

ITLOS, The *Enrica Lexie* Incident and the Prescription of Provisional Measures: Saying That There is Urgency Does Not Make It So

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Decision Commented On: ITLOS, The *Enrica Lexie* Incident: [Order](#) in respect of request for the prescription of provisional measures, Italy v India, 24 August 2015

Article 290 of the Law of the Sea Convention of 1982 ([LOSC](#)) accords the International Tribunal of the Law of Sea (ITLOS) the authority to prescribe provisional measures in two different circumstances. Paragraph one authorizes ITLOS (along with the International Court of Justice, and any relevant international tribunal properly seized with an application) “to prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision” provided that ITLOS, the Court or an arbitral tribunal (as the case may be) has *prima facie* jurisdiction, to consider the matter.

The power to *indicate* (see Article 41 of the [Statute of the International Court of Justice](#), and the [LaGrande Case](#), 2001) or *prescribe* provisional measures is a standard element of the jurisdiction of any court or tribunal, domestic or international, expressly or as part of the tribunal’s inherent jurisdiction, to preserve the rights of the parties pending judicial determination. While the text of Article 290(1) does not refer to “urgency” it is generally understood that an international tribunal should only make a provisional measures order in a case of urgency. For affirmation of this point in the context of ITLOS see, for example, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean*, [Order](#) at para 42.

More unusual is the jurisdiction conferred by Article 290(5). This paragraph authorizes ITLOS to prescribe provisional measures in situations where the parties to a dispute have selected an arbitral tribunal other than ITLOS to consider a dispute under the LOSC. In such a case paragraph 5 authorizes ITLOS to make a provisional measures order pending the effective constitution of the tribunal. The text, so far as relevant, provides as follows:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

I previously [posted](#) on the ITLOS Provisional Measures Order in the ongoing dispute between Ghana and Côte d'Ivoire. The Order by the chamber empaneled in the case engaged the Tribunal's jurisdiction under Article 290(1). The current dispute between Italy and India engages Article 290(5) since Italy instituted proceedings against India seeking to establish an Annex VII Arbitral Tribunal on 28 June 2015. The tribunal has yet to be constituted although Annex VII contemplates that it should be fully constituted in a matter of months. ITLOS has considered several previous applications for provisional measures under Article 290(5): (1) [Southern Bluefin Tuna](#), (2) [The MOX Plant Case](#), (3) [Case Concerning Land Reclamation \(Straits of Jahore\)](#), (4) [The Arctic Sunrise Case](#) (the subject of a post by Alex Oude Elferink [here](#)), and (5) [The ARA Libertad Case](#).

While paragraphs 1 and 5 must be read together, there are several differences between the two texts. First, while paragraph 5 expressly refers to the urgency of the situation there is no similar reference in paragraph 1. Thus, while urgency might well still be a part of any application for provisional measures (see above), it might follow that the quality of the urgency that an applicant must demonstrate under paragraph 5 is even more demanding. Judge Treves for example took this approach in his Separate Opinion in *Southern Bluefish Tuna*. Second, while paragraph 1 contemplates that a provisional order may operate "pending the final decision" (subject to review and possible modification or revocation pursuant to paragraph 2 "as soon as the circumstances justifying them have changed or ceased to exist"), paragraph 5 expressly contemplates that the Annex VII Tribunal should have the opportunity to "modify, revoke or *affirm*" (emphasis added), and of its own motion, any provisional measures prescribed by ITLOS once the arbitral tribunal is established. Neither paragraph refers to irreparable harm or irreparable prejudice although both domestic courts and international tribunals frequently take the view that the only interests that merit interim protection are those interests the interference with which cannot be properly compensated by damages (for an ITLOS example see Judge Mensah, sep. op. *MOX Plant Case*; for an ICJ Decision see the Order in [Aegean Sea Continental Shelf Case](#) at para 33). Similarly, while neither paragraph makes the point expressly, it is broadly understood that provisional measures constitute an exceptional and non-routine remedy (see Judge Mensah, sep. op. *MOX Plant Case* and Judge Lucky, sep. op. *Case Concerning Land Reclamation (Straits of Jahore)* at para 10).

