

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2015

24 August 2015

<u>List of Cases:</u>

No. 24

THE “ENRICA LEXIE” INCIDENT

(ITALY v. INDIA)

Request for the prescription of provisional measures

ORDER

Present: *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judge ad hoc* FRANCIONI; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and articles 21 and 25 of the Statute of the Tribunal (hereinafter “the Statute”),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter “the Rules”),

Having regard to the fact that the Italian Republic (hereinafter “Italy”) and the Republic of India (hereinafter “India”) are States Parties to the Convention,

Having regard to the fact that Italy and India have not accepted the same procedure for the settlement of disputes concerning the interpretation or application of the Convention referred to in article 287, paragraph 1, of the Convention and may therefore submit their dispute only to arbitration in accordance with Annex VII to the Convention, unless they agree otherwise,

Having regard to the “Notification under article 287 and Annex VII, article 1 of UNCLOS” and the “Statement of claim and grounds on which it is based” (hereinafter “the Statement of Claim”) dated 26 June 2015, addressed by Italy to India, instituting arbitral proceedings under Annex VII to the Convention in respect of “the dispute concerning the *Enrica Lexie* incident”,

Having regard to the request for provisional measures contained in the Statement of Claim,

Makes the following Order:

1. *Whereas*, on 21 July 2015, Italy filed with the Tribunal a Request for the prescription of provisional measures (hereinafter “the Request”) under article 290, paragraph 5, of the Convention in the above-mentioned dispute;
2. *Whereas*, on the same date, the Registrar transmitted copies of the Request electronically to the Minister of External Affairs of India and the Ambassador of India to the Federal Republic of Germany;
3. *Whereas*, by letter dated 21 July 2015 addressed to the Registrar, the Minister of Foreign Affairs and International Cooperation of Italy notified the Tribunal of the appointment of Mr Francesco Azzarello, Ambassador of Italy to the Kingdom of the Netherlands, as Agent for Italy;

4. *Whereas* the Tribunal does not include upon the bench a judge of Italian nationality, Italy, pursuant to article 17, paragraph 2, of the Statute, in its Request chose Mr Francesco Francioni to sit as judge *ad hoc* in this case;
5. *Whereas*, in a Confidential Addendum to the Request relating to medical matters, Italy made a request to the Tribunal that the information contained therein should “not be publicly disclosed, including in any Order of the Tribunal”;
6. *Whereas* a certified copy of the Request was transmitted by the Registrar to the Minister of External Affairs of India by courier on 22 July 2015;
7. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified of the Request by a letter from the Registrar dated 22 July 2015;
8. *Whereas*, on 23 July 2015, pursuant to articles 45 and 73 of the Rules, the President, by telephone conference, held consultations with the Agent of Italy and Mr Choudhary, Joint Secretary, Head of the Legal and Treaties Division, Ministry of External Affairs of India, and Ms Singla, Joint Secretary, Ministry of External Affairs of India, to ascertain the views of Italy and India (hereinafter “the Parties”) with regard to questions of procedure;
9. *Whereas*, during these consultations, it was agreed that documentation relating to the Confidential Addendum submitted by Italy would be kept confidential and that any request from the Parties that the hearing or part of the hearing be held in camera should be submitted to the Tribunal not later than 6 August 2015;
10. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President, by Order dated 24 July 2015, fixed 10 August 2015 as the date for the opening of the hearing, notice of which was communicated to the Parties on the same date;

11. *Whereas* the Registrar, in accordance with article 24, paragraph 3, of the Statute, by a note verbale dated 24 July 2015, notified the States Parties to the Convention of the Request;

12. *Whereas*, by letter dated 28 July 2015, the Minister of External Affairs of India notified the Registrar of the appointment of Ms Neeru Chadha, former Additional Secretary and Legal Adviser, Ministry of External Affairs, as Agent for India, of Mr Vijay Gokhale, Ambassador of India to the Federal Republic of Germany, as Co-Agent for India, and of Mr Vishnu Dutt Sharma, Director of the Legal and Treaties Division, Ministry of External Affairs, as Deputy Agent for India;

13. *Whereas*, on 30 July 2015, the Deputy Registrar sent a letter to the Agent of Italy requesting further documents, and *whereas* the Agent of Italy submitted the requested documents on 31 July 2015;

