

PCA Case No. 2015-28

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

THE ITALIAN REPUBLIC

- v. -

THE REPUBLIC OF INDIA

- concerning -

THE "ENRICA LEXIE" INCIDENT

AWARD

Extracts for Advance Publication on 2 July 2020

ARBITRAL TRIBUNAL:

H.E. Judge Vladimir Golitsyn (President)
H.E. Judge Jin-Hyun Paik
H.E. Judge Patrick Robinson
Professor Francesco Francioni
Dr. Pemmaraju Sreenivasa Rao

REGISTRY:

Permanent Court of Arbitration

[...]

II. THE PARTIES' SUBMISSIONS

[...]

B. FINAL SUBMISSIONS AT THE CLOSE OF THE HEARING

1. Submissions of Italy

75. At the close of the Hearing, Italy made the following final submissions:

- (1) Italy respectfully requests the Tribunal to dismiss all of India's objections to the jurisdiction of the Tribunal and the admissibility of Italy's claims.
- (2) Italy further requests the Tribunal to adjudge and declare that:
 - (a) By maintaining certain provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and by maintaining Ministry of Home Affairs Notification No. S.O. 671(E) dated 27 August 1981, India has acted and is acting in a manner that is incompatible with Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89 of UNCLOS.
 - (b) By directing and inducing the *Enrica Lexie* to change course and proceed into India's territorial sea through a ruse, as well as by interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's freedom of navigation, in breach of UNCLOS Article 87(1)(a), and Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of Article 92 of UNCLOS.
 - (c) By directing and inducing the *Enrica Lexie* to change course and proceed into India's territorial sea through a ruse, India abused its right to seek Italy's cooperation in the repression of piracy, in breach of Article 300 read in conjunction with Article 100 of UNCLOS.
 - (d) By instituting criminal proceedings against the Marines, India violated and continues to violate Italy's exclusive right to institute penal or disciplinary proceedings against the Marines, in breach of Article 97(1) of UNCLOS.
 - (e) By ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition against the arrest or detention of a ship by a State other than the flag State in breach of Article 97(3) of UNCLOS.
 - (f) By asserting and continuing to exercise its criminal jurisdiction over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, India is in violation of its obligation to respect the immunity of the Marines as Italian State officials exercising official functions, in breach of Articles 2(3), 56(2), 58(2) and 100 of UNCLOS.
 - (g) By failing to cooperate in the repression of piracy, India violated UNCLOS Article 100.
 - (h) India's assertion of jurisdiction in the present case was and is contrary to UNCLOS.
- (3) In consequence of the preceding, Italy respectfully requests that the Tribunal order, in addition or in the alternative, that:
 - (a) India must cease all wrongful acts that have caused and continue to cause any of the continuing breaches of UNCLOS. It shall, in particular, cease to apply

the provisions of the 1976 Maritime Zones Act and the 1981 Notification insofar as they are incompatible with UNCLOS. It shall also cease to exercise any form of criminal jurisdiction over the Marines, including measures of restraint and legal proceedings in India.

- (b) India must make full reparation for the breaches of UNCLOS set out in paragraphs 2 (a) to (h), above, and re-establish the situation that existed before its wrongful acts. India must, in particular, terminate all criminal proceedings (including measures of restraint) in respect of Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* Incident.
 - (c) India must pay compensation for the non-material damage suffered by Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone as a result of India's unlawful exercise of jurisdiction over them, and the material damage suffered in consequence of the detention of the *Enrica Lexie*.
- (4) In addition, Italy also respectfully requests the Tribunal to dismiss India's counterclaims in their entirety and all requests consequential on them.

2. Submissions of India

76. At the close of the Hearing, India made the following final submissions:

For the reasons developed in its Counter-Memorial and in its Rejoinder, and set out by its representatives during the oral proceedings, the Republic of India respectfully requests the Tribunal to:

- (1) Adjudge and declare that it has no jurisdiction with respect to the case submitted to it by Italy;
- (1.a) In the alternative, adjudge and declare that it has no jurisdiction with respect to Italy's Claims 2(a), 2(f), 2(h), and 3(a) and, in the further alternative, to dismiss and reject those Claims; and
- (2) Dismiss and reject all other requests and submissions of Italy.

As to its counter-claims, the Republic of India respectfully requests the Tribunal to adjudge and declare that:

- (3) India's counter-claims are admissible; and that,

By firing at the *St Antony* and killing two Indian fishermen on board, Italy:

- (4) Violated India's sovereign rights under Article 56 of UNCLOS;
- (5) Breached its obligation to have due regard to India's rights in its EEZ under Article 58(3) of UNCLOS;
- (6) Violated India's freedom and right of navigation under Articles 87 and 90 of UNCLOS; and
- (7) Infringed India's right to have its EEZ reserved for peaceful purposes under Article 88 of UNCLOS.

