PROVISIONAL MEASURES: A WAY TO IMPROVE CABLES PROTECTION?

Alexandre Martins B. Leite

amartins80@uol.com.br

São Paulo University Law School – Rua Capitão César de Andrade, n.º 168 – apto. 605 – Leblon – 22431.010 – Rio de Janeiro – RJ – Brazil

Abstract: This article is meant to show elements that can help reflecting upon the application and enforcement of provisional measures prescribed by the International Tribunal for the Law of the Sea in submarine cables protection cases and other disputes arising under its activities. However, the analysis of proceedings shall have *ratione materiae* and *ratione personae* jurisdiction rules as a background. From this point of view, the present paper will target at exhibiting the rules that favor the improvement of submarine cables protection and also the action of players of cables activities in the international scenario.

1 INTRODUCTION

The recent development of international law mainly in the fields of environmental law, human rights protection and specially the law of the sea has dramatically affected the settlement of the international disputes system. An outstanding expression of such evolution was the *provisional measures* prescription by ITLOS[i] in cases involving agreements set forth by non-state entities[ii].

The term *provisional measures* under UNCLOS provisions means a preliminary order prescribed by a Court or a Tribunal referred to and legitimate to deal with law of the sea claims. The 1982 United Nations Convention on the Law of the Sea[iii] provided, therefore, in specific cases the right of many subjects of international law, including NGO's, private companies and individuals to apply for the prescription of *provisional measures* in order to assure rights or to protect the marine environment[iv]. However, procedural rules concerning the prescription of this provision will be expressed in distinct ways at the several judging bodies[v]. Each Tribunal, even the arbitral ones, is autonomous to deal with its proceedings in an individual manner.

The creation of the International Tribunal for the Law of the Sea[vi], on its turn, caused new developments to arise new possibilities for subjects of activities with submarine cables. In addition to the possibilities of private subjects having their rights assured in international disputes, agreements on themes that are distinct from the law of the sea may also legitimate ITLOS adjudication. In this sense, the background of this article will be the analysis of *ratione materiae* and *ratione personae* competence rules of the International Tribunal for the Law of the Sea. By *ratione materiae* rules we suppose to define which case could be heard and decided on the merits by the law of the sea international judging body. On the other hand, *ratione personae* rules will expose who could come before a Court or an international Tribunal as a claimant. The study will be further complemented by the analysis of rules of the Montego Bay Convention, in which the Statute of Hamburg Court was also present. Furthermore, the verification of legal capacity to sue of the players of submarine connections before ITLOS would foster the acknowledgment of the insertion of these international persons in the category of subjects of public international law.

2 ITLOS AND PROVISIONAL MEASURES

It is necessary to verify at first to which extent *provisional measures* would work as an instrument to protect submarine cables. The mere fact that companies involved in activities with submersible cables are legitimated to file complaints at an international jurisdiction already means an important step towards the protection of world connections. In some urgent occasions, procedural rules of the Tribunal may represent considerable delays, which may not be admitted, considering the nature of services maintained by means of cables. Therefore, it is about this issue that *provisional measures*[vii] will play an important role in activities promoted with submarine cables, mostly for the several relationships arising from it.

Almost all cases of ITLOS are characterized as urgent procedures, with *provisional measures* corresponding to 38% of cases filed[viii]. In addition to provisions of the Montego Bay Convention itself, *provisional measures* by ITLOS are ruled by the Statute[ix] of the permanent judging body, as well as by its Rules[x].

According to ITLOS urgency proceedings the Tribunal could prescribe *provisional measures* without evaluating the case on the merits[xi]. These new procedures resulted from the possibilities of *forum shopping* set forth by Montego Bay Convention, constituting a true incentive for the private maritime sector.

From this point of view shall the analysis of the importance of *provisional measures* for the protection of submarine cables be developed. The competence of ITLOS to evaluate and judge cases involving the application and interpretation of agreements, jointly with the possibility of participation by private entities in disputes, represents major news in the system for

settling disputes of the law of the sea for activities with submarine cables.

3 ITLOS COMPETENCE TO DEAL WITH PRIVATE DISPUTES

The competence of the specialized Tribunal is defined in the Montego Bay Convention, as well as in its Statute[xii]. Once more, it is important to analyze the rules of *ratione materiae* competence of the Tribunal for the law of the sea. It is necessary to take into account ITLOS jurisdiction to settle disputes arising from private international agreements. Particularly, relations that interest this study are only those verified in activities promoted with submarine cables.

The Montego Bay Convention defines the competence of judging bodies listed by it to evaluate and judge disputes concerning the application and interpretation of its text and international agreements that assign competence to it. When analyzing what should be understood as international agreements, Professor Rüdiger Wolfrum[xiii] related them to treaties, considering that the Vienna Convention on the Law of Treaties of 1969 defines these international instruments as international agreements entered into by States..

