what is required for the preservation of these rights pending the final decision of the Court.

Id.

21. See *Nuclear Tests (Austl.)*, 1973 I.C.J. at 109 (opinion of Judge Singh) (stating that "if . . . in the exercise of its inherent powers the Court grants interim relief, its sole justification to do so is that if it did not, the rights of the parties would get so prejudicial that the judgment of the Court when it came could become meaningless"); OXMAN, *supra* note 10, at 325 (indicating that ultimate question is whether Court will be able to give effective relief to applicant if Court awaits full adjudication on merits).

22. See, e.g., *Trial of Pakistani Prisoners of War (Pak. v. Ind.)*, 1973 I.C.J. 328, 330 (Interim Protection Order of July 13) (stating that "it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency"); *Nuclear Tests (Austl.)*, 1973 I.C.J. at 101 (providing Court's standard that it "ought not to indicate such measures unless the provisions invoked by . . . Applicant appear, *prima facie*, to afford . . . basis on which the jurisdiction of . . . Court may be founded"); *South-Eastern Greenland (Nor. v. Den.)*, 1932 P.C.I.J. (ser. A/B) No. 48, at 276, 284 (Interim Protection Order of Aug. 3) (holding that object of interim measures is to preserve rights of parties pending Court's decision on merits "in so far, that is, as . . . damage threatening these rights would be irreparable in fact or in law"); OXMAN, *supra* note 10, at 324-26, 334-35, 341 (discussing Court's criteria for provisional measures).

of the parties if the requested measures are not granted.²³

1. The Prospect of Substantive Jurisdiction

When deciding requests for provisional measures, the Court first must determine whether a prospect of substantive jurisdiction exists.²⁴ Substantive jurisdiction pertains to the jurisdiction of the Court over the substance of the case on the merits.²⁵ In determining whether the Court has substantive jurisdiction, the Court considers the extent of its jurisdictional power over the parties as well as the nature of its power over the rights at issue.²⁶ To substantiate the Court's power over the parties during interim proceedings, the Court considers, but does not require, the parties' undisputed acceptance of the compulsory jurisdiction of the Court as to the main proceedings or the responding party's acceptance of the Court's jurisdiction to hear the claims presented by the party requesting the provisional measures.²⁷ To substantiate the Court's power over the rights at issue, the Court implicitly requires that the party requesting provisional measures make a *prima facie* showing of two elements—a nexus between the right alleged on the merits and the right sought to be preserved by provisional measures, and the validity of the requesting party's claim to such a right during the interim stages of the Court's decision.²⁸

23. See *supra* note 22 and accompanying text (discussing provisional measures requirements).

24. See *Aegean Sea (Greece v. Tur.)*, 1976 I.C.J. 3 (Interim Protection Order of Sept. 11); *Pakistani Prisoners*, 1973 I.C.J. 328; *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99 (Interim Protection Order of June 22); *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (Interim Protection Order of June 22); *Fisheries Jurisdiction (U.K. v. Ice.)*, 1972 I.C.J. 12 (Interim Protection Order of Aug. 17); *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1972 I.C.J. 30 (Interim Protection Order of Aug. 17); *Interhandel (Switz. v. U.S.)*, 1957 I.C.J. 105 (Interim Protection Order of Oct. 24); J. G. Merrills, *Interim Measures of Protection and the Substantive Jurisdiction of the International Court*, 36 CAMBRIDGE L.J. 86 (1977) (indicating substantive jurisdiction involves jurisdiction of Court to adjudicate case on merits).

25. See *supra* note 24 and accompanying text (discussing meaning of substantive jurisdiction).

26. See, e.g., *Nuclear Tests (Austl.)*, 1973 I.C.J. 99; *Nuclear Tests (N.Z.)*, 1973 I.C.J. 135; Kathie D. Frankel, *International Law: International Court of Justice Has Preliminary Jurisdiction to Indicate Interim Measures of Protection: The Nuclear Tests Cases*, 7 INT'L L. & POL. 163, 164 (1974) (noting that Court in *Nuclear Tests* required only that applicants demonstrate *prima facie* claim of possible jurisdiction and legally cognizable rights).

27. See *supra* notes 16-19 and accompanying text (discussing Court's power to obtain jurisdiction to indicate provisional measures without consent of parties).

28. See Frankel, *supra* note 26, at 164.

a. The Court's Power Over the Parties

The Court is satisfied that substantive jurisdiction over the parties is met when the Member State responding to a request for provisional measures does not dispute the Court's jurisdiction at the interim stages of a decision.²⁹ To further substantiate the Court's power over the parties in the interim proceedings, the Court also considers whether the parties have accepted the Court's compulsory jurisdiction in the main proceedings.³⁰

b. The Court's Exercise of Power Over the Rights at Issue

In addition to substantiating its jurisdiction over the parties, the Court must also find that the provisional measures sought will preserve cognizable rights.³¹ The Court has never explicitly stated that a *prima facie* showing of the existence of a right on the merits is a requirement for a grant of provisional measures.³² The Court's jurisprudence, however, reveals that

29. See ROSENNE, *supra* note 2, at 125 (explaining that no "proceedings" before Court will commence if jurisdiction of Court to hear case on its merits requires some step on part of respondent Member State for its perfection); Goldsworthy, *supra* note 19, at 277 (explaining that Court effectively considers requests for interim measures when Member States acknowledge their obligation to arbitrate before ICJ). Although the showing of a prospect of substantive jurisdiction at the interim stages does not preclude arguments by a state subsequent to the Court's grant of provisional measures that the Court never had proper jurisdiction over the case, such a showing narrows the grounds upon which a state may reasonably base its argument. See generally Jane Diplock, *Interim Relief in Cases of Contested Jurisdiction*, 8 SYDNEY L. REV. 478 (1978) (discussing ICJ cases in which parties challenged Court's jurisdiction on merits).

30. See, e.g., Polish Agrarian Reform (Germany v. Pol.), 1933 P.C.I.J. (ser. A/B) No. 58, at 175, 179 (Interim Protection Order of July 29); TASLIM O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 74 (1983). Judge Elias notes that "[t]he question of jurisdiction need not be first settled by the Court before the request for an indication of interim measures of protection . . . so long as the Court is satisfied that, *prima facie*, it has jurisdiction to begin with." *Id.*

31. See, e.g., Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99, 103, ¶ 21 (Interim Protection Order of June 22); Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135, 139, ¶ 22 (Interim Protection Order of June 22). The Court stated that it could not "exercise its power to indicate interim measures of protection unless the rights claimed in the Application, *prima facie*, appear to fall within the purview of the Court's jurisdiction." *Nuclear Tests (Austl.)*, 1973 I.C.J. at 103, ¶ 21; *Nuclear Tests (N.Z.)*, 1973 I.C.J. at 139, ¶ 22; see Goldsworthy, *supra* note 19, at 267 (stressing that Court examines admissibility of subject matter of principle claim upon determining that it has *prima facie* jurisdiction).

32. See SZTUCKI, *supra* note 1, at 123 (explaining that case law of Court does not require that applicant and requesting states show *prima facie* case).

such a showing is an implicit requirement.³³ To satisfy the Court's implicit requirement, a party must meet a two-part test.³⁴

i. A Nexus Between the Right at Issue in the Main Proceedings and the Right Sought to Be Preserved by Provisional Measures

By means of the first part of the two-part *prima facie* showing of the existence of a right, the Court requires that a nexus exist between the right sought to be preserved by provisional measures and the alleged right at issue in the main claim.³⁵ Three prominent ICJ decisions illustrate that the nature of the rights sought to be preserved by provisional measures must correspond with the nature of the alleged rights at issue in the main proceedings.³⁶

33. See, e.g., *Nuclear Tests (Austl.)*, 1973 I.C.J. at 103, 108, ¶¶ 21, 23; *Nuclear Tests (N.Z.)*, 1973 I.C.J. at 139, 145, ¶¶ 22, 24 (opinion of Judge Singh). Judge Singh discussed the fact that article 41 and the Rules of the Court do not set forth a test for provisional measures. Judge Singh explained further that each Member of the Court must find, therefore, a "possible valid basis" that the Court's "competence exists and that the Application is, *prima facie* entertainable." *Id.*; see *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 19-20, ¶¶ 37-43 (Interim Protection Order of June 22) (illustrating Court's recognition that United States had valid right to be preserved by provisional measures); Frankel, *supra* note 26, at 164; see also Goldsworthy, *supra* note 19, at 276. Professor Goldsworthy observes that "an indication will be made . . . if there exists a possibility that the Court may have jurisdiction over the subject matter of the principal suit, and the legal rights in respect of which protection is sought are particular to the applicant." *Id.*

34. See *supra* note 28 and accompanying text (discussing implicit recognition by Court of two-part test in satisfaction of *prima facie* showing of existence of rights claimed).

35. See, e.g., *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1990 I.C.J. 64, 69, ¶ 24 (Provisional Measures Order of Mar. 2) (emphasizing that purpose of exercising power conferred upon Court by article 41 is "to protect rights which are subject of dispute in judicial proceedings"); *Aegean Sea (Greece v. Turk.)*, 1976 I.C.J. 3, 11, ¶ 34 (Interim Protection Order of Sept. 11); *Fisheries Jurisdiction (U.K. v. Ice.)*, 1972 I.C.J. 12, 15, ¶ 14; *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1972 I.C.J. 30, 33, ¶ 14. In *Fisheries Jurisdiction*, the Court noted that

the contention of the Applicant that its fishing vessels are entitled to continue fishing within the above-mentioned zone of 50 nautical miles is part of the subject-matter of the dispute submitted to the Court, and the request for provisional measures designed to protect such rights is therefore directly connected with the Application.

Fisheries Jurisdiction (U.K.), 1972 I.C.J. at 15, ¶ 14; *Fisheries Jurisdiction (F.R.G.)*, 1972 I.C.J. at 33, ¶ 14; see *Polish Agrarian Reform (Germany v. Pol.)*, 1933 P.C.I.J. (ser. A/B) No. 58, at 175 (Interim Protection Order of July 29).

36. See, e.g., *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99, 105, ¶ 30 (Interim Pro-

Nuclear Tests,³⁷ for example, illustrates the Court's requirement of a correspondence between the rights sought to be provisionally preserved^t and the rights alleged on the merits. In *Nuclear Tests*, the Court stressed that it was indicating provisional measures to preserve rights claimed in the litigation by Australia and New Zealand against France for alleged unlawful atmospheric nuclear testing in the South Pacific.³⁸ The Court's justification for an examination of the nature of the

tection Order of June 22); *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135, 141, ¶ 31 (Interim Protection Order of June 22). Before proceeding to indicate provisional measures, the Court found that the right claimed by Australia on the merits to be free from the harm inherent in atmospheric nuclear testing was the same right Australia sought to have preserved during the pendency of the requested interim order. *Nuclear Tests (Austl.)*, 1973 I.C.J. at 103, ¶ 9. The Court conveyed its satisfaction that it should indicate interim measures of protection in order to preserve the right claimed by Australia in respect of the deposit of radioactive fallout on her territory. *Id.* at 101, 103, ¶¶ 9, 22-23; *see id.* at 115 (illustrating that Court will not grant provisional relief where rights sought to be preserved do not correspond with rights alleged on merits). In *Nuclear Tests (Austl.)*, Judge Gros distinguished *Fisheries Jurisdiction* on the ground that "the right of the Applicant States which was protected . . . was recognized as being a right currently exercised, whereas the claim of Iceland constituted a modification of existing law." *Nuclear Tests (Austl.)*, 1973 I.C.J. at 122; *cf. Fisheries Jurisdiction (U.K.)*, 1972 I.C.J. 12; *Fisheries Jurisdiction (F.R.G.)*, 1972 I.C.J. 30.

