Careful Balance or Missed Opportunity? The ‘In Principle’ Public Nature of the Arbitration Concerning the “Enrica Lexie” Incident

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On 26 June 2015 Italy commenced inter-state arbitral proceedings by serving on India a notification of dispute under Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea (“UNCLOS”); both States are Parties to UNCLOS. In Italy’s submission the dispute concerns 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 in respect of that incident India’s subsequent exercise of criminal jurisdiction over two Italian marines from the Italian Navy. The incident in question, in India’s submission, is the killing of two Indian fishermen on board another vessel, allegedly by two Italian marines stationed aboard the Enrica Lexie.

Why Annex VII?

A State Party that is a party to a dispute not covered by an in force declaration

concerning the choice of dispute resolution method (under Article 287), is deemed under UNCLOS (Article 287(3)) to have accepted arbitration in accordance with Annex VII to UNCLOS. Where the parties to a dispute have not accepted the same procedure for settlement of the dispute or otherwise agreed to a procedure, moreover, it can only be submitted to arbitration in accordance with Annex VII (Article 287(5)). Annex VII arbitration (as opposed to, for example, going to the International Tribunal for the Law of the Sea ("ITLOS")) was here necessitated by the fact that India has not made a declaration as to the method of resolving disputes pursuant to Article 287 of UNCLOS. This difference may have proved significant. The Statute of the International Tribunal For the Law of the Sea – whose jurisdiction only Italy had accepted – includes an article making hearings presumptively public (ANNEX VI. Statute of the International Tribunal for Law of the Sea, Article 26) and ITLOS maintains both a live feed webcast and webcast archives on its website. Annex VII is, conversely, silent on the matter – it simply allows the arbitral tribunal to determine its own procedure (see Annex VII, Article 5).

The "Enrica Lexie" Incident's Rules of Procedure

On 18 January 2016 a first procedural meeting with the State parties was held at the premises of the Permanent Court of Arbitration ("PCA") at the Peace Palace in The Hague. The PCA is serving as the Registry and is responsible for the archives of these proceedings. On 19 January 2016 the Rules of Procedure (the "Rules") were issued by the Tribunal, including a final section entitled "Section VI. Transparency". This section sets out a procedure granting imperfect but still significant transparency to the proceedings. The existence of the arbitration and the identities of the State parties, Tribunal members, agents and counsel, are all public. Procedural orders and decisions of the Tribunal are similarly public and are to be made available on the PCA website the day after they have been notified to the parties. Documents, pleadings and submissions have time-limited confidentiality: they remain confidential until the opening of the hearing to which they relate, subject to the State parties having the power to designate any document or information as confidential. Most importantly, Article 23(3) sets out that the hearings "shall in principle be open to the public" before later stating expressly that "*In lieu* of webcasting, the corrected hearing transcripts shall be published." The transcript of the first procedural meeting, however, either does not exist or has been deemed confidential: it is not on the PCA's website. The reason

why webcasting has been ruled out is unfortunately not clear and paper (arriving two weeks later, according to a PCA Press Release) is no substitute for video.

A Missed Opportunity?

For some, the lack of webcasting is a significant missed opportunity and runs contrary to current trends. Such trends include (i) the frequent use of video/webcasting in other forums used to resolve inter-State disputes (such as the ICJ and ITLOS), (ii) the trend of increased transparency in other State-party arbitrations (see, for example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration), and (iii) the use of video/webcasting in *inter alia* the Supreme Courts of Canada, the United Kingdom, and New Zealand.

Reasons offered in favour of broadcasting hearings vary by advocate but typically centre on increasing, through the broadcast process: public knowledge and familiarity, court legitimacy, public trust and perceptions of fairness, public engagement and accessibility. As the President of the European Court of Human Rights ("ECHR") said, when announcing live webcasting of all public hearings, making the ECHR more visible and accessible would ensure the dissemination of case-law, engage the public, and provide an example of transparent administration of justice as an important feature of the rule of law. In the non-political sense, it is the democratising feature of transparency – especially as regards international law – that is perhaps most harmed by the Tribunal's imperfect compromise: the potentially large numbers of people interested in this case are unlikely to be able to afford to travel to the Hague to watch the proceedings on closed-circuit television, particularly as the registration deadline to do so has already passed. Not many are likely to have the resources and knowledge needed to attend.

Why the Half Measure of Transparency?

It would be unfair to lay the blame for the attenuated transparency of the Rules, if any blame is due, solely on the Tribunal. The Rules were crafted in consultation with the State parties, and Italy (at least) appears to have had some concerns about confidentiality in separate but related ITLOS proceedings: certain parts of those proceedings were held *in camera*. There are also reasons why live webcasting may have been less appropriate in these particular proceedings: many jurisdictions are hesitant to let cameras into hearings where witnesses are involved and there remains the risk in proceedings like these that one state or both may be

tempted to “showboat” at hearings for political gain with domestic audiences. There is also the practical consideration that this is an emotionally charged case – India’s embassy in Rome has reportedly received hate mail and a live bullet – and quiet negotiations can sometimes further settlement more easily than those conducted under a spotlight. As the EU High Representative, Catherine Ashton, remarked of this dispute: “A lot of the work on this, you’ll understand, is done quietly – for good reasons”. If reduced transparency (i) lowers domestic pressures and temperatures in each State, and (ii) the delayed transcripts or provisions on confidentiality allow the parties time to reach a settlement – perhaps after a significant revelation in the arbitration, then the bucking of the trend towards transparency and the attenuation of transparency’s benefits may yet prove wise. If the arbitration proceeds all the way to an Award, however, it seems unlikely to have been worth the opportunity lost.