Incidental jurisdiction in the award in “The ‘Enrica Lexie’ Incident (Italy v. India)” – Part II

Valentin J. Schatz 2020-07-24T09:00:04

After having addressed the existence, requirements and limits of incidental jurisdiction of UNCLOS tribunals under Article 288(1) UNCLOS in the first post, this post turns to the approach taken by the arbitral award in *Italy v. India*.

Facts of the case

To briefly recapitulate, the case concerned an incident that occurred on 15 February 2012 in India’s Exclusive Economic Zone (EEZ). Two armed Italian Navy marines that belonged to a vessel protection detachment on board the privately owned and operated Italian flagged oil tanker *Enrica Lexie* fired shots at the Indian flagged fishing vessel *St. Antony*, killing two Indian fishermen (paras. 79-117). Indian authorities subsequently directed the *Enrica Lexie* to the Indian port of Kochi and, thereafter, exercised criminal jurisdiction over the two Italian marines in relation to the killing of the two Indian fishermen (paras. 118-193), as did Italy in its own investigation and proceedings (paras. 194-216).

The arbitral tribunal’s characterization of the dispute

The arbitral tribunal characterized the overall dispute in the following terms:

> “Having analysed and established the nature of the dispute between the Parties in the present proceedings, the Arbitral Tribunal concludes that the Parties’ dispute is appropriately characterised as a disagreement as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the ‘Enrica Lexie’ and the ‘St. Antony’, which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100, and 300, the interpretation or application of which the Parties have different views. *The dispute may raise, but is not limited to, the question of immunity of the Marines* (para. 243; emphasis added).”

However, it may be doubted, as Judge Robinson did in his dissent (paras. 4-24), that the arbitral tribunal properly characterized the dispute. Clearly, the immunity issue formed part of the *overall* dispute of the parties, but it was the tribunal’s task to identify to what extent that overall dispute fell *within the scope of Article 288(1) UNCLOS*. As Judge Robinson persuasively argued, the “immunity of the marines is […] a core element of the dispute; it is the real issue in the dispute between the Parties (para. 29)”. Indeed, based on Italy’s own submissions, the only link between UNCLOS and the immunity issue would have been a potential *renvoi* to the

customary international law of immunity of State officials in the UNCLOS provisions invoked by Italy. In this respect, Italy's final submission was:

"By asserting and continuing to exercise its criminal jurisdiction over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, India is in *violation of its obligation to respect the immunity of the Marines as Italian State officials exercising official functions*, in breach of Articles 2(3), 56(2), 58(2) and 100 of UNCLOS (para. 75; emphasis added)."

Italy's unsuccessful reliance on alleged *renvoi*-provisions in UNCLOS

However, the arbitral tribunal found all provisions invoked by Italy to be inapplicable. It considered that Articles 2(3), 56(2) and 58(2) of UNCLOS, which concern the EEZ or territorial sea, were not applicable because India's enforcement measures were taken in India's internal waters and territory (para. 798). It did not take a position on whether (1) the provisions invoked by Italy do indeed contain a *renvoi* and/or (2) whether they constitute obligations to comply with (or to have due regard to) external rules falling within the scope of the alleged *renvoi* (cf. the expansive jurisprudence in *Mauritius v. United Kingdom* (para. 503), rejected by Judge Robinson in an *obiter dictum* in his dissenting opinion (para. 31)).

Italy had also invoked Articles 297(1), 95, 96, and 100 UNCLOS, but these provisions were equally found by the arbitral tribunal to be inapplicable (paras. 799-802). Thus deprived of applicable provisions in UNCLOS that could (allegedly) provide a sufficiently strong jurisdictional link under Article 288(1), the arbitral tribunal acknowledged that UNCLOS "may not provide a basis for entertaining an *independent immunity claim* under general international law (para. 809; emphasis added)". From this moment, the immunity issue did no longer form part of the UNCLOS dispute as the arbitral tribunal itself severed the only potential link between the two. This was not, however, acknowledged by the arbitral tribunal.

The arbitral tribunal's acceptance of incidental jurisdiction over the immunity issue

Next, the arbitral tribunal turned to the question of incidental jurisdiction. Curiously, however, as noted by Judge Robinson in his dissent (paras. 42-49), the tribunal did not state what it considered the requirements of incidental jurisdiction to be. Despite the fact that two of the three arbitrators of the majority, Judges Golitsyn and Paik, are simultaneously arbitrator and president of the tribunal (in reverse order) in *Ukraine v. Russia*, the award contains no reference to the findings of that tribunal (which essentially followed the methodology adopted in *Mauritius v. United Kingdom*) or the tribunal in *Mauritius v. United Kingdom* on questions of incidental jurisdiction.