In *Fisheries Jurisdiction*, the United Kingdom and Federal Republic of Germany contested the unilateral extension by Iceland of its fisheries jurisdiction to 50 miles. The Court indicated a maximum fishing quota that restrained the enforcement of Icelandic regulations against U.K. and West German ships beyond 12 miles, and imposed catch limits on U.K. and German fishing in the area. *Fisheries Jurisdiction (U.K.)*, 1972 I.C.J. at 17; *Fisheries Jurisdiction (F.R.G.)*, 1972 I.C.J. at 35. The Court held that the contention by Iceland that its fishing vessels were entitled to continue fishing within the zone of 50 nautical miles was part of the subject matter of the underlying dispute and, thus, that the request for provisional measures was designed to protect such rights and was satisfactorily connected to the main proceedings. *Fisheries Jurisdiction (U.K.)*, 1972 I.C.J. at 15; *Fisheries Jurisdiction (F.R.G.)*, 1972 I.C.J. at 33. In *Aegean Sea*, the Court denied interim measures, in part, due to a lack of nexus between Greece's claim on the merits that it had exclusive sovereign rights of exploration in certain parts of the Aegean Sea and the rights sought to be preserved by provisional measures to have Turkey abstain from taking any military action that would aggravate or extend the dispute between the two countries based on an alleged agreement between the two countries. *Aegean Sea*, 1976 I.C.J. at 9, ¶ 23. In *Polish Agrarian Reform*, the Court denied interim relief because the rights sought to be preserved by Germany were not the same rights Greece requested the Court adjudicate on the merits. *Polish Agrarian Reform*, 1933 P.C.I.J. at 175.

37. (*Austl. v. Fr.*), 1973 I.C.J. 99 (Interim Protection Order of June 22); *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (Interim Protection Order of June 22).

38. *See Nuclear Tests (Austl.)*, 1973 I.C.J. at 105, ¶ 30 (granting "interim measures of protection in order to preserve the right claimed by Australia . . . in respect of the deposit of radio-active fall-out on her territory"); *Nuclear Tests (N.Z.)*, 1973 I.C.J. at 141, ¶ 31 (granting interim relief on same grounds).

rights during the interim stages is in accord with the purpose of provisional relief, that is, to suspend any action that would irreparably injure the rights at issue and result in the Court's inability to render an effective decision on the merits.³⁹

Aegean Sea further illustrates the Court's requirement of a nexus between the rights claimed in the request for interim protection and the rights claimed on the merits.⁴⁰ In *Aegean Sea*, Greece requested that the Court vindicate its right to Turkey's performance under Articles 2(4) and 33 of the U.N. Charter.⁴¹ The Court found that the request for provisional measures was not the subject of the principal claims that Greece had submitted.⁴² On the merits, Greece requested that the Court declare that Greece enjoyed sovereign rights taking precedence over those of Turkey to explore and exploit the continental shelf located below a group of islands over which both states claimed sovereignty.⁴³ Greece's request for provisional measures, however, sought that the Court direct both countries to refrain from undertaking military action in the disputed area pending the Court's final decision.⁴⁴ The Court denied provisional relief because Greece's request for provisional measures did not fall within the stated purpose of article 41 to preserve "rights" that are the subject of the main proceedings.⁴⁵

*Polish Agrarian Reform*⁴⁶ also illustrates the Court's requirement that a nexus exist between the right claimed on the mer-

39. See *supra* notes 20-21 and accompanying text (discussing purpose of provisional measures).

40. *Aegean Sea* (Greece v. Turk.), 1976 I.C.J. 3 (Interim Protection Order of Sept. 11).

41. *Id.* at 7, 11, ¶¶ 16, 34; see U.N. CHARTER arts. 2(4), 33. Article 2(4) of the U.N. Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." *Id.* art. 2(4). Article 33(1) of the U.N. Charter provides that "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." *Id.* art. 33(1).

42. *Aegean Sea*, 1976 I.C.J. at 11, ¶ 34.

43. *Id.* at 7, ¶ 16.

44. *Id.* at 11, ¶ 34.

45. *Id.*

46. (Germany v. Pol.), 1933 P.C.I.J. (ser. A/B) No. 58, at 175, 177.

its and the right sought to be preserved by interim measures. In *Polish Agrarian Reform*, the Court denied Germany's request for provisional measures because the rights claimed by Germany in the main proceedings were incompatible with the rights that it sought to protect by means of a request for provisional measures.⁴⁷ The German government claimed in its application to the Court that the Polish government had discriminated against Polish nationals of German descent in Poland while implementing the Polish agrarian reform law.⁴⁸ Germany requested that the Court declare that Poland had discriminated against Polish nationals and that, therefore, the Polish nationals were entitled to reparations.⁴⁹ In its request for interim measures, however, Germany requested that the Court require the Polish government to refrain from discriminating against Polish nationals by ceasing to expropriate the estates of Polish nationals located in Poland.⁵⁰ The Court found that the request for interim measures differed from the claims presented in the main proceedings because the provisional request involved a request to suspend the application of the Polish agrarian law based on possible future cases of discrimination, rather than a request that the Court make a preliminary determination whether actions taken by Poland in the past were discriminatory and should immediately cease until the Court renders a final decision.⁵¹ For this reason, the Court de-

47. *See id.* at 177. In *Polish Agrarian Reform*, the Court stated that "the essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures . . . is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court." *Id.*

48. *Id.* at 176-78. Germany contended that the Polish government violated Articles 7 and 8 of the Treaty Between the Principle Allied & Associated Powers and Poland, signed at Versailles on June 28, 1919, by discriminating against Polish nationals of German descent in the application of the Polish Agrarian Reform law. *Id.* at 177-78.

49. *Id.* at 177.

50. *Id.* at 178.

51. *Id.* at 177. The Court stated that

the interim measures asked for would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim, as submitted to the Court by the Application instituting proceedings.

Id. at 178; *see* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1990 I.C.J. 64 (Provisional Measures Order of Mar. 2) (denying provisional measures on similar grounds); SZTUCKI, *supra* note 1, at 89. Professor Sztucki notes that the Court is

clined to indicate provisional measures.⁵²

ii. The Validity of a Party's Claim to the Right

The Court has not yet expressly articulated that the validation of a Member State's rights on the merits is a required element of the Court's test for provisional measures. Before the Court will award interim relief, however, a party requesting provisional measures must be able to demonstrate that the right it seeks to protect is a right that the party can legitimately claim under principles of public international law.⁵³ The Court most clearly alluded to a requirement that a party demonstrate a legitimate self-interest in the rights claimed in *Nuclear Tests*.⁵⁴ In *Nuclear Tests*, Australia and New Zealand claimed that France's atmospheric nuclear testing violated their right to be free from the harm that could result from nuclear fallout on their territories.⁵⁵ The Court, without expressly indicating that harm would come to any rights possessed by Australia and New Zealand, acknowledged that the evidence presented by the parties supported the possibility that damage could be sustained by Australia and New Zealand

"rather particular about the requirement of correspondence between the interim measures and the main claim." *Id.*; see also *Charzów Factory* (Germany v. Pol.), 1927 P.C.I.J. (ser. A) No. 8, at 10 (holding that Germany's request for advance payment in partial satisfaction of principal claim for reparation was not to conserve some German right, but rather to obtain interim judgment).

52. *Polish Agrarian Reform* (Germany v. Pol.), 1933 P.C.I.J. (ser. A/B) No. 58, at 175, 177.

53. See, e.g., *Nuclear Tests* (Austl. v. Fr.), 1973 I.C.J. 99, 105, ¶¶ 29-31 (Interim Protection Order of June 22); *Nuclear Tests* (N.Z. v. Fr.), 1973 I.C.J. 135, 141, ¶¶ 30-32 (Interim Protection Order of June 22) (illustrating supportive evidence Court considered before granting interim relief); see also *Nuclear Tests* (Austl.), 1973 I.C.J. at 106-08 (opinion of Judge Arechega) (discussing how ICJ examines specific legal and factual evidence provided Applicants in support of requests for interim measures); *id.* at 103, ¶ 22 (discussing Australia's claim, in part, of an interest in protecting freedom of seas and highlighting fact that Court will not grant interim measures to protect general, rather than specific interests espoused by states); *Fisheries Jurisdiction* (U.K. v. Ice.), 1972 I.C.J. 12, 17 (Interim Protection Order of Aug. 17) (granting interim protection for rights of United Kingdom that were related to special, historic rights of U.K. nationals in fishing); *Goldsworthy*, *supra* note 19, at 270 (indicating that requirement that states demonstrate special interests in rights claimed appears to be implied in concept of interim measures).

54. *Nuclear Tests* (Austl.), 1973 I.C.J. at 103; *Nuclear Tests* (N.Z.), 1973 I.C.J. at 137.

55. *Nuclear Tests* (Austl.), 1973 I.C.J. at 103-05, ¶¶ 22-30; *Nuclear Tests* (N.Z.), 1973 I.C.J. at 139-41, ¶¶ 23-31.

from nuclear fall-out on their territories.⁵⁶ The Court further stressed that it could not be assumed that the governments of Australia and New Zealand would not be able to show a legal interest with respect to claims raised in their applications.⁵⁷ The Court, therefore, considered whether the claims asserted by the parties might effectively be cognizable causes of action.⁵⁸ As demonstrated by *Nuclear Tests*, the party requesting provisional measures must demonstrate the existence of the rights claimed in order to prove to the Court that it is not dealing with a frivolous request for provisional measures.⁵⁹

2. Urgency

If the party requesting provisional measures meets the requirement of substantive jurisdiction, the Court will then consider the urgency of the party's claim for interim relief. To receive a grant of provisional measures, a party must demonstrate that a particular petition for provisional relief requires "urgent" relief.⁶⁰ The Court has indicated that a situation is

56. *E.g.*, *Nuclear Tests (Austl.)*, 1973 I.C.J. at 102-03, ¶¶ 17, 23.

57. *Id.* at 103, ¶ 23; *Nuclear Tests (N.Z.)*, 1973 I.C.J. at 140, ¶ 24. The Court stated that "it [could not] be assumed *a priori* that . . . the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application." *Nuclear Tests (Austl.)*, 1973 I.C.J. at 103, ¶ 23; *see United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 16, ¶ 28 (Provisional Measures Order of Dec. 15). The Court in *United States Diplomatic & Consular Staff in Tehran* stated that

a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and whereas in the present case the purpose of the United States request appears to be . . . to preserve the substance of the rights which it claims *pendente lite*.