The Factual Matrix

While the detailed facts of the dispute remain contested and will only be resolved (so far they can be) following a hearing on the merits, the essential elements seem to be as follows:

1. The vessel *Enrica Lexie* is an oil tanker flying the Italian flag. The vessel, with six Italian marines on board, was *en route* from Sri Lanka to Djibouti in February 2012.
2. Approximately 20 nm off the coast of Kerala, India there was some sort of incident involving the *Enrica Lexie* and the *St. Anthony*, a fishing vessel registered in India. The crew of the *Enrica Lexie* considered that the *St. Anthony's* approach was consistent with that of a pirate attack. As a result of the incident, two crew members of the *St. Anthony* were shot and killed.
3. The *Enrica Lexie* was caused to dock in Kochi on the Kerala coast. The vessel was searched, the crew interrogated and two of the Italian marines, Latore and Girone, arrested on suspicion of murder.
4. Criminal proceedings were commenced in the Indian courts in February 2012 but the two marines have yet to be formally charged. The accused and/or Italy challenged the legality of the proceedings.

5. Bail was granted to both marines in May 2012. Since then, one of the marines has been allowed to return to Italy on medical grounds where he remained at the time of this application. The second marine remains in India but in the custody of Italy's ambassador to India.
6. There have been ongoing negotiations between Italy and India but these negotiations did not lead to a resolution. Italy chose to commence Annex VII proceedings against India on 26 June 2015 and on 21 July 2015 brought this application for provisional measures.
7. The criminal proceedings in the Indian courts have been held in abeyance since 28 March 2014 (Sep. Op. Judge Chandrasekhara Rao at para 18). During the hearings counsel for India gave the opinion (Order at para 129) that "the Supreme Court has actually stayed its proceedings and '[i]t would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them [Sergeant Latorre and Sergeant Girone]'"

The separate and dissenting opinions variously emphasized several of these "facts" including the fact that Italy did not commence Annex VII arbitration for some two and a half years since the incident and that no formal charges have ever been laid against the two marines (although in part this may be due to the domestic proceedings in Indian courts questioning their constitutional validity).

The Issue on the Merits

The issue on the merits is variously stated in the ITLOS Order and one of the separate declarations as follows:

...which State has jurisdiction to decide on the *Enrica Lexie* incident (Order at para 128)

Italy claims a right of "exclusive" jurisdiction over the incident. (Declaration of Judge Paik at para 2)

I suspect that a more precise statement might simply be whether India has breached any of the LOSC provisions listed by Italy: Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 & 300.

Italy's Application for Provisional Measures

In its application for provisional measures, Italy sought the following Order:

- (1) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and
- (2) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal;

The ITLOS Order

The Tribunal, by a majority of 15 votes to 6, made the following Order:

Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.

Vice-President Bouguetaia, and Judges Chandrasekhara Rao, Ndiaye, Cot, Lucky and Heidar voted against the adoption of the Order, principally but not exclusively, on the grounds that Italy had not been able to demonstrate the urgency of the application. Indeed, the possible absence of urgency was a cause for concern for some of those who voted for the Order (see in particular the Sep. Op. of Judge Kateka, discussed below).

This post first lists the relevant considerations that ITLOS must consider before making a provisional measures order under Article 290(5) and then considers how the Tribunal dealt with these considerations, focusing on the test for urgency that an applicant for provisional measures under Article 290(5) must meet.

Preliminary Tests

In order to be able to exercise its discretion and grant a request for provisional measures under Article 290(5), ITLOS must establish that the application meets a number of preliminary tests. These tests arise not only from paragraph 5 but also paragraph 1 and other provisions of Part XV of LOSC. In sum, these requirements are as follows:

- (1) The existence of a legal dispute as to the interpretation or application of LOSC (see Articles, 279, 283 and 286 and for the requirement that the dispute be a *legal* dispute see *Southern Bluefin Tuna Case* at para 44). The dispute must relate to LOSC; it is not enough that it relates to the international customary law of the sea unless such norms have been incorporated by reference into LOSC: *The ARA Libertad Case*, esp. Sep. Op. Judges Wolfrum and Cot.
- (2) Evidence that the Parties have exchanged views as to the dispute (Article 282). This test is relatively easy to meet since ITLOS has consistently stated that all that is required is the applicant once having commenced an exchange of views has now reached the conclusion that the possibilities of reaching agreement have been exhausted: (*MOX Plant Case*, Order, at para 60; *ARA Libertad Case*, Order, at para 71).
- (3) That the claim does not involve an abuse of process (see Article 294).
- (4) That the dispute is not one that requires the exhaustion of local remedies or, if it is, that such local remedies have been exhausted (see Article 295).
- (5) That the relevant (other) tribunal would *prima facie* have jurisdiction (Article 290(5) (or, to put it another way, that there is nothing that obviously precludes an Annex VII tribunal from assuming jurisdiction).