14. *Whereas*, by letter from the Agent of Italy to the Registrar dated 6 August 2015, Italy requested the holding in camera of the part of the hearing concerning confidential information it had submitted in its Request;

15. *Whereas*, on 6 August 2015, by electronic mail, India filed with the Tribunal its Written Observations, a certified copy of which was transmitted electronically by the Registrar to the Agent of Italy on the same date, and *whereas* the original of the Written Observations was filed with the Registry on 9 August 2015;

16. *Whereas*, since no objection to the choice of Mr Francioni as judge *ad hoc* was raised by India, and none appeared to the Tribunal itself, Mr Francioni was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 8 August 2015;

17. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 8 August 2015 concerning the written pleadings and the conduct of the case;

18. *Whereas*, on 8 August 2015, the Registrar sent a letter to the Agent of India requesting further documents, and *whereas* India submitted the requested documents on 20 August 2015;

19. *Whereas*, pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, materials were submitted to the Tribunal by Italy and India on 9 August 2015;

20. *Whereas*, on 9 August 2015, in accordance with article 45 of the Rules, the President held consultations with the Agents and counsel of the Parties with regard to questions of procedure;

21. *Whereas* during these consultations, it was agreed that Italy would present its oral arguments dealing with confidential information in camera, in accordance with article 26 of the Statute and article 74 of the Rules;

22. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Written Observations and documents annexed thereto, except for the documents referred to in paragraph 5, were made accessible to the public on the date of the opening of the oral proceedings;

23. *Whereas* oral statements were presented at four public sittings held on 10 and 11 August 2015 by the following:

On behalf of Italy:

Mr Francesco Azzarello, Ambassador of Italy to the
Kingdom of the Netherlands,

as Agent,

Sir Daniel Bethlehem, Q.C., Member of the Bar of
England and Wales, 20 Essex Street, London, United
Kingdom,

Mr Attila Tanzi, Professor of International Law, University
of Bologna, Italy,

Sir Michael Wood, Member of the International Law Commission, Member of the Bar of England and Wales, 20 Essex Street, London, United Kingdom,

Mr Paolo Busco, Member of the Rome Bar,

Mr Guglielmo Verdirame, Professor of International Law, King's College London, Member of the Bar of England and Wales, 20 Essex Street, London, United Kingdom,

as Counsel and Advocates;

On behalf of India: Ms Neeru Chadha, former Additional Secretary and Legal Adviser, Ministry of External Affairs,

as Agent,

Mr P.S. Narasimha, Additional Solicitor General, Government of India,

Mr Alain Pellet, Professor emeritus, Université Paris Ouest Nanterre La Défense, France, former Chairperson of the International Law Commission, Member of the Institut de droit international,

Mr Rodman R. Bundy, Eversheds LLP Singapore, Member of the New York Bar and former Member of the Paris Bar,

as Counsel and Advocates;

24. *Whereas*, in the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors;

25. *Whereas*, further to the request by Italy in its letter dated 6 August 2015, referred to in paragraphs 14 and 21, and as agreed by the Parties, part of the hearing on 10 August 2015 was held in camera, in accordance with article 26 of the Statute and article 74 of the Rules;

26. *Whereas*, during the hearing on 11 August 2015, Judge Cot put a question to the Agents of Italy and India, in accordance with article 76, paragraph 3, of the Rules;

27. *Whereas* India responded to the question put by Judge Cot during the hearing on 11 August 2015, and *whereas* Italy submitted a written response to that question on 12 August 2015;

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28. *Whereas*, in paragraph 33 of the Statement of Claim, Italy requests the arbitral tribunal to be constituted under Annex VII to the Convention (hereinafter “the Annex VII arbitral tribunal”) to adjudge and declare that:

- (a) India has acted and is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines in connection with the Enrica Lexie Incident.
- (b) The assertion and exercise of criminal jurisdiction by India is in violation of India’s obligation to respect the immunity of the Italian Marines as State officials exercising official functions.
- (c) It is Italy that has exclusive jurisdiction over the *Enrica Lexie* and over the Italian Marines in connection with the Enrica Lexie Incident.
- (d) India must cease to exercise any form of jurisdiction over the Enrica Lexie Incident and the Italian Marines, including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone.
- (e) India has violated its obligation under the Convention to cooperate in the repression of piracy;

