

## ***International Tribunal Order on ‘Provisional Measures’ in MV Enrica Lexie Case: A Preliminary Analysis***

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01 October 2015

On 24 August 2015, a 21-member panel including judge ad-hoc from Italy at the International Tribunal of the Law of the Sea (ITLOS) pronounced its order on the Italian request for ‘provisional measures’ in the *MV Enrica Lexie* case. This case involves India and Italy, and is centred around the killing of two Indian fishermen by the Italian Marines off the Kerala Coast on 15 February 2012. The two accused Marines of the Italian Navy were part of a six-member anti-piracy Vessel Protection Detachment (VPD) and the incident occurred about 20.5 nautical miles from the Indian Coast while the Italian flagged tanker, *MV Enrica Lexie* was on its passage from Sri Lanka to Djibouti. Initially the ship was detained and two Marines arrested. While the ship was subsequently released on court orders, the two Italian Marines awaiting trial remain on bail, one each in Italy and in India, as per the orders of the Supreme Court of India.

This article seeks to examine the salient observations made by both ‘the Parties’ (India and Italy) during the recent hearings and those of the ‘Tribunal’ (ITLOS) in its 24 August Order. The sequence and details of events related to domestic legal processes as far as the trial of the Italian Marines are not addressed, since these are not germane to the issues under discussion, except to mention that the proceedings of the Special Court ordered by the Supreme Court of India are in abeyance.

## The Road to International Arbitration

On 26 June 2015, Italy initiated proceedings against India seeking international arbitration in the *MV Enrica Lexie* case under Annex VII of the United Nations Convention of the Law of the Sea (UNCLOS) by serving the mandatory 'Notification' and the 'Statement of Claim'. It is important to mention that both India and Italy are parties to the UNCLOS. Italy through its 26 February 1997 declaration has chosen the ITLOS and the International Court of Justice (ICJ) as the means/choice of procedure for dispute settlement under UNCLOS, whereas India has not made any statement in this regard.<sup>1</sup> Therefore, in the absence of a common means/choice of procedure, Annex VII becomes the default mechanism for future arbitration in the present case (UNCLOS Article 287 Para 5).

In its 'Notification and Claim', Italy has argued that India was in breach of international law, and UNCLOS provisions on multiple counts (Parts II, V and VII, in particular Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300).<sup>2</sup>

The major arguments put forth by Italy were:

- (a) India's unlawful arrest and detention of the *Enrica Lexie*;
- (b) India's interference with Italy's freedom of navigation;
- (c) India's 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, some 20.5 nautical miles off the Indian coast;
- (d) India's 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
- (e) The failure to cooperate in the repression of piracy by exercising criminal jurisdiction over the *Enrica Lexie* incident and the Italian Marines.

## **Request by Italy for Provisional Measures and India's Response**

On 21 July 2015, Italy made a submission to the ITLOS that, firstly – as India had not responded to its ‘Notification and Statement of Claim’ seeking international arbitration within the prescribed limit of two weeks and, secondly - considering India’s conduct in continuing with domestic legal proceedings pending constitution of arbitral tribunal; it was seeking ‘Provisional Measures’ in the *Enrica Lexie* case under UNCLOS Article 90 Para 5, which *inter alia* states :

“Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, ..., *may prescribe, modify or revoke provisional measures in accordance with this 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. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.*”

The reasons cited for this request for provisional measures were the ‘plausibility and jurisdictional applicability’ of the ITLOS in the *Enrica Lexie* case, ‘urgency’ of the situation and ‘serious and irreversible prejudice to its rights’ under extant international legal framework. In its request to the ITLOS for provisional measures, Italy made two specific requests:

- (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.<sup>3</sup>

India submitted its 'Written Observations' in response to ITLOS on 06 August 2015.<sup>4</sup> India contested Italy's recourse seeking provisional measures by reasons of:

(a) Italy's assertion for the applicability of UNCLOS Article 97 in the present case is unjustified since no occurrence related to navigation or collision took place in the incident.