Consequently, the Republic of India requests the Tribunal to order that:

- (8) Italy make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS.

[...]

VIII. DISPOSITIF

1094. For the reasons set out in this Award, the Arbitral Tribunal

A. In relation to jurisdiction and admissibility

1. FINDS, by four votes to one, in respect of Italy's Submission (1) and India's Submission (1), that in the present Arbitration there is a dispute between the Parties as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", and that the dispute concerns the interpretation or application of the Convention;

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni, Pemmaraju Sreenivasa Rao*

AGAINST: *Arbitrator Robinson*

2. FINDS, by four votes to one, that the Arbitral Tribunal has jurisdiction over the dispute, subject to its decision on the specific objections to its jurisdiction raised by India in its Submission (1.a);

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni, Pemmaraju Sreenivasa Rao*

AGAINST: *Arbitrator Robinson*

3. FINDS, unanimously, that India's counter-claims are admissible;

4. FINDS, by three votes to two, in respect of Italy's Submission (2)(f), that Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention are not pertinent and applicable in the present case;

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni*

AGAINST: *Arbitrators Robinson, Pemmaraju Sreenivasa Rao*

5. FINDS, by three votes to two, in respect of Italy's Submission (2)(f) and India's Submission (1.a), that it has jurisdiction to deal with the question of the immunity of the Marines;

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni*

AGAINST: *Arbitrators Robinson, Pemmaraju Sreenivasa Rao*

6. FINDS, unanimously, in respect of India's submission (1.a), that there is no need to address the question of the compatibility with UNCLOS of India's 1976 Maritime Zone Act and its 1981 Notification;

B. In relation to the merits of the dispute between the Parties

1. FINDS, unanimously, in respect of Italy's Submission (2)(b)-(e) and (g),
 - a. that India has not acted in breach of Article 87, paragraph 1, subparagraph (a), of the Convention;
 - b. that India has not violated Article 92, paragraph 1, of the Convention;
 - c. that Article 97, paragraphs 1 and 3, of the Convention are not applicable in the present case;
 - d. that India has not violated Article 100 of the Convention and that therefore Article 300 cannot be invoked in the present case;
2. DECIDES, by three votes to two, in respect of Italy's Submission (2)(f), that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines;

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni*

AGAINST: *Arbitrators Robinson, Pemmaraju Sreenivasa Rao*

3. DECIDES, by three votes to two, in respect of Italy's Submission (3)(a) and (c), taking note of the commitment expressed by Italy during the proceedings to resume its criminal investigation into the events of 15 February 2012, that India must take the necessary steps to cease to exercise its criminal jurisdiction over the Marines, and that no other remedies are required;

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni*

AGAINST: *Arbitrators Robinson, Pemmaraju Sreenivasa Rao*

4. FINDS, in respect of India's Submissions (4), (5), and (7),
 - a. by three votes to two, that Italy has not violated India's sovereign rights under Article 56 of the Convention;

IN FAVOUR: *President Golitsyn; Arbitrators Paik, Francioni*

AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

- b. by three votes to two, that Italy has not violated Article 58, paragraph 3, of the Convention;

IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

- c. unanimously, that Italy has not infringed on India's rights under Article 88 of the Convention;
5. FINDS, unanimously, in respect of India's Submission (6), that by interfering with the navigation of the "St. Antony" Italy has acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention;
6. DECIDES, unanimously, in respect of India's Submission (8),
- a. that a finding in the present Award that Italy has breached Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention constitutes adequate satisfaction for the injury to India's non-material interests;
- b. that as a result of the breach by Italy of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention, India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the "St. Antony") and moral harm suffered by the captain and other crew members of the "St. Antony", which by its nature cannot be made good through restitution;
- c. that the Parties are invited to consult with each other with a view to reaching agreement on the amount of compensation due to India referred to in paragraph 6(b) above;
- d. that the Arbitral Tribunal shall retain jurisdiction should either Party or both Parties wish to apply for a ruling from the Arbitral Tribunal in respect of the quantification of compensation due to India, in which event the Arbitral Tribunal would fix a timetable for further proceedings, and that, should no such application be received within one year after the date of the present Award, the proceedings shall be closed;

- C. In relation to the costs of these proceedings, DECIDES that each Party shall bear its own costs.

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