29. *Whereas*, at the public sitting held on 11 August 2015, the Agent of Italy made the following final submissions, which reiterate the submissions contained in paragraph 57 of the Request:

... Italy requests that the Tribunal prescribe the following provisional measures:

- (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and
- (b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal;

30. *Whereas*, at the public sitting held on 11 August 2015, the Agent of India made the following final submissions, which reiterate the submissions contained in paragraph 3.89 of the Written Observations:

[T]he Republic of India requests the International Tribunal for the Law of the Sea to reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and [to] refuse prescription of any provisional measure[s] in the present case;

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31. *Considering* that, in accordance with article 287 of the Convention, Italy, on 26 June 2015, instituted proceedings under Annex VII to the Convention against India in a dispute concerning “an incident ... involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India’s subsequent exercise of jurisdiction over the incident”;

32. *Considering* that, on 21 July 2015, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Italy submitted the Request to the Tribunal;

33. *Considering* that article 290, paragraph 5, of the Convention provides that, pending the constitution of an arbitral tribunal, the Tribunal may prescribe, modify or revoke provisional measures in accordance with that article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

34. *Considering* that the Tribunal needs to satisfy itself that there is a dispute between the Parties;

35. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must first satisfy itself that the dispute between the Parties relates to the interpretation or application of the Convention and that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

36. *Considering* that Italy maintains that

[t]he dispute submitted to an Annex VII arbitral tribunal concerns an incident that occurred [on 15 February 2012] approximately 20.5 nautical miles off the coast of India involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident, and over two Italian Marines from the Italian Navy ... who were on official duty on board the *Enrica Lexie* at the time of the incident;

37. *Considering* that Italy argues “that the law and the facts of the present case manifestly show that the Annex VII tribunal under constitution will have more than simply *prima facie* jurisdiction over the merits of this dispute”;

38. *Considering* that Italy maintains that the dispute with India concerns the interpretation and application of the Convention, including, “in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention”;

39. *Considering* that Italy argues that India breached the Convention by its “unlawful arrest and detention of the *Enrica Lexie*” and its “interference with Italy’s freedom of navigation”;

40. *Considering* that Italy further argues that India breached the Convention by its “exercise of jurisdiction over the *Enrica Lexie* Incident and the Marines notwithstanding Italy’s exclusive jurisdiction over the same by virtue of the undisputed fact that the Incident took place beyond India’s territorial sea”;

41. *Considering* that Italy maintains that, pursuant to article 97, paragraph 1, of the Convention, “in the event of an incident of navigation which gives rise to the penal responsibility of any person in the service of the ship, no penal proceedings may be instituted against such a person ‘except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national’” and that, “[i]n the present dispute, Italy is both the flag State and the State of nationality”;

42. *Considering* that Italy further maintains that India also breached the Convention by its “exercise of criminal jurisdiction over the Italian Marines who, as State officials exercising official functions pursuant to lawful authority, are immune from criminal proceedings in India” and by its “failure to cooperate in the repression of piracy by exercising criminal jurisdiction over the *Enrica Lexie* Incident and the Italian Marines”;

43. *Considering* that India maintains that the *Enrica Lexie* incident arose “from the killing of two innocent Indian fishermen on board an Indian fishing vessel, *St. Antony*”, which on 15 February 2012 was “engaged in fishing at a distance of about 20.5 nautical miles from the Indian coast”;

44. *Considering* that India admits that “the event which is at the origin of the dispute took place in the Indian EEZ and involved the *MV Enrica Lexie*, an oil tanker flying the Italian flag” and that “India envisages to exercise jurisdiction over the Marines”;

45. *Considering* that India contends that “the Annex VII tribunal that Italy requests be constituted does not have jurisdiction to rule on the case that it seeks to submit to it” and that “the subject-matter of the dispute does not fall within the ambit of the Convention”;

46. *Considering* that India argues that “this case is not covered by Article 97” of the Convention, contending that “there was in reality no ‘incident of navigation’, nor any collision between the two ships”, and that “[t]hey had no physical contact and Article 97 of the UNCLOS ... is irrelevant by any means”;

