

**ITALY SEEKS PROVISIONAL MEASURES AGAINST INDIA - ITLOS DECISION
on 24th AUGUST 2015**

The “Enrica Lexie” Incident (Italy v India)

Introduction

In a dispute between Italy and India arising out of the killing of two Indian fishermen by two Italian marines on board the *Enrica Lexie* ship, following a request by Italy to the International Tribunal on the Law of the Sea (“ITLOS”), a majority of the arbitral tribunal made an order for provisional measures applying to both parties. The Tribunal ordered both Italy and India to suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render; but declined to prescribe provisional measures in respect of the situation of the two Marines involved in the dispute.

The Incident

The *Enrica Lexie* was sailing from Sri Lanka to Djibouti. On 15 February 2012, the *Enrica Lexie* was in transit around 20.5 nautical miles off the Indian coast at Kerala when its radar detected an unidentified vessel travelling towards it at high speed. Pursuant to Italian law, the *Enrica Lexie* had on board a detachment of Italian Marines in order to defend the ship from piracy.

According to Italy’s Notification and Statement of Claim, two officers of the Italian Navy, Chief Master Sergeant Massiliano Latorre and Sergeant Salvatore Girone (“the Marines”) assessed that the unidentified vessel was a pirate ship – having seen through binoculars that the unidentified ship was manned by people carrying rifles and equipment for boarding a ship.

The *Enrica Lexie* sent out a distress signal as the unidentified vessel continued to approach the ship in spite of repeated visual and auditory warnings and firing of warning shots into the water. The unidentified vessel eventually veered away from the *Enrica Lexie* and headed away into open sea.

Following reports that two Indian fishermen had been killed in a fishing boat off the Kerala coast, the Indian authorities caused the *Enrica Lexie* to put in at Kochi. According to Italy, the Master of the *Enrica Lexie* was given the impression that this was so that the crew could help in identifying captured suspected pirate boats rather than that the *Enrica Lexie* was suspected of involvement in the killings.

On 16 February 2012, whilst at Kochi, the *Enrica Lexie* was boarded by Indian police and the Master was informed that the unidentified vessel was, in fact, an unflagged fishing vessel called the *St Antony*, and was informed of the deaths of two Indian fishermen on board. On 19 February 2012, the Marines were arrested by Kerala police.

Italy claims that it asserted jurisdiction over the incident promptly and objects to India's exercising of criminal jurisdiction over the Marines arrested and held custody in India.

Reference to Arbitration and Subsequent Developments

On 26 June 2015, Italy notified the Indian Government that, following a failure to achieve resolution through peaceful settlement, proceedings were being commenced against India for breaches of the United Nations Convention on the Law of the Sea ("UNCLOS") and/or principles of customary international law. These proceedings were brought by a submission to an arbitral tribunal to be constituted according to the provisions of Annex VII of UNCLOS.

Italy asserted that on the facts there was "plainly a dispute between Italy and India concerning the interpretation or application of UNCLOS", alleging breaches on the part of India including:

- (a) the unlawful arrest of the *Enrica Lexie*;
- (b) interference with freedom of navigation;
- (c) wrongful exercise of jurisdiction when Italy had exclusive jurisdiction by virtue of the fact that the events took place beyond Indian territorial sea;
- (d) exercise of criminal jurisdiction over individuals benefitting from immunity as they were exercising official functions pursuant to lawful authority; and
- (e) failure to co-operate with combating piracy by exercising jurisdiction over the incident and the Marines.

Italy further relied upon its 26 February 1997 declaration made pursuant to Article 287 of UNCLOS choosing ITLOS and the International Court of Justice as the means for the settlement of disputes concerning the interpretation and application of UNCLOS in order to assert that ITLOS had jurisdiction to grant provisional measures in support of an arbitral tribunal currently being constituted under Annex VII of UNCLOS. India has not made such a declaration and, according to Italy, is deemed to have accepted arbitration.

Subsequently, the Marines requested the Indian Supreme Court to defer consideration of a petition to commence domestic criminal proceedings against them pending the completion of the arbitral process. Additionally, Sergeant Latorre, whilst in Italy on medical grounds (by leave of the Indian courts), applied for an extension of his stay in Italy in view of the commencement of arbitration proceedings and his serious medical condition.

The Indian Supreme Court rejected in substance Sergeant Latorre's application for an extension of his time in Italy. Sergeant Girone remains detained in India. Neither of the Marines have been charged with criminal offences.

Italy contends that the continued detention of Sergeant Girone and the continued exercise of criminal jurisdiction over Sergeant Latorre and the measures of constraint imposed against him are "arbitrary and unjustified".

Request for Provisional Measures

On 21 July 2015, Italy submitted a request to ITLOS for provisional measures pursuant to

Article 290(5) of UNCLOS, which provides that, pending the constitutional of the arbitral tribunal, parties may apply to ITLOS for provisional measures to preserve the rights of the parties or to prevent serious harm to the marine environment. ITLOS may prescribe such measures where it considers that the urgency of the situation requires provisional measures and that *prima facie* the arbitral tribunal, once constituted, will have jurisdiction.

Italy requests that ITLOS order the following provisional measures:

(a) India shall refrain from taking or enforcing any judicial or administrative measures against the Marines 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 through the duration of the arbitration proceedings.

ITLOS Hearing

A public hearing was held before ITLOS in Hamburg on 10-11 August 2015. Advocates on behalf of Italy cited five requirements for provisional measures to be granted:

- (1) There must have been two weeks elapsed between the date of the request for provisional measures and the reference to ITLOS;
- (2) ITLOS must consider that the arbitral tribunal, once constituted, will *prima facie* have jurisdiction over the dispute;
- (3) The rights claimed in the main proceedings must be “at least plausible”;
- (4) There must be a link between the rights claimed in the main proceedings and the provisional measures sought;
- (5) There must be urgency such that provisional measures ought to be prescribed.

India contended *inter alia* that for ITLOS to grant the provisional measures in the terms stated by Italy would “go well beyond the preservation of [Italy’s] rights”. Rather it would be “anticipating their recognition in the judgment on the merits” and “jeopardizing any possibility for India to see its rights recognized or at least effectively enforced”.

Decision

The decision was handed down on 24 August 2015.

The Tribunal, by 15 votes (including the President of the Tribunal) to 6 (including the Vice President of the Tribunal), held that 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 arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render. The Tribunal (again by a majority of 15 to 6) ordered Italy and India to each submit to the Tribunal an initial report on their compliance with that measure not later than 24 September 2015, and further authorised the President, after that date, to request such information from the parties as he considered appropriate.

The Tribunal held that it did not consider it appropriate to prescribe provisional measures in respect of the situation of the two Marines because that touched upon issues related to the merits of the case, and therefore declined to order the provisional measure sought by Italy in that regard.

A copy of the Order, along with certain of the Tribunal's declarations and dissenting opinions, can be found [here](#).

25 August 2015