(b) The incident involved a merchant ship and registered Indian fishing vessel engaged in legally justified activity of fishing in its Exclusive Economic Zone (EEZ). The right of immunity from jurisdiction of any State other than the flag State is only applicable to 'warships on high seas' and 'ships used only on government non-commercial service' (UNCLOS Articles 95 and 96). Further, Italy has not conducted any serious investigation of the incident thus nullifying its argument of 'exclusive right of jurisdiction' over the accused.

(c) The conduct of Italian Marines was in contravention of the declaration made by India on 29 June 1995 while ratifying the UNCLOS statement which states:

"The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or maneuvers, in particular those involving the use of weapons or explosives without the consent of the coastal State."

Italy through its statement of 24 November 1995 had contested this provision by India, which is quite similar to those made by Brazil, Cape Verde and Uruguay.<sup>5</sup>

- (d) During the domestic legal proceedings in India, Italy on numerous occasions has participated in the process thus indicating its ‘acceptance and applicability’ of Indian legal regime in the case. The slow progress of domestic legal proceedings are attributable to the frequent delaying tactics used by Italy. In addition, India has shown due compassion by allowing both the accused to proceed to Italy without raising any undue objections whenever such requests have been made.
- (e) All principles of natural justice have been followed during the course of domestic legal process by according due access to the accused across the complete ambit India legal mechanism. Further, the Italian submission does not address the aspect of justice to the victims/relatives of the deceased that were a target of legally unjustified (unnecessary/invalid) and disproportionate (excessive) ‘use of force’ by the Italian Marines.

India concluded by stating that Italy’s request for provisional measures at the ITLOS were inadmissible and ill-founded on the grounds of an absence of urgency since the domestic legal proceedings were in abeyance, there being no possible prejudice to rights of Italy, its pre-judgment on the applicability of UNCLOS and, the ‘selective and partial interpretation’ of humanitarian aspects in the present case.

Both the sides explained their respective positions by reiterating the aforementioned rationale during the oral hearings at ITLOS on 10 and 11 August 2015. In addition, Italy and India extensively cited instances of case law in support of their viewpoints.

### **Salient Aspects of ITLOS Order on Provisional Measures**

To contextualise the ‘final order by the ITLOS’<sup>6</sup> on Italy’s request seeking provisional measures on two counts as mentioned earlier, a brief enumeration and interpretation of operative observations made by the tribunal that are likely to have a bearing on future prospects of the case is considered necessary. These are:

(a) The Tribunal observed that, ‘there is a dispute between them [Italy and India] on matters of fact and law relating to the *Enrica Lexie* incident’; ‘a dispute appears to exist between the Parties concerning the interpretation or application of the Convention’ and; ‘the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute’ (Para 51, 53, 54).<sup>7</sup> These observations when read in conjunction indicate that Italy and India not only have differing views about the factual (narrative) and the legal dimension of the incident, but also have divergent perspectives on the applicability of UNCLOS in the case. The tribunal seems to agree that with the Italian position on UNCLOS finding applicability in the *Enrica Lexie* case. However, it is for emphasis that this is a preliminary interpretation evident from the use of term ‘*prima facie*’. The final decision on the ‘admissibility’ of Italy’s request for international arbitration and ‘jurisdictional applicability’ of UNCLOS will once again be deliberated at length and, the decision on these aspects would be taken by the arbitral tribunal for the case ‘if, as and when’ such a body is established.