Once the Tribunal has satisfied itself as to these preliminary tests it can then assess whether it is “appropriate in the circumstances” to make an order of provisional measures and to that end will consider:

(6) The urgency of the situation so requires (Article 290(5)).

(7) That the provisional measures are required to preserve the respective rights of the parties to the dispute or to prevent serious harm to the environment (Article 290(1)).

The Tribunal need only consider the last two requirements (6 and 7) if it has first satisfied itself (where relevant) as to the first five requirements. The Tribunal consistently takes the view that in settling on provisional measures it is not confined to the measures requested by the parties (a view criticized by Judge ad hoc Shearer in the *Southern Bluefin Tuna* case). Moreover, the Tribunal will be careful to avoid passing judgement on the merits of the claim in formulating provisional measures.

A Dispute as to a Provision of LOSC

As to the first requirement there was little doubt that there was an ongoing legal dispute between the Parties. Indeed the Order recites, at para 51, that the Parties agree that there is a dispute between them as to facts and law. More specifically, Italy alleged that the dispute might involve the application or interpretation of a number of LOSC provisions as listed above. India took issue with some or all of these assertions and some members of the Tribunal were not convinced that any or all of these provisions were at issue (see, in particular, Diss. Op. Vice President Bouguetaia at paras 10 - 17), However, the majority emphasized that Italy need only establish *prima facie* jurisdiction in relation to *one* such provision (see Order at para 52) and contented itself with observing, rather blandly, (at para 53) that

Considering that, having examined the positions of the Parties, the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention;

It bears emphasizing that at no point did the majority indicate which provision(s) it was relying on.

An Exchange of Views

There was similarly little difficulty with the requirement for an exchange of views in relation to the dispute since there was evidence of ongoing diplomatic negotiations over an extended period (Order at para 59).

Abuse of Process?

As to the third requirement, India evidently took the position that there was an abuse of process on the ground that once Italy had elected to participate in the domestic court proceedings it had lost the opportunity to pursue its options under Section 2 of Part XV of LOSC. The majority scotched that idea noting (Order at para 73):

...that article 290 of the Convention applies independently of any other procedures that may have been instituted at the domestic level and Italy is therefore entitled

to have recourse to the procedures established in that article and, if proceedings are instituted at the domestic level, this does not deprive a State of recourse to international proceedings.

Exhaustion of Local Remedies

The fourth element (exhaustion of local remedies where applicable) has been the occasion of some difficulty for the Tribunal in the past in relation to issues on the merits (see in particular [*M/V Saiga \(No. 2\) Case, Merits*](#)). In this case, however, the Tribunal found it unnecessary to express an opinion on the point on the ground that the issue was inevitably bound up with the substance of the dispute and need only be considered on the merits (Order at para 67).

Prima Facie Jurisdiction

The fifth element (*prima facie* jurisdiction in relation to at least one issue) is a core and express requirement of Article 290(5). It is not so much an independent criterion as it is a conclusion that the tribunal must reach following consideration of the previous criteria and provided that there is nothing else that would obviously serve to deny an Annex VII tribunal jurisdiction. An example of the latter would be a case in which a state had taken advantage of the opportunity provided by Article 298 to opt out of binding dispute resolution in relation to a category of dispute, and the dispute in question fell squarely within that category. That was not the case here.

The Rights to be Protected and Urgency

The sixth and seventh elements must be considered together since urgency is contextual and must be established in the context of the rights which are to be protected, pending either a final order resolving the dispute (Article 290(1)), or, more narrowly in the case of Article 290(5), pending the constitution of the Annex VII tribunal. It is logical to examine the rights at issue before moving to the question of urgency. The Order accepts that logic.

Italy asserted (Order at para 76) that the rights it sought to have protected were: (1) its right of exclusive jurisdiction over the *Enrica Lexie* incident, and (2) its rights in relation to its own immunity and the immunity of its officials. Thus Italy contended that any continuation of India's own proceedings in relation to these matters would irrevocably prejudice Italy and might (my words) make the outcome of the Annex VII proceedings moot. India in turn contended that it had the right to continue its own judicial proceedings and hence that any Order should not prejudice that entitlement (Order at para 81). Both claims were, in the opinion of the Tribunal, "plausible" (Order at para 85).