47. *Considering* that India further argues that “[t]he real question is to know whether or not the dispute between the Parties is covered by one or more provisions of the Convention”, that “[p]rima facie this is not the case if you focus on the real subject-matter of the dispute”, and that “the Convention does not contemplate the situation that is before” the Tribunal;

48. *Considering* that India maintains that “[t]he only legal issue is to know what State ... has the jurisdiction to try the perpetrators of this shooting, which led to the death of two Indian fishermen”, and that “[o]n this point the ... Convention is silent”;

49. *Considering* that India contends that “[l]egal proceedings ... commenced in Indian courts under the relevant provisions of Indian law, as the victims were Indian nationals and they were killed on board an Indian fishing vessel”, and that the “early assertion of jurisdiction by Italy does not preclude India from exercising jurisdiction over the killing of its nationals who were fishing in India’s exclusive economic zone”;

50. *Considering* that India further contends that “the Italian marines were on board a merchant vessel, therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law” and that “there was no piracy attack or threat thereof that could justify the killing of two Indian fishermen so as to attract the application of the Convention and thus the *prima facie* jurisdiction of an Annex VII tribunal”;

51. *Considering* that both Parties agree that there is a dispute between them on matters of fact and law relating to the *Enrica Lexie* incident;

52. *Considering* that, at the stage of the proceedings under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that any of the provisions invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded;

53. *Considering* that, having examined the positions of the Parties, the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention;

54. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

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55. *Considering* that article 283, paragraph 1, of the Convention reads as follows:

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

56. *Considering* that Italy contends that the requirements of article 283 of the Convention have been satisfied in light of “[e]xtended attempts to negotiate a solution ... with Ministers and other high-level government representatives of both States meeting several times to discuss possible solutions”;

57. *Considering* that Italy maintains that “[i]t was only in late May of this year [2015] that it became clear beyond doubt that a negotiated settlement would not be possible”;

58. *Considering* that India states that “[n]othing happened in May [2015] to change what had been the status quo over the previous 14 months” and recognizes that “in the spring of 2014, it was apparent that a diplomatic impasse had been reached”;

59. *Considering* that both Parties agree that an extensive exchange of views has taken place and that this did not lead to an agreement between the Parties regarding the settlement of the dispute by negotiation or other peaceful means;

60. *Considering* that, having examined the circumstances of the present case, the Tribunal is of the view that the requirements of article 283, paragraph 1, of the Convention are satisfied;

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61. *Considering* that article 295 of the Convention provides:

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law;

62. *Considering* that India contends that the procedures required by article 295 of the Convention are applicable in this case;

63. *Considering* that India argues that although Italy “pretends to act in order to protect its own alleged rights, Italy in reality behaves as if it were espousing its nationals’ rights while clearly the conditions for exercising its diplomatic protection are not fulfilled”;

64. *Considering* that India maintains that “Italy should have exhausted the local remedies available before the Indian courts” and that “an Annex VII tribunal can only exercise its jurisdiction and rule on the claims of Italy once all remedies available to the two accused have been exhausted”;

65. *Considering* that Italy states that “the rights claimed by Italy are rights of Italy, rights which have been directly infringed by India” and that “[n]o question of exhaustion of local remedies arises”;

66. *Considering* that Italy further maintains that the requirement of exhaustion of local remedies “does not apply where the individual injured was a State official engaged in official business” and that “the invocation of the exhaustion of local remedies rule is not a matter for a provisional measures hearing...in any event the local remedies rule does not apply here”;

67. *Considering* that, in the view of the Tribunal, since the very nature of the dispute concerns the exercise of jurisdiction over the *Enrica Lexie* incident, the issue

of exhaustion of local remedies should not be addressed in the provisional measures phase;

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68. *Considering* that article 294, paragraph 1, of the Convention provides:

A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case;

69. *Considering* that India states that “Italy’s initiative constitutes an abuse of legal process, an abuse which India reserves its right in due course to draw the attention of the future Annex VII tribunal in accordance with article 294 of the Convention”;