(b) The tribunal order further states, ‘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’ and; ‘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 [UNCLOS] are satisfied’ (Para 59 and 60).<sup>8</sup> This indicates that attempts by India and Italy for ‘conciliation and negotiated settlement’ in the case have been unsuccessful and, recourse to international arbitration emerges as the only viable option. It is pertinent to mention that while Italy has chosen ITLOS as the forum for arbitration, India has the flexibility to agree or agree on this issue, in a strict legal sense. However, the empirical trend suggests that in most cases, the opposing party does not contest the choice of forum suggested by the initiating country, as long it is convinced about the jurisdictional effectiveness of the forum to deal with the issues that it wishes to bring forth. Therefore, in all

probability, ITLOS would be the venue for further legal proceedings in the *Enrica Lexie* case.

(c) The 25 August ITLOS Order also observes that, ‘both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible’; ‘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’ and; the above consideration requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved’ (Para 85, 106 and 107).<sup>9</sup> When read in conjunction, it is clear that the ITLOS panel examining the ‘Provisional Measures’ issue has found merit in the rationale and the arguments put forth by India and Italy both. However, it seems clear that the continuation of domestic legal proceedings in India is seen as adversely influencing the rights of Italy.

(d) The other three operative observations are - ‘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’; ‘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 [UNCLOS]’, and; ‘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 [ITLOS Statute] , the Tribunal may prescribe measures different in whole or in part from those requested’ (Para 125-127).<sup>10</sup> These statements make it clear that both the ‘Provisional Measures’ sought by Italy do not satisfy the criteria of being non-prejudicial to the rights of both the affected parties and as ‘impacting on the functionality of future arbitration proceedings’.

In light of these observations and statements, the final measure prescribed by the ITLOS panel was for India and Italy to suspend all court proceedings and not initiate new ones that could aggravate/prejudice the dispute submitted to Annex VII tribunal. It

would therefore be evident that Italy's request for India to not to proceed further with the ongoing legal proceedings has been upheld. However, the measure seeking liberty, security and movement of the two accused Italian Marines has been denied. It is of importance that the provisional measure prescribed by the ITLOS was not a unanimous decision, being voted 15-6 in favour.

A preliminary reading of the (four) declarations, (one) separate opinion and (five) dissenting opinions by the judges have raised some very important questions.<sup>11</sup> The salient ones are:

- (a) About the justification of 'urgency' criteria by Italy given that 3 ½ years have elapsed from the occurrence of the incident and its recourse for 'provisional measures'.
- (b) 'Admissibility and plausibility' aspects in that Italy in the intervening period had actively participated at each stage of India's domestic legal process related to the case.
- (c) Some of the judges have also questioned the pre-suppositions made in the ITLOS Final Order. The first is about the observation that all efforts between the contenting parties at conciliation and negotiations have failed. The second is about 'jurisdictional applicability' of the ITLOS in the case. The contrarian arguments raised are about the definitive articulation on these aspects since these would form the 'core' during the preliminary stages of future arbitrations, thus impacting on the future trajectory of the case.
- (d) Some of the judges have opined that the two 'provisional measures' sought by Italy are inextricably linked and cannot be discussed or adjudicated upon in a mutually exclusive manner. The opinion seems to be equally divided between those favouring India and Italy.



Further, the complimentary remarks by a number of judges about the Indian legal system and India's conduct in providing access to the various arms of its legal system deserves special mention, with one judge terming this benevolence to be excessively liberal.<sup>12</sup>

### **Concluding Remarks**

Some could argue that the ITLOS Order of allowing one 'provisional measure' and denying the other is reflective of the trend where the international dispute resolution bodies have opted for a 'middle path' during their judgements/awards. In this regard, a more nuanced interpretation would be about the existence of merits/strengths in the statement of contending parties, howsoever small, which has led to such 'intermediate' judgements.

The ITLOS order obviously restrains India from progressing with its domestic legal proceedings in the *Enrica Lexie* case where as the present bail status for the two Italian marines would continue in that they remain the accused in this case. Therefore, the ITLOS Order confers a virtual *status quo* on the subject. In reality, 'provisional measures' are akin to 'interim and temporary orders' and, this is neither the 'end of the road' nor a 'reflection of the future' in the *Enrica Lexie* case.

