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The Annex VII Tribunal in The "*Enrica Lexie*" Incident Makes New Provisional Measures Order

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Decision Commented on: Annex VII Arbitral Tribunal, Order on Prescription of Provisional Measures in the "*Enrica Lexie*" Incident, Registry of the Permanent Court of Arbitration, 29 April 2016

The "*Enrica Lexie*" incident has already been the subject of an earlier post here in relation to the provisional measures order made by the International Tribunal for the Law of the Sea (ITLOS) pending the establishment of the Annex VII Tribunal in the matter. The facts of the matter and the unusual nature of ITLOS's jurisdiction in cases of this sort are canvassed in that earlier post. The characterization of the dispute as summarized by the Annex Tribunal VII is as follows (at para 5):

> According to Italy, the Parties' dispute arises from an incident approximately 20.5 nautical miles off the coast of India involving the "MV Enrica Lexie", an oil tanker flying the Italian flag, and India's subsequent exercise of criminal jurisdiction over the vessel and two Italian marines from the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, in respect of that incident. According to India, the "incident" in question concerns the killing of two Indian fishermen, on board an Indian vessel named the "St. Antony", and the subsequent exercise of jurisdiction by India. It is alleged that the fishermen were killed by the two Italian marines stationed on the "Enrica Lexie".

The Annex VII tribunal was constituted by September 30, 2015 and comprises Professor Francesco Francioni appointed by Italy, Judge Patibandla Chandrasekhara Rao appointed by India, and, in default of agreement between the parties, Judge Jin-Hyun Paik, Judge Patrick Robinson as arbitrators, and Judge Vladimir Golitsyn, President of the Arbitral Tribunal, all appointed by the President of ITLOS pursuant to Annex VII, Article 3, subparagraphs (d) and (e) of the *Law of the Sea Convention* (LOSC). It is not without interest that this means that three of the five arbitrators are also sitting members of ITLOS (Chandrasekhara Rao, Paik and Golitsyn) and all three participated in the ITLOS provisional measures order. Judge Robinson is a member of the International Court of Justice.

It will be recalled that following the docking of the *Enrica Lexie* at the port of Kochi in India, Indian authorities arrested Sergeants Latorre and Girone and charged them with murder. The two marines were subsequently released on bail on terms set by the Supreme Court of India. The bail conditions for Sergeant Latorre were later relaxed for medical reasons and he was allowed to return to India (but still subject to bail conditions). Sergeant Girone remains in India on bail conditions that allow him to live at the residence of Italy's Ambassador to India and require reporting weekly to the authorities.

In this provisional measures application Italy asked the Tribunal (at para 25) to order that:

> India shall take such measures as are necessary to relax the bail conditions on Sergeant Girone in order to enable him to return to Italy under the responsibility

of the Italian authorities, pending the final determination of the Annex VII Tribunal

It bears mentioning (as the Tribunal itself emphasises at para 75) that this was a considerably more restrained request for provisional measures than Italy had submitted before ITLOS, at which time Italy simply requested that ITLOS order "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". ITLOS's actual Order was considerably narrower and was largely aimed at preserving each party's position by ordering each party to suspend any ongoing proceedings and to refrain from initiating any new ones pending any decision by the Annex VII arbitral tribunal.

Prima facie jurisdiction

Article 290 governs the authority of an Annex VII tribunal to make an order of provisional measures. In order to make such an order the tribunal must consider that it has *prima facie* jurisdiction. ITLOS had satisfied itself as to that test and in this application neither party contested that issue. Indeed, counsel for India, while reserving the right to contest jurisdiction on the merits, indicated (at para 51) that "India does not intend to second guess or seek to modify the Law of the Sea Tribunal's conclusions on these matters." In light of this the Tribunal (at para 54) had little difficulty in satisfying itself that it had *prima facie* jurisdiction.

Article 290 – paragraph 1 or 2?

The Parties disagreed as to whether Italy's request was a request for provisional measures under paragraph 1 or 2 of Article 290. Paragraph 2 deals with the modification or revocation of provisional measures and suggests that measures might only be revoked or modified if the circumstances justifying them have changed or ceased to exist. India argued that the application was an application under this paragraph and that nothing had changed.