Id.

58. *See Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99, 105, ¶ 29 (Interim Protection Order of June 22); *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135, 141, ¶ 30 (Interim Protection Order of June 22). The Court considered scientific reports on the effects of atmospheric nuclear testing and determined that they demonstrated sufficient evidence to support the "possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radio-active fall-out resulting from such tests." *Nuclear Tests (Austl.)*, 1973 I.C.J. at 105, ¶ 29.

59. *See* EDWARD DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 165 (1932) (expressing view that "if it is apparent that applicant can not succeed in his main action, preliminary relief will of course be denied").

60. *See* Rules of the Court 1978, art. 74, 4 I.C.J. Acts & Docs. 139. Article 74 of the Rules of the Court provides that "[t]he Court . . . shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency." *Id.*; *see Nuclear Tests (Austl.)*, 1973 I.C.J. at 104, ¶ 26; *Nuclear Tests (N.Z.)*, 1973 I.C.J. at 140,

sufficiently urgent when harm to the rights of the parties will result before the Court renders a final decision on the merits.⁶¹ Conversely, the Court will deny provisional relief to the party petitioner if such relief is not urgently required.⁶²

3. Irreparable Injury

Once a party has met the requirements of substantive jurisdiction and urgency, the party seeking a grant of provisional measures must demonstrate that the rights at issue will suffer irreparable prejudice.⁶³ The party must demonstrate the possibility that the rights claimed will be irreparably prejudiced by action taken before final judgment can be rendered.⁶⁴ The Court will not grant provisional measures, however, where the rights claimed to be irreparably harmed may be made whole by monetary compensation.⁶⁵

¶ 27; Trial of Pakistani Prisoners of War (Pakis. v. India), 1973 I.C.J. 328, 330, ¶¶ 13-14 (Interim Protection Order of July 13) (reviewing Court's requirement of showing of imminence before granting provisional measures); ROSENNE, *supra* note 1, at 251-52 (discussing I.C.J. Rules of Court, art. 74).

61. *Pakistani Prisoners*, 1973 I.C.J. at 330; *see* *Interhandel* (Switz. v. U.S.), 1957 I.C.J. 105 (Interim Protection Order of Oct. 24) (denying interim measure against United States on ground that new federal U.S. court proceedings relating to underlying claim would not reach quick conclusion and thus urgency was absent).

62. *Interhandel*, 1957 I.C.J. at 112.

63. *See, e.g.*, *Aegean Sea* (Greece v. Turk.), 1976 I.C.J. 3, 9, ¶ 25 (Interim Protection Order of Sept. 11) (stressing that power of Court to indicate provisional measures presupposes that irreparable injury should not be caused to rights of parties).

64. *See, e.g.*, *Fisheries Jurisdiction* (U.K. v. Ice.), 1972 I.C.J. 12, 16 (Interim Protection Order of Aug. 17); *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1972 I.C.J. 30, 34 (Interim Protection Order of Aug. 17). The Court stated that "the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour." *Fisheries Jurisdiction* (U.K.), 1972 I.C.J. at 16, ¶ 22; *Fisheries Jurisdiction* (F.R.G.), 1972 I.C.J. at 34, ¶ 23; *see* *Nuclear Tests* (Austl. v. Fr.), 1973 I.C.J. 99, at 105, ¶ 29 (Interim Protection Order of June 22); *Nuclear Tests* (N.Z. v. Fr.), 1973 I.C.J. 135, at 141, ¶ 30 (Interim Protection Order of June 22) (granting provisional measures due to radioactive fallout on ground of possible irreparable damage to Australia); *see also* *United States Diplomatic & Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 7, 20, ¶ 42 (holding that hostage situation in Tehran posed serious possibility of irreparable harm).

65. *See, e.g.*, *Denunciation of the Treaty of November 2, 1865 Between China and Belgium* (Belg. v. China), 1927 P.C.I.J. (ser. A) No. 8, at 6 (granting provisional measures on ground that injury expected "could not be made good by . . . payment of an indemnity or by compensation or restitution in some other material form").

II. CONCERNING PASSAGE THROUGH THE GREAT BELT (FINLAND v. DENMARK)⁶⁶

A. *Factual and Procedural Background*

Great Belt involved a conflict between two rights—the right of passage through an international strait and the right to territorial sovereignty.⁶⁷ In *Great Belt*, Finland challenged Denmark's construction of a sixty-five meter clearance bridge across the Great Belt strait which separates the two major Danish population centers of Jutland and Funen.⁶⁸ Finland opposed the construction of the bridge because it would block the passage of Finnish offshore craft ranging in heights of up to 170 meters, and whose only navigable sea lane to the high seas is the Great Belt strait.⁶⁹

After negotiations between Finnish and Danish officials failed, Finland applied to the Court for an adjudication of the dispute.⁷⁰ Finland filed a request for an indication of provi-

66. 1991 I.C.J. 12 (Fin. v. Den.) (Provisional Measures Order of July 29).

67. *See id.* at 13.

68. *See* Written Observations by the Government of the Kingdom of Denmark Relating to the Request for an Indication of Provisional Measures (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 2 (June 1991). Since 1948, the establishment of a fixed traffic link across the Great Belt has been an undertaking of paramount national importance to Denmark. *Id.* at 4. In 1948, Denmark initiated the Great Belt project by setting up a governmental commission to study possibilities of constructing a fixed link across the Great Belt. *Id.* On October 24, 1989, Denmark officially notified Finland and other interested states that a fixed traffic link consisting of a high level suspension bridge with a clearance of 65 meters would be built across the East Channel of the Great Belt and a low level bridge would be built across the West Channel. *Id.* at 6. Today, about one-half of the Danish population lives on Zealand and neighboring islands, and the other half lives on Jutland and Funen islands. *Id.* at 2. Transportation across the Great Belt is currently provided by ferry, but frequent adverse weather conditions often shut down ferry service, leaving Danes stranded and unable to commute between Jutland and Funen. *Id.*

69. *See* Application Instituting Proceedings Against the Kingdom of Denmark (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 2 (May 17, 1991). Finnish offshore craft range in heights of up to 170 meters. *Id.* at 8, ¶ 18. The bridge to be constructed across the Great Belt will reach a maximum height of 65 meters. *Id.* at 2, ¶ 1. Therefore, it will be impossible for Finnish craft to traverse through the Great Belt once the bridge is built. *Id.*

70. *See id.* at 4, ¶¶ 7-8. Finland attempted to negotiate with Denmark concerning its belief that modification of the bridge construction project was possible and would allow continued passage of Finnish craft through the Great Belt. *Id.* ¶ 7. Denmark agreed to submit to negotiations primarily due to its long-standing friendly relations with Finland, not because it wanted to concede to alleged Finnish rights. *See Verbatim Record CR91/9* (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage

sional measures prohibiting further progress of the Great Belt project.⁷¹ After oral argument, the Court denied the request for an immediate cessation of the Great Belt project.⁷² The Court based its decision primarily on a lack of urgency regarding Finland's alleged right of passage through the Great Belt strait because further construction on the bridge would not occur before 1994.⁷³

through the Great Belt) 21, 23 (July 1, 1991). After it became evident that Finnish needs could not be met, Denmark refused to continue negotiations. *Id.* First, Denmark indicated that Finland waited too long to voice any objections and that the project was too far advanced. *Id.* at 21. Second, although Denmark conceded that the right of passage through the Great Belt existed for all ships, Denmark argued that the right did not extend to Finnish drill ships and oil rigs, which Denmark insisted were not ships for purposes of enjoying this right. *Id.* at 23.

71. Request from the Ministry for Foreign Affairs of Finland for an Indication of Provisional Measures (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) (May 22, 1991).

72. *See* Concerning Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, 18, ¶ 27 (Provisional Measures Order of July 29).

73. *See* *Great Belt*, 1991 I.C.J. at 18, ¶ 27. Finland asserted that continued construction of the bridge would prejudice the outcome of the dispute by hampering the goal of continued negotiations toward modification of the bridge plans and, ultimately, would impede the right of passage, which a finished or very advanced bridge project would deny. *See* Request from Ministry for Foreign Affairs of Finland for an Indication of Provisional Measures (Fin. v. Den.), 1991 I.C.J. Pleadings at 2, ¶ 6. Denmark observed, however, that construction works for the bridge project were not expected to be completed until 1994. *See* Written Observations by the Government of the Kingdom of Denmark Relating to the Request for an Indication of Provisional Measures (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt), at 8-9, ¶ 33. On this basis, the Court decided that no urgency existed requiring an immediate cessation of the Great Belt project. *See* *Great Belt*, 1991 I.C.J. at 18, ¶ 27. Finland based its request for provisional measures on the ground that international law guaranteed its right of passage through the Great Belt. *See* Application Instituting Proceedings Against the Kingdom of Denmark (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt), at 12, ¶ 24 (asserting that Great Belt is strait used for international navigation connecting two parts of high seas, as defined in *Corfu Channel* (U.K. v. Alb.), 1948 I.C.J. 15 (defining international strait as "strait used for international navigation between two parts of high seas")); *see also* Verbatim Record CR91/9 (Fin. v. Den.), 1991 I.C.J. Pleadings at 15. Finland also asserted that its regime of free passage is controlled by the 1857 Treaty of Copenhagen on the Abolition of the Sound Dues, 117 Consol. T.S. 285 [hereinafter 1857 Treaty]. Verbatim Record CR91/9 (Fin. v. Den.), 1991 I.C.J. Pleadings at 15. Finland interpreted the 1857 Treaty to pertain to "vessels," which was in opposition to Denmark's interpretation that it only pertained to "cargo-carrying merchant ships." *Id.* Finland also claimed that the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter 1958 Convention], granted a right of free passage, and that, accordingly, proper weight should also be given to customary international law in light of *Corfu Channel*, in which the Court concluded that customary international law recognized special transit rights pertaining to straits used for international navigation. Verbatim Record

B. *The Court's Decision*

In a succinct decision, the Court found that Finland failed to demonstrate two of the three standard requirements for a grant of provisional measures.⁷⁴ The Court found that Finland failed to demonstrate both urgency and irreparable preju-