Instead, the arbitral tribunal simply stated that the dispute "could [not] be satisfactorily answered without addressing the question of the immunity of the Marines (para. 805)." In its view, the arbitral tribunal "could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines enjoy immunity (para. 808)". This was because "[i]mmunity from jurisdiction, by definition, operates as an exception to an

otherwise-existing right to exercise jurisdiction" and because the question "[w]hether that exception applies in the present case is a question that forms an integral part of the Arbitral Tribunal's task to determine which Party may exercise jurisdiction over the Marines (para. 808)". On this basis, the arbitral tribunal concluded that its "competence extends to the determination of the issue of immunity of the Marines that *necessarily arises as an incidental question in the application of [UNCLOS]* (para. 809; emphasis added)".

Was the immunity issue "incidental" to the UNCLOS dispute?

Applying the "necessity" requirement as introduced in the first post, it is quite evident that the immunity issue was *not* a preliminary question in the interpretation or application of any of Italy's claims based on UNCLOS. As mentioned, after the arbitral tribunal had rejected Italy's claims based on (alleged) *renvoi* provisions in UNCLOS, none of the remaining provisions invoked required a prior determination of the immunity issue. Therefore, the immunity issue no longer formed part of the *UNCLOS dispute*.

What remained was a dispute as to whether Italy or India (or both) had jurisdiction under UNCLOS over the incident, requiring an interpretation and application of, *inter alia*, Articles 92 and 97 UNCLOS. However, prior to turning to the immunity issue, the arbitral tribunal found that Italy and India had concurrent jurisdiction under Article 92(1) UNCLOS over the incident (paras. 363-370). This finding evidently did not require, as a preliminary question, a determination that the Italian marines did not enjoy immunity from criminal jurisdiction. Indeed, as the International Court of Justice (ICJ) stated in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, there is an important distinction between jurisdiction and immunity from jurisdiction: "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction (para. 59)". How, then, could a determination of the immunity issue have been "necessary" for the determination of the question of jurisdiction *under UNCLOS*?

Applying the "ancillarity" requirement, the weight of the immunity dispute within the overall dispute was – as already stated in the context of the characterization of the dispute – arguably such that it would probably not have been "minor" to the UNCLOS dispute, but itself constituted a separate "real issue" falling outside the scope of incidental jurisdiction under Article 288(1).

Concluding remarks

Regrettably, the award does not address the requirements for incidental jurisdiction of international courts and tribunals operating under a compromissory clause generally, nor does it place these general requirements in the specific context of Part XV of UNCLOS and previous jurisprudence. It seems more convincing to consider that the immunity issue was not incidental (neither "necessary" nor "ancillary") to the UNCLOS dispute.

It is true that the ICJ very recently considered in the ICAO Council Cases (here and here) that incidental jurisdiction of dispute settlement bodies with limited subject-

matter jurisdiction may extend to defences based on countermeasures where such a determination is indispensable to a decision of a claim for which it has jurisdiction. However, the ICJ's approach, if one considers it persuasive, is still more restrictive than that of the arbitral tribunal in *India v. Italy*. Lawful countermeasures may preclude State responsibility under rules of the treaty over which jurisdiction exists (in the present case UNCLOS), whereas the question of immunity at issue in *India v. Italy* was not indispensable to the merits of Italy's claims concerning violations of provisions of UNCLOS (notably Articles 92, 97 and 100). It was an entirely separate issue that concerned the violation of the customary international law of immunity of state officials as *primary* obligations.

In conclusion, the approach taken by the majority reflects a very broad understanding of the extent of incidental jurisdiction of UNCLOS tribunals that is arguably at odds with the extent of consent to jurisdiction granted under Article 288(1). If it were to form the starting point of a new line of jurisprudence, it should be hoped that it is restricted to defenses such as immunity that are at least closely related to the UNCLOS provisions at issue.

Valentin J. Schatz is a research associate and Ph.D. candidate at the Chair of International Law of the Sea and International Environmental Law, Public International Law and Public Law at the University of Hamburg and a member of the Institute for the Law of the Sea and for Maritime Law.

Cite as: Valentin J. Schatz, "Incidental jurisdiction in the award in *The 'Enrica Lexie' Incident (Italy v. India)*: Part II", 24 July 2020.