70. *Considering* that India also states that “Italy chose to seise Indian courts and now turns away from them and seeks to remove the case to the international level” and that “a party cannot claim irreparable prejudice or undue burden if it voluntarily submits to the jurisdiction of one court (in this case, India’s Supreme Court) and asks that court to decide the essential questions in dispute – jurisdiction and immunity – and then later turns around and argues that actually those questions should be heard and decided by another court or tribunal, the Annex VII arbitral tribunal and that the first court, the Supreme Court, should be enjoined from proceeding further”;

71. *Considering* that Italy, in response to these allegations, states that “[i]t is Italy’s right to start proceedings under UNCLOS in connection to a dispute which India’s own Supreme Court accurately characterizes as concerning the interpretation of UNCLOS provisions”;

72. *Considering* that Italy also maintains that “Italy objected promptly” to the Indian domestic proceedings, and that

[a]s for the idea that there was some kind of “fork in the road” here and that Italy opted for the domestic process, this is so completely unfounded that it barely warrants attention. Italy did not opt for domestic proceedings. Its marines were subjected to them; and, in any event, there is no basis or precedent for the notion of “fork in the road” in the context of inter-State proceedings;

73. *Considering* that the Tribunal is of the view that article 290 of the Convention applies independently of any other procedures that may have been instituted at the domestic level and Italy is therefore entitled to have recourse to the procedures established in that article and, if proceedings are instituted at the domestic level, this does not deprive a State of recourse to international proceedings;

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74. *Considering* that article 290, paragraph 5, of the Convention has to be read in conjunction with article 290, paragraph 1, of the Convention;

75. *Considering* that, under article 290, paragraph 1, of the Convention, the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute;

76. *Considering* that, in this regard, Italy invokes its rights under the Convention and customary international law, in particular “(a) Italy's right of exclusive jurisdiction over the Enrica Lexie Incident, including in relation to the exercise of criminal jurisdiction over the Marines; and (b) Italy's rights in relation to its own immunity and the immunity of its officials”;

77. *Considering* that Italy argues that as the flag State it has the right to exercise exclusive jurisdiction over vessels flying its flag as set out in article 92, paragraph 1, of the Convention, which is applicable to the exclusive economic zone by virtue of

article 58, paragraph 2, of the Convention, and that none of the exceptions provided for in the Convention or in other treaties applies in the present instance;

78. *Considering* that Italy states that it promptly “asserted its jurisdiction over the *Enrica Lexie*, over the incident and over the *Enrica Lexie* crew, including the Italian Marines” and subsequently attempted to exercise and defend its exclusive jurisdiction;

79. *Considering* that India argues that, since two of its unarmed fishermen were killed, the right “to inquire, investigate and try the accused” is a fundamental right of India;

80. *Considering* that India maintains that under the Convention “immunity from the jurisdiction of any State other than the flag State is available only to warships and Government ships operated for non-commercial purposes” and notes that “no bilateral agreement exists between India and Italy for granting such immunity to armed forces personnel of Italy”;

81. *Considering* that India claims that its right “to continue the judicial process that has been set in motion” should be preserved and that if the first provisional measure requested by Italy was granted, “the right of India to pursue its judicial review of the case would be severely prejudiced and effectively prejudged”;

82. *Considering* that India argues that “[i]f granted, Italy’s second requested provisional measure ... would prejudice the decision of the Annex VII Tribunal or preclude its implementation”;

83. *Considering* that, in provisional measures proceedings, the Tribunal is not called upon to settle the claims of the Parties in respect of the rights and obligations in dispute and to establish definitively the existence of the rights which they each seek to protect (see *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, *Provisional Measures*, Order of 25 April 2015, para. 57);

84. *Considering* that, before prescribing provisional measures, the Tribunal does not need to concern itself with the competing claims of the Parties, and that it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible;

85. *Considering* that the Tribunal finds that both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible;

86. *Considering* that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal “may prescribe, modify or revoke provisional measures ... if it considers that ... the urgency of the situation so requires”;

87. *Considering* that article 290, paragraph 1, of the Convention stipulates *inter alia* that the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which implies that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures (see *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010*, *ITLOS Reports 2008-2010*, p. 58, at p. 69, para. 72);