CR91/9 (Fin. v. Den.), 1991 I.C.J. Pleadings at 15. Finland claimed further that the 1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf. 62/122 [hereinafter 1982 Convention], also substantiated the concept of transit passage as part of customary international law. Verbatim Record CR91/9 (Fin. v. Den.), 1991 I.C.J. Pleadings at 16; Verbatim Record 91/11 (Fin. v. Den.), 1991 I.C.J. Pleadings at 50. Denmark argued that the 1982 transit passage regime was inapplicable to the Danish straits, which are governed by their own treaty regime according to Article 35 of the 1982 Convention. *Id.* In support of its contention, Denmark quoted Article 35(c) of the 1982 Convention, which provides that "the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits [governs]." *Id.* at 51. According to Denmark, under Article 35(c) of the 1982 Convention, the Danish straits are governed by the 1857 Treaty and the 1958 Convention, two treaties of long-standing. *Id.* at 53. Denmark indicated that the scope of the 1857 Treaty facilitated and increased maritime relations existing in 1857 by removing all dues levied on non-Danish ships and their cargoes through the Danish straits. *Id.* at 64-65. According to Denmark, Finnish offshore craft are not cargo-carrying merchant vessels as envisioned under the 1857 Treaty and, thus, are not to be treated as "ships" for purposes of enjoying a right of passage governed thereunder. *Id.* at 65. Denmark also indicated that states that are parties to the 1958 Convention could not substitute the 1982 Convention for the 1958 Convention. *Id.* at 61. Although Article 311(1) of the 1982 Convention indicates that the Convention shall prevail as between states parties over the 1958 Convention, the Danish straits are excluded from governance under the 1982 Convention pursuant to article 35(c) thereunder. *Id.* at 62. Denmark argued that the position taken by Finland with respect to the establishment of a connection between the treaties and its alleged right of passage was, therefore, irrelevant. *Id.* at 63. Denmark also noted that the 1857 Treaty is applicable to "merchant ships" only, and that it is therefore more restrictive than, for example, the 1982 Convention. *Id.* at 66. Relying on the authority of Professor H. Caminos, an author and scholar of the international law of straits under the 1982 Convention, Denmark indicated that if a long-standing convention exempted by Article 35(c) calls for the application of a more restrictive regime than should be applied under the 1982 Convention, the more restrictive regime would take precedence. *Id.*; see Danish Written Observations (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 28, ¶ 113 (citing H. CAMINOS, *THE LEGAL REGIME OF STRAITS IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* 135 (1987)). Denmark insisted that because the 1982 Convention does not govern any of the Danish straits, any rights alleged by Finland to exist in accordance with the provisions thereunder are non-existent. *Id.*; see CAMINOS, *supra*, at 130-31; J. A. YTURRIAGA, *STRAITS USED FOR INTERNATIONAL NAVIGATION* 292 (1991). These commentators have extensively studied and published writings on the subject of straits, and all agree that the regimes that qualify under Article 35(c) are the Turkish Straits (Dardanelles and Bosphorus), the Danish Straits, the Strait of Magellan, and the Finnish Aaland Straits. See Verbatim Record CR91/11 (Fin. v. Den.), 1991 I.C.J. Pleadings at 50.

74. See *Great Belt*, 1991 I.C.J. 12.

dice.⁷⁵ The Court stressed, however, that Finland had demonstrated the element of prospective substantive jurisdiction.⁷⁶

1. Prospect of Substantive Jurisdiction

The Court was satisfied that the parties had made a *prima facie* showing of a prospect of substantive jurisdiction.⁷⁷ Finding that its jurisdiction was not challenged, the Court stressed that it did not need to be satisfied definitively that it possessed jurisdiction on the merits of the case.⁷⁸ Instead, the Court acknowledged both Denmark's and Finland's acceptance of the Court's compulsory jurisdiction on the merits, and thereby found that the Court's jurisdiction in *Great Belt* was undis-

75. *See id.* at 17-18, ¶¶ 25-27 (finding that alleged Finnish right of passage would not be infringed because no physical obstruction would occur before 1994); *id.* at 18-19, ¶¶ 28-29 (finding no irreparable prejudice because Finland failed to adduce evidence that damage would be caused to its rights).

76. *See id.* at 15-16, ¶¶ 13-15. The Court stated that

[t]he Republic of Finland claims to found the jurisdiction of the Court . . . primarily upon declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court;

Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

Whereas in the present case it has been stated by Denmark that the Court's jurisdiction on the merits is not in dispute;

Whereas the Court in the circumstances of the present case is satisfied that it has the power to indicate provisional measures.

Id.

77. *See* Application Instituting Proceedings against the Kingdom of Denmark (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 4 (May 17, 1991). The Court was satisfied that Finland had met this criterion based on a showing of acceptance of the Court's compulsory jurisdiction by both countries. *Id.* at 50. Finland filed an application with the Registrar pursuant to article 40(1) and articles 38 and 40 of the Rules of the Court. *Id.*; *see Great Belt*, 1991 I.C.J. at 15, ¶ 13 (stating that jurisdiction of Court was founded upon declarations made by parties). Denmark's declaration of acceptance, dated December 10, 1956, states that "[p]ursuant to art. 36, ¶ 2, of the Statute of the International Court of Justice, the Kingdom of Denmark recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in relation to any other State accepting the same obligation, that is to say on condition of reciprocity." Application Instituting Proceedings Against the Kingdom of Denmark (Fin. v. Den.), 1991 I.C.J. Pleadings at 4, ¶ 9. An identical declaration was made by Finland on June 25, 1958. *Id.*

78. *See* Concerning Passage through the Great Belt (Finland v. Denmark), 1991 I.C.J. 12, 15-16, ¶¶ 14-15 (Provisional Measures Order of July 29).

puted.⁷⁹

2. The Element of a *Prima Facie* Showing of the Existence of a Right on the Merits

The Court recognized the existence of Finland's general right of passage through the Great Belt strait before it further considered the request for provisional measures.⁸⁰ The Court stressed Denmark's concession that a general right of passage through the Danish straits existed and that the application of that right to Finnish offshore craft was an issue relating to the merits of the case.⁸¹ Although the Court emphasized that Denmark acknowledged the existence of Finland's general right of passage through the Great Belt strait, the Court did not state whether Finland was obliged to make a *prima facie* showing that it actually had this right of passage.⁸²

The Court reiterated that the purpose of provisional measures is to preserve the rights that are the subject of dispute in the main proceedings.⁸³ Therefore, before the Court considered whether the situation warranted a cessation of the Great Belt project, the Court acknowledged that a right of passage through the Great Belt strait existed that extended to Finland.⁸⁴ The Court also acknowledged that the nature of the dispute on the merits was the interpretation of the right of passage through the Great Belt strait as it specifically applied to Finnish offshore craft.⁸⁵ The Court then examined the nature of the right Finland sought to have preserved by provisional measures and, in so doing, implicitly sought to satisfy itself that a connection existed between the provisional rights and

79. *Id.* at 15.

80. *Id.* at 17, ¶ 22.

81. *Id.* ¶ 21.

82. *Id.*

83. *Id.* ¶ 22. The Court also stressed its concern for preserving the subject matter of the litigation against acts which were likely to lead to the impossibility of an execution of a final judgment on the merits, and stated that "it is the purpose of provisional measures to preserve 'rights which are the subject of dispute in judicial proceedings.'" *Id.* (quoting *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 19, ¶ 36); see also *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 3, 8, ¶ 13.

84. See *Concerning Passage through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 12, 13, ¶ 6 (Provisional Measures Order of July 29).

85. *Id.* at 16, ¶ 17.

the rights claimed on the merits.⁸⁶ The Court thus acknowledged that Finland must be able to substantiate its right of passage to prove the existence of a reasonable prospect of success in the main case.⁸⁷

86. *Id.* at 16-17, ¶¶ 19-22; Verbatim Record CR91/11 (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 14, 48 (July 2, 1991). Denmark stated that

not even a *prima facie* case exists in favour of the Finnish contention that the right of passage through the Great Belt applies to all ships, including drill ships, oil rigs . . . irrespective of their heights. It is to preserve this alleged "right" that Finland is asking the Court to decide . . . and it follows from the general principles of law recognized by States that the Finnish Government must be able to substantiate the alleged right to a point where reasonable prospect of success in the main case exists.

Id. at 14; see Danish Written Observations (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 23 (June 1991) (challenging Finland's contention of absolute and unconditional right of unimpeded passage through Danish straits); Verbatim Record CR91/11 (Fin. v. Den.), 1991 I.C.J. Pleadings at 71 (indicating that there is no rule in international law, absent clear indication in text of particular conventions, that requires Denmark to take account of height of offshore units when constructing bridge across Danish straits). Denmark conceded that all ships enjoy a right of passage through the Great Belt, but it did not agree that the right of passage through the Great Belt applied to Finnish offshore craft, which according to Denmark, are not ships as envisioned under convention law governing the Danish straits. *Id.* Denmark asserted that although there exist international conventions which, in using, the terms "ship" or "vessel," include floating platforms, these conventions are addressed to the protection of the marine environment. *Id.* at 70. As a result, logically they should include all potential sources of pollution, whereas conventions governing the Danish straits do not interpret merchant ships as extending to offshore craft. *Id.*; see Verbatim Record CR91/10 (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 49 (July 1, 1991). Denmark argued that Finland based its whole case on the existence of a right to passage extending to Finnish offshore craft. *Id.* Therefore, the position taken by Finland not to discuss the extent of the existence of its alleged right, because it went to the merits, was untenable and seemingly designed to have the Court proceed blindly on the presumption that a right exists. *Id.*

87. See *Great Belt*, 1991 I.C.J. at 17, ¶ 22. The Court acknowledged that a right of passage through the Great Belt existed. *Id.*; see also Verbatim Record CR91/13 (Fin. v. Den.), 1991 I.C.J. Pleadings 47 (Concerning Passage through the Great Belt) (July 4, 1991). Although Finland did not agree that the Court required a *prima facie* showing of the existence of a right on the merits, Finland argued that it had demonstrated a *prima facie* showing of the existence of a right of passage. *Id.* at 16. Finland cited *Corfu Channel* to illustrate that the Great Belt is a strait used for international navigation. Verbatim Record CR91/9 (Fin. v. Den.), 1991 I.C.J. Pleadings 15 (Concerning Passage through the Great Belt) (July 1, 1991). To substantiate the claim that Denmark conceded that the Great Belt is a strait used for international navigation, Finland quoted the following sentence from a letter Finland received from Denmark: "The erection of the bridge section crossing the Eastern Channel will, in conformity with international law, allow for the maintenance of free passage for international shipping between the Kattegat and the Baltic Sea as in the past." *Id.* at 17.

3. Urgency

The Court indicated that provisional measures are only justified if the situation demands urgent intervention.⁸⁸ According to the Court, urgency exists when prejudicial action is likely to be taken before a final decision.⁸⁹ The Court concluded that because the bridge would not be completed before 1994, the right of Finland to passage would not be prejudiced because the Court would have rendered a final decision before that time.⁹⁰

4. Irreparable Prejudice

The Court found that the rights of Finland would not be irreparably prejudiced.⁹¹ The Court rejected Finland's allegation that the undertaking of contractual obligations by Denmark in preparation of the Great Belt project would cause irreparable harm to the Finnish offshore craft industry because their customers could no longer rely on continued passage through the Great Belt.⁹² The Court rejected Finland's claim

88. See *Great Belt*, 1991 I.C.J. at 17, ¶ 22 (citing United States Diplomatic & Consular Staff in Tehran, 1979 I.C.J. 7, 19, ¶ 36); see also *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 3, 8, ¶ 13.

