Recurring Themes / Thèmes récurrents

Interim Measures in International Law / Les mesures provisoires en droit international

The Continuing Controversy over Provisional Measures in International Disputes

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I. Of Practice and Principle

The dramatic events in the recent case of Motorola Credit Corporation v. Uzan et al\(^1\) demonstrate the global potency of provisional measures in modern international litigation. Following a multi-billion dollar default on its loans to a Turkish mobile telephone operator, Motorola brought a complaint of fraud against its Turkish partner's owners to the Southern District of New York. It then pursued an application for a freezing injunction in support of the New York proceedings in England. Its coup de grâce was to seek enforcement of that order in Switzerland, a strategy which has now received the blessing of the Swiss Federal Supreme Court. The experience of this case could be multiplied many times from the law reports in both public and private international litigation. Very often the availability of provisional measures is of huge practical importance to the parties, and may be decisive of the outcome of the case. This is not only true of the large multi-jurisdictional commercial and fraud cases typified by the Motorola litigation. In international tribunals, too, the interim measures jurisdiction may overshadow the settlement of disputes on the merits, as the initial experience of the International Tribunal for the Law of the Sea demonstrates.

It is doubtless true, as Jiménez de Aréchaga held in the Aegean Sea Continental Shelf case in the International Court of Justice, that the interim protection of rights is a general principle of law recognized by civilised nations:\(^2\)

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\(^1\) 322 F. 3d 130 (USCA 2nd Cir); [2002]EWCA Civ 989 (English CA); BGE 129 III 626 (Swiss Federal Sup Ct), and see: Veit and Sprange 'Enforcing English Worldwide Freezing Injunctions in Switzerland' (2004) 5 BLI 400.

\(^2\) ICJ Rep 1976, 3 at 15-16.

… the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision … is that the action of one party ‘pendente lite’ causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour.

Collins, in his seminal series of Hague lectures on the topic,3 showed the common issues faced by tribunals, whether they be domestic courts, arbitral tribunals, or international courts, in setting the boundaries for the availability of such relief. The American Law Institute and UNIDROIT, in developing their Principles and Rules of Transnational Civil Procedure, have recognised a general right to grant provisional relief “when necessary to provide effective relief by final judgment or to regulate the status quo.”4

Given this general recognition of the importance of provisional relief, it is therefore both surprising and disturbing to have to report that there remain major controversies over the extent and conditions of its availability in international cases. These controversies have engaged the attention of supreme courts around the world. They have also taxed international tribunals and law reform bodies. They go to the very heart of the matter by raising fundamental issues in (at least) the following five areas:

1. the substantive type of orders which may be made as provisional measures;
2. the territorial scope of such orders;
3. the jurisdiction to grant them and their availability in aid of proceedings on the merits in another tribunal;
4. the availability of ex parte relief; and,
5. the enforceability of such orders outside the tribunal granting them.

It is the burden of this paper to suggest that, while a general trend towards an international consensus may be discerned, there remain serious shortcomings in the law in this area. The judicial decisions and international debates on the matter over the last five years have done little to dispel these deficiencies. They stem from a widespread failure properly to analyse the international context in which applications for such measures arise. In the compass of this short note it is not possible