A larger question for India, not addressed here due to space constraints, is about revisiting national maritime legal framework. Certain provisions like including the aspect of 'security' within the Contiguous Zone and, even the declaration about military manoeuvres and firing/use of weapons in India's EEZ/Continental Shelf are seen as 'excessive' by a large section of the international community.<sup>13</sup> Further, the failure to contemporise the archaic Admiralty provisions despite repeated attempts is an area that needs serious examination. There are other examples like the Draft Piracy Bill introduced in 2012 (but still to be enacted) that can be cited. The moot point is not the absence of national legislation but more about their alignment with the contemporary international legal regime.

Some of the important remarks in the ITLOS Order also bring to fore questions that Italy (and in some respects India) could well deliberate upon before going ahead with international arbitration. Much would depend on the questions of the ‘admissibility’ and ‘jurisdictional applicability’ during the preliminary stages of international arbitration, which in this case extend beyond the strict confines of UNCLOS into the domain of International Humanitarian Law (IHL). These aspects would be dealt with at greater length and in more deliberate fashion, which eventually would decide the ‘mandate’ of the international arbitration, an issue that lies in the realm of the future.

An important issue worth considering is to use the space available through this provisional measure to revisit some of the hardened positions, evident from the language used by both sides in respective written submissions, as to whether there is another approach to resolve this dispute. It would require considerable political and diplomatic capital from both the sides and the concurrent domestic pressure would also be considerable. Whether the contending parties are ready, and indeed interested, in such (tough) negotiations on such a complex issue is for the respective stakeholders to consider.

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<sup>1</sup> See entries under India and Italy at United Nations Treaty Collection website at [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec). Italy’s declaration of 26 February 1997 states “In implementation of article 287 of the United Nations Convention on the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other. In making this declaration under article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice.” India’s declaration states “The Government of the Republic of India reserves the right to make at the appropriate time the declarations provided for in articles 287 and 298, concerning the settlement of disputes.”

<sup>2</sup> Request under Article 290, paragraph 5, of the Convention, submitted by Italy on 21 July 2015, together with the notification instituting arbitral proceedings dated 26 June 2015, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.24\\_prov\\_meas/Request/Request\\_of\\_the\\_Italian\\_Republic\\_r.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Request_of_the_Italian_Republic_r.pdf), p. 7.

<sup>3</sup> Request under Article 290, Note 3, p. 16.

<sup>4</sup> Written observations submitted by India on 6 August 2015, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.24\\_prov\\_meas/Response/VOL\\_1.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Response/VOL_1.pdf) (Accessed 25 August 2015).

<sup>5</sup> Note 2, under Italy which states "Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which 'the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them'. According to the declaration made by Italy upon ratification this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it".

<sup>6</sup> International Tribunal for The Law of the Sea, 'The "Enrica Lexie" Incident, (Italy v. India), Order on the Request for the Prescription of Provisional Measures', 24 August 2015, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.24\\_prov\\_meas/C24\\_Order\\_24.08.2015\\_orig\\_Eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf), (accessed 24 August 2015).

<sup>7</sup> Ibid, p. 11.

<sup>8</sup> Ibid, p. 12.

<sup>9</sup> Ibid, p. 17, 20-21.

<sup>10</sup> Ibid, p. 23.

<sup>11</sup> These can be accessed at the ITLOS website <https://www.itlos.org/cases/list-of-cases/case-no-24/>.

<sup>12</sup> Dissenting Opinion of Judge Lucky, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.24\\_prov\\_meas/C24\\_Order\\_24.08.2015\\_diss.op\\_Lucky\\_orig\\_Eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_diss.op_Lucky_orig_Eng.pdf), (accessed 24 August 2015).

<sup>13</sup> J. Ashley Roach and Robert Wayne Smith, *Excessive Maritime Claims*, (Dordrecht: Nijhoff, 2012), pp. 22, 156.