89. See *Frontier Dispute*, 1986 I.C.J. at 17, ¶ 23.

90. See *id.* at 18, ¶ 27.

91. See *id.* at 18-19, ¶¶ 28-29.

92. See Request for Indication of Provisional Measures (Fin. v. Den.), 1991 I.C.J. Pleadings 2 (Case Concerning Passage through the Great Belt) (May 22, 1991). The Finnish request for provisional measures was made primarily on behalf of a private Finnish shipbuilding company, Rauma-Repola Offshore Oy, to allow it to continue manufacturing offshore craft that may traverse the Great Belt unimpeded. *Id.* Finnish offshore craft are fully assembled at Finnish shipyards and range in height from 80 to 170 meters. *Id.* Finland claimed that it possesses a major shipbuilding industry in Western Europe and that the competitive status Finland has attained in the international shipbuilding market is due to its ability to fully assemble offshore craft at its shipyards. *Id.* Finland asserted that since 1972, Finnish drill ships, semi-submersible and jack-up oil rigs had been built by Rauma-Repola, and that all of the offshore craft had been delivered for use outside the Baltic sea, by navigating through the Great Belt. *Id.* Finland did not provide sufficient evidence to the Court, however, that more offshore craft would be ordered during the 1990s. See *Concerning Passage through the Great Belt* (Fin. v. Den.), 1991 I.C.J. 12, 18-19, ¶ 29 (Provisional Measures Order of July 29); cf. *Danish Written Observations* (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 31 (June, 1991) (arguing that provisional measures only may be granted where prejudice to applicant's rights is imminent and citing *Nuclear Tests* (Austl. v. Fr.), 1973 I.C.J. 99, 104, ¶ 26 (Interim Protection Order of June 22); *Nuclear Tests* (N.Z. v. Fr.), 1973 I.C.J. 135, 140, ¶ 27 (Interim Protection Order of June 22); *Trial of Pakistani Prisoners of War* (Pakis. v. India), 1973 I.C.J. 328, 330, ¶ 14 (Interim Protection Order of July 13)). Denmark

because Finland had failed to provide sufficient evidence demonstrating actual and prospective losses in the construction and delivery of offshore craft.⁹³ The Court also found that Finland's right of passage could not possibly be irreparably prejudiced because Denmark pledged not to begin construction on the Great Belt project before the end of 1994, a time by which the Court would have rendered a decision on the merits.⁹⁴

C. *The Separate Opinion of Judge Shahabuddeen*

Judge Shahabuddeen rendered a separate opinion concerning Finland's obligation to make a *prima facie* showing of the existence of the right that it allegedly possessed.⁹⁵ He argued that the Court should require a party requesting provisional measures to make a *prima facie* showing of the existence of the right it claims to possess to the extent that it substantiates the possibility of a success on the merits.⁹⁶ Judge Shahabuddeen noted that the prospect of substantive jurisdiction is only one factor that a party must establish to succeed in securing interim measures.⁹⁷ He concluded, therefore, that if a state cannot adduce *prima facie* the possibility of the existence of a right, the party has no chance of succeeding on the merits.⁹⁸

presented evidence that the bridge would not be completed until 1994 and argued, therefore, that no alleged Finnish right to passage would be imminently prejudiced. Danish Written Observations (Fin. v. Den.), 1991 I.C.J. Pleadings at 7-9, ¶¶ 25-35.

93. See *Great Belt*, 1991 I.C.J. at 18-19, ¶ 29; see also Danish Written Observations (Fin. v. Den.), 1991 I.C.J. Pleadings at 33. Denmark asserted that the reservations in the Finnish application to a claim for compensation for damage or loss arising from the bridge project showed that the dispute really concerned economic expenses involved with the manufacture and, perhaps, redesign of offshore craft due to the bridge clearance level. *Id.* Thus, Denmark argued that no irreparable damage would be incurred by Finland that Denmark could not compensate because the overall purpose of Finland's case was clear from its reservation to a claim for compensation. *Id.* at 33-34.

94. See *Great Belt*, 1991 I.C.J. at 18, ¶ 27.

95. See *id.* at 28 (opinion of Judge Shahabuddeen).

96. See *id.* at 31; see also Verbatim Record CR91/9 (Fin. v. Den.), 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 33 (July 1, 1991). Finland asserted that the right it claimed "corresponds closely" to relief sought on merits, and therefore, requirement of a showing of some connection between rights to be preserved and main proceedings was satisfied. *Id.*

97. See Concerning Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, 31 (Provisional Measures Order of July 29) (opinion of Judge Shahabuddeen).

98. See *id.* at 36.

According to Judge Shahabuddeen, the Court's failure to set a clearer standard regarding its test for provisional measures can be attributed to the Court's concern with avoiding the appearance of prejudging the merits.⁹⁹ Judge Shahabuddeen indicated that a case of prejudgment might arise where a party is required to meet every issue capable of arising on the merits.¹⁰⁰ In this case, however, Judge Shahabuddeen noted that it was enough that sufficient material was presented to the Court to disclose the possibility of the existence of the right claimed.¹⁰¹ Judge Shahabuddeen observed, for example, that it was enough that Denmark accepted that Finland enjoyed a right of passage through the Great Belt; that Denmark has been aware of the fact that since 1972 several Finnish offshore craft have passed through the Great Belt; and that in fact Denmark never objected to such passage.¹⁰² Judge Shahabuddeen also concluded that the Court's reasoning was inadequate because the Court's power to indicate provisional measures derives from article 41 of the Statute of the Court, which differs from article 36, the source of its right to adjudicate claims on the merits.¹⁰³ For these reasons, Judge Shahabuddeen opined that Finland was obliged to demonstrate the possibility of the existence of a right of passage,¹⁰⁴ and that Finland's argument that the Court would prejudice the merits if Finland were required to make a *prima facie* showing was unsubstantiated.¹⁰⁵

99. *See id.* at 35. According to Judge Shahabuddeen, the Court's reasoning of not wanting to prejudge the merits was unpersuasive.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 30. Judge Shahabuddeen discussed the Court's power to indicate provisional measures as arising under article 41 of the Statute of the Court and that the Court's jurisdiction to hear claims on the merits was compulsory under article 36 of the Statute of the Court. *Id.* (citing *Interhandel* (Switz. v. U.S.), 1957 I.C.J. 105, 118 (opinion of Judge Lauterpacht); *see Anglo-Iranian Oil Company* (U.K. v. Iran), 1952 I.C.J. 93, 102-03; *DUMBAULD*, *supra* note 59, at 165, 186; *FITZMAURICE*, *supra* note 17, at 533; *M. O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 425 (1943).

104. *See* Concerning Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, 28 (Provisional Measures Order of July 29) (opinion of Judge Shahabuddeen).

105. *See* Verbatim Record CR91/11 (Fin. v. Den.), I.C.J. Pleadings (Concerning Passage through the Great Belt) 48 (July 2, 1991). Dr. Jimenez de Arechega, a former President of the Court, argued during oral proceedings that the *prima facie* showing of the existence of right constituted one of the circumstances, perhaps the most important circumstance, to be considered when determining whether interim relief should be granted. *Id.* Dr. Arechega noted that article 41 supports this contention

III. CONCERNING PASSAGE THROUGH THE GREAT BELT
(FINLAND v. DENMARK): THE ICJ STANDARDS
FOR PROVISIONAL MEASURES SHOULD
BE CLARIFIED

The ICJ's jurisprudence suggests that the Court considers a fourth and implicit requirement in its test for granting provisional measures. In addition to its three explicit requirements, the Court implicitly requires that a party requesting provisional relief demonstrate that the claimed rights exist *prima facie* on the merits.¹⁰⁶ Because the Court weighs the extent to which a party has made such a *prima facie* showing, the Court should explicitly recognize this *prima facie* showing as a fourth element in its test for an award of provisional relief and articulate appropriate and explicit standards for the showing.¹⁰⁷ By

by providing that any provisional measures are to be taken in order to preserve the rights of each party. *Id.* In addition, he emphasized that the 1972 Rules of Court implicitly require that requests for provisional measures specify rights that an applicant is seeking to protect, and that this requirement remains in place today. Although the Court acknowledged the challenge by Denmark, it never elucidated whether Finland was or was not required to make the showing. *See Great Belt*, 1991 I.C.J. at 28; *id.* at 32 (opinion of Judge Shahabuddeen) (citing DUMBAULD, *supra* note 59, at 160-61). Dr. Dumbauld observes that an "[i]ndication of interim measures is to be made if the Court 'considers' . . . that circumstances so require. It thus appears that a *prima facie* showing of probable right and probable injury is all that is required." DUMBAULD, *supra* note 59, at 160-61.

106. *See, e.g.*, United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 8 (Interim Protection Order of Dec. 15) (including statement by United States that "the Court should have passed judgment on the actual substance of the case submitted to it"). The Court responded that requests for provisional measures by their very nature, relate to the substance of the case since, as article 41 expressly states, "their object is to preserve the respective rights of either party." *Id.*, *see Aegean Sea (Greece v. Turk.)*, 1976 I.C.J. 3 (Interim Protection Order of Sept. 11) (concerning belief of counsel for Greece that it was only required to make *prima facie* showing that Greece had rights that were threatened); *see also* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1990 I.C.J. 64, ¶ 24 (Provisional Measures Order of Mar. 2) (noting that power under article 41 is to protect rights which are subject of dispute); Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99, 105, ¶ 30 (Interim Protection Order of June 22); Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135, 141, ¶ 31 (Interim Protection Order of June 22) (finding that possibility of right claimed by applicants in litigation of territory could possibly be found under customary international law); Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12, 15, ¶ 14; Fisheries Jurisdiction (F.R.G. v. Ice.), 1972 I.C.J. 30, 33, ¶ 14 (Interim Protection Order of Aug. 17) (discussing satisfaction by Court at finding connection between rights subject to provisional request and main dispute).

107. *See, e.g.*, U.S. Diplomatic & Consular Staff, 1979 I.C.J. at 19, ¶ 36 (reiterating principles indicated in *Aegean Sea*); Nuclear Tests (Austl.), 1973 I.C.J. at 105, ¶ 30; Nuclear Tests (N.Z.), 1973 I.C.J. at 141, ¶ 31 (holding that right claimed related to main

way of comparison, the European Court of Justice (the "ECJ" or "Court of Justice") has established explicit standards for interim relief which include the requirement that the party requesting relief establish a *prima facie* case on the merits in support of the interim measures requested. The interim relief jurisprudence of the ECJ may represent an appropriate source of international law for the ICJ to consider in developing its criteria for provisional measures.