88. *Considering* that, as provided for in article 290, paragraph 5, of the Convention, the tribunal to which the dispute has been submitted may modify, revoke or affirm the provisional measures prescribed by the Tribunal;

89. *Considering* that, as stated in its Request, Italy seeks the prescription of provisional measures on the following two principal grounds:

(a) the serious and irreversible prejudice that will be caused to its rights under UNCLOS if Indian jurisdiction continues to be exercised over the *Enrica Lexie* Incident; and

(b) the serious and irreversible prejudice to Italy’s rights if its Marines continue to be subjected to Indian jurisdiction, in particular, to measures

restricting their liberty and movement, notwithstanding the commencement of international arbitration and the irreparable consequences for personal health and well-being that such restrictions will or are likely to cause;

90. *Considering* that Italy further contends in the Request that “India’s decision to persist in exercising jurisdiction, notwithstanding the commencement of international proceedings under UNCLOS, creates a clear risk of prejudice to the carrying out of future decisions of the Annex VII arbitral tribunal”;

91. *Considering* that Italy also points out that if India “perseveres in the exercise of jurisdiction, even proceeding to a criminal trial while the dispute is still pending, all risks of irreparable prejudice would be on Italy’s side”;

92. *Considering* that India maintains that it “also possesses fundamental rights that would be prejudiced if the Tribunal were to accede to Italy’s submissions”, that its rights at stake are “even more important” and that in this case “what is irreparable are not the rights that Italy claims will be prejudiced, but rather the fact that two Indian fishermen are dead ...”;

93. *Considering* that, with regard to the first ground on which Italy seeks provisional measures, India contends that “[t]his is pure, unwarranted speculation without a shred of evidence to back it up” and points out in this connection that “the conduct of the Indian courts in the matter over the past three years has been beyond reproach” and that “India’s Supreme Court has gone to considerable lengths to preserve Italy’s (and the two Marines’) rights, including the right to raise any issues of jurisdiction and immunity before the Special Court ”;

94. *Considering* that, with reference to Italy’s second ground for seeking provisional measures, India further contends that “well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime” and that “[i]t is a generally accepted principle that the latter should prevail in case of conflict”;

95. *Considering* that India points out that

a party cannot claim irreparable prejudice or undue burden if it voluntarily submits to the jurisdiction of one court (in this case, India's Supreme Court) and asks that court to decide the essential questions in dispute – jurisdiction and immunity – and then later turns around and argues that actually those questions should be heard and decided by another court or tribunal, the Annex VII arbitral tribunal;

96. *Considering* that Italy states that under article 290, paragraph 1, of the Convention “the rights which the Annex VII tribunal has not yet adjudged” are to be preserved, that “Italy cannot preserve those rights if India continues to exercise jurisdiction”, and that Italy points out that “in its Written Observations, India has left no doubt as to its determination to put the marines on trial” and that “[a]s observed by Italy's Agent, India has seemed to have already decided the outcome of that trial”;

97. *Considering* that Italy further states that “[f]or all intents and purposes, therefore, the criminal trial, which India now insists should commence as soon as possible, would be a *fait accompli*, depriving the Annex VII tribunal of any effect if it decides in Italy's favour”;

98. *Considering* that Italy contends that “[i]n circumstances where irreparable harm is being suffered by Italy through each and every exercise of jurisdiction, urgency is demonstrated by the fact that the exercise of jurisdiction” by India is “certain and ongoing”;

99. *Considering* that Italy points out that “[u]rgency ... is both humanitarian and legal”, that “... the status quo in relation to the marines is one where their rights and Italy's rights are suffering irreparable damage on a daily basis” and that “[e]very additional day in which a person is deprived of these rights must be regarded as one day too many”;

100. *Considering* that India contends that “[n]either the first nor the second Italian submission fulfils either the ‘aggravated urgency’ standard resulting from Article 290(5) of the UNCLOS or even the ‘basic’ standard of urgency”;

101. *Considering* that, with reference to the first Italian submission, India states that “[w]hen the facts are placed in their proper context, they show that there is absolutely no situation of urgency that justifies the Tribunal issuing an order restraining India from continuing to take judicial or administrative measures – measures that it has always carried out lawfully and with absolute fairness to Italy and the two Marines – or to exercise any other form of jurisdiction”;