Nevertheless, for the maritime private sector purposes, what truly matters is the provision of Article 21 of ITLOS Statute. According to said provision, any agreement would be inserted in the framework of the *ratione materiae* competence of the Tribunal of Hamburg. However, the Article of ITLOS Statutes pointed out no qualifications concerning disputes on the law of the sea. In particular, the words “related to the purposes of this Convention” are not included in Article 21 of ITLOS Statute. For this reason, it has been suggested that the restriction in Article 288 that recognizes competence only in the field of the law of the sea does not apply to ITLOS[xiv]. Furthermore, the enlarged competence of the Tribunal under Article 288 and Article 21 of the Statute is not restricted to agreements to be concluded after its establishment, but it can also apply to agreements already in force prior to ITLOS establishment[xv]. From this point of view, it may be concluded that the Tribunal would be legitimated to evaluate and judge disputes arising from the application and interpretation of agreements concerning activities performed with submarine cables outside the framework of UNCLOS and even in force before its establishment.

However, the extension of the competence of ITLOS would face the argument that Article 288 of UNCLOS concerns all courts and tribunals referred to in Article 287 of UNCLOS. Therefore, by applying Article 21 of ITLOS Statute, its competence is broader than that of the others. Anyway, the international law of the sea does not aim at ruling only questions of maritime delimitation with a public character. The existence of the many maritime spaces and technological development encouraged a substantial growth of activities promoted in the sea. Nevertheless, timid work of public international law on regulating maritime activities insert it in the framework of private law as observed in submarine cables matters. It was in this sense that the Montego Bay Convention dealt with the Seabed Disputes Chamber, competent to deal with disputes involving private agreements. We can not forget ITLOS possibilities to adjudicate outside the ambit of UNCLOS. For this purpose, ITLOS jurisprudence shall harmonize the relation of UNCLOS provisions and its Statute.

The ITLOS former judge and president Thomas Mensah[xvi] recognizes the competence of the Hamburg Tribunal to settle disputes arising under agreements other than UNCLOS and related to its purposes that may be of particular interest to legal practitioners in the private maritime sector, including submarine cables activities.

Considering the conventional and statutory provisions evidenced before, the competence of the permanent international jurisdiction of the law of the sea may be accepted to evaluate disputes arising from activities promoted with submerged cables. The major question will be about the capacity of submarine cables actors to claim in the framework of specialised international litigation. Would they need diplomatic protection? Or would they be legitimated to claim rights arising from treaties and/or internationalized agreements in their own names or in the name of States?

4 INTERNATIONAL LEGAL CAPACITY OF PRIVATE SUBJECTS TO SUE BEFORE ITLOS

As already seen, ITLOS competence has been enlarged to agreements established outside UNCLOS framework, aiming at ruling the exercise of activities, even the private ones, in the several maritime spaces. Considering the particular issues of the current uses of the sea, aligned with the development of technologies, the law of the sea could not ignore this evolution and dismiss private players and their relations in maritime spaces[xvii]. Therefore, it was with the aim of entirely suiting the new traces of the law of the sea that UNCLOS granted *locus standi* for non-state entities to come before ITLOS in specific situations, as the exploration and exploitation of marine resources[xviii].

However, outside of the framework of UNCLOS, as already seen, ITLOS *ratione personae* competence was expanded in order to cover the participation of entities other than States Parties[xix]. The Montego Bay Convention itself, when referring to cases of exploration and exploitation of the bottom of the sea, uses a term that is different from the one used to deal with subjects authorized to agree with procedures to settle disputes of the sea[xx]. The conventional text of part XI lists[xxi] the subjects inserted in the competence of the Seabed

Disputes Chamber, which would be involved in activities for exploring and exploiting mineral resources of the sea, being thus considered as "*Non-state entities"*. However, the definition of access by subjects to procedures for settling disputes of the Tribunal was established by the expression "*entities other than States Parties"*, which suggests a much broader competence if compared to that of the Seabed Disputes Chamber.

On the other side, the competence of the Tribunal outside the framework of UNCLOS could never be implemented if only the legitimacy of players of the exploration of mineral resources was acknowledged. It is from this point of view, then, that the theme of submarine cables is inserted.

The access by private subjects of activities with submerged cables to the procedure of prescribing *provisional measures* by ITLOS would be conditioned to a provision expressed in a contract that granted jurisdiction to the specialized Tribunal. This could not be different, because Article 20 of ITLOS Statute determines that the competence granted to the Tribunal shall be acknowledged by the parties under dispute.

5 CONCLUSION

By the present moment, the International Tribunal for the Law of the Sea has not evaluated any case involving the application and/or interpretation of agreements signed by private subjects on questions outside UNCLOS framework. However, concerning its *ratione personae* competence, the Hamburg Tribunal, however timidly, consecrated the participation by an international organization in one of the cases submitted for its evaluation[xxii].