The Tribunal however took the view that there was an important distinction to be made between a provisional measures order under paragraph 1 and a provisional measures order made under paragraph 5 by ITLOS, pending establishment of the ad hoc Annex VII tribunal. Thus (at para 72), "The object and purpose of Article 290, paragraph 1, is to enable a tribunal to prescribe any provisional measures that it considers appropriate to preserve the respective rights of the parties to a dispute pending the final decision, without being limited by a prior decision of ITLOS pursuant to Article 290, paragraph 5, of the Convention." As such, Italy's request should be treated as a new request rather than a request to modify the Order made by ITLOS. In reaching this conclusion the Tribunal claimed to be following the Annex VII Tribunal's Order in *The MOX Plant Case (Ireland v United Kingdom)*, Order No 3, 24 June 2003 at para 39 where that Tribunal indicated that it was dealing with the first such request by Ireland to the tribunal. No doubt it was also easier to take that position here (and notwithstanding the final sentence of Article 290(5)) because ITLOS' order, as noted above, did not actually deal with the bail conditions of the two sergeants. The present application was much more focused and modest, and, as the Tribunal notes (at para 75) "It is evident from the focus on Sergeant Girone's bail conditions that Italy is prepared to accept that, should he be allowed to return to Italy, he will remain under the jurisdiction of the courts of India. The requested measures are intended to change the physical location of Sergeant Girone's bail without prejudice to the authority of India's courts."

Urgency

Article 290 only refers to urgency in paragraph 5 which leads to the question of whether urgency is also a condition precedent to making a provisional measures order under paragraph 1, and, if so, what does urgency mean or require? Here the Tribunal followed both the jurisprudence of

ITLOS (*Ghana/Côte d'Ivoire*) and the jurisprudence of the ICJ (*Costa Rica v Nicaragua* [2011] ICJ Rep 1) concluding (at para 89) that "a showing of urgency in some form is inherent in provisional measures proceedings." What does that involve? The Tribunal answered as follows: "Generally, urgency is linked to the criterion of preservation of the respective rights of the parties to the dispute in order to avert a real and imminent risk that irreparable prejudice may be caused to the rights at issue, pending the final decision on the merits pursuant to Article 290, paragraph 1, of the Convention."

The rights of the respective parties

Italy's claimed rights are essentially the right to exercise exclusive jurisdiction over the *Enrica Lexie* incident and a claim of immunity with respect to its officials and agents. India's claimed right is a right to exercise criminal jurisdiction over the two sergeants which entails the proposition that they should be available to the Indian judicial system should India prevail. Which claim will prevail is the matter to be determined on the merits. The task of the Tribunal at this stage is evidently to ensure no irreparable prejudice to either State's conceptualization of the legal position.

In the end the Tribunal agreed to give Italy a modified form of the relief that it sought on the condition of its renewed solemn undertaking that it would comply with any award of the Annex VII Tribunal requiring the return of the marines to India.

I think that the Tribunal gives three interrelated reasons for acceding to Italy's request. The first is that (at para 103) pending determination of the legal position on the merits there is some ongoing prejudice to Italy's positon insofar as Sergeant Girone remains "under India's authority alone". The second reason that the Tribunal gives (at para 104; see also para 119) are "considerations of humanity" – namely the separation of Sergeant Girone from his family including children. Third, since the ITLOS Order had suspended all legal proceedings in the matter, there was (at para 107) "no legal interest in Sergeant Girone's physical presence in India." India's legal interests could be protected by the terms of a solemn undertaking.

Due Process

Italy also sought to justify its request for an order relaxing Sergeant's Girone's bail conditions on the basis of an alleged breach of due process and specifically a breach of Articles 9(2) and 14(1) of the *International Covenant on Civil and Political Rights*. In response the Tribunal emphasised that provisional measures are forward looking and thus, to the extent possible, the Tribunal (at para 118) "should avoid engaging with questions of wrongfulness of past conduct" and that it was not necessary to do so here.

