ZOOM IN

The question:

Assessing the requirements for the indication of provisional measures by ITLOS: The order of 24 August 2015 in the *Enrica Lexie* case

Introduced by Paolo Palchetti and Maurizio Arcari

On 24 August 2015, the International Tribunal for the Law of the Sea ('ITLOS') rendered an order on a request by Italy for the prescription of provisional measures under Article 290(5) UNCLOS. The case concerned a dispute between Italy and India relating to the exercise of jurisdiction by India over an incident involving an oil tanker flying the Italian flag, the *Enrica Lexie*. The Tribunal indicated provisional measures which differed in part from those requested by Italy, deciding that both Parties were under a duty to suspend all court proceedings relating to the incident.

The order of 24 August 2015 raises a number of interesting questions concerning the requirements for the indication of provisional measures. QIL asked Massimo Lando and Irini Papanicolopulu to focus on just two of those issues.

The first one, which is addressed in Lando's contribution, pertains to the competence of the Tribunal to indicate provisional measures in the case at hand. This presupposes an examination of a preliminary issue, namely whether there existed a dispute between the Parties relating to the interpretation and application of UNCLOS. The question of determining the real subject-matter of the dispute was very much relevant in the case Italy submitted before the Tribunal. India had objected that no dispute concerning the application and interpretation of UNCLOS existed between the Parties. In its order, the Tribunal admitted the existence of a dispute by mainly relying on the fact that Italy had invoked a number of provisions of UNCLOS. While it is true that, in the context of the proceedings on provisional measures, the Tribunal has only to determine the existence *prima facie* of a dispute, it may be asked

whether the Tribunal resorted to too low a threshold in order to determine the existence of a dispute falling within its competence. Is the Tribunal's approach to the determination of a dispute in line with its previous case law? Is such an approach justified? Is there a risk that, because of the very low threshold used by the Tribunal, States may be willing to request provisional measures from the Tribunal even in the cases in which the law of the sea aspects of a dispute are of secondary importance, if not artificially raised by the State in order to be able to have access to an international tribunal?

Irini Papanicolopulu addresses the role of the so-called 'considerations of humanity' in the formulation, interpretation and application of law of the sea rules. Both Italy and India referred to considerations of humanity to support their contention before the Tribunal. In paragraph 133 of its order, the Tribunal stressed that 'considerations of humanity must apply in the law of the sea as they do in other areas of international law'. While, as shown by the author, this is not the first case where ITLOS has referred to considerations of humanity in its case law, the use of this concept has been somewhat ambiguous. Thus, one may ask what is the practical meaning of the ITLOS statement? What does this statement add to the provisional measures indicated to the Parties? Is the Tribunal competent to assess whether the Parties, in fulfilling their duties under the order, acted in full compliance of these 'considerations of humanity'? Is the use of 'considerations of humanity' in the *Enrica Lexie* case different from the use made of the same concept in previous cases? More broadly, is there a need for a bolder attitude from law of the sea judges in adapting the law of the sea to the values attached to human rights?