A. *The Great Belt Decision Illustrates the Court's Implicit Reliance on a Prima Facie Showing of the Existence of a Right on the Merits*

The Court's opinion in *Great Belt* corroborates the argument that the Court implicitly requires a party requesting provisional measures to make a preliminary demonstration that the right claimed exists under international law.¹⁰⁸ Although the Court did not expressly address the issue in *Great Belt*, the Court acknowledged that Finland had a general right of passage through the Great Belt strait.¹⁰⁹ In its denial of Finland's request, the Court acknowledged that Finland's general right of passage corresponded to issues pending in the main proceeding.¹¹⁰ The Court did not clearly state, however, whether Finland was obliged to make a *prima facie* showing of a right of passage for the purposes of meeting a particular preliminary test which would entitle Finland to receive interim protection.¹¹¹

By providing evidence substantiating the existence of a right of passage through the Great Belt, Finland, in effect, made a *prima facie* showing of the existence of its right of passage.¹¹² Denmark's challenge that the Court clarify both the requirement for such a showing and the viability of Finland's

proceedings); *Fisheries Jurisdiction (U.K.)*, 1972 I.C.J. at 15; *Fisheries Jurisdiction (F.R.G.)*, 1972 I.C.J. at 33 (preserving right claimed as directly connected with Application).

108. See *Great Belt*, 1991 I.C.J. at 17, ¶ 22.

109. *Id.* ¶¶ 22-23.

110. *Id.* at 16, ¶ 17.

111. *Id.*

112. See *supra* notes 80-94 and accompanying text (discussing evidence Finland provided to Court in support of its claim to right of passage through Great Belt strait).

showing met with little, if any, elucidation by the Court.¹¹³ Nevertheless, the recognition by the Court of a right of passage belonging to Finland in its analysis in *Great Belt*, supports the tacit requirement of an evidentiary showing pertaining to the existence of the right claimed.¹¹⁴ Because the Court directly considers whether such a showing has been made, the ICJ should explicitly acknowledge that a *prima facie* showing of the existence of rights on the merits is a requirement that must be met for interim relief.¹¹⁵

B. *The Recognition by the Court of an Explicit Requirement That a Party Make a Prima Facie Showing of the Existence of Rights Claimed Will Support the Goal of Provisional Measures*

As a matter of logical progression, the Court should explicitly acknowledge four separate requirements under the test for a grant of provisional measures. The three requirements explicitly acknowledged by the Court are prospective substantive jurisdiction, urgency and irreparable prejudice.¹¹⁶ The fourth element requires that a party requesting provisional relief make a *prima facie* showing of the existence of a right on the merits. This evidentiary showing is met by fulfilling a two-part nexus test.¹¹⁷ In the first part of the test, the party must demonstrate that the rights to be preserved are the same rights as the rights at issue in the main proceedings.¹¹⁸ In the second part of the test, the party must demonstrate that it legitimately can claim entitlement to the right to be preserved by demonstrating that a valid basis exists upon which the Court may justifiably award interim relief.¹¹⁹

The goal of provisional measures is to protect disputed

113. See *Concerning Passage through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 12, 16, ¶ 17 (Provisional Measures Order of July 29).

114. See *id.* at 17, ¶ 22 (acknowledging existence of right of passage of Finland).

115. *Id.*

116. See OXMAN, *supra* note 10 (discussing three current requirements of prospective substantive jurisdiction, urgency, and irreparable prejudice).

117. See *supra* text accompanying note 28 (explaining Court's implicit reliance on two-part test).

118. See *supra* notes 35-52 and accompanying text (discussing Court's use of first part of test in case analysis).

119. See *supra* notes 53-59 and accompanying text (discussing Court's use of second part of test in case analysis).

rights from irreparable damage pending the Court's decision on the merits.¹²⁰ The purpose of a grant of provisional measures is to prevent a situation from occurring that would negatively affect the status of rights and subsequently hinder the Court's ability to render an effective final judgment.¹²¹ An explicit requirement of the *prima facie* showing of existence of rights claimed would serve to facilitate the role of provisional measures to provide effective relief because the Court would avoid entertaining arguments concerning the existence of a requirement of a *prima facie* showing.¹²² In *Great Belt*, for example, Denmark's assertions that Finland was required to substantiate the existence of the right of passage it claimed, and Finland's contentions to the contrary, constituted a significant portion of the arguments presented to the Court.¹²³ A *prima facie* showing of the existence of rights also serves as a necessary safeguard against the possibility that the Court's provisional order will adversely affect either party's right without merit.¹²⁴ In his separate opinion in *Great Belt*, Judge Shahabuddeen expressed the concern that the ICJ might reasonably have awarded provisional measures that would stop a major

120. See *Concerning Passage through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 12, 17, ¶ 22 (Provisional Measures Order of July 29). The Court noted that provisional measures are designed to preserve the subject matter of the litigation against acts that are likely to lead to the impossibility of execution of a final judgment on the merits. *Id.*; Goldsworthy, *supra* note 19, at 258 (stating that "interim measures are intended to prevent irreparable prejudice to . . . rights of parties"); see also ROSENNE, *supra* note 2, at 427. Dr. Rosenne notes that "it is precisely when the Court is satisfied of the existence of a risk that possible destruction of the subject-matter would render ineffective any decision by the Court, that the procedure of article 41 of the Statute becomes appropriate." *Id.*

121. See Goldsworthy, *supra* note 19, at 276. Professor Goldsworthy states that "interim measures of protection are designed to facilitate the functioning of the Court by ensuring that proceedings are not frustrated and the execution of any final judgment is not aborted by irremediable change of circumstances." *Id.*; M. H. Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259 (1972-1973). Professor Mendelson writes that "the parties to the dispute may be enjoined *pendente lite* from acting in a manner prejudicial to the effectiveness of the judgment which may ultimately be given." *Id.*

122. See, e.g., *Great Belt*, 1991 I.C.J. at 17, ¶ 21.

123. See *supra* text accompanying notes 80-82 (discussing arguments of Finland and Denmark concerning Finland's contested obligation to make *prima facie* showing of existence of right of passage).

124. See OXMAN, *supra* note 10, at 336 (stating that interim measures "can give rise to misgivings about subjecting a sovereign state to constraint on uncertain grounds" (quoting SZTUCKI, *supra* note 1, at 102)).

Danish project without the certainty that Finland had a valid basis for its claimed right of passage.¹²⁵

The explicit inclusion of a *prima facie* showing of the existence of rights as a fourth requirement for provisional measures will enable the Court to render effective judicial action for two additional reasons. First, by suspending any action that might be taken by a party and that might irreparably harm disputed rights, the Court holds the operative enforcement of those rights at a standstill until a final decision is rendered in favor of either party.¹²⁶ Second, the showing of entitlement to a particular right would reduce the possibility that the Court might grant interim measures that improperly enjoin a state from engaging in legitimate activities.¹²⁷ As a result, the risk that the duration of judicial proceedings will cause irreparable prejudice to the rights at issue will be reduced, and the effectiveness of the Court's final decision will be enhanced.¹²⁸

C. *A Prima Facie Showing of the Existence of Rights Claimed as a Fourth Criterion for Provisional Measures Will Strengthen the Effectiveness of the Court's Analysis of Provisional Measures*

Despite arguments to the contrary, an explicit requirement by the Court that a state make a *prima facie* showing of a right will not lead to an interim decision on the merits, as opposed to mere interim relief.¹²⁹ The possibility that such a

125. See Concerning Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, 28 (Provisional Measures Order of July 29) (opinion of Judge Shahabuddeen). Judge Shahabuddeen expressed his opinion that

it [was] difficult to conceive how it could be otherwise in respect of the major programme of construction taking place in the territory of the Respondent [Denmark] in the present case . . . and [how] the Court [could] really have stopped the construction of a multi-billion dollar project by the Respondent [Denmark] in its own territory without first satisfying itself that the requesting State could at least show a possibility of the existence of the right which it was seeking to have protected.

Id. at 35.

126. See *supra* note 120 (discussing goals of article 41 to preserve rights of both parties).

127. See OXMAN, *supra* note 10, at 336 (discussing possible adverse impact interim measures can have on sovereign State when grounds for granting relief are unclear).

128. *Id.*

129. See, e.g., Charzów Factory (Germany v. Pol.), 1927 P.C.I.J. (ser. A) No. 8, at

showing might result in an interim decision was clearly a concern of the ICJ in *Great Belt*, as in other ICJ cases.¹³⁰ As Judge Shahabuddeen indicated in *Great Belt*, however, such an argument only would succeed if the Court were to require that a party requesting provisional measures make a thorough showing of the existence of its alleged rights as part of its request for provisional measures.¹³¹ If the Court required a requesting state to disprove each challenge to the validity of the rights it claimed, in essence the Court would require the party to prove its case definitively. The result would render a disservice to the objective of providing effective interim relief.¹³² One of the main advantages of interim relief is that a party may obtain immediate relief without fully proving the merits of its case.¹³³ According to Judge Shahabuddeen, a party should be able to satisfy a *prima facie* showing of the existence of the right on the merits by providing enough information to show that the right it claims to possess is reasonably, not definitively, justified.¹³⁴

The use of a categorical nexus test will provide guidance to Member States concerning this threshold requirement.

10 (holding that Germany's request so closely dealt with claim on merits that it was in effect seeking interim judgment).

130. See Concerning Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12, 31 (Provisional Measures Order of July 29); Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12, 16, ¶ 21 (Interim Protection Order of Aug. 17); Fisheries Jurisdiction (F.R.G. v. Ice.), 1972 I.C.J. 30, 34, ¶ 20 (Interim Protection Order of Aug. 17). The Court has made it clear that "the decision given in the course of the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any question relating to the merits themselves." *Fisheries Jurisdiction (U.K.)*, 1972 I.C.J. at 16; see *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 19 (Interim Protection Order of Dec. 15); *Aegean Sea (Greece v. Turk.)*, 1976 I.C.J. 3 (Interim Protection Order of Sept. 11); *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. 99 (Interim Protection Order of June 22); *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (Interim Protection Order of June 22); *Polish Agrarian Reform (Germany v. Pol.)*, 1933 P.C.I.J. (ser. A/B) No. 58, at 175 (Interim Protection Order of July 29) (illustrating Court's intentional insertion of "without prejudice" clause, demonstrative of fact that Court does not reach final decision by grant of provisional measures). On the contrary, the "without prejudice" clause expressly indicated that provisional measures orders do not affect or prematurely adjudge the parties rights on the merits. *Id.*

131. See *Great Belt*, 1991 I.C.J. at 28 (opinion of Judge Shahabuddeen).

132. See *id.* at 32.

133. See DUMBAULD, *supra* note 59, at 184. Dr. Dumbauld notes that "[i]nterim measures always constitute an exceptional remedy. They derogate from the usual rule that a plaintiff cannot obtain relief until he has thoroughly proved his case, and all defenses and objections of his adversary have been heard and considered." *Id.*

134. See *Great Belt*, 1991 I.C.J. at 28, 32 (opinion of Judge Shahabuddeen).

First, parties would know that they will not obtain interim measures of protection for rights that are not exactly the same as those that are at issue in the main proceedings.¹³⁵ The parties would be aware that the required showing of a close connection between the rights claimed in both the main and provisional stages of a decision is necessary to ensure that the nature of the rights at issue remain the same throughout the course of judicial proceedings.¹³⁶ Second, parties would know that they would not succeed in any attempt to bring baseless claims before the Court.¹³⁷ In *Legal Status of the South-Eastern Territory of Greenland*,¹³⁸ for example, the Court, in its denial of interim relief, stressed that the Norwegian request for provisional measures was not based on the same right as that before the Court on the merits.¹³⁹ The showing of a viable basis supporting the existence of rights on the merits, therefore, will enhance the Court's ability to thwart challenges that the right alleged does not exist and, consequently, that it does not or

135. See *supra* text accompanying notes 46-49 (discussing ICJ requirement that rights alleged on merits correspond with rights sought to be preserved by provisional measures).