102. *Considering* that India contends that:

The proceedings before the Special Court are in abeyance. There is no prospect that the stay in those proceedings will be lifted, or that the prosecution will present the results of the NIA [National Investigation Agency] investigation, which has been blocked by the application of Italy and the marines, that it will present that report to the Special Court, or that the defendants will have their opportunity to answer that case. There is no chance that that is going to happen in the near future, and certainly not before the Annex VII arbitral tribunal is set up and running;

103. *Considering* that, with reference to the second Italian submission, India states that “the situation of either of the accused persons cannot justify any pre-judgement by this Tribunal concerning their conditions of living”;

104. *Considering* that India points out in this regard that in the case of Sergeant Latorre new extensions for his stay in Italy are not to be excluded if necessary on humanitarian grounds and that “given the renewable six months leave granted by the Supreme Court on 13 July 2015, Italy is ill-advised to invoke any urgency in this matter”;

105. *Considering* that India further points out that in the case of Sergeant Girone “the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour ...”, namely by the fact that in the proceedings before the Supreme Court of 16 December 2014 “he formally withdrew his interim application seeking to relax bail conditions so that he may be allowed to travel to Italy”;

106. *Considering* that, in the circumstances of the present case, continuation of court proceedings or initiation of new ones by either Party will prejudice rights of the other Party;

107. *Considering* that the above consideration requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved;

108. *Considering* Italy's request that the Tribunal shall prescribe the following provisional measures:

(a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and

(b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal;

109. *Considering* that the Tribunal is called upon to decide whether these requests are appropriate taking into account the facts of the case and the arguments advanced by the Parties;

110. *Considering* that, in the course of the proceedings, the Parties advanced conflicting arguments on the status of the two Marines;

111. *Considering* that Italy argues that the two Marines are part of its armed forces and therefore "[a]s State officials exercising official functions on board the *Enrica Lexie* pursuant to lawful authority, ... immune from proceedings in India";

112. *Considering* that India states (see also paragraphs 50 and 80) that:

Under articles 95 and 96 of the Convention, immunity from the jurisdiction of any State other than the flag State is available only to warships and Government ships operated for non-commercial purposes. Admittedly, the Italian marines were on board a merchant vessel, therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law ;

113. *Considering* that the question of the status of the two Marines relates to the issue of jurisdiction and cannot be decided by the Tribunal at the stage of provisional measures;

114. *Considering* that Italy argues that any risk to India's rights could be addressed by an order that is directed to both Parties "not to take any step of criminal investigation or trial during the pendency of the Annex VII proceedings that could prejudice the rights of the other Party";

115. *Considering* that Italy maintains that its second submission is justified on at least three grounds: as a consequence of the first measure requested; by virtue of the applicable international standards of due process; and in light of the circumstances assessed during the hearing held in camera;

116. *Considering* that Italy argues, relying on the Order of the Tribunal in the "*Arctic Sunrise*" Case, that international standards of due process would be violated "if the measures restricting the marines' liberty are not lifted promptly";

117. *Considering* that, according to Italy,

a freezing order in respect of the criminal proceedings is not enough. Italy's rights engaged by the prejudice that is posed to its State officials cannot be adequately addressed, or even addressed at all, by an order that simply maintains the status quo;

118. *Considering* that, during the hearing, Italy undertook to abide by any decision the Annex VII arbitral tribunal will render and "to return Sergeant Latorre and Sergeant Girone to India following the final determination of rights by the Annex VII tribunal, if this is required by the award of the tribunal";

119. *Considering* that in the view of India "the measures invoked by Italy would clearly jeopardize the effectiveness of India's rights at stake";

120. *Considering* that India strongly objects to the allegation of Italy that it has violated international standards of due process;

121. *Considering* that India further points out that the first submission by Italy does not indicate the period of time in which no judicial or administrative measures may be taken against the two Marines;

122. *Considering* that India emphasizes, in respect of the second submission by Italy, that it is its right to see that justice is done for the two dead fishermen;

123. *Considering* that India further points out that the second submission by Italy corresponds to the request on the merits Italy makes under letter (d) of the relief sought in its Statement of Claim and thus, if granted, would prejudice the merits contrary to the object and purpose of provisional measures;