The Order, the *Dispostif*

The Tribunal made the following order prescribing provisional measures:

> a) Italy and India shall cooperate, including in proceedings before the Supreme Court of India, to achieve a relaxation of the bail conditions of Sergeant Girone so as to give effect to the concept of considerations of humanity, so that Sergeant Girone, while remaining under the authority of the Supreme Court of India, may return to Italy during the present Annex VII arbitration.
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> b) The Arbitral Tribunal confirms Italy's obligation to return Sergeant Girone to India in case the Arbitral Tribunal finds that India has jurisdiction over him in respect of the "Enrica Lexie" incident.
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> c) The Arbitral Tribunal decides that Italy and India each shall report to the Arbitral Tribunal on compliance with these provisional measures, and authorizes the President to seek information from the Parties if no such report is submitted

within three months from the date of this Order and thereafter as he may consider appropriate.

Observations / Conclusions

1. This decision demonstrates that there is potentially a complex interaction between the provisional measures order of ITLOS pending constitution of the Annex VII tribunal and the provisional measures order(s) of that tribunal once constituted. In some cases a party may indeed ask the Annex VII tribunal to revisit the terms of the ITLOS Order as Article 290(5) contemplates in which case paragraph 2 might well require that the Tribunal satisfy itself that the relevant "circumstances have changed or ceased to exist". Alternatively, a party to the arbitration may seek a new Order as was the case here in which case paragraph 2 is inapplicable. The original ITLOS Order continues (and the Tribunal relies upon its continuance insofar as it preserves the interests of both States) but the Tribunal adds three additional measures (quoted above).

2. The Order (and especially paragraph (a)), is framed in terms which are very deferential to India's jurisdiction and in particular deferential to the authority of the judicial branch. Thus, paragraph (a) is framed as an obligation of conduct rather than an obligation of result. It requires that the parties cooperate in making an application but it does not dictate the result that must flow from that application. It is also framed in terms that protect India's view of the matter and is rather more protective of that view than the terms of the order that Italy actually sought.

3. While the Tribunal refers to "considerations of humanity" it is hard to see precisely what role these considerations play in justifying the Order when considered in light of the Tribunal's own conceptualization of the purpose of a provisional measures order. ITLOS has referred to "considerations of humanity" on a number of occasions, most notably in its prompt release jurisprudence (see e.g. *The "Juno Trader Case" (Saint Vincent and the Grenadines v Guinea Bissau),* Application for Prompt Release, Judgment, at para 77 and in its assessment of the proportionality of enforcement measures (see *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea),* Judgment, at para 155 and operative paragraph 183(9)). ITLOS also referred to considerations of humanity in its provisional measures order in this case (at para 133). It is easy to see how considerations of humanity are used in the first two categories of cases since ITLOS is engaged in a balancing exercise and such considerations are evidently relevant to the balance and to the interpretation of the reasonableness of the actions of the coastal State. It is more difficult to see precisely what role they play in a provisional measures order which, as the Tribunal observes, is intended to preserve the legal rights of the parties to the dispute. It is not clear that considerations of humanity have any interpretive role to play in this context, and if they cannot be used in that manner in what other way are they relevant? Are they an independent source of authority? This would seem unlikely insofar as a Part XV tribunal's jurisdiction is limited to disputes concerning the interpretation or application of LOSC. In any event it might be considered that the Tribunal's first reason for acceding to Italy's request is reason enough to support the order.

4. The Tribunal's treatment of Italy's due process argument is measured but inconclusive. If the argument is pursued on the merits the Tribunal will have to rule as to its jurisdiction to consider the matter and on this there seems to be something of a difference in views as between Part XV Tribunals. Most recently both the *Arctic Sunrise* and *South China Seas Tribunals* have ruled that they have no jurisdiction to consider a claim of breach of a treaty outside the context of LOSC but that they will take into account other treaty obligations as part of interpreting LOSC obligations: see *Arctic Sunrise* (Merits) at paras 188 – 198 and *South China Seas* (Jurisdiction and Admissibility) at para 282. On the other hand ITLOS seemed to take a broader view of its jurisdiction in *Saiga No 2* (see reference above) as did the Annex VII Tribunal in *Guyana v Suriname* (at para 423).

This blog is also cross-posted on the website of K.G Jebsen Centre for the Law of the Sea