136. See, e.g., *Polish Agrarian Reform (Germany v. Pol.)*, 1933 P.C.I.J. (ser. A/B) No. 58, at 175, 177 (rejecting German request for provisional measures due to lack of connection between main claim and request). *Polish Agrarian Reform* illustrates that in instances where a lack of correspondence between the rights at issue and the request for provisional relief exists, the Court will deny interim measures. See *Verbatim Record CR91/9 (Fin. v. Den.)*, 1991 I.C.J. Pleadings (Concerning Passage through the Great Belt) 35 (July 1, 1991) (illustrating Finland's contention that right claimed corresponded with right to be adjudged on merits). Counsel for Finland stated that

[i]n light of the need to show a correspondence between rights sought to be preserved and the rights at issue in the main proceedings, as required by the jurisprudence of this Court, it is necessary—as well as useful—to say something . . . about the rights on which Finland bases its case.

Id. at 35.

137. See *supra* note 136 and accompanying text (discussing ICJ's requirement that right sought to be preserved by provisional measures is same right to be adjudged on merits).

138. (*Nor. v. Den.*), 1932 P.C.I.J. (ser. A/B) No. 48, at 277 (according to statements by counsel for Denmark, Norwegian request for provisional measures had no foundation in article 41 because Norway possessed no right in territory in question capable of forming subject of interim measures).

139. *Id.* at 284-85. The Norwegian government applied to the Court for an interpretation of a Norwegian Royal Decree to determine the legal status of various parts located in the south-eastern areas of Greenland. *Id.* at 284. The Norwegian government requested, however, that the Court have Danish troops abstain from taking coercive measures against Norwegian nationals in the area. *Id.* at 277-80.

did not merit provisional relief.¹⁴⁰

D. *The European Court of Justice's Requirements for Provisional Measures May Represent an Appropriate Source of International Law for the ICJ*

Article 38 of the Statute of the Court directs the ICJ to apply to disputes submitted to it international conventions and customs, the general principles of law of civilized nations, and the judicial decisions and teachings of highly qualified publicists of the various nations as sources of international law.¹⁴¹ In particular, reference by the ICJ to the general principles of law, national judicial decisions, and the writings of publicists are essential to the continuity of the Court's jurisprudence.¹⁴² Article 38(1)(c) provides that the general principles of law are an authoritative source of international law.¹⁴³ Article 38(1)(d) lists judicial decisions and writings of publicists as subsidiary sources of international law.¹⁴⁴

1. General Principles of Law as Sources of International Law

The general principles of law established by the international community are one of the primary sources of interna-

140. See *supra* note 29 and accompanying text (discussing ICJ cases wherein parties challenged Court's jurisdiction on merits).

141. I.C.J. Statute, art. 38, 59 Stat. 1055, 1060, 3 Bevens 1153, 1187. Article 38 provides that

[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

142. See SIR HERSCH LAUTERPACHT, *INTERNATIONAL LAW* 52, 79 (E. Lauterpacht ed. 1970) (discussing basis for establishment of ICJ as stemming from necessity to create "an institution, which by the continuity of its jurisprudence, might itself become an organ of importance in developing international law").

143. I.C.J. Statute, art. 38(1)(c), 59 Stat. at 1060, 3 Bevens at 1187; see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 15-20 (3d. ed. 1979) (discussing article 38(1)(c) as formal source of international law).

144. I.C.J. Statute, art. 38(1)(c), 59 Stat. at 1060, 3 Bevens at 1187; see BROWNLIE, *supra* note 143, at 20 (noting that "judicial decisions [of international tribunals] are . . . regarded as authoritative private and public evidence of the state of the law").

tional law.¹⁴⁵ General principles of law are useful for purposes of clarifying intricate problems that an international court may encounter as a result of differing systems of national laws.¹⁴⁶ As Sir Hersch Lauterpacht observes, the comparative elucidation and application of general principles of law as a source of international law has been increasingly recognized.¹⁴⁷ This comparative method proceeds by way of generalization and synthesis of the various systems of national law.¹⁴⁸ In this sense, these general principles have become "the modern *jus gentium* in its wider sense," one in which common and natural principles supplement the positivist elements of treaties and

145. LAUTERPACHT, *supra* note 142, at 68-77. Sir Hersch Lauterpacht writes that "general principles of law" function as an objective source of international law. *Id.* at 55. Sir Hersch Lauterpacht notes also that

in the absence of international law thus created and revealed [by treaty and custom], the rules and principles derived from the fact of the existence of the international community and formulated with the assistance of general principles of law—of the modern law of nature—must be regarded as one of the primary sources of international law.

Id. Sir Hersch Lauterpacht describes these principles to be "those principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character." *Id.* at 69. In addition, he explains that general principles of law are, and have been, a legitimate source of reference for the Court and its predecessor. *Id.* at 69-70. Sir Hersch Lauterpacht states that

[this general] enquiry consists in ascertaining what, in the absence of a rule of international law, is the way in which the law of States representing the main systems of jurisprudence regulates the problem in the situations in question. . . . It is a method combining the processes of comparison of the law of various countries in the sphere of the various branches of private and public law, of deduction from such comparison, and of application of the results thus achieved to the special conditions of international law and international society.

Id. at 71. Sir Hersch Lauterpacht further observes that "'general principles of law' as a source of international law . . . [are] grounded in international custom . . . [and have been applied] by [i]nternational tribunals, as well as the International Court of Justice . . . from the very inception of modern arbitration." *Id.* at 76; see J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 63 (6th ed. 1963) (explaining that international law "looks to [general principles of law as] an indication of . . . legal policy or principle").

146. See LAUTERPACHT, *supra* note 142, at 72-73. Sir Hersch Lauterpacht notes that although "a general principle of law may fail to offer direct assistance for the reason that national systems of law differ with regard to the particular subject . . . [t]he negative result may not be altogether without usefulness inasmuch as it may throw light on the intricacies of the problem involved." *Id.* at 72.

147. *Id.* at 74.

148. *Id.*

custom as sources of international law.¹⁴⁹

2. Judicial Decisions and Writings of Publicists as Sources of International Law

As subsidiary sources of law, the judicial decisions of international tribunals and the writings of publicists also function as authoritative evidence of the state of international law.¹⁵⁰ In this respect, the decisions of arbitral tribunals, international military tribunals, the Court's own judicial precedent, as well as decisions by the European Court of Justice, are important sources of the state of international law that may be elucidated and applied by the ICJ in its development of rules of international law.¹⁵¹ As Ian Brownlie observes, "[w]hatever the need for caution" in invoking the opinions of individual publicists, the writings of publicists are used widely by judicial tribunals as authoritative evidence of the state of the law.¹⁵²

149. *Id.* at 74-75.

150. See BROWNLIE, *supra* note 143, at 20 (explaining that judicial decisions and writings of publicists are evidence of state of international law); LAUTERPACHT, *supra* note 142, at 78-79. Sir Hersch Lauterpacht explains that the effect of judicial decisions as precedent is not formally recognized by the ICJ or other international tribunals. *Id.* Nevertheless, Sir Hersch Lauterpacht stresses that judicial decisions are persuasive evidence of the state of international law that provide clarification to the Court when analyzing cases. *Id.* at 79; see BRIERLY, *supra* note 145, at 65 (noting that judicial precedent and especially decisions of national courts are a particularly valuable source of international law).

151. See BROWNLIE, *supra* note 143, at 20-25 (discussing significance of judicial decisions to development of international law).

152. *Id.* at 25; see BRIERLY, *supra* note 145, at 65 (quoting *The Paquete Habana*, 175 U.S. 677 (1899) (Gray, J.)). As Justice Gray stated in *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. at 700; see BROWNLIE, *supra* note 143, at 25 (observing that ICJ refers to writings of publicists in its judicial practice).

3. The ICJ Should Apply the Same Interim Measures Standards Used by the European Court of Justice to Its Test for Provisional Measures

The jurisprudence of the European Court of Justice reflects a particularly valuable distillation of general legal principles that may provide a propitious source for the International Court of Justice's further clarification of its own provisional measures jurisprudence under public international law.¹⁵³ As an international court, the ECJ rules on questions of Community law at the request of national courts of the Member States of the European Community.¹⁵⁴ In interpreting and applying the provisions and principles of the Treaty Establishing the European Economic Community,¹⁵⁵ the ECJ has jurisdiction to give preliminary rulings concerning Community law where such questions are raised before certain courts or tribunals of European Community nations.¹⁵⁶

The award of provisional measures of protection is an accepted practice of the Court of Justice.¹⁵⁷ The ECJ has juris-

153. See BROWNLIE, *supra* note 143, at 23-24 (discussing significance of ECJ decisions as evidence of international law).

154. See Treaty Establishing the European Economic Community, art. 177, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty]; see also L. NEVILLE BROWN & FRANCIS G. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 151 (2d ed. 1983) (discussing role of European Court of Justice [hereinafter ECJ] as interpreter of Community law).

155. EEC Treaty, *supra* note 154, art. 164. Article 164 of the EEC Treaty provides that "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty, the law is observed." *Id.*

156. See EEC Treaty, *supra* note 154, art. 177. Article 177 provides that The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of any one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal, from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.

Id.

157. See EEC Treaty, *supra* note 154, art. 186. Article 186 provides that "[t]he Court of Justice may, in any cases referred to it, make any necessary interim order."

diction to grant interim relief, and in certain circumstances, it will grant such relief as a means of securing the rights claimed under the disputed Community law.¹⁵⁸ The ECJ's standards for interim measures are explicitly outlined in the Rules of the Court of Justice.¹⁵⁹ The requirements for a grant of interim measures are also explicitly identified in ECJ case law.¹⁶⁰ Like the ICJ, the ECJ requires that a party requesting interim measures demonstrate urgency, likelihood of irreparable injury, and

Id.; see, e.g., *Regina v. Secretary of State for Transport ex parte Factortame, Ltd.*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1 (holding that Community law requires that Member States' legal systems provide effective protection of directly effective Community rights, including by means of interim relief); see also Guus Borchardt, *The Award of Interim Measures by the European Court of Justice*, 22 *COMMON MKT. L. REV.* 203, 204 (1984) (discussing increased practice by ECJ of interim measures).