On the question of urgency, the Tribunal formulated the test by quoting the reference to urgency in Article 290(5) and then it referred to Article 290(1) and a leading ITLOS decision on paragraph 1 as follows:

*Considering that article 290, paragraph 1, of the Convention stipulates *inter alia* that the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which implies that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures (see *M/V**

“Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, at p. 69, at para 72);

It is perhaps important to emphasize that the *M/V Louisa* case was only concerned with Article 290(1) and not (notwithstanding the reference in the quoted paragraph) with Article 290(5). The Tribunal in the instant case concluded its statement of the relevant test by acknowledging (Order at para 89) that the Annex VII Tribunal would be in a position to “modify, revoke or affirm” any provisional measures once it was in place.

In assessing Italy’s request for provisional measures against this test, the Tribunal concluded that neither of the two forms of relief requested by Italy “would equally preserve the requested rights of both Parties” (Order at para 127). Accordingly, the Tribunal elected, consistent with past practice, to formulate different and more limited provisional measures (Order at para 127). Thus the Tribunal reformulated Italy’s first measure in the form of an Order directed at both parties requiring each to suspend existing court proceedings and refrain from initiating new ones that might aggravate or extend the dispute or prejudice the carrying out of any decision the arbitral tribunal might make. The Tribunal declined to make any Order in relation to the status of the two marines on the ground that were it to do so it would be trespassing on the merits of the case (Order at para 132). That said it did choose to reaffirm that “considerations of humanity” do apply to the law of the sea as they do apply in other areas of the law.

Thus, in the end, the Tribunal had remarkably little to say about urgency, either the basic standard of urgency, or, as India put it (quoted in the Order at para 100), the aggravated urgency standard of Article 290(5). The same is equally true of irreparable harm or prejudice. At no point does the Tribunal suggest that there was any likelihood that the Indian courts were likely to resume their proceedings in respect of the matter before the Annex VII tribunal was constituted. Indeed, the only information on that point, was the information provided by counsel for India and quoted above to the effect that it was unlikely that the suspended proceedings would be resumed in this short interim period. Somewhat curiously the Tribunal immediately juxtaposed this reference with a statement to the effect that “the Tribunal places on record assurances and undertakings by both Parties during the hearing”; but the statement by counsel for India fell far short of any assurance or undertaking.

The absence of any real urgency (especially after the long lapse of time between the initiation of criminal proceedings by India and the initiation of Annex VII arbitration proceedings and this request for provisional measures) clearly troubled some of the dissenting members of the Tribunal including Judge Heidar (Diss. Op. at para 14), Judge Lucky (Diss. Op. at paras 56 – 65), Judge Chandrasekhara Rao (Diss. Op. at paras 1 – 15), Judge Ndiaye (Diss. Op. at paras 27 – 36) and Vice President Bouguetaia (Diss. Op. at paras 19 – 34). Even Judge Kateka who joined the majority expressed the following concerns (Sep. Op. at paras 3 & 4):

My main hesitation about the Order concerns the issue of urgency. The Tribunal can exercise its power to prescribe provisional measures only if there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute No such real and immediate risk of irreparable damage has been established by the facts and arguments submitted by the Applicant.

In the present case, the Tribunal has not only acted without giving full reasons for urgency but has also prescribed measures different from those requested by the Applicant...

In light of these reservations one wonders how Judge Kateka was able to vote in favor of the Order. For Judge Jesus on the other hand, any continuation by India of the criminal proceedings carried the risk of irreparable prejudice (Sep. Op. at para 14) as “the possible punishment of the imprisonment of the marines would render ineffective, or even moot, any decision of the Annex VII arbitral tribunal determining which of the Parties has jurisdiction to deal with the incident, in the event that the arbitral tribunal decided the issue of jurisdiction in favor of Italy. This alone justifies the urgency of the situation with respect to the prescription of provisional measures to suspend any exercise of criminal jurisdiction by either of the Parties pending a decision of the arbitral tribunal.” Judge Jesus would also have extended his conclusion as to urgency to the second head of relief requested by Italy; as would Judge ad hoc Francioni who also added, inexplicably (Sep. Op. at para 21), that it “would be misleading to assess the ‘urgency of the situation’ only in the limited time frame of the weeks or months that will pass before the Annex VII tribunal is constituted and can rule on the question.” Such an observation flies in the face of the distinction paragraphs 1 and 5 of Article 290 make between provisional measures “pending the final decision” and provisional measures pending effective constitution of the Annex VII tribunal.

This comment was first posted on the blog of the [KG Jebsen Centre of the Law of the Sea](#) of the University of Tromsø, the Arctic University of Norway.

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