124. *Considering* that, as far as the undertaking by Italy is concerned, India stated during the hearing that it “has legitimate apprehensions on Italy’s ability to fulfil its promises”;

125. *Considering* that the Order must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII;

126. *Considering* that the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention;

127. *Considering* that due to the above the Tribunal does not consider the two submissions by Italy to be appropriate and that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

128. *Considering* that the Parties disagree on which State has jurisdiction to decide on the *Enrica Lexie* incident and that such decision is to be taken by the Annex VII arbitral tribunal to be constituted;

129. *Considering* that, as was stated by the Additional Solicitor General of India during the hearing, the Supreme Court has actually stayed its proceedings and “[i]t would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them [Sergeant Latorre and Sergeant Girone]”;

130. *Considering* that the Tribunal places on record assurances and undertakings given by both Parties during the hearing;

131. *Considering* that it is appropriate for the Tribunal to prescribe that both Italy and India suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render;

132. *Considering* that, since it will be for the Annex VII arbitral tribunal to adjudicate the merits of the case, the Tribunal does not consider it appropriate to prescribe provisional measures in respect of the situation of the two Marines because that touches upon issues related to the merits of the case;

133. *Considering* that the Tribunal reaffirms its view that considerations of humanity must apply in the law of the sea as they do in other areas of international law (see *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 62, para. 155);

134. *Considering* that the Tribunal is aware of the grief and suffering of the families of the two Indian fishermen who were killed;

135. *Considering* that the Tribunal is also aware of the consequences that the lengthy restrictions on liberty entail for the two Marines and their families;

136. *Considering* that any action or abstention by either Party in consequence of this Order should not in any way be construed as a waiver of any of its claims or an

admission of claims of the other Party to the dispute (see *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 103);

137. *Considering* that the present Order in no way prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case or relating to the merits themselves, and leaves unaffected the rights of Italy and India, respectively, to submit arguments in respect of those questions (see *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 104);

138. *Considering* that pursuant to article 95, paragraph 1, of the Rules each party is required to submit to the Tribunal a report on compliance with the measure prescribed;

139. *Considering* that it may be necessary for the Tribunal to request further information from the Parties on the implementation of the provisional measure and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

140. *Considering* that, in the present case, the Tribunal sees no reason to depart from the general rule, as set out in article 34 of its Statute, that each Party bears its own costs;

141. *For these reasons,*

THE TRIBUNAL,

(1) By 15 votes to 6,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention:

Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render;

FOR: *President* GOLITSYN; *Judges* AKL, WOLFRUM, JESUS, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO; *Judge ad hoc* FRANCONI;

AGAINST: *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, NDIAYE, COT, LUCKY, HEIDAR.

(2) By 15 votes to 6,

Decides that Italy and India shall each submit to the Tribunal the initial report referred to in paragraph 138 not later than 24 September 2015, and *authorizes* the President, after that date, to request such information from the Parties as he may consider appropriate;

FOR: *President* GOLITSYN; *Judges* AKL, WOLFRUM, JESUS, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO; *Judge ad hoc* FRANCONI;

AGAINST: *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, NDIAYE, COT, LUCKY, HEIDAR.

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Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-fourth day of August, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Italian Republic and the Government of the Republic of India, respectively.

(signed)
Vladimir GOLITSYN
President

(signed)
Philippe GAUTIER
Registrar

Judge Kateka appends a declaration to the Order of the Tribunal.

Judge Paik appends a declaration to the Order of the Tribunal.

Judge Kelly appends a declaration to the Order of the Tribunal.

Judge *ad hoc* Francioni appends a declaration to the Order of the Tribunal.

Judge Jesus appends a separate opinion to the Order of the Tribunal.

Vice-President Bouguetaia appends a dissenting opinion to the Order of the Tribunal.

Judge Chandrasekhara Rao appends a dissenting opinion to the Order of the Tribunal.

Judge Ndiaye appends a dissenting opinion to the Order of the Tribunal.

Judge Lucky appends a dissenting opinion to the Order of the Tribunal.

Judge Heidar appends a dissenting opinion to the Order of the Tribunal.