



INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

Press Release

THE “ENRICA LEXIE” INCIDENT (ITALY v. INDIA), PROVISIONAL MEASURES

TRIBUNAL ORDERS PARTIES TO SUSPEND ALL COURT PROCEEDINGS WHICH MIGHT AGGRAVATE OR EXTEND THE DISPUTE SUBMITTED TO THE ANNEX VII ARBITRAL TRIBUNAL

The International Tribunal for the Law of the Sea delivered its Order in *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures* case today.

On 26 June 2015, Italy instituted arbitral proceedings under Annex VII to the United Nations Convention on the Law of the Sea (“the Convention”) against India in respect of “the dispute concerning the *Enrica Lexie* incident”. Subsequently, on 21 July 2015, Italy submitted to the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in relation to the dispute. In accordance with article 290, paragraph 5, of the Convention, pending the constitution of an Annex VII 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.

At the public hearing held on 11 August 2015, Italy requested the Tribunal to 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.”

At the same public hearing, India made the following submissions:

[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.

In its Order of today's date, the Tribunal first notes that both Parties agree that there is a dispute between them relating to the *Enrica Lexie* incident (paragraph 51). It adds that, at the stage of the provisional measures proceedings, "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" (see paragraph 52). 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, and it finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute (paragraphs 53 and 54).

The Tribunal notes 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. Having examined the circumstances of the present case, the Tribunal is of the view that the requirements relating to the exchange of views have been satisfied (see article 283 of the Convention) (paragraphs 59 and 60).

In relation to the issue of exhaustion of local remedies (see article 295 of the Convention), the Tribunal is of the view that "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" (see paragraph 67).

Turning to the issue of abuse of legal process referred to in article 294, paragraph 1, of the Convention, the Tribunal considers that "article 290 of the Convention applies independently of any other procedures that may have been instituted at the domestic level and that 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" (see paragraph 73).

The Tribunal notes that, under article 290, paragraph 1, of the Convention, it "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute" (see paragraph 75). In this regard, it explains that in provisional measures proceedings, it 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 paragraph 83). The Tribunal states that it "does not need to concern itself with the competing claims of the Parties, it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible", and "finds that both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible" (see paragraphs 84 and 85).

The Tribunal recalls that, pursuant to article 290, paragraph 5, of the Convention, it "may prescribe, modify or revoke provisional measures ... if it considers that ... the urgency of the situation so requires" (see paragraph 86). It observes 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 paragraph 87). The Tribunal concludes 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” (paragraph 106), and that this consideration “requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved” (see paragraph 107).

The Tribunal notes that, in the present case, it is called upon to decide whether the provisional measures requested by Italy “are appropriate taking into account the facts of the case and the arguments advanced by the Parties” (see paragraph 109). Considering the conflicting arguments of the Parties regarding the status of the two Marines, the Tribunal concludes “that the question of their status relates to the issue of jurisdiction and cannot therefore be decided by the Tribunal at the stage of provisional measures” (see paragraph 113). The Tribunal emphasises 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” (see paragraph 125). It considers that the two provisional measures requested by Italy, “if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal” (see paragraph 126). The Tribunal concludes that it “does not consider the two submissions by Italy to be appropriate and that, in accordance with article 89, paragraph 5, of the Rules, it may prescribe measures different in whole or in part from those requested” (see paragraph 127).

The Tribunal finds that it is appropriate for it 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” (see paragraph 131). It also finds 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” (see paragraph 132).

In its Order, 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”, noting “the grief and suffering of the families of the two Indian fishermen who were killed” as well as “the consequences that the lengthy restrictions on liberty entail for the two Marines and their families” (see paragraphs 133, 134 and 135).

The operative provisions of the Order of 24 August 2015 read as follows:

“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* FRANCIONI;

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* FRANCIONI;

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

Judges Kateka, Paik, Kelly and Judge *ad hoc* Francioni append a declaration to the Order, Judge Jesus appends a separate opinion to the Order and Vice-President Bouguetaia and Judges Chandrasekhara Rao, Ndiaye, Lucky and Heidar append a dissenting opinion to the Order.

The text of the Order, the declarations and opinions as well as a recorded webcast of the reading are available on the [website](#) of the Tribunal.

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The press releases of the Tribunal, documents and other information are available on the Tribunal's websites (<http://www.itlos.org> and <http://www.tidm.org>) and from the Registry of the Tribunal. Please contact Ms Julia Ritter at: Am Internationalen Seegerichtshof 1, 22609 Hamburg, Germany, Tel.: +49 (40) 35607-227; Fax: +49 (40) 35607-245; E-mail: press@itlos.org