158. See *supra* note 157 and accompanying text (discussing ECJ's jurisdiction to grant interim measures).

159. See Court of Justice Codified Versions of the Rules of Procedure, the Supplementary Rules and the Instructions to the Registrar, art. 83(2), O.J. C 39/1, at 20 (1982). Article 83(2) states that "[a]n application of a kind referred to in paragraph 1 of this Article [interim measures] shall state the subject matter of the dispute, the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for." *Id.*

160. See, e.g., *Compagnia Italiana Alcool SAS di Mario Mariano & Co. v. Commission*, Case 358/90R, [1990] E.C.R. — (Dec. 19, 1990) (LEXIS, Eurcom library, Cases file). The Court of Justice in *Compagnia Italiana* explicitly set forth the ECJ's standards for interim measures, stating that

[i]t should be borne in mind that, according to Article 83(2) of the Rules of Procedure, a decision ordering interim measures is subject to the existence of circumstances giving rise to urgency and factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

The Court has consistently held that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measures.

Id.; see *Arbed S.A. v. Commission*, Case 20/81R, [1981] E.C.R. 721 (illustrating explicit ECJ requirements for interim measures). The Court in *Arbed* stated that

[b]y virtue of . . . Article 83 of the Rules of Procedure, as well as a consistent line of decisions of the Court, [interim] measures . . . may be adopted by the Judge hearing the application for such measures if it is established that their adoption is *prima facie* justified in fact and in law, if they are urgent in the sense that it is necessary, in ordet [sic] to avoid serious and irreparable damage, that they should be laid down, and should take effect, before the decision of the Court on the substance of the action and if they are provisional in the sense that they do not prejudice the decision in the substance of the case, that is to say that they do not at this stage decide disputed points of law or of fact, or neutralize in advance the consequences of the decision to be given subsequently on the substance of the action.

Id. at 730-31, ¶ 13.

substantive jurisdiction.¹⁶¹ Unlike the ICJ, however, the ECJ has explicitly acknowledged that the party requesting interim relief must make a *prima facie* showing of the existence of rights claimed on the merits.¹⁶² In *Jean-Marc Bosman v. Commission*,¹⁶³ for example, the Court of Justice denied interim measures on the ground that the party requesting relief failed to establish a *prima facie* case for the measures requested.¹⁶⁴ In *Jean-Marc Bosman*, a professional non-national football player brought suit against the Commission seeking, in part, to annul an alleged decision of the Commission that prevented non-national football teams from joining national football clubs.¹⁶⁵ Pending the ECJ's final decision, the applicant, Mr. Bosman, requested interim relief in the form of a suspension of the enforcement of the Commission's alleged decision.¹⁶⁶ The Commission contested Mr. Bosman's contention on the ground that the regulation of non-national football players in national football clubs was not contained in any Commission decision, but rather was the product of an agreement between the Commission and the European Union of Football Associations.¹⁶⁷ The Court of Justice found, therefore, that Mr. Bosman's claims were inadmissible because the regulations in question were not contained in a decision by the Commission.¹⁶⁸ As a result, the ECJ denied the interim relief requested on the ground that Mr. Bosman failed to adduce evidence that would establish a *prima facie* case on the merits and support the interim measures requested.¹⁶⁹

161. See, e.g., *Compagnia Italiana*, [1990] E.C.R. at __, (Dec. 19, 1990) (LEXIS, Eurcom library, Cases file); *Arbed*, [1981] E.C.R. at 730-31, ¶ 13 (illustrating ECJ requirements for interim measures set forth in case law); see also JOHN A. USHER, EUROPEAN COURT PRACTICE 278 (1990) (discussing ECJ's criteria for interim measures).

162. See, e.g., *Arbed*, [1981] E.C.R., at 731, ¶ 15 (denying interim relief because applicant failed to establish *prima facie* case for measures requested); see also Opinion of Advocate General Tesouro, *Regina v. Secretary of State for Transport ex parte Factortame, Ltd.*, Case C-213/89, [1990] E.C.R. 2433, 2464, [1990] 3 C.M.L.R. 1, 24 (noting that *prima facie* case is necessary precondition for grant of interim relief in legal systems of Member States).

163. Case 117/91R, [1991] E.C.R. __, [1991] 3 C.M.L.R. 938.

164. *Id.* at __, [1991] 3 C.M.L.R. at 941.

165. *Id.* at __, [1991] 3 C.M.L.R. at 939.

166. *Id.* at __, [1991] 3 C.M.L.R. at 940.

167. *Id.*

168. *Id.*

169. *Id.* at __, [1991] 3 C.M.L.R. at 941. The Court observed that pursuant to Article 83(1) of the Rules of Procedure, an application for sus-

The ECJ's rationale for requiring a *prima facie* showing of rights claimed on the merits is to ensure that the rights claimed are well-founded under Community law.¹⁷⁰ In this regard, the opinion of Advocate General Tesauro in *Regina v. Secretary of State for Transport, ex parte Factortame, Ltd.*,¹⁷¹ is a particularly noteworthy example of a general and comparative synthesis of the law of the Member States concerning interim measures.¹⁷² Advocate General Tesauro's opinion represents persuasive evidence of the state of law with respect to interim measures in the legal systems of the Member States. In *Factortame*, the Ad-

pension of the operation of an act or for interim measures is admissible only if the Court has before it an application in which the plaintiff contests the act [sic] suspension of which is sought or if the court is seised of an action to which the plaintiff is a party and to which the interim measures sought relate. Therefore an application for suspension or interim measures cannot be granted if the main action to which the application is collateral is inadmissible. . . . [In addition, the Court of Justice noted that] *prima facie*, there are no feature[s] of the case which indicate that the application is admissible.

Id.; at __, [1991] 3 C.M.L.R. at 940-41; see *Emerald Meats, Ltd. v. Commission*, Case 66/91R, [1991] E.C.R. __ (Mar. 8, 1991) (LEXIS, Eurcom library, Cases file) (denying interim relief on grounds that applicant failed to demonstrate *prima facie* case in support of measures requested).

170. See, e.g., *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt v. Commission*, Joined Cases 43, 45 & 48/59R, [1960] E.C.R. 463 (holding that it should be apparent that there exists strong presumption that application in main action is well-founded *fumus boni juris*). The applicants in *Eva von Lachmüller* requested the ECJ to stay the contested decisions of the Commission until judgment in the main action had been rendered. *Id.* at 491-92. The ECJ emphasized that the grounds upon which the applicant sought relief must be well-founded before the Court will grant interim relief. *Id.* The applicants failed to meet this requirement and the ECJ rejected the applicants' request on the ground that they failed to adduce sufficient documentary and oral evidence in order that the ECJ might effectively reach a conclusion regarding the basis of the rights claimed. *Id.*

171. Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1.

172. See Opinion of Advocate General Tesauro, *Factortame*, [1990] E.C.R. at 2450, [1990] 3 C.M.L.R. at 15. In *Factortame*, Advocate General Tesauro noted that interim measures are an indispensable tool for any judicial system that seeks "the objective of determining the existence of a right and more generally of giving effect to the relevant legal provisions, whenever the duration of the proceedings is likely to prejudice the attainment of this objective and therefore to nullify the effectiveness of [a] judgment." *Id.* at 2457, [1990] 3 C.M.L.R. at 15. Advocate General Tesauro further noted that the assessment of whether

the putative nature of the right claimed is such that interim protection must be granted or refused [is done] on the basis of substantive criteria linked to the greater or lesser extent to which the provision at issue appears to be valid (*fumus boni juris*) . . . and to the possibility that . . . the interests in question may be prejudiced pending the final outcome of proceedings.

Id. at 2459, [1990] 3 C.M.L.R. at 17.

vocate General explained that the goals of interim measures in Community law are to ensure that the rights claimed are not harmed before the Court of Justice can effectively render a final decision.¹⁷³ The Advocate General observed that a grant of interim measures protects the status quo of the parties' alleged rights by suspending the effect that any disputed provisions of Community law may have on those rights until the ECJ determines how the disputed Community law applies to the rights claimed.¹⁷⁴ The Advocate General also explained that while the ECJ interprets and applies the disputed Community provisions to the case in question, it attaches a presumption of validity to each of the disputed provisions relied on by the parties in support of the existence of the individual rights claimed.¹⁷⁵ He observed that for purposes of interim relief, whether the right claimed will be entitled to interim protection

173. *See id.* Advocate General Tesáuro stated that the typical function of judicial proceedings . . . seek[s] to establish the existence of and hence to give effect to putative rights, so that the requirement that the individual's position be protected on a provisional basis remains the same, in as much as it is a question of determining, interpreting and applying to the case in question the relevant (and valid) legal rules [which involves the choice between two or more presumptively valid rights]. It therefore, remains necessary to provide a remedy to compensate for the fact that the final ruling establishing the existence of the right may come too late and therefore be of no use to the successful party.

Id. at 2458, [1990] 3 C.M.L.R. at 16.

174. *See id.* at 2455 n.6, [1990] 3 C.M.L.R. at 12 n.12. The Advocate General explained that interim measures, in substance, amount to a "provisional suspension of the application of the [disputed law] in question." *Id.* The Advocate General observed that interim relief is designed, therefore, to protect disputed rights "whose existence is in the course of being determined in a situation where there is a conflict between legal rules of differing rank." *Id.* at 2455, [1990] 3 C.M.L.R. at 12-13. The Advocate General explained that interim measures "paralyze the effects of a disputed provision affecting rights, pending a final determination of its validity vis-à-vis . . . one or other of the legal rights in question that is likely to be irremediably impaired." *Id.* at 2458, [1990] 3 C.M.L.R. at 16. The Advocate General further explained that interim measures are intended to prevent the possibility that the rights which are the subject of a dispute may be damaged before the Court renders a final decision. *Id.* The Advocate General concluded that

interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right, which was also specifically affirmed by the court when it linked interim protection to a requirement that, when delivered, the judgment will be fully effective.

Id. at 2457, [1990] 3 C.M.L.R. at 14.

175. *See id.* at 2457, [1990] 3 C.M.L.R. at 17.

is largely based on meeting the preconditions of the substantive criteria. These preconditions depend to a greater or lesser extent on the degree to which each provision appears *prima facie* valid, and to the possibility that one or the other interests involved may be prejudiced pending the final outcome of the proceedings.¹⁷⁶ The Advocate General concluded that if preconditions are met, interim measures may be granted by the Court of Justice as a matter of urgency in order to prevent any possible negative effects on the final decision on the merits.¹⁷⁷

CONCLUSION

The jurisprudence of the ICJ evinces a pattern of precedents that may be interpreted as implicitly requiring a *prima facie* showing of a right on the merits before the Court will grant a request for provisional measures. The Court has yet to provide the international community with a general rule that would clarify the Court's requirements in this area of its jurisprudence. The Court should, in a manner analogous to the jurisprudence of the European Court of Justice, purposefully endeavor to redress the uncertainties of its judicial practice in this area by establishing a clear and workable standard to which states may refer for guidance in seeking provisional measures.

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176. *Id.*

177. *Id.* at 2460, [1990] 3 C.M.L.R. at 19-20.

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