Although there is no jurisprudence on the matter, procedural rules of the International Tribunal on the law of the sea concerning the prescription of *provisional measures* are favorable to international judicial adjudication on submarine cables matters. Nevertheless, only international practice may show the effective place of this permanent jurisdiction of the law of the sea in the context of protection and ruling of activities promoted with submarine cables.

The only requirement is that the parties negotiating an appropriate agreement or parties to an existing agreement who consider that the Tribunal can provide an acceptable mechanism for the settlement of disputes under such an agreement should include an express provision to that effect in the agreement. In this sense, considering all that was said, the procedure of prescription of *provisional measures* by the International Tribunal for the Law of the Sea may represent an important step to improve protection and ruling of activities exercised with submarine cables.

6 REFERENCES

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[i] Abreviation of International Tribunal for the Law of the Sea.

[ii] Non-state entities are non-governmental organisations, private companies and individuals.

[iii] Also known as UNCLOS.

[iv] See Article 290 §1 of UNCLOS and article 25 §1 of ITLOS Statute.

[v] The Montego Bay Convention on the law of the sea in compulsory procedures entailing binding decisions section prescribed various means for the settlement of disputes. The system for settling disputes on the law of the sea allows the States, at first, to elect one among the several judging bodies in a sort of *forum shopping.* States and non-states entities may choose between the International Tribunal for the Law of the Sea, International Court of Justice and various types of Arbitration the best way to settle international disputes related to law of the sea purposes. Please refer to SOREL, Jean-Marc. Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions interétatiques (CIJ et TIDM). In: 1ère Journée du Contentieux International. 2002. Paris. Anals of Journée du Contentieux International. Paris: Pedone, 2003. p. 8/9.

[vi] In addition to ITLOS, the procedure of *provisional measures* also exists in permanent jurisdictions, such as the International Court of Justice, Court of Justice of the European Communities, European Court of Human Rights and Inter-American Court of Human Rights.

[vii] Rules of ITLOS predicted priority and fast proceedings for *provisional measures* prescription. See article 90 §1 of the Rules of ITLOS.

[viii] ITLOS has a list of cases comprised of 13 cases, 5 with application for the prescription of *provisional measures.* Furthermore, 12 cases correspond to urgent procedures, including the cases of *prompt release of vessels* and *provisional measures.* See ITLOS' list of cases in www.itlos.org.

[ix] See Article 25 of the Statute of ITLOS

[x] See Articles 89 to 95 of the Rules of the Tribunal.

[xi] According to § 5 of Article 290 of UNCLOS, ITLOS may prescribe *provisional measures* while the parties wait for the constitution of an Arbitral Tribunal. Without an analysis of the merits of the case by the permanent jurisdiction, *provisional measures* can be prescribed in order to safeguard rights and the marine environment. The Southern bluefin tuna case perfectly exemplifies this mode of prescribing *provisional measures*, in which,

after ITLOS work, the case continued before ICSID jurisdiction.

[xii] See Article 21 of ITLOS Statute.

[xiii] See WOLFRUM, Rüdiger. The Legislative History of Articles 20 and 21 of the Statute of the International Tribunal for the Law of the Sea. **Rabels Zeitschrift für Ausländisches und Internationales Privatrecht**, Hamburg, v. 63 (2), p. 345-346. April 1999.

[xiv] MENSAH, Thomas. The competence of the International Tribunal for the Law of the Sea outside the framework of the Convention on the Law of the Sea. **Zbornik Pravnog Fakulteta u Zagrebu**, Zagreb, v. 51 (5), p. 881. 2001. BOYLE, Alan E. The proliferation of International Jurisdictions and its implications for the Court. *In:* BOWETT and others (eds.) **The International Court of Justice**: process, practice and procedure. London: The British Institute of International and Comparative Law, 1997. p. 127.

[xv] Article 22 of ITLOS Statute expressly states that "*all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any dispute concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal"*. This provision amplified ITLOS competence to agreements established outside the UNCLOS framework before the creation of the Tribunal.

[xvi] MENSAH, Thomas. International Tribunal for the Law of the Sea and the Private Maritime Sector. **International Business Lawyer**, London, v. 27, n. 7, p. 320. 1999.

[xvii] Maritime spaces are those areas in the sea referred to by UNCLOS as territorial waters, contiguous zone, exclusive economic zone, continental shelf, high sea and archipelagic water.

[xviii] See Article 187 of UNCLOS.

[xix] See Article 291 § 2 of UNCLOS and Article 20 of ITLOS Statute.

[xx] To demonstrate private *locus standi* before the Seabed Disputes Chamber, UNCLOS uses the term "*Non-state entities"*. However, when it deals with private *locus standi* before ITLOS in outside UNCLOS framework context, it uses the term "*entities other than States Parties"*.

[xxi] See Article 187 of UNCLOS

[xxii] See ITLOS Case n.º 7 concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean. Dispute arising between the European Community and Chile.